

# **EXHIBIT B**

## **General Conditions**

### **Design Build Agreement**

SAMPLE

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# GENERAL CONDITIONS OF THE DESIGN BUILD CONTRACT

## 1. GENERAL PROVISIONS

### 1.1 Basic Definitions

**1.1.1 Acceleration Proposal Request.** City's written request to Design-Builder to submit an itemized proposal for Extraordinary Measures in order to achieve early completion of all or a portion of the Work when the need for such measures is not due to the fault of the Design-Builder.

**1.1.2 Addenda.** The Addenda or Addendum consist of the written clarifications of the Proposal Requirements, Criteria Documents, or the Contract Documents issued by the City prior to the execution of the Agreement.

**1.1.3 Allowance.** An amount carried in the Contract Sum for a particular scope of Work insufficiently defined so as to allow the Design-Builder to adequately determine fair value on the Proposal Deadline.

**1.1.4 Applicable Law.** State, federal and local laws, statutes, ordinances, building codes, rules, and regulations relating to the Work.

**1.1.5 Change Order.** A Change Order is a written document prepared by the City using the form attached as an exhibit to the Agreement reflecting the agreement between the City and Design-Builder for: a change in the terms or conditions of the Contract, if any; a specific Scope Change in the Work; the amount of the adjustment, if any, in the Contract Sum; and the extent of the adjustment, if any, in the Contract Time.

**1.1.6 Change Order Request (COR).** As more specifically described in herein below, a Change Order Request is a written document originated by the Design-Builder, which describes an instruction issued by the City after the effective date of the Contract, which Design-Builder believes to be a Scope Change that may result in changes to the Contract Sum or Contract Time or, which describes the need for or desirability of a change in the Work proposed by Design-Builder.

**1.1.7 Construction Change Directive.** A Construction Change Directive is an unilateral written order prepared and signed by the City, directing Design-Builder to perform a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both.

**1.1.8 Construction Documents (CDs).** All technical drawings, shop drawings, working Drawings, Specifications, schedules, diagrams and samples, setting forth in detail the requirements necessary for construction of the Project in accordance with the Contract Documents, approved by the City and incorporated into the Contract after such approval. All amendments to the Construction Documents must be approved by City prior to incorporation into the Contract and prior to the construction of the Work affected by the change.

**1.1.9 Contract.** The Contract Documents form the Design-Build Contract ("Contract").

**1.1.10 Contract Documents.** The Contract Documents consist of the documents enumerated as such in the Agreement between City and Design-Builder (hereinafter "Agreement"), all Addenda issued prior to and all Modifications issued after the effective date of the Agreement.

**1.1.11 Criteria Documents.** Criteria documents may include, but are not limited to, conceptual documents, preliminary drawings, outline specifications, design and performance criteria, and other documents provided to Proposers by the City establishing the Projects basic elements and scale, and their relationship to the Work Site.

**1.1.12 Date of Commencement.** The date for commencement of the Work fixed by City in a Notice to Proceed to Design-Builder.

**1.1.13 Day(s).** The terms "day" or "days" mean calendar days unless otherwise specifically designated in the Contract Documents. The term "Work Day" or "Working Day" shall mean any calendar day except Saturdays, Sundays and City-recognized legal holidays.

**1.1.14 Design-Build.** The terms "Design-Build" and "Design-Build Services" mean a method of construction in which the Contractor furnishes both professional design services and construction services for portions of the Work so designated in the Contract Documents. Contractor shall be solely responsible for all design, construction means and methods, cost overruns, defects, errors, omissions and delays arising from its Design-Build Services delegated to Contractor by the Contract Documents.

**1.1.15 Design-Build Team Members.** The Design-Builder, licensed Design Consultants and any subcontractors who are part of the design-build entity and listed in the bid submission and identified in the Agreement.

**1.1.16 Design-Builder.** The Design-Builder is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Design-Builder" means the Design-Builder or the Design-Builder's authorized Project Manager. The Design-Builder and all Consultants and Subcontractors shall be properly licensed to perform all Work they are contracted to perform.

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

**1.1.18 Design Development Documents.** Design Development Documents may include, but are not limited to, prepared plot plans, landscape, irrigation, civil, architectural, structural, mechanical and electrical floor, elevations, cross-sections and other required drawings; and outline specifications describing the size, character, and quality of the entire Project in its essentials as to kinds and locations of materials, and type of structural, mechanical and electrical systems.

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

**1.1.20 Extraordinary Measures.** Measures implemented by Design-Builder at City's direction to expedite the progress of design or construction of all or a portion of the Work, including, without limitation, (i) working additional shifts or overtime, (ii) supplying additional manpower, equipment, and facilities, and (iii) submitting a recovery schedule for resequencing performance of the Work or other similar measures, as more specifically described in Paragraph 2.8.

**1.1.21 Final Completion.** The term Final Completion is the date, evidenced by the City's approval of Design-Builder's Final Application for Payment, when the Work has been completed and the requirements for Project closeout set forth in the Contract Documents including, but not limited to, those set forth in Paragraph 9.8 below, have been satisfactorily completed.

**1.1.22 Final Payment.** City's payment of the Contract Sum due to Design-Builder for the entire Work, less only the sums which City is specifically allowed to withhold under the terms of the Contract Documents and Applicable Law.

**1.1.23 Modifications.** A Modification is (i) a written amendment to the Agreement signed by duly authorized representatives of the Parties, (ii) a Change Order, or (iii) a Construction Change Directive.

**1.1.24 Notice of Completion.** City intends to record a Notice of Completion when all Work called for in the Construction Documents has been completed.

**1.1.25 Notice to Proceed.** The Notice to Proceed is a document issued by the City fixing the date for commencement for the Work or Services. The Contract Time for Design-Builder's performance of the Work is measured in calendar days (not Work Days).

**1.1.26 Parties.** The City and Design-Builder may be referred to in the Contract Documents from time to time as the Parties.

**1.1.27 Project.** The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the City or by Separate Contractors.

**1.1.28 Project Manager.** City's Project Manager, identified by City in writing, is City's Project Representative, who interprets and defines City's policies, renders decisions with respect to Design-Builder's performance of the Work, approves Design-Builder Applications For Payment, reviews and approves Design-Builder schedules and submittals, reviews and approves Change Order Requests and Change Orders, reviews all quantity calculations related to pay quantities, reviews and approves changes in the Contract Time, concurs in any defective Work notification, and reviews and determines Substantial Completion of the Work and Final Completion of the Work. The extent and limits of the authority of any designee of City's Project Manager shall be set forth in writing. Design-Builder shall be entitled to rely on the decisions and information provided by such written designee subject to the limitations of authority set forth in writing. All correspondence and electronic communication shall flow through the Project Manager.

**1.1.29 Project Manual/Specification.** The terms "Project Manual" and "Specification" refer to the assembly of Contract Documents which may include, but is not limited to, the RFP Documents, standard specifications, reference specifications, special provisions and specifications in agreements between the Design-Builder and City.

**1.1.30 Project Representative.** Those individuals designated by the Parties in writing with authority to render decision in connection with the Work and the Contract.

**1.1.31 Proposal.** A "Proposal" is a complete and properly executed offer by the Design-Builder to perform the Work for the sums stipulated therein, submitted in accordance with the RFP Documents. The Proposal includes all documents prepared by Design-Builder for this Project.

**1.1.32 Proposer.** A "Proposer" is a person or entity who, as the lead Design-Build Team Member, submits a Proposal to the Owner.

**1.1.33 Request for Qualifications ("RFQ").** The Pre-Qualification questionnaire issued by the City, including any and all Addenda.

**1.1.34 Request for Proposals ("RFP").** The Request for Proposals issued by the City, including any and all Addenda.

**1.1.35 RFP Documents.** RFP Documents include the Proposal Requirements and the proposed Contract Documents.

**1.1.36 Scope Change.** A Scope Change is Work that is not reasonably inferable from the Contract Documents upon which the Contract Sum is based, by a design-builder with the skill, experience, and expertise necessary for the proper, timely, and orderly completion of the Work or a project of this type and quality, and is (i) materially inconsistent with, or (ii) a material change in the quantity, quality, programming requirements, or other substantial deviation in, the Contract Documents upon which the Contract Sum is based; and are necessary to correct an error, omission or defect in the Criteria Documents, which cannot reasonably be corrected in the design and construction process.

**1.1.37 Separate Contractors.** The term Separate Contractors means licensed contractors performing portions of the Project under separate contracts with the City.

**1.1.38 Site.** The physical area designated in the Contract Documents for Design-Builder's performance of the Work.

**1.1.39 Specifications (Technical Specifications).** The outline Specifications included in the Criteria Documents as well as the Specifications included in the Construction Documents approved by the City, consisting of the written requirements for materials, equipment, systems, standards and workmanship for the Work, warranties, and performance of related Services.

**1.1.40 Subcontractor.** A Subcontractor is a person or entity who has a direct contract with the Design-Builder to perform a portion of the Work at the Site. The term "Subcontractor" does not include a Separate Contractor or subcontractors of a Separate Contractor.

**1.1.41 Sub-subcontractor.** A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the Site.

**1.1.42 Substantial Completion.** Substantial Completion is defined to mean the stage in the progress of the Work when the Work is sufficiently complete in accordance with the Contract Documents as determined by the City so that the City can occupy and utilize the Work for its intended use (for which a Temporary Certificate of Occupancy ("TCO") has been issued by the City) and as further defined in the Agreement.

**1.1.43 Work.** The term "Work" means the design, construction and other services required by, and reasonably inferable from the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment, and services provided or to be provided by the Design-Builder to fulfill the Design-Builder's obligations. The Work may constitute the whole or a part of the Project.

## **1.2 Correlation and Intent of the Contract Documents**

**1.2.1 Complementary Documents.** The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work. The Contract Documents are complementary, and what is required by any one shall be as binding as if required by all. All Work mentioned or indicated in the Contract Documents, and all Work reasonably inferable from them, shall be performed by the Design-Builder as part of the Contract unless it is specifically indicated in the Contract Documents that such work is to be done by others.

**1.2.2 Order of Precedence.** In the event of conflict between any of the Contract Documents, the provision placing a more stringent requirement on the Design-Builder shall prevail. The Design-Builder shall provide the better quality or greater quantity of Work and/or materials unless otherwise directed by City in writing. In the event none of the Contract Documents place a more stringent requirement or greater burden on the Design-Builder, the controlling

provision shall be that which is found in the document with higher precedence. In the event of conflicts or discrepancies among the Contract Documents, interpretations will be based on the following order of precedence, with "(1)" being the highest:

- (1) RFP
- (2) Permits;
- (3) Modifications;
- (4) The Agreement, including all exhibits, and Addenda;
- (5) Supplementary Conditions, if any;
- (6) General Conditions;
- (7) The most current Construction Documents prepared by Design Builder and approved by City;
- (8) Criteria Document prepared by City; and
- (9) RFP Documents (other than Criteria Documents).

**1.2.2.1** Nothing herein shall relieve the Design-Builder of its obligation to notify the City of any inconsistencies in the Contract Documents. Should it appear that the Work to be done or any of the matters relative thereto are not sufficiently detailed or explained in the Contract Documents, the Design-Builder shall apply to the City in writing for such further written explanations as may be necessary.

**1.2.2.2** All Work shall conform to the Contract Documents. No change therefrom shall be made without review and written acceptance by City.

**1.2.3** Organization. Organization of the Criteria Documents into divisions, sections, and articles, and sequential order of Drawings shall not control the Design-Builder in dividing the Work among Design Consultants or Subcontractors or in establishing the extent of Work to be performed.

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

**1.2.5** Design-Builder Deviations. No deviation by the Design-Builder from the Contract Documents relating to any portion of the Services, materials, labor, or equipment required for the Work shall be construed to set a precedent with respect to subsequent interpretation of the Contract Documents or performance of the Work unless such a deviation is memorialized in a Modification to the Contract.

### **1.3 Capitalization**

Terms capitalized in these General Conditions include those which are (i) specifically defined, (ii) the titles of numbered articles, and identified references to paragraphs, subparagraphs and clauses in the document or (iii) the titles of other Contract Documents or forms.

## **1.4 Interpretation**

**1.4.1 Omitted Articles.** In the interest of brevity, the Contract Documents frequently omit articles such as "the" and "an", but the fact that an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

**1.4.2 References to Contract Documents.** Where "as indicated", "as detailed", or words of similar import are used, it shall be understood that the reference is made to any one of the Contract Documents.

**1.4.3 Severability.** In the event any article, section, sub-article, paragraph, subparagraph, sentence, clause, or phrase contained in the Contract Documents shall be determined, declared, or adjudged invalid, illegal, unconstitutional, or otherwise unenforceable such determination, declaration, or adjudication shall in no manner affect the other articles, sections, sub articles, paragraphs, subparagraphs, sentences, clauses, or phrases of the Contract Documents, which shall remain in full force and effect as if the article, section, sub-article, paragraph, subparagraph, sentence, clause, or phrase declared, determined, or adjudged invalid, illegal, unconstitutional, or otherwise unenforceable was not originally contained in the Contract Documents.

**1.4.4 Provisions Deemed Inserted.** Each and every provision and clause required by law to be inserted in the Contract Documents shall be deemed to be inserted herein and the Contract Documents shall be read and enforced as though such provision or clause is included herein and, if through mistake or otherwise, any such provision is not inserted or not correctly inserted, then upon application of either Party, the Contract Documents shall forthwith be physically amended to make such insertion or correction.

**1.4.5 Headings Not Controlling.** The various headings contained in the Contract Documents are inserted for convenience only and shall not affect the meaning or interpretation of the Contract or any provision thereof.

## **1.5 Execution of Contract Documents**

**1.5.1 Signatures.** The Agreement shall be signed by the City and Design-Builder.

**1.5.2 Design-Builder Representations Concerning Contract Documents and Site Investigation.** By executing the Agreement, Design-Builder represents and warrants that: (i) the Contract Documents are sufficiently detailed to enable Design-Builder to determine the cost of the Work within the Contract Sum and Contract Time; (ii) it has visited the Project Site, familiarized itself with the local conditions under which the Work is to be performed including, without limitation, the conditions contained in any test results and/or reports provided to or obtained by the Design-Builder, and the conditions reflected on any Site surveys provided to or obtained by the Design-Builder; (iii) it is fully experienced, qualified and competent to perform the Services set forth in the Contract Documents; (iv) it is properly equipped, organized and financed to perform the Work; (v) it is properly permitted and licensed by the State of the Project and all other governmental entities to perform the Work required by the Contract and that it will retain only properly licensed Design Consultants and Subcontractors to perform the Work of the Contract; (vi) it has familiarized itself with all conditions bearing upon transportation, disposal, handling, and storage of materials; (vii) it has familiarized itself with the availability of labor, water, electric power, and roads; (viii) it has familiarized itself with uncertainties of weather or similar observable physical conditions at the Project Site; (ix) it has familiarized itself with the character of equipment and facilities needed preliminary to and during performance of the Work; (x) it has familiarized itself with the staging and material storage constraints of the Project Site and surrounding buildings and will confine its staging and storage operations to approved areas; (xi) it shall maintain the immediate surrounding areas of the Project Site in a clean and safe manner at all times; (xii) it will coordinate its design construction activities with City's Separate Contractors performing work on the Project Site; (xiii) it will adhere to the assigned transit route identified by the City; and (xiv) it will adhere to and be bound by conditions set forth in the Contract Documents and any regulatory agency, utility, or governmental entity with jurisdiction over the Project. In addition, and without limiting the foregoing warranties, Design-Builder represents and warrants to City that prior to executing the Agreement:

(1) Design-Builder has familiarized itself and will continuously familiarize itself throughout performance of the Work with the nature and extent of the Contract Documents, the Work, the Project Site, the identified as-built conditions of the Project Site and locality, and all laws, rules, ordinances, and regulations of all government authorities and utilities having jurisdiction over the Project that may affect costs, progress, performance, or furnishing of the Work;

(2) Design-Builder has obtained and carefully studied (or assumes responsibility for obtaining and carefully studying) all such examinations, investigations, explorations, tests, reports and studies which pertain to the physical conditions at or contiguous to the Project Site or conditions which otherwise may affect the cost, progress, performance or furnishing of the Work, as Design-Builder considers necessary for the performance hereinafter defined, within the Contract Time and Construction Schedule and in accordance with the other terms and conditions of the Contract Documents and no additional examinations, investigations, explorations, tests, reports, studies or similar information or data are or will be required by Design-Builder for such purposes. Design-Builder may rely upon the accuracy of the technical data contained in such documents but not upon nontechnical data, interpretations, opinions or conditional statements contained therein or for the completeness thereof for Design-Builder's purposes.

(3) Design-Builder has reviewed and checked all information and data shown or indicated on the Contract Documents with respect to existing underground facilities at or contiguous to the Project Site;

(4) Design-Builder has coordinated the results of all observations, examinations, investigations, explorations, tests, reports, and studies provided to the Design-Builder as part of the Contract Documents;

(5) As of the effective date of the Agreement, Design-Builder has no knowledge of any conflicts, errors, or discrepancies in the Contract Documents other than those which Design-Builder has notified City of in writing prior to executing the Agreement;

(6) Design-Builder is experienced and competent in the interpretation and use of Specifications and Drawings, and in the use of materials, equipment and construction techniques as are required to successfully complete the Project. Design-Builder shall, at its own expense, employ any and all experts necessary to successfully complete the construction Work required by the Contract Documents; and

(7) The City assumes no responsibility for any conclusions or interpretations made by the Design-Builder based on the information made available by the City. Nor does the City assume responsibility for any understanding reached or representation made concerning conditions which can affect the Work by any of its Project Managers or agents before the execution of this Contract, unless that understanding or representation is expressly stated in the Contract Documents or any Addenda thereto.

## **1.6 Ownership and Use of Drawings, Specifications and Other Instruments of Service**

**1.6.1 Ownership of Contract Documents.** All Criteria Documents, sketches and other documents, and copies thereof furnished by the City are and shall remain the property of the City. They are to be used only with respect to this Project and are not to be used on any other project. Submission or distribution to meet official regulatory requirements or for other purposes in connection with the Project is not to be construed as publication in derogation of the City's common law copyright or other reserved rights.

**1.6.2 Design-Builder's Assignment of Copyrights.** The Construction Documents, Project related documents created, prepared, or issued by Design-Builder or its Design Consultants or Subcontractors, including certain design Drawings, Specifications, and electronic data are "work for hire", and shall become the property of City when prepared and shall be delivered to City whenever requested. The Design-Builder hereby assigns to the City, without reservation, all copyrights to all Project-related documents, models, photographs, and other written expressions created by the Design-Builder. Among these Project-related documents are certain "Instruments of Service," including

drawings, specifications and other documents required by the Contract Documents. Design-Builder shall obtain a valid written assignment of copyrights from its Design Consultants with items identical to this subparagraph which copyrights Design-Builder hereby assigns to City. The City, in return, hereby grants the Design-Builder a non-exclusive license to reproduce the documents for purposes relating to the Design-Builder's performance of this Project.

**1.6.3 Submissions to City.** A copy of every technical memorandum and report prepared by Design-Builder shall be submitted to the City to demonstrate progress toward completion of Work. In the event City rejects or has comments on any such work product or Instrument of Service, City shall identify specific requirements for satisfactory completion by Design-Builder. Design-Builder shall provide City with Project-related documents in reproducible or electronic format, upon City's written request. Complete Record Documents shall be turned over to City upon termination of this Agreement or Final Completion, whichever occurs first. If the City subsequently reproduces Project-related documents or creates (or causes to create) a derivative work based upon Project-related documents created by the Design-Builder, the City shall remove or completely obliterate the original professional seals, logos, and other indications on the documents of the identity of the Design-Builder and its Design Consultants. However, where required by law, such identification with appropriate qualifying language or other statutorily prescribed information identifying the original City or the scopes of the reuse of the documents may remain or be applied. In the event this Agreement is terminated prior to completion of the Work, City may terminate the license and City is authorized to allow another Design-Builder, architect, contractor, or the City itself, to use the documents prepared for the City's benefit for the Project and all said documents deemed to be the property of the City.

## **1.7 Publicity**

The Design-Builder, its agents, employees, Design Consultants, Subcontractors, and suppliers shall not engage in any communication or correspondence with persons not directly involved in the construction of the Project, concerning any aspect of the construction of the Project, without the express written consent of City. All communications to the media, or in response to inquiries made by private citizens, shall be issued solely through the City.

## **2. CITY OF SALINAS DUTIES AND RESPONSIBILITIES**

### **2.1 General**

The City is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The City shall designate the Project Manager(s) defined in Paragraphs 4.1 and 4.2 below, in writing. Whenever the Contract Documents require or permit the City to take or request an action or approve or disapprove of an action or request made by another Party, the reference to "City" shall mean the City's Project Manager unless the Contract Documents or context make it clear that another person is authorized to act as the City's Project Manager. All communications to the City shall be made through the City's Project Manager. The Design-Builder shall not be entitled to rely on directions (nor shall it be required to follow the directions) from anyone outside the scope of that person's authority as set forth in written authorization pursuant to the Agreement. Direction and decisions made by the City's Project Manager shall be binding on the City of Salinas.

### **2.2 City Review of Design Materials**

The Design-Builder shall be entitled to proceed with all or a part of the construction phase of the Project upon the City's review for conformity of the design and Contract Documents, and any subsequent submittals or shop drawings for conformance with the Contract Documents, and other Contract Documents. If the City modifies or otherwise changes in a material way the scope of Work called for in the Construction Documents, subsequent submittals or shop drawings, after such review for conformity, the Design-Builder shall be entitled to a Change Order in accordance with Article 7 of the Agreement. In no event shall a Change Order be issued to the extent such modification is due to the fault or neglect of Design-Builder, or in the event the original submittals were not accompanied by annotations showing nonconformance with the Contract Documents, if any.

## **2.3 Information and Services Required of the City**

**2.3.1 Approvals for Permanent Structures.** Except for the permits, fees, and other such items set forth under Subparagraph 3.7.1, that are the responsibility of the Design-Builder under the Contract Documents, the City shall pay for necessary assessments and charges reasonably required for construction, use, or occupancy of permanent structures or for permanent changes in existing facilities.

**2.3.2 Existing Utilities: Removal, Relocation and Protection.** In accordance with California Government Code Section 4215, the City shall assume the responsibility for the timely removal, relocation, or protection of existing main or trunkline utility facilities located on the Project Site which are not identified in the Contract Documents provided by City. Design-Builder shall be compensated for the costs of locating, repairing damage not due to the Design-Builder's failure to exercise reasonable care, and removing or relocating such utility facilities not indicated in the Contract Documents with reasonable accuracy, and for equipment on the Project Site necessarily idled during such work. Design-Builder shall not be assessed Liquidated Damages for delay in completion of the Work when such delay is caused by the failure of the City or the utility provider to provide for removal or relocation of such utility facilities. Nothing in this Paragraph shall be deemed to require the City to indicate the presence of existing service laterals or appurtenances whenever the presence of such utilities on the Project Site can be inferred from the presence of other visible facilities, such as buildings, meters and junction boxes, on or adjacent to the Project Site. If the Design-Builder encounters utility facilities not identified by the City in the Contract Documents, the Design-Builder shall immediately notify, in writing, the City and the public utility. In the event that such utility facilities are owned by a public utility, the public utility shall have the sole discretion to perform repairs or relocation work or permit the Design-Builder to do such repairs or relocation work at a price determined in accordance with Article 7 herein.

**2.3.3 Surveys.** Design-Builder shall be responsible for locating, and shall locate prior to performing any Work, all utility lines, including telephone, cable, television, and fiber optic lines and cables, sewer lines, water pipes, gas lines, electrical lines, including, without limitation, all buried pipelines and buried telephone cables, and shall perform the Work in such a manner so as to avoid damaging any such lines, cables, pipes, and pipelines.

**2.3.4 Time for Furnishing.** Information or services required of the City by the Contract Documents shall be furnished by the City with reasonable promptness.

## **2.4 City's Right to Stop the Work**

If the Design-Builder fails to correct Work which is not in accordance with the requirements of the Contract Documents as required by Paragraph 12.2 or fails to carry out Work in accordance with the Contract Documents, the City may issue a written order to the Design-Builder to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the City to stop the Work shall not give rise to a duty on the part of the City to exercise this right for the benefit of the Design-Builder or any other person or entity. The City's right to stop the Work is in addition to and without prejudice to any other rights or remedies of the City.

## **2.5 City's Right to Carry Out the Work**

If the Design-Builder defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a forty-eight (48) hour period after receipt of written notice from the City to commence and continue correction of such default or neglect with diligence and promptness, the City may after such forty-eight (48) hour period give the Design-Builder a second written notice to correct such deficiencies within a second forty-eight (48) hour period. If the Design-Builder within such second forty-eight (48) hour period after receipt of such second notice fails to commence and continue to correct any deficiencies, the City, without prejudice to other remedies the City may have, may correct such deficiencies. In such case an appropriate Construction Change Directive shall be issued deducting from payments then or thereafter due the Design-Builder, the cost of correcting such deficiencies, including compensation

for any additional design services and expenses made necessary by such default, neglect, or failure. If payments then or thereafter due the Design-Builder are not sufficient to cover such amounts, the Design-Builder shall pay the difference to the City. The City's right to carry out the Work is in addition to and without prejudice to any other rights or remedies of the City.

## **2.6 Suspension of Operations**

In addition to the City's right to stop the Work set forth in these General Conditions, the Design-Builder shall, upon receipt of City's written notice and within the time stated therein, suspend shipment and delivery of material and stop any part or all of the Work and operations under the Contract for such period or periods of time as the City may deem advisable and designate in said notice. Upon receipt of such notice to suspend operations, the Design-Builder shall immediately confer with the City concerning the probable duration of such suspension and stoppage, delays, and extensions of time resulting therefrom as well as the reduction and possible elimination of the Design-Builder's field cost and such other costs and expenses as may result directly from such Work stoppage. Upon written notice from the City to resume operations, the Design-Builder shall promptly resume all or any part of the Work and operations including securing of materials required by said resumption notice. Design-Builder shall be compensated for suspension in accordance with Article 13 herein.

## **2.7 Prohibited Interests**

No official of City who is authorized in such capacity and on behalf of City to negotiate, make, accept, or approve, or to take part in negotiating, making, accepting or approving any City structural, engineering, inspection, construction or material supply contract or any subcontract in connection with construction of the Project, shall become directly or indirectly interested financially in this Contract or in any part thereof. No officer, employee, City, attorney, engineer or inspector of or for City who is authorized in such capacity and on behalf of City to exercise any executive, supervisory or other similar functions in connection with construction of Project shall become directly or indirectly interested financially in this Contract in any part thereof. Design-Builder shall receive no compensation and shall repay City for any compensation received by Design-Builder hereunder, should Design-Builder aid, abet or knowingly participate in violation of this Section.

## **2.8 City's Right to Order Extraordinary Measures**

**2.8.1 Non-Compensable Extraordinary Measures.** In the event the City determines that the performance of the Work, or any portion thereof, has not progressed or reached the level of completion required by the Contract Documents due to causes within the control of Design-Builder, the City shall have the right to order the Design-Builder to take corrective measures necessary to expedite the progress of construction, including, without limitation, (i) working additional shifts or overtime, (ii) supplying additional manpower, equipment, and facilities and (iii) submitting a recovery schedule for re-sequencing performance of the Work or other similar measures as defined as Extraordinary Measures in Paragraph 1.1 above. Such Extraordinary Measures shall continue until the progress of the Work complies with the stage of completion as required by the Contract Documents. The Design-Builder will be entitled to submit a recovery schedule for re-sequencing of work prior to working additional shifts, overtime or providing additional manpower. The Design-Builder shall not be entitled to an adjustment in the Contract Sum in connection with the Extraordinary Measures required by the City under or pursuant to this section. The City may exercise the rights furnished the City under or pursuant to this section as frequently as the City deems necessary to ensure that the Design-Builder's performance of the Work will comply with the Contract Time or interim completion dates set forth in the Contract Documents. If Design-Builder or its Design Consultants or Subcontractors fail to implement or commence Extraordinary Measures within ten (10) calendar days of City's written demand, City may, without prejudice to other remedies take corrective action at the expense of the Design-Builder and shall reduce the Contract Sum.

**2.8.2 Compensable Extraordinary Measures.** City, in its discretion, may issue a written request to the Design-Builder asking Design-Builder to submit an itemized proposal for Extraordinary Measures in order to achieve

early completion of all or a portion of the Work, due to no fault of the Design-Builder, in a form acceptable to City within ten (10) calendar days after City's issuance of the Acceleration Proposal Request.

### **3. DESIGN BUILDER'S DUTIES AND RESPONSIBILITIES**

#### **3.1 General**

The Design-Builder shall perform the Work in accordance with the Contract Documents. The Design-Builder shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the City or Owner's Separate Consultants in their administration of the Contract, or by tests, inspections, or approvals required or performed by persons other than the Design-Builder.

#### **3.2 Review of Criteria Documents and Field Conditions By Design-Builder, Its Design Consultants and Subcontractors**

**3.2.1 Suitability of Preliminary Designs Documents.** Design-Builder acknowledges that the Criteria Documents are necessarily conceptual in nature and that Design-Builder is responsible for correcting any errors, omissions or defects in the Criteria Documents, which can reasonably be corrected through the design and/or construction process, subject to Change Orders only for Scope Changes, and that it has satisfied itself regarding the adequacy and accuracy of the design information contained in the Criteria Documents and agrees to assume all risk and sole responsibility for all conditions in or among the various parts of the Criteria Documents that (i) constitute errors, omissions, conflicts, ambiguities, or violations of Applicable Laws, or (ii) are unsuitable for construction.

**3.2.2 LEED Certification.** The United States Green Building Council (USGBC) has developed green building rating systems that advance energy and material efficiency and sustainability known as Leadership in Energy and Environmental Design (LEED) for new construction and major renovations. LEED promotes a whole- building approach to sustainability by recognizing performance in five key areas of human and environmental health: sustainable site development, water savings, energy efficiency, material selection, and indoor environmental quality. The City may determine that this project shall achieve the LEED certification. Accordingly, the Design-Builder's design and construction of the work of improvement shall incorporate all necessary measures to achieve this certification. Further, the project shall be submitted to the USGBC for formal certification at the Design-Builder's expense.

**3.2.3 Field Measurements.** Prior to commencement of the Work, or portions thereof, the Design-Builder shall take field measurements and verify field conditions at the Site and shall carefully compare such field measurements and conditions and other information known to the Design-Builder with information provided in the Contract Documents. Errors, inconsistencies or omissions discovered must be reported to the City at once.

**3.2.4 Request for Information ("RFI").** If the Design-Builder encounters any condition which the Design-Builder believes, in good faith and with reasonable basis, is the result of an ambiguity, conflict, error or omission in the Contract Documents (collectively the "Conditions"), it shall be the affirmative obligation of the Design-Builder to timely notify the City, in writing, of the Conditions encountered and to request information from the City necessary to address and resolve any such Conditions before proceeding with any portion of the Work affected or which may be affected by such Conditions. If the Design-Builder fails to timely notify the City in writing of any Conditions encountered and the Design-Builder proceeds to perform any portion of the Work containing or affected by such Conditions, the Design-Builder shall bear all costs associated with or required to correct, remove, or otherwise remedy any portion of the Work affected thereby without adjustment of the Contract Time or the Contract Sum. The Contract Time shall not be subject to adjustment in the event that the Design-Builder fails to timely request information from the City.

**3.2.5 Resolution of Uncertainties.** City and Design-Builder acknowledge that questions may arise concerning the level and scope of performance required under the Criteria Documents. City and Design-Builder will in good faith attempt to resolve such conflicts and uncertainties in a manner that is consistent with the express design

intent of the Criteria Documents and without adjustment to the Contract Sum or Contract Time. In the event that they are unable, after good faith efforts, to resolve such differences, then, in recognition of their mutual desire that such questions not result in a compromise of the high standards they mutually intend be followed for design and construction of the Project, City and Design-Builder agree that all such unresolved conflicts or uncertainties in respect to the standard of quality shall be interpreted so as to require Design-Builder to perform the Work, without adjustment to the Contract Sum or Contract Time, in a manner that reflects the higher or better standard indicated by the Criteria Documents.

### **3.3 Supervision and Construction Procedures**

**3.3.1 Design-Builder's Means and Methods.** The Design-Builder shall supervise and direct the Work, using the Design-Builder's best skill and attention. The Design-Builder shall be responsible for and have control over construction means, methods, techniques, sequences, and procedures for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences, or procedures, the Design-Builder shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences, or procedures. If the Design-Builder determines that such means, methods, techniques, sequences, or procedures may not be safe, the Design-Builder shall give timely written notice within ten (10) calendar days to the City and shall not proceed with that portion of the Work without further written instructions from the City. If the Design-Builder is then instructed to proceed with the required means, methods, techniques, sequences, or procedures without acceptance of changes proposed by the Design-Builder, the City shall be solely responsible for any resulting loss or damage.

**3.3.2 Design-Builder's Vicarious Liability.** Design-Builder shall be responsible to City for acts and omissions of Design-Builder's employees, Consultants, Subcontractors, Sub-subcontractors, and their agents and employees, and any other persons or entities performing any of the Work under a direct or indirect contract (or other arrangement) with the Design-Builder.

**3.3.3 Property Lines and Encroachments.** Prior to the commencement of the Work on the Project Site, Design-Builder shall have all property corners and benchmarks verified and established by a State licensed land surveyor, shall locate the Project, together with all grades, lines, and levels necessary for the Work, on the Project Site, establishing necessary reference marks from which the Work can progress accurately and shall furnish City with reasonable evidence of such verification, noting any errors, inconsistencies, or omissions discovered during such verification. After all lines are staked out and before foundation Work is commenced, Design-Builder shall review with City the placement of all buildings and other permanent facilities to be constructed on the Site. Any encroachments resulting from the Design-Builder's locating or constructing the Work on adjacent properties to the Project Site as revealed by a survey of the foundations or an "as-built" survey, except for encroachments arising from errors or omissions not reasonably discoverable by Design-Builder in the Contract Documents, shall be the sole responsibility of Design-Builder, and Design-Builder shall commence the remedy of such encroachments within thirty (30) calendar days after discovery thereof (unless circumstances require a more rapid response), at Design-Builder's sole cost and expense, either by the removal of the encroaching improvement (and the subsequent reconstruction of such improvement on the Project Site) or by agreement with the City of the adjacent property, in a form and substance satisfactory to City in its sole discretion, providing a permanent easement for such encroachment.

**3.3.4 Inspection of Work in Place.** The Design-Builder shall be responsible for the inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work.

### **3.4 Labor and Materials**

**3.4.1 Coordination.** The Design-Builder shall coordinate its Work with that of all others on the Project including deliveries, storage, installations, and construction utilities. The Design-Builder shall be responsible for the

space requirements, locations, and staging of its equipment in areas and locations approved by City. Where the proper and most effective space requirements, locations, and routing cannot be made as indicated in the Contract Documents, the Design-Builder shall meet with all others involved before installation to plan the most effective and efficient method of overall installation.

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

**3.4.3 Labor Discipline.** The Design-Builder shall enforce strict discipline and good order among the Design-Builder's employees and other persons carrying out the Contract. The Design-Builder shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

**3.4.4 Skilled Labor.** None but skilled workmen shall be employed on any portion of the Work. When required in writing by the City, the Design-Builder or any Design Consultant, Subcontractor shall discharge any person who is, in the reasonable opinion of the City, incompetent, unfaithful, disorderly or otherwise unsatisfactory, and shall not again employ such discharged person on the Work except with the written consent of the City. Such discharge shall not be the basis of any claim for compensation or damages against the City or any of its officers or agents.

**3.4.5 Procurement and Installation of Materials and Equipment.** Design-Builder shall: (i) place orders for all materials and equipment, taking into account current market and delivery conditions necessary to meet the Construction Schedule; (ii) purchase and expedite the procurement of long lead time items to obtain their delivery by the required dates; and (iii) arrange for alternate sources for the supply of critical materials and equipment to maintain the schedule. Should Design-Builder fail in this duty, City reserves the right to order such materials and equipment as the City may deem advisable to maintain the schedule for the Work or the Contract Time and all expenses shall be charged to and paid for by Design-Builder within the Contract Sum. Design-Builder shall keep the City informed of the status of procurement and shall promptly notify City in writing of any materials or equipment which may not be available within the time scheduled or necessary for the Project. The Design-Builder shall be responsible for the space requirements, locations, and routing of its equipment. In areas and locations where the proper and most effective space requirements, locations and routing cannot be made as indicated, the Design-Builder shall meet with all others involved, including, but not limited to, City, Design Consultants, and Subcontractors before installation, to plan the most effective and efficient method of overall installation.

**3.4.6 Substitution of Materials, Process or Equipment.**

**3.4.6.1** Whenever any particular material, process, or equipment is indicated in the Contract Documents by patent, proprietary, manufacturer or brand name, with or without the words "or equal", only such items shall be provided unless the City's prior written approval is obtained for the substitution. The burden of proving the quality of any material, process, or equipment proposed for substitution shall rest with the Design-Builder.

**3.4.6.2** If any substitution request offered by the Design-Builder is not found to be equivalent or cannot be delivered to the Site in compliance with the Project Schedule, Design-Builder shall furnish and install the material specified in the Contract Documents.

**3.4.6.3** Proposals for substitutions shall be submitted to the City using an approved format. Unless otherwise approved in writing by City, no substitution will be considered or allowed by the City without Design-Builder's delivery of the following to City:

(1) A full explanation of the proposed substitution and submittal of all supporting data including technical information, complete manufacturers catalogs, brochures, drawings, samples, warranties, certified copies of test results, installation instructions, operating procedures, and other descriptive information to substantiate Design-Builder's claim of equivalent quality and necessary for a complete evaluation of the proposal;

(2) A complete description of the difference between the requirements of the Contract Documents and the proposed substitution, the comparative advantages and disadvantages of each, and the reasons the substitution is advantageous and necessary, including the benefits to the City and the Work in the event the substitution is acceptable;

(3) A description of aspects of the Contract Documents affected by the proposal;

(4) The adjustment, if any, in the Contract Sum in the event the substitution is acceptable;

(5) The adjustment, if any, in the Contract Time and impact to the Construction Schedule;

(6) The estimated cost of any engineering, design, or agency fees required for Work of all trades directly or indirectly affected by the substitution;

(7) A list of projects, to the extent known, where the subject of the request was used and the results; and

(8) Other information reasonably necessary to fully evaluate the proposal request.

**3.4.6.4** By submitting a substitution request, Design-Builder will be deemed to certify to the City that (i) the proposed substitution is equal to or exceeds all requirements of the pertinent Contract Documents as reasonably determined by Design-Builder; (ii) Design-Builder accepts the warranty and correction obligations in connection with the proposed substitution as if originally specified; (iii) the cost data presented is complete and includes all related costs under Contract, including an estimate of the redesign costs, (iv) Design-Builder will coordinate the installation of the accepted substitute, making such changes as may be required for the Work to be complete in all respects; (v) Design-Builder waives all Claims for additional costs related to the substitution which subsequently become apparent; and (vi) Design-Builder accepts all responsibility for direct or indirect costs and/or time impacts as result of the substitution including impacts to Work not identified in the proposal.

**3.4.6.5** Design-Builder shall submit all requests for substitutions, together with substantiating data, prior to the Proposal Deadline. Following commencement of construction or such other time indicated in the Agreement, substitutions requested by the Design-Builder will be considered only when one or more of the following conditions are met and documented by Design-Builder:

(1) Specified item fails to comply with regulatory requirements; or

(2) Specified item has been discontinued by the manufacturer; or

(3) Specified item, through no fault of the Design-Builder, is unavailable in the time frame required to meet the Project Schedule; or

(4) Specified item, through subsequent information disclosure, will not perform properly or fit in designated space; or

(5) Manufacturer declares specified product to be unsuitable for intended use or refuses to warrant installation of product.

**3.4.6.6** The City has reviewed the technical and aesthetic qualities of materials specified, and in no case will the City accept a substitution of a product with a lower cost which does not extend credit to the City.

**3.4.6.7** No incomplete request for substitution will be considered by the City, and products for which insufficient information is submitted will be disapproved by the City for lack of substantiating data.

**3.4.6.8** Failure of the Design-Builder to submit proposed substitutions for approval in the manner described may be deemed sufficient cause for disapproval by the City of any substitution otherwise proposed.

**3.4.6.9** Design-Builder shall proceed with performance of the Work as required by the Contract Documents and shall not modify such requirements in accordance with any value engineering proposal or substitution request unless the City approves such request in a written order. In the event City approves a value engineering or substitution request and Design-Builder furnishes a material, process or article more expensive than that specified, the difference in cost shall be borne entirely by Design-Builder. Any engineering, design fees or agency fees required to make adjustments in material or work of all trades directly or indirectly affected by the approved substituted item shall be borne entirely by Design-Builder.

**3.4.7** Reference Standards. Any material specified by reference to the number, symbol, or title of a standard such as that of the American Society for Testing Materials ("ASTM"), Underwriters Laboratories, Factory Mutual, a product or commercial standard, or similar standards, shall comply with the requirements of the latest revisions thereof and any supplement or amendment thereto in effect on the date of the Agreement. The standards referred to, except as specifically modified in the specifications, shall have the same force as if they were printed in full within the Contract Documents. Whenever a product is specified in accordance with such a Reference Standard, the Design-Builder shall present a certification from the manufacturer and test data to substantiate compliance, when requested by the City or required in the Specifications, certifying that the product complies with the particular standard or specification.

**3.4.8** Manufacturer's Instructions. Where it is required in the Contract Documents that materials, products, processes, equipment or the like be installed or applied in accordance with manufacturer's instructions, directions or specifications or words to this effect, it shall be construed to mean that said application or installation shall be in strict accord with current printed instructions furnished by the manufacturer of the material concerned for use under conditions similar to those at the jobsite. Unless otherwise stated, Design-Builder shall furnish one copy of said instructions to City. If there is a conflict between manufacturer's instructions and Applicable Law or the Contract Documents, Design-Builder shall notify City in writing to request clarification.

### **3.5 Warranty and Correction**

**3.5.1 Warranty.** The Design-Builder warrants to the City that: (i) materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents; (ii) the Work will be of good quality and free from defects; (iii) the Work will conform to the requirements of the Contract Documents; and (iv) Design-Builder will deliver a Project free of stop notice claims. Work not conforming to these requirements, including substitutions not properly approved by the City, shall be deemed defective. Design-Builder's warranty excludes improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the City, the Design-Builder shall furnish satisfactory evidence as to the kind and quality of materials and equipment. This warranty is not limited by the provisions of Paragraph 12.2 herein.

**3.5.2 Commencement of Correction Periods.** In accordance with Paragraph 12.2 herein, in addition to warranties required elsewhere in the Contract Documents, Design-Builder shall, and hereby does, warrant all Work for a period of one (1) year commencing from the date of final Completion of the Work and shall repair or replace any and all such Work, together with any other Work which may be displaced in so doing, that may prove defective in workmanship and/or materials, without expense whatsoever to City.

**3.5.3 No Limitation.** Nothing contained in this Paragraph shall be construed to establish a period of limitation with respect to other obligations that the Design-Builder might have under the Contract Documents. Establishment of the one-year period for correction of Work relates only to the specific obligation of the Design-Builder to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Design-Builder's liability with respect to the Design-Builder's obligations other than specifically to correct the Work. Neither the making of Final Payment nor the use or occupancy of the Work, in whole or in part, by City, shall constitute acceptance of Work not in accordance with the Contract Documents or relieve the Design-Builder from liability for faulty or defective Work.

**3.5.4 Overlap.** Where any warranties provided under the Contract Documents overlap, conflict, or are duplicative, Design-Builder shall be bound by the more stringent requirements.

**3.5.5 City's Right to Correct.** If Design-Builder fails to commence corrections within forty-eight (48) hours after receipt of written notice, City, under the provisions of Article 12 herein, will proceed to have defects repaired and made good at the expense of Design-Builder and its performance bond surety, plus fifteen percent (15%) for City's overhead and administrative expense. City may charge such costs against any payment due Design-Builder. If, in the opinion of the City, defective work creates a dangerous or hazardous condition or requires immediate correction or attention to prevent further loss to the City or to prevent interruption of operations of the City, the City may take immediate action, give notice, make such correction, or provide such attention and the cost of such correction or attention shall be charged against the Design-Builder. Such action by the City will not relieve the Design-Builder of the warranties provided in this Article or elsewhere in the Contract Documents.

**3.5.6 Procurement and Assignment of Warranties.** Design-Builder shall obtain in the name of City, or transfer or assign to City or City's designee prior to the time of Final Completion of the Work, any and all warranties or guarantees which Design-Builder is required to obtain pursuant to the Contract Documents and which Design-Builder obtained from any other person or entity other than Design-Builder including, but not limited to, Subcontractors and manufacturers, and further agrees to perform the Work in such a manner so as to preserve any and all such warranties. Design-Builder shall secure written warranties from all Subcontractors in the form approved by City. Design-Builder and its Consultants and Subcontractors shall offer any warranty upgrades or extensions that are offered by manufacturers of any equipment or system in the Project to the City.

**3.5.7 Survival of Warranties.** The provisions of this Paragraph 3.5 shall survive Design-Builder's completion of the Work or termination of Design-Builder's performance of the Work.

### **3.6 Taxes**

**3.6.1 Payment.** The Design-Builder shall pay all applicable sales, consumer, use, and similar taxes for the Work provided by the Design-Builder and such taxes shall be included in the Contract Sum.

**3.6.2 Liability for Employee Payments.** Design-Builder accepts full liability for the payment of any and all contributions, deductions, or taxes for social security, unemployment insurance, old age and survivor's benefits, medical and health benefits, or for any other purpose now or hereafter imposed under any Applicable Law measured by the wages, salary or other remuneration paid to persons employed by or on behalf of Design-Builder for the Work. Design-Builder covenants and agrees to observe and fully comply with all Applicable Law, including procurement of any necessary occupational licenses, permits and inspection certificates.

### **3.7 Permits, Fees and Notices**

**3.7.1 Responsibility for Permits and Fees.** Design-Builder shall identify and obtain all certificates, licenses, fees, approvals and inspections necessary or required for the proper execution and completion of the Work, or which are customarily secured after execution of the Contract and shall submit to City copies of receipts for reimbursement within the Contract Sum. All such licenses and certificates shall be delivered to the City before Design-Builder submits a final Application for Payment. The City will obtain and pay for all required permits necessary for the Project. The City will pay connection fees directly to the utilities for all permanent water and electrical connections.

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

**3.7.3 Bonds.** The Design-Builder shall procure and pay for all bonds required of the City by any public or private entity with jurisdiction over the Project. Design-Builder shall prepare all applications, supply all necessary backup material, and furnish the surety with any required personal undertakings. The Design-Builder shall also obtain and pay all charges for all approvals for street closings, traffic regulation, parking meter removal, and other similar matters as may be necessary or appropriate from time to time for the performance of the Work.

#### **3.7.4 Compliance with Applicable Law.**

**3.7.4.1** Design-Builder is responsible to ascertain that the Design-Builder's design, submittals, deliverables, including Design-Builder's Construction Documents in CAD format, and Work, are in accordance with Applicable Laws, including life safety codes, storm water runoff, Americans with Disabilities Act (ADA), and other federal and state disabled access requirements. Design-Builder is responsible to perform all Work in accordance with the requirements of local agencies and inspectors having jurisdiction over the Work. If the Design-Builder observes that any portions of the Contract Documents are at variance with Applicable Law, Design-Builder shall promptly notify the City in writing.

**3.7.4.2** If the Design-Builder performs any Work when the Design-Builder knows or should have reasonably known it would be contrary to Applicable Law, Design-Builder shall assume full responsibility therefore and shall bear all costs (within the Contract Sum) directly or indirectly attributable to the correction of the Work. If Design-Builder fails to comply with any such codes, laws, ordinances, rules, and regulations, City may (without prejudice to any of its other rights or remedies) issue an order suspending all or any part of the Work.

### **3.8 Allowances**

Design-Builder shall include in the Contract Sum and Schedule of Values all Allowances provided for in the Contract Documents. Items covered by Allowances shall be supplied for such amounts approved by Owner. All expenditures for Allowances shall be separately itemized in each Application for Payment and are subject to City's prior approval. City shall not reimburse Design-Builder for Allowance costs in excess of the amounts specified in the Schedule of Values without City's prior written approval of such costs.

### **3.9 Design-Builder's Key Personnel, Design Consultants and Subcontractors**

**3.9.1 Design-Builder's Project Manager.** The Design-Builder's Project Manager, as is designated in Exhibit E to the Agreement or as otherwise approved in writing by City, shall: (i) be present at the Project Site at all times that any Work is in progress and at any time that any Design Consultants, Subcontractor or employee of Design-Builder is present at the Site; (ii) attend all job meetings; (iii) be actively involved throughout all phases of design and construction of the Project; (iv) maintain oversight of the Project at all times; (v) have full authority to represent and act on behalf of the Design-Builder for all purposes under this Agreement; (vi) supervise and direct the Work using his or her best skill and attention; (vii) be responsible for the means, methods, techniques, sequences, and procedures used for the Work; (viii) adequately coordinate all portions of the Work; and (ix) act as the principal contact with City and all Subcontractors and inspectors on the Project. A biography or resume of Design-Builder's Project Manager, or any proposed designee, shall be submitted to the City prior to the preconstruction meeting.

**3.9.2 Design-Builder's Key Personnel.** In addition to its designated Project Manager, Design-Builder represents to City that certain additional key personnel, including, but not limited to, the designers, the superintendent, approved by City and designated in Exhibit E to the Agreement, will perform services required by the Contract Documents. City may at any time elect to add job categories to the Design-Builder's key personnel list.

**3.9.3 Changes in Design-Builder's Project Manager, Key Personnel, Design Consultants and Subcontractors.** Design-Builder understands and acknowledges that its selection by City was, in part, based on the Design-Builder's Project Manager, listed Design Consultants, Subcontractors, and key personnel. Design-Builder shall not make changes to its Project Manager, Design Consultants, key personnel or Subcontractors, or reduce their responsibilities for this Project without the prior written approval of the City. Prior to making any changes to the Project Manager, key personnel, Design Consultants or Subcontractors, the Design-Builder shall submit the qualifications and experience of the Design-Builder's proposed replacement for the City's approval. If City determines, in its sole discretion, that the performance of any person or entity employed by Design-Builder is unsatisfactory, then at the written request of City, Design-Builder shall remove, reassign, or replace such individual or entity without increase in the Contract Sum and such individual or entity shall not be reemployed on the Project without the prior written approval of City.

**3.9.4 Qualifications and Licenses.** Work furnished by or on behalf of Design-Builder shall be performed by persons: (i) qualified to perform the Work assigned to them; (ii) licensed to practice their respective trades or professions where required by Applicable Law in the State where the Project is located; and (iii) who shall assume professional responsibility for any design documents furnished by them. Design-Builder's Project Manager, key personnel, Design Consultants and Subcontractors shall be experienced in, projects of similar nature and complexity to the Project and must provide City with resumes of education, training, and relevant experience whenever requested and shall be approved by City prior to their assignment to the Project.

### **3.10 Documents and Samples at the Site**

**3.10.1 As-Built and Record Documents.** Design-Builder shall maintain at the Project Site and shall make available to City, one copy of the Criteria Documents, Addenda, requests for information, bulletins, Change Orders and other Modifications to the Contract Documents, approved Construction Documents, Shop Drawings, Product Data,

Samples and mock-ups, permits, inspection reports, test results, daily logs, schedules, subcontracts, and purchase orders in good order (the "Record Documents"). The Record Documents shall include a set of As-Built Construction Documents, which shall be continuously updated during the prosecution of the Work. The prints for As-Built Construction Documents (except for design-build systems, as addressed below) will be a set of blackline prints produced by Design-Builder and approved by City at the start of construction. Design-Builder shall maintain said set in good condition and shall use colored pencils to mark-up said set with "record information" in a legible manner to show; (i) deviations from the City-approved Construction Documents made during construction; (ii) details in the Work not previously shown; (iii) changes to existing conditions or existing conditions found to differ from those shown on any existing Construction Documents; (iv) the actual installed position of equipment, piping, conduits, light switches, electric fixtures, circuiting, ducts, dampers, access panels, control valves, drains, openings, and stubouts; and (v) such other information as City may reasonably request. In addition, Design-Builder shall continuously update its Construction Documents in the latest version of AutoCAD format.

**3.10.2 Condition to Payment.** Design-Builder's obligation to keep Record Documents current, including As-Built Construction Documents, and to make them available to City is a condition precedent to City's duty to process Applications for Payment. The Design-Builder shall provide a written certification of this monthly review, signed by the City's Project Manager, and attach same to each Application for Payment. Within thirty (30) calendar days after Substantial Completion or earlier termination of the Agreement and as a condition precedent to Final Payment, Design-Builder shall provide final approved Record Documents including, but not limited to, As-Built Construction Documents and approved Shop Drawings. Design-Builder's obligations under Paragraph 3.11 shall survive completion of the Work or termination of Design-Builder's performance of the Work.

**3.10.3 Daily Logs.** Design-Builder shall maintain a daily log containing a record of weather, Design-Builder's own forces working on Site, Subcontractors working on the Site, number of workers for each Subcontractor on Site, materials delivered, Work accomplished, problems encountered and other similar relevant data as the City may reasonably require. The daily log shall be signed by Design-Builder's Superintendent, submitted within 24 hours (next working day) to City's Project Manager and shall be made available to others as directed by City.

### **3.11 Shop Drawings, Product Data and Samples**

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

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

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

**3.11.4 Purpose.** Shop Drawings, Product Data, Samples, and similar submittals ("Submittals") are not Contract Documents. The list of required submittals is designated in the Submittal Schedule Exhibit F. The purpose of these Submittals is to demonstrate for those portions of the Work for which submittals are required by the Contract Documents the way by which the Design-Builder proposes to conform to the information given and the design concept expressed in the Contract Documents. Review by the City is subject to the limitations of Subparagraph 3.11.6 herein. Informational submittals upon which the City is not expected to take responsive action may be so identified in the Contract Documents. Submittals which are not required by the Contract Documents may be returned by the City without action.

**3.11.5 Design-Builder's Submittals.**

**3.11.5.1 Prompt Submittals.** The Design-Builder shall review for compliance with the Contract Documents, confirm, and deliver to the City, Submittals within the timeframes required by the Contract Documents. Design-Builder's complete and timely submission of Submittals in conformity with the Submittal Schedule (Exhibit F) is a material consideration of the Contract. In the event that the City reasonably determines that all or any portion of any Submittal fails to comply with the requirements of the Contract Documents and/or such Submittals are not otherwise complete and accurate so as to require re-submission more than one time, Design-Builder shall bear all costs (within the Contract Sum) associated with the review and approval of such resubmitted Submittals. No adjustment to the Contract Time or the Contract Sum shall be granted by the City to the Design-Builder on account of its failure to make timely submission of any Submittals.

**3.11.5.2 Design-Builder's Confirmation of Submittals.** After checking and verifying all field measurements and after complying with applicable procedures specified in the Specifications, Design-Builder shall submit to City in compliance with the Submittal Schedule for review and approval, or for other appropriate action, one (1) reproducible transparency (sepia) and four (4) opaque prints (unless otherwise specified in the Specifications) of all Shop Drawings and other Submittals, which shall bear a stamp or specific written indication that Design-Builder has satisfied Design-Builder's responsibilities under the Contract Documents with respect to the review of the Submittal. All Submittals will be identified as the City may reasonably require. The data shown on the Shop Drawings must be complete with respect to quantities, dimensions, specified performance and design criteria, materials, and similar data in order to enable City to review the information as required.

(1) Before submission of each Submittal, Design-Builder shall have determined and verified quantities and dimensions, specified performance criteria, installation requirements, materials, catalog numbers, and similar data with respect thereto and reviewed or coordinated each submittal with other submittals and with the requirements of the Work and the Contract Documents.

(2) At the time of each submission, Design-Builder shall give City specific written notice of each variation that the submittal may have from the requirements of the Contract Documents, and, in addition, shall cause a specific notation to be made on each submittal submitted to City for review and approval of each such variation.

(3) By reviewing and submitting Shop Drawings, Product Data, Samples, and similar submittals, the Design-Builder represents that the Design-Builder has determined and verified materials, field measurements and field construction criteria related thereto, or will do so, and has checked and coordinated the information contained within such Submittals with the requirements of the Work and of the Contract Documents.

**3.11.6 Review by City.** Unless Design-Builder is notified in writing of a specific need for an extended period of time due to the nature or extent of the Shop Drawings being submitted, City shall utilize its best efforts to complete Shop Drawing review within a maximum of ten (10) calendar days. City's review and approval will be only for conformance with the design concept of the Project and for compliance with the information given in the Contract Documents and shall not extend to means, methods, techniques, sequences, or procedures of construction (except where a specific means, method, technique, sequence, or procedure of construction is indicated in or required by the Contract Documents). The review and approval of a separate item as such will not indicate approval of the assembly in which the item functions. Design-Builder shall make corrections required by City, and shall return the required number of corrected copies of Submittals and submit as required new Submittals for review and approval. Design-Builder shall direct specific attention in writing to any and all revisions other than the corrections called for by City on previous Submittals.

**3.11.7 Performance.** The Design-Builder shall perform no portion of the Work for which the Contract Documents require submittal and review of Shop Drawings, Product Data, Samples, or similar Submittals until the respective Submittal has been approved by the City.

**3.11.8 Approved Submittals.** The Work shall be performed in accordance with approved submittals required by the Contract Documents and the Design-Builder shall not be relieved of responsibility for variations from requirements of the Contract Documents by the City's approval of Shop Drawings, Product Data, Samples, or similar submittals unless the Design-Builder has specifically informed the City in writing of such deviation at the time of submittal and a Change Order or Construction Change Directive has been issued, authorizing the variations. The Design-Builder shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples, or similar submittals by the City's approval thereof.

**3.11.9 Resubmission.** Design-Builder shall direct specific attention, in writing on resubmitted Shop Drawings, Product Data, Samples, or similar submittals, to revisions other than those requested by the City on previous submittals. In the absence of such written notice the City's approval of a resubmission shall not apply to such revisions.

**3.11.10 Professional Services.**

**3.11.10.1** The professional design services and certifications by a design professional related to systems, materials, or equipment shall comply with the Design and Performance Criteria set forth in the Criteria Documents prepared by City. The Design-Builder shall cause such services or certifications to be provided by a properly licensed design professional, who shall comply with the reasonable requirements of City regarding qualifications and insurance and whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings, and other submittals prepared by such professional.

**3.11.10.2** Design-Builder's design professionals shall certify that design-build Work invoiced in each Application for Payment is installed in accordance with the design prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professional, shall bear such professional's written approval when submitted to the City. The City shall be entitled to rely upon the adequacy, accuracy and completeness of the Services, certifications or approvals performed by such design professionals. The City will review, approve, or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the Criteria Documents.

**3.12 Site Conditions**

**3.12.1** The Design-Builder represents that it has taken the necessary steps to ascertain the nature, location and extent of the Work, and that it has investigated and satisfied itself as to the general and local conditions which are applicable to the Work, such as:

- (1) conditions bearing on transportation, disposal and storage of materials;
- (2) the availability of labor, water, power and roads;
- (3) normal weather conditions;
- (4) physical conditions at the Site;
- (5) the conditions of the ground;
- (6) the character of equipment and facilities needed prior to and during the performance of the

Work.

**3.12.2** To the extent the Design-Builder encounters subsurface conditions or hazardous materials which differ materially from that actually known by the Design-Builder, or from those ordinarily known to exist or could have

been reasonably discovered within the time permitted during the Request for Proposals, or generally recognized as inherent in the area, then notice by the Design-Builder shall be immediately given to the City, before conditions are disturbed, and in no event later than two (2) business days after the first observance of the conditions. If such conditions could not have been reasonably identified by Design-Builder's site investigations and available existing data, and the Design-Builder incurs significant additional costs or delays as a result of such concealed conditions, such conditions may be the subject of a Change Order. The Design-Builder will not be liable for any expenses or consequential damages arising from the costs of repair, relocation, disruption, or removal of utilities if known utility locations do not exist and the best practices methods of detection are made by Design-Builder and/or it(s) subcontractors.

Should any existing utilities or services be disturbed, disconnected or damaged during construction, the Design-Builder shall be responsible, at no additional cost or time to the City, for all expenses and consequential damages of whatever nature arising from such disturbance or the replacement or repair thereof and shall repair such items as required to maintain continuing service, including emergency repairs.

**3.12.3** The Design-Builder is responsible for foreseeable site conditions and toxic materials to the extent described in the Contract Documents and/or could be reasonably inferred by the Design-Build team based on their experience and expertise on similar projects in urban areas.

**3.12.4** To the extent the City has provided the Design-Builder with preliminary geotechnical data and site conditions, and title reports, these documents are provided "for information only". Design-Builder shall be responsible to verify the accuracy of the information provided and, at its cost, obtain any additional measurements, verifications, or supplemental geotechnical report or land survey.

**3.12.5** The Design-Builder shall verify the location and depth (elevation) of all existing utilities and services before performing any excavation Work.

**3.12.6** The Design-Builder shall obtain, and pay for, the services of geotechnical engineers licensed in the State of California and other consultants to provide services deemed necessary by the Design-Builder. Such services may include reports, test borings, test pits, soil bearing values, percolation tests, air and water pollution tests, ground corrosion and resistivity tests, and other necessary operations for determining subsoil, air and water conditions, with reports and appropriate professional interpretations and recommendations thereof.

### **3.13 Use of Site**

**3.13.1** Site Constraints. Prior to mobilization on the Project Site, the Design-Builder shall submit to the City for approval a Site Constraint Plan including layout drawings to scale as required to fully describe the proposed locations of all temporary construction facilities and controls. This plan shall show the proposed activities in each portion of the Work area and identify the areas of limited use or nonuse. This plan shall also show proposed vehicle access routes and traffic control. Design-Builder shall confine operations at the Project to the areas designated in the Contract Documents and the approved Site Constraint Plan and within the hours permitted by all codes, laws, ordinances, permits, or the City, and shall not unreasonably encumber the Project Site or the adjoining sidewalks, streets, and alleyways with any material, equipment, or debris. In that regard, Design-Builder shall keep the Site and surroundings clean and in a safe condition in accordance with Paragraph 3.15 herein and the Specifications. Design-Builder shall use only those locations designated on the approved Site Construction Plan for locating Design-Builder's trailers, staging areas, lay-down areas, and other construction operations. The Design-Builder shall not unreasonably encumber the Site with any materials or equipment, nor permit any, persons on the Site, or any activity at the Site, except as the presence of those persons, or that activity, is directly related to the Project. The Design-Builder shall be liable for any and all damage caused by it to the City's premises.

**3.13.2** Coordination. Design-Builder expressly acknowledges that City, its own forces, and City's Separate Contractors may be working simultaneously with Design-Builder on the Project during certain periods of time in certain

portions of the Project Site. Design-Builder and City will take all steps necessary in connection with the construction Work not to interfere with the use and occupancy of the Project Site by City's Separate Contractors and personnel to minimize any interruption of services to such persons, including, without limitation, utilities, ingress and egress, and parking. Design-Builder further agrees to coordinate its construction activities with all others performing work on the Project Site, including deliveries, storage, and installation. Design-Builder shall meet and consult with City from time to time at City's request to insure that Design-Builder and City are fully advised of all other construction activities on the Project Site, and Design-Builder shall take such steps as are reasonably necessary at City's request to coordinate its Work with the Work of City's Separate Contractors on the Project Site.

**3.13.3 Security.** The Design-Builder shall be responsible for providing security at the Site of the Work with all such costs included in the Contract Sum. A temporary fence shall surround the Project Site unless otherwise requested by City. All security provided by Design-Builder shall be coordinated with City's existing security personnel, if any. In addition, the Design-Builder shall take all necessary precautions and provide enclosures, barricades, security guards, signs, notices, shoring, bracing, passageways, lights, and such other materials, equipment, and services as may be required (including, without limitation, such protections as may be required by applicable laws) for the protection of: (i) all persons who may be on the Project Site or in other areas affected by the Design-Builder's operations; and (ii) the City's and any third party's personal or real property. Design-Builder shall execute all repairs to land, roadways, structures, utilities, sidewalks, parkways and alleys damaged by the operations under this Contract.

**3.13.4 Utility Interruption.** When it is necessary to interrupt any existing utility service, a minimum of fourteen (14) calendar days advance written request for interruption of services shall be given by the Design-Builder to the City. Interruption of these services shall be of the shortest possible duration and shall be approved by the City in advance of such interruption. In the event that such notices and approvals are not secured prior to interruption in utility services the Design-Builder shall be financially liable for any and all damages suffered by the City and third parties due to unauthorized interruption.

**3.13.5 Parking.** The Design-Builder shall coordinate and obtain all construction related parking. The cost of all Design-Builder parking shall be included in the Contract Sum.

### **3.14 Cutting and Patching**

**3.14.1 Responsibility.** Design-Builder shall be responsible for cutting, fitting, or patching required to complete the Work or to make its parts fit together properly.

**3.14.2 Separate Contractors.** Design-Builder shall not damage or endanger a portion of the Work or fully or partially completed construction of the City or City's Separate Contractors by cutting, patching, or otherwise altering such construction, or by excavation. Design-Builder shall not cut or otherwise alter such construction by the City or a Separate Contractor except with written consent of the City.

**3.14.3 Finish Surfaces.** Cutting, drilling or other mechanical change to surfaces constituting final finish, including but not limited to, glass, marble, tile mosaic, finish wood, finish metals, etc., necessary for the fastening, installation, securing, and/or insertion of any devices, equipment, and/or materials shall be accomplished with special care. If requested by the City, Design-Builder shall submit procedures for finish changes for the City's review and approval. Specific approval must be obtained from the City for such finish changes to be done by any trades other than the one installing the specific finish material. Failure to obtain City approval shall place full responsibility upon the Design-Builder for any extra cost occasioned by unacceptable finish-surface.

### **3.15 Cleaning Up**

**3.15.1 Continuous Obligations.** The Design-Builder shall keep the Project Site and surrounding area free from accumulation of waste materials or rubbish at all times. As construction is completed on a daily basis, paved

surfaces adjoining the Project shall be broomed clean and other surfaces of the Project Site raked clean. If the Design-Builder defaults or neglects to maintain the Project free from accumulation of waste and rubbish as set forth above, and fails within a twenty-four (24) hour period after receipt of oral notice, subsequently confirmed in writing, to commence and continue correction of such default or neglect with diligence and promptness, the City may after such twenty-four (24) hour period, immediately, without prejudice to other remedies the City may have, correct such deficiencies. In such case, an appropriate Construction Change Directive shall be issued deducting from payments then or thereafter due the Design-Builder the cost of correcting such deficiencies. If payment then or thereafter due the Design-Builder is not sufficient to cover such amounts, the Design-Builder shall pay the difference to the City on demand.

### **3.15.2 Cleaning and Environmental Controls.**

(1) Maintain areas free of waste materials, debris, and rubbish. Maintain site in a clean and orderly condition.

(2) Remove waste materials, debris and rubbish from site and dispose off site legally.

(3) The Design-Builder shall furnish and operate a self-loading motor sweeper with spray nozzles as directed by the City's Project Manager to maintain the Project in a condition of cleanliness acceptable to the City at all locations affected by the Design-Builder's operation. These affected areas include all haul routes to and from the Project and all areas of construction and restoration which have not been completed. The Design-Builder shall not proceed with Work until job site is clean to the satisfaction of the City's Project Manager.

(4) The Design-Builder shall take appropriate action to insure that no dust originates from the Project Site.

(5) Spoil sites shall not be located where spoil shall be washed back into a street gutter, storm drain, runoff conveyance or ocean.

(6) Water containing mud, silt, or other pollutants from activities, shall not be allowed to enter the ocean or placed in locations that may be subject to storm runoff.

(7) Any equipment or vehicles driven and/or operated within or adjacent to a street gutter, storm drain, runoff conveyance or ocean shall be checked and maintained daily to prevent leaks of materials that if introduced to water could be deleterious to aquatic life.

(8) No debris, soil, silt, sand, bark, slash, sawdust, rubbish, cement or concrete or washings thereof, oil or petroleum products or other organic or earthen material from any construction, or associated activity or whatever nature shall be allowed to enter into or placed where it may be washed by rainfall or runoff into waters of the State. When operations are completed, any excess materials or debris shall be removed from the work area.

(9) The Design-Builder shall comply with all litter and pollution laws. All Subcontractors and employees shall also obey these laws and it shall be the responsibility of the Design-Builder to insure compliance.

**3.15.3 Water Pollution Control.** As part of the City's Storm Water Management Program, implementation of minimum Best Management Practices (BMPs) is required for this Contract. The Design-Builder is directed to comply with applicable requirements of the BMPs that are specified under this section to reduce pollutants from entering the storm drain system.

The Design-Builder shall maintain copies of these BMP fact sheets (guidance paper) at the Project Site and shall make these fact sheets available during construction activities. Best management practices shall be defined as any program,

technology, progress, siting criteria, operating method, measure, or device that controls, prevents, removes, or reduces pollution. These BMPs have been selected from the California Storm Water Best Management Practice Handbook, Municipal Industrial, and Construction Volumes (May 1993). These handbooks contain a full description of each BMP and provide for its implementation.

As a minimum, the Design-Builder shall implement the following BMPs in conjunction with all its activities construction operations:

- B.1. Site Planning Consideration
  - Preservation of Existing Vegetation (ESC02)
- B.2. Construction Practices
  - Structure Construction and Painting (CA03)
  - Spill Prevention and Control (CA12)
  - Dust Control (ESC21)
  - Storm Drain Inlet Protection (ESC54)
- B.3. Vehicle & Equipment Management
  - Vehicle & Equipment Cleaning (CA30)
  - Vehicle & Equipment Maintenance (CA32)
- B.4. Material Management
  - Solid Waste Management (CA20)
  - Concrete Waste Management (CA23)
  - Sanitary/Septic Waste Management (CA24)

**3.15.3.1 Additional BMPs.** Design-Builder may be required to implement additional BMPs as a result of a change in actual field conditions, contractor activities, or construction operations. When more than one BMP is listed under each category, the Design-Builder shall select the appropriate and necessary BMPs in order to achieve the BMP objective.

**3.15.3.2 Enforcement.** The City, as a permittee, is subject to enforcement actions by the Regional Water Quality Control Board, U.S. Environmental Protection Agency, environmental groups and private citizens. The Design-Builder shall be responsible for the costs and for any liability imposed by law as result of the Design-Builder's failure to comply and/or less than complete implementation with the requirement set forth in this section "Water Pollution Control". Cost and liabilities include, but are not limited to, fine, penalties and damages weather assessed against the City or the Design-Builder. In addition to any remedy authorized by law, so much of the money due to the Design-Builder under the Contract that shall be considered necessary by the City may be retained by the City until disposition has been made of the costs and liabilities.

**3.15.3.3 Maintenance.** Design-Builder shall ensure the proper implementation and functioning of BMP's control measures, and shall regularly inspect and maintain the construction site for the BMP's identified in Sections B.1 through B.4. The Design-Builder shall identify corrective actions and time frames to address any damaged measures or reinstate any BMPs that have been discontinued.

**3.15.4 Final Completion.** In order to achieve Final Completion of the Work, the Design-Builder must remove from and about the Project waste materials, rubbish, the Design-Builder's tools, construction equipment, machinery, and surplus materials as well as the requirements set forth in the Criteria Documents and other Contract Documents. In addition to the general cleaning, the Design-Builder must perform the following special cleaning requirements:

- (1) Remove putty stains from glazing, then wash and polish glazing;
- (2) Remove marks, stains, fingerprints, and other soil or dirt from glass, painted, stained, or decorated work;
- (3) Remove temporary protection and clean and polish floors and waxed surfaces;
- (4) Clean and polish hardware and plumbing trim; remove stains, dust, dirt, plaster, and paint;
- (5) Remove spots, soil, plaster, and paint from tile work, and wash tile;
- (6) Clean all fixtures and equipment, remove excess lubrication, clean light fixtures and lamps, polish metal surfaces;
- (7) Vacuum-clean carpeted surfaces and remove any stains; and
- (8) Remove debris from roofs, downspout, and drainage system.

### **3.16 Access to Work**

The Design-Builder shall provide the City and its respective Project Managers access to the Work in preparation and progress wherever located.

### **3.17 Royalties, Patents and Copyrights**

**3.17.1 Design-Builder Must Secure Rights.** The Design-Builder shall secure in writing from all patentees, copyright holders, and assignees of all Project-related documents, all copyrights, assignments, and licenses related to such expression (e.g., designs, drawings, Contract Documents, specifications, documents in computer form, etc.) as necessary to allow the City the full, unlimited, and unencumbered use of that expression for the execution, operation, maintenance, modernization or expansion of the Project. The Design-Builder shall immediately convey all such copyrights, assignments, and licenses to the City without reservation except that which is expressly allowed in Subparagraph 1.6.2 herein. In the case of products, materials, systems, etc., protected by patent, the Design-Builder and its consultants shall not specify or cause to be specified any infringing use of a patent. The Design-Builder shall pay all royalties and license fees.

**3.17.2 Infringement.** Should the Design-Builder become aware of or receive notice of potential infringement of any intellectual property right related to the Project, regardless of the source of that awareness or notice, in addition to its indemnity obligation, the Design-Builder shall (a) immediately cease the copying and any other activity which is the potential source of infringement; and within seven (7) calendar days (b) investigate the potential infringement; (c) submit to the City copies of all documents relating to that awareness, the notice, or the object thereof, and (d) issue to the City a complete written response and analysis of the potential infringement and the course of action recommended by the Design-Builder. The Design-Builder shall submit to the City a supplement of the initial report within seven (7) calendar days of the Design-Builder's receipt of, or awareness of, additional related information. Nothing in this Agreement shall be deemed to relieve the Design-Builder of its obligations under this Article, nor shall the City's receipt of the information indicated in this Article give rise to any duty or obligation on the part of City.

**3.17.3 Assignment of Rights.** The Design-Builder offers and agrees to assign to the City all rights, title and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Section 15) or under the Cartwright Act [Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code of the State of California], arising from purchases of goods, services or materials pursuant to the performance of the Work. This assignment will be made and become effective at the time the City tenders Final Payment to the Design-Builder, without further acknowledgement by the Parties.

### **3.18 Indemnification**

**3.18.1 Indemnity for Professional Liability.** Design-Builder agrees to indemnify, hold harmless, protect and defend the City, its officers, employees, agents, representatives and their successors and assigns ("Indemnitees") from any and all demands, liability, loss, suit, claim, action, cause of action, damage, cost, judgment, settlement, decree, arbitration award, stop notice, penalty, loss of revenue, and expense (including any fees of accountants, attorneys, experts, other professionals, and costs of investigation, mediation, arbitration, litigation and appeal) arising from any negligence, willful misconduct, or fraud of the Design-Builder or any of its officers, agents, employees, Subcontractors, Sub-subcontractors, Design Consultants or any person for whose acts any of them may be liable, in connection with the performance of the Contract, regardless of whether the claim, suit, or demand alleges that it arises in part by virtue of the negligent act or omission of an Indemnitee. Notwithstanding the foregoing, Design-Builder's obligation to indemnify, hold harmless and protect the Indemnitees for any judgment, settlement, decree or arbitration award shall extend only to the percentage of negligence attributed to Design-Builder, its agents, employees, Project Managers, Subcontractors or Design Consultants with regard to such liability, suit, claim, damage, cost, judgment and expense. The Design-Builder's duty to indemnify, hold harmless, protect and defend includes, but is not limited to, bodily injury (including death at any time) and property or other damage (including, but without limitation, economic loss, and liability arising from contract, tort, patent, copyright, trade secret or trademark infringement) sustained by any person or persons, but only to the extent such duty to indemnify arises out of the negligent, reckless, or willful misconduct, of the Design-Builder or any of its officers, agents, employees, Project Manager(s), Subcontractors, Subsubcontractors, or Design Consultants.

**3.18.2 Indemnity for Other Than Professional Liability.** To the maximum extent permitted by law, the Design-Builder shall fully indemnify, hold harmless, protect, and defend the Indemnitees from and against any and all demands, liability, loss, suit, claim, action, cause of action, damage, cost, judgment, settlement, decree, arbitration award, stop notice, penalty, loss of revenue, and expense (including any fees of accountants, attorneys, experts or other professionals, and costs of investigation, mediation, arbitration, litigation and appeal), in law or in equity, of every kind and nature whatsoever, arising out of or in connection with, resulting from or related to, or claimed to be arising out of the Work performed by Design-Builder or any of its officers, agents, employees, Subcontractors, Sub-Subcontractors, Design Consultants or any person for whose acts any of them may be liable, regardless of whether such claim, suit or demand is caused, or alleged to be caused, in part, by an Indemnitee, including but not limited to:

- (1) Bodily injury, emotional injury, sickness or disease, or death to any persons;
- (2) Infringement of any patent rights, licenses, copyrights or intellectual property which may be brought against the Design-Builder or City arising out of Design-Builder's Work, for which the Design-Builder is responsible;
- (3) Stop notices, and claims for labor performed or materials used or furnished to be used in the Work, including all incidental or consequential damages resulting to City from such stop notices, and claims;
- (4) Failure of Design-Builder or its Subcontractors to comply with the provisions for insurance;
- (5) Failure to comply with any Applicable Law, statute, code, ordinance, regulation, permit, or orders;

- (6) Misrepresentation, misstatement, or omission with respect to any statement made in or any document furnished by the Design-Builder in connection therewith;
- (7) Breach of any duty, obligation, or requirement under the Contract Documents;
- (8) Failure to coordinate the Work with other contractors;
- (9) Failure to provide notice to any Party as required under the Contract Documents;
- (10) Failure to protect the property of any utility provider or adjacent property City; or
- (11) Failure to make payment of all employee benefits.

**3.18.3 Enforcement.** Design-Builder's obligations under this Paragraph 3.18 extend to claims occurring after termination of the Design-Builder's performance of the Contract or Final Payment to Design-Builder. The obligations apply regardless of any actual or alleged negligent actor omission of Indemnitees. Design-Builder, however, shall not be obligated under this Agreement to indemnify an Indemnitee for claims arising from the sole negligence, active negligence or willful misconduct of the Indemnitee or independent contractors who are directly responsible to Indemnitees. Design-Builder's obligations under this Paragraph 3.18 are in addition to any other rights or remedies which the Indemnitees may have under the law or under the Contract Documents. In the event of any claim, suit or demand made against any Indemnitees, the City may in its sole discretion reserve, retain, or apply any monies due to the Design-Builder under the Contract for the purpose of resolving such claims; provided, however, that the City may release such funds if the Design-Builder provides the City with reasonable assurance of protection of the City's interests. The City shall in its sole discretion determine whether such assurances are reasonable.

**3.18.4 No Limitations.** Design-Builder's indemnification and defense obligations set forth in this Paragraph 3.18: (i) are separate and independent from the insurance provisions set forth in Paragraph 11.2 (reference Attachment 12 in RFQ-RFP) to the Contract; and (ii) do not limit, in any way, the applicability, scope, or obligations set forth in these insurance provisions. In claims, suits, or demands against any Indemnitee by an employee of the Design-Builder, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, the Design-Builder's indemnification and defense obligations shall not be limited by a limitation on amount or type of damages, compensation, or benefits payable by or for the Design-Builder or a Subcontractor under workers' compensation acts, disability benefit acts, or other employee benefit acts.

### **3.19 Signs and Advertising**

Design-Builder shall not place or maintain any advertising signs, bills, or posters, nor shall it allow the same to be placed in or about the Project Site, or on any structure, fence, or barricade located on the Site, except as may be specified herein or approved in writing by the City, which approval shall not be unreasonably withheld, delayed, or conditioned. City shall have the right to reasonably approve the size, style, text, and location of any Design-Builder sign placed on the Project Site or on any structure, fence, or barricade located at the Project Site. Notwithstanding any other provision of the Contract Documents, City shall have complete discretion with respect to placement of Consultant and Subcontractor signs on the Project Site.

### **3.20 Coordination With Neighboring Property**

Design-Builder shall coordinate with adjoining property businesses, tenants, and their customers and contractors to provide access to neighboring property and shall implement measures to minimize disruption to operations and occupancy of neighboring property businesses, tenants, and their customers and contractors.

### **3.21 Nondiscrimination**

During the term of the Contract, Design-Builder shall not discriminate against any employee or applicant for employment because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, or military and veteran status. Design-Builder shall comply with Executive Orders 11246, 11375, 11625, 12138, 12432, 12250, 13672, Title VII of the Civil Rights Act of 1964, the California Fair Housing and Employment Act and other applicable Federal, State and City laws and regulations and policies relating to equal employment and contracting opportunities, including laws and regulations hereafter enacted.

### **3.22 Travel Management Policy**

Design-Builder shall adhere to the City's Travel Management Policy (08-02 and 08-02SP1) when travel is pursuant to this Contract and for which reimbursement is sought from the City. In addition, Design-Builder is encouraged to utilize local transportation services, including but not limited to, the Ontario International Airport.

## **4. ADMINISTRATION OF THE CONTRACT**

### **4.1 City's Project Representative**

The City's Project Manager identified by the City in writing is the City's Project Representative. The City's Project Manager shall serve as a single point transmission of City's instructions and approvals, and receive all information required to be provided by Design-Builder, City's Project Manager shall be on-site on a daily basis to monitor progress, quality of work, and Contract and schedule compliance.

### **4.2 Administration of the Contract**

**4.2.1 Site Visits.** The City's Project Manager will visit the Site at intervals appropriate to the stage of the Design-Builder's operations to become familiar with the progress and quality of the portion of the Work completed and to determine if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents.

**4.2.2 No Estoppel.** Neither the City nor its Project Manager will be responsible for the Design-Builder's failure to perform the Work in accordance with the requirements of the Contract Documents. The City and its Project Manager will not be responsible for acts or omissions of the Design-Builder, Design Consultants, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work. Approval and/or acceptance of all or any portion of the Work shall in no way relieve the Design-Builder from its obligation to construct each portion of the Work in accordance with the Contract Documents and the City shall not be estopped or otherwise prevented from asserting any claim it might have against the Design-Builder as a result of any such acceptance or approval.

**4.2.3 Determination of Payment Amounts by Project Manager.** The City's Project Manager will review Design-Builder's Applications for Payment and determine the amount of payment due Design-Builder.

**4.2.4 Rejection of Work Testing and Inspection.** The City has the authority to reject Work that does not conform to the Contract Documents. Whenever the City considers it necessary or advisable, it will require inspection or testing of the Work in accordance with Paragraph 15.5 below, whether or not such Work is fabricated, installed or completed. However, neither this authority nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the City to the Design-Builder, its Design Consultants, Subcontractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.

**4.2.5** Submittal Review. The City will review and approve or take other appropriate action upon the Design-Builder's submittals such as Shop Drawings, Product Data, and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents as described in Paragraph 3.11 herein.

**4.2.6** Contract Modifications. The City's Project Manager will prepare Change Orders and Construction Change Directives.

**4.2.7** Substantial Completion and Project Closeout. The City's Project Manager will conduct inspections to determine the date or dates of Substantial Completion and the date of Final Completion, review written warranties and related close-out documents required by the Contract and assembled by the Design-Builder, and will issue a final Certificate for Payment upon Design-Builder's satisfaction of the requirements of the Contract Documents.

### **4.3 Claims and Disputes**

**4.3.1** Definition. The term "Claim" or "Claims" shall mean a separate demand by the Design-Builder for: (i) a time extension (ii) payment of money or damages arising from Work done by or on behalf of the Design-Builder pursuant to this Contract and payment of which is not otherwise expressly provided or the Design-Builder is not otherwise entitled to; or (iii) an amount the payment of which is disputed by the City.

**4.3.2** Notification of Third-Party Claims. City shall provide Design-Builder with prompt written notice upon City's receipt of any third party claim relating to the Contract.

**4.3.3** Notice and Time Limits on Claims. If the Design-Builder wishes to make a Claim for an increase in the Contract Sum or an extension of the Contract Time, the Design-Builder shall give the City written notice thereof within ten (10) calendar days after the occurrence of the event, giving rise to such Claim. The written notice must comply with the requirements of this Article 4 and Article 8, if applicable, herein. This notice shall be given by the Design-Builder before proceeding to execute Work affected by the event, except in an emergency endangering life or property, in which case the Design-Builder shall proceed in accordance with Article 10 below.

**4.3.4** Resolution. The City will issue a Change Order or a Construction Change Directive to Design-Builder within a reasonable period of time after City's approval of any Claim, specifying the additional cost and/or time, if any, approved by City.

**4.3.5** Continuing Contract Performance. Design-Builder shall not delay or postpone any Work pending resolution of any disputes or disagreements, except as the City and Design-Builder may otherwise agree in writing. Pending final resolution of a Claim, the Design-Builder shall proceed diligently with performance of the Contract and the City shall continue to make payments for undisputed Work in accordance with the Contract Documents. In the event of disputed work, City shall have the right to unilaterally issue a Construction Change Directive and Design-Builder shall continue performance pending resolution of the dispute and shall maintain the accounting and cost data described in Paragraph 7.4 herein.

**4.3.6** Claims for Concealed or Unknown Conditions. The Design-Builder shall notify the City of the following Project Site conditions in writing within ten (10) calendar days upon their discovery and before they are disturbed;

(1) Subsurface or latent physical conditions differing materially from those indicated in the Contract Documents;

(2) Unknown physical conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the Work of the character being performed; and

(3) Material differing from that represented in the Contract Documents which the Design-Builder believes may be hazardous waste, as defined in the California Health and Safety Code, that is required to be removed to a Class 1, Class 2, or Class 3 disposal Site in accordance with the provisions of existing law.

The City will promptly investigate unknown conditions or conditions which appear to be concealed. If the City determines that the conditions fall within one of the three categories set forth above and will materially affect the cost or time to complete the Work, a Change Order or Construction Change Directive will be issued by the City adjusting the compensation for such portion of Work in accordance with the requirements of the Contract Documents. If the City determines that the conditions do not justify an adjustment in compensation or the Contract Time, the Design-Builder will be notified in writing. Should the Design-Builder disagree with the decision, Design-Builder may submit a written notice of potential claim to the City before commencing the disputed Work. In the event of such a dispute, the Design-Builder shall not be excused from any scheduled completion date provided by the Contract Documents and shall proceed with all Work to be performed under the Contract Documents. The Design-Builder's failure to give notice of changed conditions within ten (10) calendar days of their discovery and before they are disturbed shall constitute a waiver of all Claims in connection therewith.

#### **4.3.7 Claims for Additional Cost and/or Time.**

**4.3.7.1 General.** If Design-Builder wishes to make a Claim for an increase in the Contract Sum and/or Contract Time, Design-Builder shall provide written notice within ten (10) calendar days, as provided in Paragraph 4.3.3 herein, before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Article 10. If the Design-Builder believes additional cost is involved for reasons including, but not limited to: (i) any written interpretation; (ii) a Verbal Change in the Work as more specifically described in Subparagraph 7.5.2 below; (iii) failure of payment by the City; or (iv) any order by the City to stop Work where the Design-Builder was not at fault, Design-Builder shall file Claims in accordance with the procedures established herein. Compliance with the notice and Claim submission procedures described in this Paragraph is a condition precedent to the right to commence litigation, file a Government Code Claim, or commence any other legal action. No claim or issues not raised in a timely notice and timely Claim submitted under this Paragraph may be asserted in any Government Code Claim, subsequent litigation, or legal action. The provisions of Section 4.3 and 4.4 constitute a non-judicial claim settlement procedure, and also step one of a two step claim presentment procedure by agreement under Section 930.2 of the California Government Code. Specifically, step one is compliance with this contract claims procedure and filing/administering timely contract claims in accordance with the Contract Documents. Step two is filing a timely Government Code Section 910 claim in accordance with the California Government Code. Any Government Code Section 910 claims shall be presented in accordance with the Government Code and shall affirmatively indicate Design-Builder's prior compliance with the claims procedure herein and previous dispositions under the claims procedure. These provisions shall survive termination, breach or completion of the Contract Documents. Design-Builder shall bear all costs incurred in the preparation and submission of a claim.

#### **4.3.7.2 Certification of Claim.**

(1) Design-Builder, under penalty of perjury under the laws of the State of California, shall submit with the Claim its and its Subcontractors' and Design Consultants' certification that:

- (a) The Claim is made in good faith;
- (b) Supporting data are accurate and complete to the best of the Design-Builder's knowledge and belief; and

(c) The amount requested accurately reflects the Contract adjustment for which the Design-Builder believes the City is liable.

(2) The certification shall be executed by an officer or general partner of the Design-Builder having overall responsibility for the conduct of the Design-Builder's affairs.

(3) If a false claim is knowingly submitted (as the terms "claim" and "knowingly" are defined in the California False Claims Act, California Government Code Sections 12650 et seq.), the City will be entitled to the remedies set forth in the California False Claims Act in addition to all other remedies provided by law. The Design-Builder may be subject to criminal prosecution.

(4) In regard to any Claim or portion of a Claim for Subcontractor or Design Consultant work, the Design-Builder shall fully review said Claim and certify said Claim, under penalty of perjury under the laws of the State of California, to have been made in good faith and in accordance with this Contract.

(5) Failure to furnish certification as required hereinbefore will result in the Design-Builder waiving its rights to the subject the Claim.

**4.3.7.3 Content of Written Notice.** Design-Builder shall waive all rights to assert a Claim for Additional Cost and/or Time unless such notice is given as required in this Paragraph. The written notice shall set forth:

(1) The date of the event or occurrence giving rise to the claim and, if applicable, the date when the event ceased;

(2) The nature of the event or occurrence and reasons for which the Design-Builder believes additional cost and/or time will or may be due;

(3) The quantification of the costs involved together with the accounting and cost data described in Paragraph 7.4 herein;

(4) A Critical Path Method ("CPM") schedule analysis supporting any request for any additional time; and

(5) Design-Builder's plan for mitigating such costs and/or delay.

**4.3.7.4 Back-up Documentation.** In addition to the initial ten (10) day written notice required herein, Design-Builder shall submit detailed backup documentation for its Claim including, but not limited to, contract provisions, specifications, drawings, Request for Information, correspondence, meeting minutes, and the like, within thirty (30) calendar days from Design-Builder's initial written notice. Failure to provide either this backup documentation or an explanation acceptable to the City for the cause of the Design-Builder's delay in submitting this documentation as herein indicated shall constitute Design-Builder's waiver of any and all rights associated with the Claim. Except where provided by law, the City shall not be liable for special or consequential damages, and claims shall not include special or consequential damages.

**4.3.7.5 Remedies Related to Delays.**

(1) For Claims relating to extensions of Contract Time, due to Compensable City-Caused delays, as described in Article 8 herein, Design-Builder may be entitled to an equitable adjustment of the Contract Sum and Contract Time provided Design-Builder otherwise complies with this Paragraph 4.3.

(2) For Claims relating to extensions of Contract Time due to Non-Compensable Force Majeure events, as described in Article 8 herein, Design-Builder may be entitled to an equitable adjustment of the Contract Time, subject to the limitations set forth in Article 8 below, but shall not be entitled to adjustment of the Contract Sum.

(3) For Claims relating to extensions of the Contract Time due to rain delays/inclement weather, Design-Builder shall not be entitled to adjustment of the Contract Time unless and until the number of unworkable days due to the effects of rain/inclement weather exceed the number of days set forth in Subparagraph 8.4.1.3 below. In such event, the Contract Time shall be equitably adjusted, but Design-Builder shall not be entitled to adjust of the Contract Sum.

#### **4.4 Dispute Resolution**

**4.4.1** Claims between the City and the Design-Builder of \$375,000.00 or less shall be resolved in accordance with the procedures established in Part 3, Chapter 1, Article 1.5 of the California Public Contract Code Sections 20104 et seq.; provided however that California Public Contract Code Section 20104.2(a) shall not supersede the requirements of the Contract Documents with respect to the Design-Builder's notification to the City of such claim or extend the time for giving of such notice as provided in the Contract Documents.

**4.4.1.1** Pursuant to Assembly Bill 626 (2015-2016 Reg. Sess.) the text of Public Contract Code section 9204 is included as follows:

(a) The Legislature finds and declares that it is in the best interests of the state and its citizens to ensure that all construction business performed on a public works project in the state that is complete and not in dispute is paid in full and in a timely manner.

(b) Notwithstanding any other law, including, but not limited to, Article 7.1 (commencing with Section 10240) of Chapter 1 of Part 2, Chapter 10 (commencing with Section 19100) of Part 2, and Article 1.5 (commencing with Section 20104) of Chapter 1 of Part 3, this section shall apply to any claim by a contractor in connection with a public works project.

(c) For the purposes of this section:

(1) "Claim" means a separate demand by a contractor sent by registered mail or certified mail with return receipt requested, for one or more of the following:

(A) A time extension, including, without limitation, for relief from damages or penalties for delay assessed by a public entity under a contract for a public works project.

(B) Payment by the public entity of money or damages arising from work done by, or on behalf of, the contractor pursuant to the contract for a public works project and payment for which is not otherwise expressly provided or to which the claimant is not otherwise entitled.

(C) Payment of an amount that is disputed by the public entity.

(2) "Contractor" means any type of contractor within the meaning of Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code who has entered into a direct contract with a public entity for a public works project.

(3) (A) "Public entity" means, without limitation, except as provided in subparagraph (B), a state agency, department, office, division, bureau, board, or commission, the California State

University, the University of California, a city, including a charter city, City, including a charter City, city and City, including a charter city and City, district, special district, public authority, political subdivision, public corporation, or nonprofit transit corporation wholly owned by a public agency and formed to carry out the purposes of the public agency.

**(B)** “Public entity” shall not include the following:

**(i)** The Department of Water Resources as to any project under the jurisdiction of that department.

**(ii)** The Department of Transportation as to any project under the jurisdiction of that department.

**(iii)** The Department of Parks and Recreation as to any project under the jurisdiction of that department.

**(iv)** The Department of Corrections and Rehabilitation with respect to any project under its jurisdiction pursuant to Chapter 11 (commencing with Section 7000) of Title 7 of Part 3 of the Penal Code.

**(v)** The Military Department as to any project under the jurisdiction of that department.

**(vi)** The Department of General Services as to all other projects.

**(vii)** The High-Speed Rail Authority.

**(4)** “Public works project” means the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind.

**(5)** “Subcontractor” means any type of contractor within the meaning of Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code who either is in direct contract with a contractor or is a lower tier subcontractor.

**(d) (1) (A)** Upon receipt of a claim pursuant to this section, the public entity to which the claim applies shall conduct a reasonable review of the claim and, within a period not to exceed 45 days, shall provide the claimant a written statement identifying what portion of the claim is disputed and what portion is undisputed. Upon receipt of a claim, a public entity and a contractor may, by mutual agreement, extend the time period provided in this subdivision.

**(B)** The claimant shall furnish reasonable documentation to support the claim.

**(C)** If the public entity needs approval from its governing body to provide the claimant a written statement identifying the disputed portion and the undisputed portion of the claim, and the 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 public entity shall have up to three days following the next duly publicly noticed meeting of the governing body after the 45-day period, or extension, expires to provide the claimant a written statement identifying the disputed portion and the undisputed portion.

**(D)** Any payment due on an undisputed portion of the claim shall be processed and made within 60 days after the public entity issues its written statement. If the public entity fails to issue a written statement, paragraph (3) shall apply.

**(2) (A)** If the claimant disputes the public entity's written response, or if the public entity fails to respond to a claim issued pursuant to this section within the time prescribed, the claimant may demand in writing an informal conference to meet and confer for settlement of the issues in dispute. Upon receipt of a demand in writing sent by registered mail or certified mail, return receipt requested, the public entity shall schedule a meet and confer conference within 30 days for settlement of the dispute.

**(B)** 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 public entity shall provide the claimant 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 public entity issues its written statement. Any disputed portion of the claim, as identified by the contractor in writing, shall be submitted to nonbinding mediation, with the public entity and the claimant sharing the associated costs equally. The public entity and claimant shall mutually agree to a mediator within 10 business days after the disputed portion of the claim has been identified in writing. 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. If mediation is unsuccessful, the parts of the claim remaining in dispute shall be subject to applicable procedures outside this section.

**(C)** 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.

**(D)** Unless otherwise agreed to by the public entity and the contractor in writing, the mediation conducted pursuant to this section shall excuse any further obligation under Section 20104.4 to mediate after litigation has been commenced.

**(E)** This section does not preclude a public entity 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.

**(3)** Failure by the public entity to respond to a claim from a contractor within the time periods described in this subdivision or to otherwise meet the time requirements of this section shall result in the claim being deemed rejected in its entirety. A claim that is denied by reason of the public entity'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 claimant.

**(4)** Amounts not paid in a timely manner as required by this section shall bear interest at 7 percent per annum.

**(5)** If a subcontractor or a lower tier subcontractor lacks legal standing to assert a claim against a public entity because privity of contract does not exist, the contractor may present to the public entity a claim on behalf of a subcontractor or lower tier subcontractor. A subcontractor may request in writing, either on his or her own behalf or on behalf of a lower tier subcontractor, that the contractor present a claim for work which was performed by the subcontractor or by a lower tier subcontractor on behalf of the subcontractor. The subcontractor requesting that the claim be presented to the public entity shall furnish reasonable documentation to support the claim.

Within 45 days of receipt of this written request, the contractor shall notify the subcontractor in writing as to whether the contractor presented the claim to the public entity and, if the original contractor did not present the claim, provide the subcontractor with a statement of the reasons for not having done so.

(e) The text of this section or a summary of it shall be set forth in the plans or specifications for any public works project that may give rise to a claim under this section.

(f) A waiver of the rights granted by this section is void and contrary to public policy, provided, however, that (1) upon receipt of a claim, the parties may mutually agree to waive, in writing, mediation and proceed directly to the commencement of a civil action or binding arbitration, as applicable; and (2) a public entity may prescribe reasonable change order, claim, and dispute resolution procedures and requirements in addition to the provisions of this section, so long as the contractual provisions do not conflict with or otherwise impair the timeframes and procedures set forth in this section.

(g) This section applies to contracts entered into on or after January 1, 2017.

(h) Nothing in this section shall impose liability upon a public entity that makes loans or grants available through a competitive application process, for the failure of an awardee to meet its contractual obligations.

(i) This section shall remain in effect only until January 1, 2027, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2027, deletes or extends that date.

**4.4.2** Except as provided for in Subparagraph 4.4.1, any other claims, disputes or other matters in controversy shall be resolved as follows. In lieu of, or prior to litigation, the Parties shall endeavor to settle disputes by mediation in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect unless the Parties mutually agree otherwise to a different method of alternative dispute resolution. Completion of a mediation or other mutually agreed to alternative dispute resolution is a condition precedent to the commencement of litigation. Mediation shall be non-binding and utilize services of a mediator mutually acceptable to the Parties. If the parties cannot agree, on a mediator, then the American Arbitration Association shall appoint a mediator trained in construction industry disputes.

**4.4.3** Any dispute which cannot be resolved between the Parties shall be resolved through litigation in a court of competent jurisdiction of the State of California. Venue for any such litigation concerning this Project or Agreement shall be in the Superior Court of California, County of Monterey, and Design-Builder agrees to incorporate this provision into all subcontracts. Each Party hereby waives any law or rule of court that would allow them to request or demand a change of venue. If any third party brings an action or claim concerning this Contract, the Parties hereto agree to use their best efforts to obtain a change of venue to the Superior Court of California, County of Monterey.

## **5. SUBCONTRACTORS AND DESIGN CONSULTANTS**

### **5.1 Award of Subcontracts and Other Contracts for Portions of the Work**

**5.1.1 Subcontractor Listing.** The Design-Builder shall list its Subcontractors, and shall make no substitution except in accordance with Public Contract Code Sections 4100 et seq. ("Subcontractor Listing Law"). As required by Public Contract Code Section 22166(b), following the City's approval of the Contract, the Design-Builder shall award construction subcontracts with a value exceeding  $\frac{1}{2}$  of 1% of the Contract Sum allocable to construction Work as follows: (1) Provide public notice of the availability of work to be subcontracted in accordance with the publication requirements applicable to the competitive bidding process used by the City, including a fixed date and time when qualification statements, bids or proposals will be due; (2) Establish reasonable qualification criteria and standards; and (3) Award the subcontract either on a best value basis or to the lowest responsible bidder – this process

may include prequalification or short-listing and does not apply to construction subcontractors listed in the Design-Builder's Proposal. As soon as practicable after award of the Contract, Design-Builder shall provide City with the description of work, name of Subcontractor, business phone and address and contact person for each Subcontractor performing Work on the Project and shall continuously update the City upon selection of each Subcontractor.

**5.1.1.1 Substitution Process.** Any request of the Design-Builder to substitute a listed Subcontractor will be considered by the City only if such request is in strict conformity with this Paragraph 5.1 and California Public Contract Code Section 4107. All costs and fees, including all costs of the hearing, incurred by the City in the review and evaluation of a request to substitute a listed Subcontractor shall be borne by the Design-Builder; such costs and fees may be deducted by the City from the Contract Sum then or thereafter due the Design-Builder. For purposes of a hearing for the substitution of subcontractors (pursuant to the Public Contract Code commencing with Section 4100) the awarding authority shall be the Director of the Real Estate Services Department, or his/her designee.

**5.1.1.2 Responsibilities of Design-Builder Upon Substitution of Subcontractor.** Neither the substitution nor the City's consent to Design-Builder's substitution of a listed Subcontractor shall relieve Design-Builder from its obligation to complete the Work within the Contract Time and for the Contract Sum. In the event that the City determines that revised or additional Submittals are required of the newly substituted Subcontractor, the City shall promptly notify the Design-Builder, in writing, of such requirement and the time for Submittal. In the event that the revised or additional Submittals are not submitted by Design-Builder within the time specified, Design-Builder shall be solely responsible for delays in the Work arising from the untimely Submittal. Design-Builder shall reimburse the City for all fees and costs incurred or associated with the processing, review and evaluation of any revised or additional Submittals required pursuant to this paragraph; the City may deduct such fees and costs from any portion of the Contract Sum then or thereafter due the Design-Builder. In the event that additional or revised Submittals are required pursuant to this paragraph, such requirement shall not result in an increase to the Contract Time or the Contract Sum.

## **5.2 Design Consultant and Subcontractor Relations**

**5.2.1 Agreements.** By appropriate written agreement, the Design-Builder shall require each Design Consultant and Subcontractor, to the extent of the Work to be performed by the Design Consultant and Subcontractor, to be bound to the Design-Builder by terms of the Contract Documents, and to assume toward the Design-Builder all the obligations and responsibilities, including the responsibility for safety of the Design Consultant or Subcontractor's Work, which the Design-Builder, by Contract Documents, assumes toward the City. Each such agreement shall preserve and protect the rights of the City under the Contract Documents with respect to the Work to be performed by the Design Consultant or Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Design Consultant or Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Design-Builder that the Design-Builder, by the Contract Documents, has against the City. The Design-Builder shall require each Design Consultant or Subcontractor to enter into similar agreements with their Sub-subcontractors. The Design-Builder shall make available to each proposed Design Consultant or Subcontractor, prior to the execution of the agreement, copies of the Contract Documents to which the Design Consultant or Subcontractor will be bound by this Paragraph. At a minimum, each agreement shall:

(1) Require that the Work being performed pursuant to such agreement, as the case may be, be performed in accordance with the requirements and intent of the Contract Documents and provide no less than five percent (5%) retainage unless otherwise indicated in Agreement between the City and Design-Builder or as authorized under Public Contract Code Section 22167;

(2) Require submission of Applications for Payment in the form required by the Contract Documents, together with invoices and billings supporting such applications and conditional and unconditional lien releases in the form required by the Contract Documents completed by it and by its Sub-Subcontractors as a condition to the disbursement of any progress payment next due and owing to it;

(3) Require the Design Consultant, Subcontractor, Sub-Subcontractor or supplier, as the case may be, to maintain insurance coverage as provided in the Contract Documents and to file required certificates of such coverage and additional insured endorsements with City, and, upon City's request, to provide copies of such insurance policies to City;

(4) Require each Design Consultant, Subcontractor, Sub-Subcontractor, and supplier to furnish to Design-Builder or the applicable Subcontractor, as the case may be, in a timely fashion all information necessary for transmittal of Submittals and the reports required herein;

(5) Require that each Design Consultant, Subcontractor and supplier continue to perform under its subcontract if the Contract is terminated and if City takes an assignment of the subcontract or supply agreement and requests the Subcontractor or supplier to continue such performance;

(6) Require each Design Consultant, Subcontractor, Sub-subcontractor, and supplier to remove all debris created by its activities;

(7) Provide that in the event that City accepts the conditional assignment of the subcontract, City shall only be responsible to the Design Consultant or Subcontractor for those obligations that accrue subsequent to City's acceptance of the assignment; and

(8) Require the Design Consultant or Subcontractor to resolve all disputes involving City according to the dispute resolution procedure established in Paragraph 4.4 herein.

**5.2.2 Precedence.** If any provision of any Subcontractor supply agreement is inconsistent with any provision of the Contract Documents or the intent of the Contract Documents, then the Contract Documents shall control.

**5.2.3 Payments.** Design-Builder shall make payment to Subcontractor within seven (7) days of receipt of each progress payment, in accordance with Public Contract Code Section 10262 and Business and Professions Code Section 7108.5. City hereby reserves the right, upon written notice to Design-Builder, to make, at any time, and from time-to-time, payments directly to each Subcontractor, and, if such rights shall be exercised by City, then such amount shall be credited against the Contract Sum due to Design-Builder hereunder and City shall be relieved and released from the obligation to make such payment to Design-Builder and Design-Builder shall be relieved and released as to City from the obligation to make such payments to each Design Consultant or Subcontractor paid by City, but not from any of the other obligations and responsibilities of Design-Builder to City under the Contract Documents.

### **5.3 Contingent Assignment of Design Consultant, Subcontractor and Material Supply Agreements**

Each Design Consultant, Subcontractor and supplier agreement for a portion of the Work is assigned by the Design-Builder to the City provided that:

(1) Assignment is effective only after termination of the Contract by the City only for those subcontracts which the City accepts by notifying the Design Consultant, Subcontractor or supplier, and Design-Builder in writing;

(2) Assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract; and

(3) Upon exercise of this right of assignment, City has the right to reassign the agreement.

## **6. CONSTRUCTION BY CITY OR BY SEPARATE CONTRACTORS**

## **6.1 City's Right to Perform Construction and to Award Separate Contracts**

**6.1.1 City's Right to Perform.** The City reserves the right to perform construction or operations related to the Project with the City's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the Site. If the Design-Builder claims that delay or additional cost is involved because of such action by the City, the Design-Builder shall make such Claim as provided in Paragraph 4.3 herein.

**6.1.2 Interpretation of Contract Documents.** When separate contracts are awarded for different portions of the Project or other construction or operations on the Site, the term "contractor" in the Contract Documents in each case shall mean the City's Separate Contractor who executes each Separate Contractor agreement.

**6.1.3 Coordination.** The City shall provide for coordination of the activities of the City's own forces and of each Separate Contractor with the Work of the Design-Builder, who shall cooperate with them. The Design-Builder shall participate with other Separate Contractors and the City in reviewing their construction schedules when directed to do so. The Design-Builder shall make any revisions to the Construction Schedule deemed necessary after a joint review and mutual agreement. Upon City's written approval, the revised Construction Schedule shall then constitute the schedule to be used by the Design-Builder, Separate Contractors, and the City until subsequently revised and approved by City.

## **6.2 City's Right to Clean Up**

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

## **6.3 Independent Testing**

**6.3.1 City Testing.** The City will employ and pay for services of an independent testing laboratory to perform services specifically required by the governing code authority, and as additionally requested by City.

**6.3.2 Design-Builder Duties.** The Design-Builder shall:

- (1) Notify the City and the testing laboratory sufficiently in advance of the required test to allow for its assignment of personnel and scheduling of tests;
- (2) Cooperate with testing and inspection personnel, provide access to the work and to off-site fabrication facilities;
- (3) Furnish copies and records of mill test reports;
- (4) Employ and pay for services of the same independent testing laboratory to perform additional inspections, sampling, and testing required when initial tests indicate Work does not comply with Contract requirements;
- (5) Be responsible for all scheduling of inspections and tests; and
- (6) Not proceed with Work requiring inspection if the appropriate inspector is absent.

## **7. CHANGES IN THE WORK**

## **7.1 General**

**7.1.1 City's Right to Order Changes.** The City, without invalidating the Contract, may authorize changes in the Work consisting of additions, deletions, or other revisions, with the Contract Sum and Contract Time being adjusted accordingly, if necessary. All such changes in the Work shall be authorized by Change Order or Construction Change Directive and Design-Builder shall perform such changes in the Work according to the applicable requirements of the Contract Documents.

**7.1.2 Basis for Agreement.** A Change Order shall be based upon agreement among the City and Design-Builder. A Construction Change Directive may or may not be agreed to by the Design-Builder.

**7.1.3 No Estoppel.** Changes in the Work shall be performed under applicable provisions of the Contract Documents. The Design-Builder shall proceed promptly with the change, unless otherwise provided in the Change Order or Construction Change Directive. A change in the Contract Sum or the Contract Time shall be accomplished only by Change Order or Construction Change Directive. Accordingly, no course of conduct or dealings between the Parties, nor express or implied acceptance of alterations or additions to the Work and no Claim that the Contract has been abandoned or the City has been unjustly enriched by any alteration or addition to the Work shall be the basis of any Claim to an increase in any amounts due under the Contract Documents or a change in any time period provided for in the Contract Documents.

## **7.2 Change Orders**

**7.2.1 Computation.** Methods used in determining adjustments to the Contract Sum by Change Order may include those listed in Paragraph 7.4 below.

**7.2.2 Accord and Satisfaction.** Agreement on any Change Order shall be a full compromise and settlement of all adjustments to Contract Time and Contract Sum, and compensation for any and all delay, extended or additional field and home office overhead, disruption, acceleration, inefficiencies, lost labor or equipment productivity, differing site conditions, construction interferences and other extraordinary or consequential damages (hereinafter called "Impacts"), including any ripple or cumulative effect of said Impacts on the overall Work under the Contract arising directly or indirectly from the performance of Work described in the Change Order. By execution of any Change Order, Design-Builder agrees that the Change Order constitutes a complete accord and satisfaction with respect to all claims for schedule extension, Impacts, or any costs of whatsoever nature, character or kind arising out of or incidental to the Change Order. No action, conduct, omission, product failure or course of dealing by the City shall act to waive, modify, change, or alter the requirement that (i) Change Orders must be in writing, signed by the City and Design-Builder and; (ii) that such written Change Orders are the exclusive method for effectuating any change to the Contract Sum and/or Contract Time.

## **7.3 Construction Change Directives**

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

**7.3.2 Duty to Proceed.** Upon receipt of a Construction Change Directive, the Design-Builder shall promptly proceed with the Work involved and advise the City of the Design-Builder's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

**7.3.3 Disagreement.** If the Design-Builder does not promptly indicate its disagreement with the method of pricing provided in the Construction Change Directive, Design-Builder shall be deemed to agree with the method of pricing the change. If the Design-Builder indicates its disagreement with the method of pricing or if no method of pricing

is provided in the Construction Change Directive, the increase in cost or credit to the Contract Sum for the change shall be determined by cost in accordance with Subparagraph 7.4.1(3) and the provisions of Subparagraphs 7.4.2, 7.4.3 and 7.4.4 shall apply to the change.

**7.3.4 Agreement.** A Construction Change Directive is effective immediately whether or not it is signed by the Design-Builder. If the Design-Builder signs a Construction Change Directive such agreement shall be effective immediately and shall be recorded as a Change Order.

## **7.4 Computation of Cost or Credit for Changes**

**7.4.1 Cost or Credit.** The cost or credit to the City resulting from a change in the Work shall be determined by City by one or more of the following methods:

(1) Mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;

(2) Unit prices stated in the Contract Documents or subsequently agreed upon;

(3) By cost, as defined in (a), (b), (c) and (d) below, properly itemized and supported by sufficient substantiating data to permit evaluation, plus agreed markup for overhead and profit as defined in (e) below. Such costs shall be itemized by craft directly allocable to the change in the Work:

(a) Cost of materials, including cost of transportation and delivery;

(b) Cost of labor, including social security, and unemployment insurance, and fringe benefits required by agreement and Workers' Compensation insurance;

(c) Rental value of equipment and machinery, exclusive of hand tools;

(d) Sales tax; insurance; permit costs and bond premiums;

(e) Mark-up to Design-Builder, Subcontractors, and Sub-subcontractor for overhead, profit and other expenses which are not specifically included in (a) through (d) above shall not exceed the following amounts:

(i) If the net cost of changes is less than or equal to \$25,000, the Design-Builder mark-up shall be computed as follows:

a. For changes performed directly by the Design-Builder's forces, the added cost for all expenses, overheads, profit, bond and insurance shall not exceed fifteen percent (15%) of the net cost of the change.

b. For changes performed by a Subcontractor, the cost of combined expenses, overheads, profit, bond and insurance of both the Design-Builder and all Subcontractor(s) and Sub-subcontractor(s) shall not exceed twenty (20%) of the net cost of all Subcontractor performed changes.

(ii) If the net cost of the changes is greater than \$25,000 and less than or equal to \$100,000, the total mark-up shall be computed as follows:

**a.** For changes performed directly by the Design-Builder's forces the added cost for all expenses, overheads, profit, bond and insurance shall not exceed twelve (12%) of the net cost of the change.

**b.** For changes performed by a Subcontractor, the cost of combined expenses, overheads, profit, bond and insurance of both the Design-Builder and all Subcontractor(s) and Sub-subcontractor(s) shall not exceed seventeen (17%) of the net cost of all Subcontractor performed changes.

**(iii)** If the net cost of change is greater than \$100,000, the mark-up shall be computed as follows:

**a.** For change performed directly by the Design-Builder's forces the added cost for all expenses, overheads, profit, bond and insurance shall not exceed ten percent (10%) of the net cost of the changes.

**b.** For changes performed by a Subcontractor, the cost of combined expenses, overheads, profit, bond and insurance of both the Design-Builder and all Subcontractor(s) and Sub-subcontractor(s) shall not exceed fifteen (15%) of the net cost of all Subcontractor performed changes.

**(f)** Cost of Extra Work shall not include any of the following:

**(i)** Superintendent(s)

**(ii)** Assistant Superintendent(s)

**(iii)** Project Engineer(s)

**(iv)** Project Manager(s)

**(v)** Scheduler(s)

**(vi)** Estimator(s)

**(vii)** Incidental Drafting or Detailing

**(viii)** Small tools (Replacement value does not exceed \$300)

**(ix)** Office expenses including staff, materials and supplies

**(x)** On-Site or off-site trailer and storage rental and expenses

**(xi)** Site fencing

**(xii)** Utilities including gas, electric, sewer, water, telephone, facsimile, copier equipment

**(xiii)** Data processing personnel and equipment

**(xiv)** Federal, state, or local business income and franchise taxes

**7.4.2 Credits.** The amount of credit to be allowed by the Design-Builder to the City for a deletion or change, which results in a net decrease in the Contract Sum, shall be actual net cost as determined herein. The amount of deduct/credit for liquidated damages shall be in accordance with the Agreement. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overheads and profit shall be figured on the basis of net increase/decrease, if any, with respect to that change.

**7.4.3 Design-Builder Maintenance of Records.** In the event that Design-Builder is directed to perform any changes to the Work, or should Design-Builder encounter conditions which the Design-Builder believes would obligate the City to adjust the Contract Sum and/or the Contract Time, Design-Builder shall maintain detailed records of the cost of such changes on a daily basis. Such records shall include without limitation hourly records for labor and construction equipment and itemized records of materials and equipment used each day in connection with the performance of any change to the Work. In the event that more than one change to the Work is performed by the Design-Builder in a calendar day, Design-Builder shall maintain separate records of labor, construction equipment, materials, and equipment for each such change. In the event that any Design Consultant, Subcontractor or Sub-subcontractor, of any tier, shall provide or perform any portion of any change to the Work, Design-Builder shall require that each such Design Consultant, Subcontractor and Sub-subcontractor maintain records in accordance with this Article. Each daily record maintained hereunder shall be signed by Design-Builder's Project Representative; such signature shall be deemed Design-Builder's representation and warranty that all information contained therein is true, accurate, complete, and relates only to the change referenced therein. All records maintained by a Design Consultant, Subcontractor and Sub-subcontractor, of any tier, relating to the costs of a change in the Work shall be signed by such Design Consultant, Subcontractor's authorized Project Manager or Superintendent. Such records shall be forwarded to City's Project Manager on the day the Work is performed (same day) for independent verification. In the event that Design-Builder shall fail or refuse, for any reason, to maintain or make available for inspection, review, and/or reproduction such records, adjustments to the Contract Sum or Contract Time, if any, on account of any change to the Work shall be determined by City which shall be binding upon Design-Builder. Design-Builder's obligation to maintain records hereunder is in addition to, and not in lieu of, any other Design-Builder obligation under the Contract Documents with respect to changes to the Work.

**7.4.4 Payment of Undisputed Amounts.** Pending final determination of the total cost of a Change, amounts not in dispute for such changes in the Work shall be included in Applications for Payment accompanied by an approved Change Order or Construction Change Directive, indicating the Parties' agreement with part or all of such costs.

## **7.5 Authority to Approve Changes**

**7.5.1 City's Project Manager's Authority.** The City's Project Manager must authorize any changes in the Work. Such changes shall be effected by written order and shall be binding on the Design-Builder.

**7.5.2 Verbal Changes.** Any oral order, direction, instruction, interpretation, or determination from the City (collectively "Verbal Change") which, in the opinion of the Design-Builder, causes a Scope Change in the Work, or otherwise requires an adjustment to the Contract Sum or the Contract Time, shall be treated as a Change Order Request only if the Design-Builder gives the City written notice within ten (10) calendar days of the Verbal Change and prior to acting in accordance therewith. Time is of the essence in Design-Builder's written notice pursuant to the preceding sentence, so that the City can promptly investigate and consider alternative measures to address the Verbal Change giving rise to Design-Builder's notice. Accordingly, Design-Builder acknowledges that its failure, for any reason, to give written notice within ten (10) calendar days of such Verbal Change shall be deemed Design-Builder's waiver of any right to assert or Claim any entitlement to an adjustment of the Contract Time or the Contract Sum on account of such Verbal Change. The written notice shall state the date, circumstances, extent of adjustment to the Contract Sum or the Contract Time, if any, requested and the source of the Verbal Change. Any such Verbal Change shall not be treated as a change and the Design-Builder hereby waives any Claim for any adjustment to the Contract Sum or the Contract Time on account thereof.

**7.5.3 Unauthorized Work.** Any Work performed by the Design-Builder not indicated on the Contract Documents or any changes in the Work performed or provided by the Design-Builder without notice to the City, shall be considered unauthorized by the City and performed at the sole expense of the Design-Builder. Unauthorized work so performed will not be measured or paid for and no extension of Contract Time will be granted on account thereof. Any such unauthorized work may be ordered removed at the Design-Builder's sole cost and expense. The failure of the City to direct or order removal of such unauthorized work shall not constitute acceptance or approval of such work nor relieve the Design-Builder from any liability on account thereof.

## **7.6 City Originated Proposal Request**

City may issue a request, in writing, to Design-Builder, describing a proposed change to the Work and requesting the Design-Builder submit an itemized proposal in a format acceptable to City within ten (10) calendar days after City issues the request. The Design-Builder's proposal shall include an analysis of impacts to cost and time, if any, to perform additional work, or delete Work, as applicable, including the effects and impacts, if any, on unchanged Work, estimates of costs (broken down by the cost categories listed in the Agreement and/or Paragraph 7.4 herein), and Design-Builder's proposed methods to minimize costs, delay, and disruption to the performance of the Work. If Design-Builder fails to submit a written proposal within such period of time, it shall be presumed that the change described in the City's original proposal request will not result in an increase to the Contract Sum or Contract Time and the change shall be performed by Design-Builder without additional compensation. City's proposal request does not authorize the Design-Builder to commence performance of the change, unless otherwise specified in writing. If City desires that the proposed change be performed, the Work shall be authorized according to the Change Order or Construction Change Directive procedures set forth above.

## **7.7 Design-Builder Originated Change Order Request (COR)**

If the Design-Builder alleges that instructions issued by the City after the effective date of the Contract may result in changes to the Contract Sum or Contract Time or if the Design-Builder otherwise becomes aware of the need for or desirability of a change in the Work, Design-Builder may submit a written Change Order Request ("COR") to the City in writing, in a format acceptable to City and in accordance with the notice provisions and other requirements of Paragraph 4.3 above for Claims. The COR must specify the reasons for the proposed change, cost impacts and relevant circumstances and impacts on the Construction Schedule. The document shall be complete in its description of the Work, its material and labor quantities and detail, and must support and justify the Costs and credits claimed by the Design-Builder. A CPM schedule fragment is required to support and justify any additional Time of performance requested by the Design-Builder. The City will not review any COR which is incomplete. The Design-Builder may request additional compensation and/or time through a COR but not for instances that occurred more than ten (10) calendar days prior to the notice date. Design-Builder's failure to initiate a COR within this ten-day period or to provide detailed back-up documentation to substantiate the COR within thirty (30) calendar days of the initial written notice shall be deemed a waiver of the right to adjustment of the Contract Sum or the Contract Time for the alleged change. Any COR that is approved by the City will be incorporated in a Change Order or Construction Change Directive. If the COR is denied but the Design-Builder believes that it does have merit, the Design-Builder shall proceed with the disputed Work and may submit a Claim in accordance with the procedures set forth herein.

## **8. SCHEDULE AND EXTENSIONS OF TIME**

### **8.1 Definitions**

**8.1.1 Contract Time.** The Contract Time is the period of time allocated in the Contract Documents from the date of commencement provided in City's Notice to Proceed for Substantial Completion of the Work.

**8.1.2 Commencement.** The date of commencement of the Work is the date provided in City's Notice to Proceed.

**8.1.3 Substantial Completion.** The date of Substantial Completion is the date determined by City and certified by the City in accordance with Paragraph 9.6 below and the terms of this Agreement.

## **8.2 Progress and Completion**

**8.2.1 Time is of the Essence.** Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement and any Modifications relating to Substantial Completion or Contract Time the Design-Builder agrees and confirms that the Contract Time is a reasonable period for performing the Work.

**8.2.2 Commencement.** The Design-Builder shall not knowingly, except by agreement or instruction of the City in writing, prematurely commence operations on the Site or elsewhere prior to the effective date of insurance required to be furnished by the Design-Builder and City as specified in the Agreement. The Date of Commencement of the Work shall not be changed by the effective date of such insurance.

**8.2.3 Completion.** The Design-Builder shall proceed expeditiously with adequate labor and supervision to achieve Substantial Completion within the Contract Time.

## **8.3 Design-Builder's Schedules**

**8.3.1 Project Schedule.** Unless otherwise provided in the Agreement or Technical Specifications, within fourteen (14) calendar days after the Date of Commencement, Design-Builder shall submit a baseline Project Schedule for the Work for comment and approval by City. The baseline Project Schedule shall include, but not be limited to:

(1) A CPM format that incorporates all activities with descriptions, sequence, logic relationships, duration estimates, resource-loading, and other information required for all design, pre-construction and construction activities.

(2) Activities indicating the start and finish dates for preparation of Design Development and Construction Documents, project design, engineering, government agency plan check and the City agency document review.

(3) Activities to be integrated and shown in the CPM network shall include all milestones representing the Design-Builder's submittal dates and activities representing the City's review period of each submittal (which review period shall in no case be scheduled for less than 15 working days); Design-Builder's procurement of materials and equipment; submittals; manufacture and/or fabrication, testing and delivery to the jobsite of special material and major equipment; equipment installation and preliminary, final and performance testing of equipment or systems.

(4) Activities showing the start and finish dates for all temporary works; all construction of mock-ups, and prototypes and/or samples.

(5) Activities showing start and finish dates of owner-furnished items and interface requirement dates with other contractors; regulatory agency approvals; and permits required for the performance of the work.

(6) Activities showing start and finish of tenant programming (as appropriate), modular furniture, tenant improvement work and phased occupancy.

(7) Close-out activities.

(8) The schedule shall consider all foreseeable factors or risks affecting or which may affect the performance of the work, including historical and predicted weather conditions, applicable laws, regulations or collective bargaining agreements pertaining to labor, transportation, traffic, air quality, noise and any other applicable regulatory requirements.

(9) The Design-Builder shall attach a narrative report which explains assumptions used for activity durations, its assumptions regarding crew sizes, equipment requirements and production rates, any potential areas of concern or specific areas requiring coordination it may have identified and any long-lead time materials or equipment.

(10) Time units for all schedules shall be in calendar days, and no construction activity shall have a duration greater than 30 calendar days without City approval.

Upon the City's approval, the Project Schedule shall be deemed to be a Contract Document. Any revisions or updates to the Project Schedule are subject to review and approval by City.

**8.3.2** Format. Unless otherwise provided in the Agreement or Technical Specifications, the Project Schedule shall be in a detailed precedence CPM or Primavera-type format satisfactory to the City, which shall also: (i) provide a graphic representation of all activities and events that will occur during performance of the Work; (ii) identify each phase of design, construction and maintenance; and (iii) set forth dates that are critical in ensuring the timely and orderly completion of the Work in accordance with the requirements of the Contract Documents (hereinafter referred to as Milestone Dates). At a minimum the Project Schedule shall depict the schedule for Work on a discipline by discipline and trade by trade basis and tasks within each discipline and trade. The Project Schedule shall include: (i) a schedule of the Construction Documents issuance dates, including sequentially issued documents for phased construction; (ii) proposed activity sequences and durations; (iii) milestone dates for receipt and approval of pertinent information, including City-supplied information and approvals by public authorities having jurisdiction over the Project; (iv) dates for preparation and processing of Design Development Documents, Construction Documents, Shop Drawings, Product Data, and Samples; (v) dates for delivery of materials or equipment requiring long-lead time procurement; (vi) City's occupancy/use requirements showing portions of the Project having occupancy priority; (vii) the estimated date of Substantial Completion; and (viii) other information reasonably required by City. Upon review and acceptance by the City of the baseline Project Schedule, the baseline Project Schedule shall be deemed part of the Contract Documents. If not accepted, the baseline Project Schedule shall be promptly revised by the Design-Builder in accordance with the recommendations of the City and re-submitted for acceptance.

**8.3.3** Updates. With each Application for Payment submitted by Design-Builder (other than the Final Application for Payment), the Design-Builder shall submit to the City an updated Project Schedule revised to include, at a minimum:

(1) Monthly update/status of electronic database shall include recording of all Actual Start Dates and Actual Finish Dates and status of activities in progress.

(2) Review of "planned" versus "actual" work force allocations and progress for the preceding month.

(3) Reviews of revisions, added or deleted work and how those activities are being integrated into the Design-Builder's work plan.

(4) Review of Design-Builder's interface and coordination with other work on the Project.

(5) Review of all impacts to the work during the preceding month and to date, Design-Builder evaluation of those impacts and any recovery plans or remedial actions required to comply with the contract schedule.

If the Design-Builder does not submit an updated Project Schedule with an Application for Payment, City may withhold payment, in whole or in part. In the event any update to the Project Schedule indicates any delays to the Contract Time that are the fault of Design-Builder or others for whom Design-Builder is responsible, the Design-Builder shall propose an affirmative plan to correct the delay, including overtime and/or additional labor, if necessary. In no event shall any Project Schedule Update constitute an adjustment in the Contract Time, any deadline, or the Contract Sum unless any such adjustment is agreed to by the City and authorized pursuant to Change Order or Construction Change Directive.

**8.3.4** Extraordinary Measures. In the event the City determines that the performance of the Work has not progressed or reached the level of completion required by the Contract Documents, the City shall have the right to order the Design-Builder to take corrective measures necessary to expedite the progress of construction, including, without limitation, the Extraordinary Measures as provided in Paragraph 2.8 herein.

**8.3.5** Early Completion. While the Design-Builder may schedule completion of the Project earlier than the date established by the Contract Documents, no additional compensation shall become due the Design-Builder for the use of float time between the Design-Builder's projected early completion date and the date for Substantial Completion established by the Contract Documents except any bonus or penalty provisions set forth in the Contract Documents, which would take precedence over and supersede this Paragraph.

**8.3.6** Schedule of Submittals. Unless otherwise provided in the Agreement or Technical Specifications, within ten (10) calendar days after the Date of Commencement, the Design-Builder shall prepare and keep current, for the City's review and approval, a Schedule of Submittals for Design Development Documents, Construction Documents, Shop Drawings, Product Data, Samples, and similar submittals, coordinated with the baseline Project Schedule and allowing the City reasonable time to review. Design-Builder shall be solely responsible for any delay, disruption, impact, loss of efficiency or other loss, arising directly or indirectly from Design-Builder's failure to manage submittals properly.

**8.3.7** Procurement Schedule. Unless otherwise provided in the Agreement or Technical Specifications, within ten (10) calendar days after the Date of Commencement, Design-Builder shall prepare and keep current, for City's approval, a schedule for procurement of materials and equipment which is coordinated with the baseline Project Schedule and allows the City reasonable time to review. Design-Builder is solely responsible for any delay, disruption, impact, loss of efficiency, or other loss arising directly or indirectly from Design-Builder's failure to properly manage procurement of equipment and materials.

**8.3.8** Performance. The Design-Builder shall perform the Work in accordance with the most recent Project Schedule and Schedule of Submittals approved by the City. The Design-Builder shall monitor the progress of the Work for conformance with the requirements of the Project Schedule and shall promptly advise the City of any delays or potential delays.

## **8.4 Delays and Extensions of Time**

### **8.4.1 Non-Compensable Force Majeure Events.**

**8.4.1.1** Definition. "Force Majeure" shall mean any of the following events, which materially and adversely affect Design-Builder's obligations hereunder and which event could not have been avoided or prevented by due diligence and use of reasonable efforts by Design-Builder: earthquake, fire, flood, epidemic, blockade, rebellion, war, terrorism, riot, act of sabotage, or civil commotion; industry-wide labor strike which has a material adverse impact on the Project; discovery of any archaeological, paleontological or cultural resources; spill of hazardous substances by

a third party at or near the Site which is required to be reported to the Federal or California Environmental Protection Agency, Toxic Substances Control; discovery at, near, or on the Site of any species listed as "threatened" or "endangered" under the Federal or California Endangered Species Act.

**8.4.1.2 Remedies.** If the critical path of the Work is delayed by Force Majeure events, provided that the aforesaid causes were not foreseeable and did not result from the acts of the Design-Builder, and provided further that the Design-Builder has taken reasonable precautions to prevent further delays owing to such causes, then the Design-Builder may pursue remedies for adjustment of the Contract Time in accordance with Paragraph 4.3 above.

**8.4.1.3 Rain Days/Inclement Weather.** For purposes of granting time extensions pursuant to this subparagraph and in accordance with the Claims procedures set forth in Paragraph 4.3 herein, resulting from unworkable days due to rain/inclement weather which were not reasonably foreseeable, the Design-Builder and City agree that the impact of rainfall/inclement weather for which the Design-Builder is not entitled to a time extension is a total of ten (10) Work Days per year ("Rain Days"). The Design-Builder shall account for the above number of Work Days for which the effects of rainfall/inclement weather are expected to prevent Work in the Construction Schedule as set forth in Subparagraph 8.3 herein and shall obtain City's approval of Design-Builder's use of each Rain Day before requesting extension of the Contract Time.

**8.4.2 Compensable City-Caused Delays.** If the date for Substantial Completion of the Work is delayed as a result of the wrongful acts or negligence of the City or anyone for whom City is legally liable and the delays are unforeseeable and are unreasonable under the circumstances involved, the Design-Builder shall be entitled to an equitable adjustment of the Contract Time and/or compensation for reasonable additional costs directly resulting from such delays. City agrees to pay Design-Builder **\$2,500.00** per day for each calendar day that Substantial Completion is delayed due to City-Caused Delays as described in this paragraph provided Design-Builder complies with the notice and procedural requirements of Articles 4 and 7 herein. Such compensable delay reimbursement costs payable to the Design-Builder shall constitute the Design-Builder's exclusive compensation covering all direct and indirect costs, expenses and damages of whatsoever nature (including, but not limited to, home office overhead, extended or added site overheads, productivity losses or inefficiencies, supervision, labor, material, equipment, insurance, taxes, bonds and profit) due to compensable delay(s) that are incurred by Design-Builder and its subcontractors and subconsultants of every tier. No other compensation to Design-Builder for costs, expenses or damages associated with delay shall be permitted.

**8.4.3 Concurrent Delays.** To the extent the Design-Builder is entitled to an extension of time due to an excusable delay, but the performance of the critical path of the Work would have been otherwise suspended, delayed, or interrupted by the fault or neglect of the Design-Builder or by an unexcusable delay, the Design-Builder shall not be entitled to any additional cost during the period of such concurrent delay.

**8.4.4 Float.** Critical Work activities are defined as Work activities which, if delayed or extended, will delay the scheduled completion of the milestones and/or time of completion. All other Work activities are defined as non-critical Work activities and are considered to have float. Float is defined as the time that a non-critical Work activity can be delayed or extended without delaying the scheduled completion of the milestones and/or time of completion. Float is considered a Project resource available to either party or both parties as needed. Once identified, Design-Builder shall monitor, account for, and maintain float in accordance with Critical Path Methodology.

Delays of any non-critical Work shall not be the basis for an extension of Contract Time until the delays consume all float associated with that non-critical Work activity and cause the Work activity to become critical.

It is acknowledged that City-caused time savings (i.e., critical path submittal reviews returned in less time than allowed by the Contract Documents, approval of substitution requests which result in a savings of time for Design-Builder, etc.) create shared float. Accordingly, City-caused delays may be offset by City-caused time savings.

**8.4.5 Shortage of Materials.** An extension of time will not be granted by the City for a delay caused by a shortage of materials, except City-furnished materials, unless the Design-Builder furnishes to the City documented proof that the Design-Builder has made every effort to obtain such materials from every known source within reasonable reach of the Work. The Design-Builder shall also submit proof, in the form of network analysis data that the inability to obtain such materials when originally planned did, in fact, cause a delay in Final Completion of the Work which could not be compensated for by revising the sequence of operations. City will consider only the physical shortage of material as a cause for extension of time. The City will not consider any claim that material could not be obtained at a reasonable, practical, or economical cost, unless it is shown to the satisfaction of the City that such material could have been obtained only at exorbitant prices, entirely inconsistent with current rates taking into account the quantities involved and the usual practices in obtaining such quantities and that such fact could not have been known or anticipated at the time the Contract was entered into.

**8.4.6 Utility and Agency Delays.** Design-Builder is aware that governmental agencies, gas companies, electrical utility companies, water districts, and other utilities and agencies may be required to approve Design-Builder prepared drawings or approve a proposed installation. Design-Builder has endeavored and will continue to use its best efforts to include the cost of such anticipated delays and related costs which may be caused by such utilities and agencies in the Contract Sum. Thus, Design-Builder is not entitled to make claim upon the City for damages or delays arising from the delays caused by such utilities and agencies. Furthermore, the Design-Builder has included time periods for such governmental approval in the Project Schedule and is not entitled to an extension of time for delays caused by governmental agencies from which Design-Builder must obtain approvals. The Design-Builder will be entitled to an extension of Contract Time, but not an addition to the Contract Sum, for delays caused by submittal review time and/or non-response from governmental agencies and/or utility companies, for delays that exceed the allotted time identified and agreed upon for agency submittal review in the contract schedule, delays that are not a direct result of the Design-Builder's actions or inactions, and for delays that are outside of the Design-Builder's control. The Design-Builder is to notify the City of any claim for the review agency delay per Article 4 of the General Conditions.

**8.4.7 Design-Builder Fault.** No extension of time will be granted under this Article 8 for any delay to the extent: (i) that performance was so delayed by any Design-Builder induced causes, including but not limited to the fault or negligence of the Design-Builder or its Consultants or Subcontractors; or (ii) for which any remedies are provided for or excluded by any other provision of the Contract.

**8.4.8 Contract Modification.** A Change Order or Construction Change Directive will be issued by the City to the Design-Builder within a reasonable period of time after approval of a request for extension of time, specifying the number of days allowed, if any, and the new date or number of calendar days after the date of commencement for completion of the Work or specified portions of the Work.

**8.4.9 No Release of Surety.** An extension of time granted shall not release the Design-Builder's surety from its obligations. Work shall continue and be carried on in accordance with all the provisions of the Contract and said Contract shall be and shall remain in full force and effect during the continuance and until the completion and Final Acceptance of the Work covered by the Contract unless formally suspended or annulled in accordance with the terms of the Contract.

**8.4.10 No Waiver.** Neither the grant of an extension of time beyond the date fixed for Substantial Completion of the Work, nor the performance and acceptance of any part of the Work or materials specified by the Contract after the time specified for Substantial Completion of the Work, shall be deemed to be a grant of any future extensions, a waiver by the City of the City's right to abrogate this Contract for abandonment or failure to complete within the time specified, or to impose and deduct damages as may be provided in the Contract Documents.

## **8.5 Liquidated Damages**

**8.5.1** City and Design-Builder recognize that time is of the essence in this Agreement and that the City may suffer financial loss in the form of lost grant funds, additional contract administration expenses, loss of public use if the Work is not completed within the Contract Time, including any extensions thereof allowed in accordance with the Contract Documents.

**8.5.2** Design-Builder and City agree to liquidate damages with respect to Design-Builder's failure to achieve Substantial Completion of the Work within the Contract Time. The Parties intend for the liquidated damages set forth herein to apply to this Contract as set forth in Government Code Section 53069.85. Design-Builder acknowledges and agrees that the liquidated damages are intended to compensate City solely for Design-Builder's failure to meet the deadline for Substantial Completion and shall not excuse Design-Builder from liability from any other breach, including any failure of the Work to conform to the requirements of the Contract Documents.

**8.5.3** In the event that Design-Builder fails to achieve Substantial Completion of the Work within the Contract Time, Design-Builder agrees to pay City **two thousand five hundred dollars \$2,500.00** per day for each calendar day that Substantial Completion is delayed.

**8.5.4** Design-Builder acknowledges and agrees that the foregoing liquidated damages have been set based on an evaluation by City of damages that it will incur in the event of the late completion of the Work. Design-Builder and City agree that because of the nature of the Project it would be impractical or extremely difficult to fix the amount of actual damages incurred by the City due to a delay in completion of the Work. Accordingly, the City and Design-Builder have agreed to such liquidated damages to fix Design-Builder's costs and to avoid later disputes. It is understood and agreed by Design-Builder that any liquidated damages payable pursuant to this Agreement are not a penalty and that such amounts are not manifestly unreasonable under the circumstances existing as of the effective date of this Agreement.

**8.5.5** It is further mutually agreed that City shall have the right to deduct liquidated damages against progress payments or retainage and that the City will issue a unilateral Construction Change Directive and reduce the Contract Sum accordingly. In the event the remaining unpaid Contract Sum is insufficient to cover the full amount of liquidated damages, Design-Builder shall pay the difference to City.

## **9. PAYMENTS AND COMPLETION**

### **9.1 Contract Sum**

The Contract Sum, including authorized adjustments, is the total maximum amount payable by the City to the Design-Builder for performance of the Work under the Contract Documents.

### **9.2 Schedule of Values**

Within fourteen (14) calendar days after the Date of Commencement, Design-Builder shall submit to the City a Schedule of Values allocated to various portions of the Work. The Schedule of Values shall be approved by the City in writing. The Schedule of Values shall be prepared in such a manner that each major item of Work assigned to Design-Builder and to each separate Design Consultant and Subcontractor is shown as a single line item on AIA Document G703 (or other form as required by City) and supported by such data to substantiate its accuracy as the City may require. The approved Schedule of Values shall be used as a basis for reviewing the Design-Builder's Applications for Payment.

### **9.3 Applications for Payment**

**9.3.1 Applications for Payment.** The Design-Builder shall submit to the City an itemized Application for Payment, utilizing a form approved in writing by the City, for operations completed in accordance with the Schedule of Values and the payment provisions of the Agreement. Such Application shall be notarized, if required by City, and supported by such data substantiating the Design-Builder's right to payment as the City or City may require, including copies of requisitions from Subcontractors and Suppliers.

**9.3.1.1** Payment will be made on valuation of Work done as of the twenty-fifth of each month, and such application shall be submitted approximately five (5) days before the end of the month.

**9.3.2** Based on California Public Contract Code Section 20104.50 and the Contract Documents, each Application for Payment shall be reviewed by the City as soon as practicable after receipt for the purpose of determining that the payment request is proper. Any Application for Payment determined not to be suitable for payment shall be returned to Design-Builder not later than seven (7) calendar days after receipt. Any returned Application for Payment shall be accompanied by a document setting forth in writing the reasons why the payment request is not proper. The City shall make any progress payment within 30 days after receipt of an undisputed and properly submitted Application for Payment from the Design-Builder. If the City fails to make the payment in a timely fashion, then the City shall pay interest to the Design-Builder equivalent to the legal rate set forth in Section 685.010(a) of the Code of Civil Procedure. The number of days available to the City to make payment without incurring interest shall be reduced by the number of days by which the City exceeds the seven-day return requirement set forth herein.

**9.3.2.1** As provided in Article 7 herein, such Applications for Payment may include requests for payment on account of changes in the Work which have been properly authorized by Construction Change Directives but not yet included in Change Orders.

**9.3.2.2** Such Applications for Payment shall not include requests for payment of amounts the Design-Builder does not intend to pay to a Design Consultant, Subcontractor or material supplier because of a dispute or other reason, or as to which an appropriate conditional or unconditional waiver and release of rights upon payment has not been provided.

**9.3.3 Documentation.** As a condition precedent to City's monthly progress payment to Design-Builder, Design-Builder shall submit with each Application for Payment the following documentation:

(1) Updated Schedules of Values, invoices and requisitions from all Subcontractors, Sub-subcontractors and suppliers performing Work covered by the Application for Payment;

(2) Completed and executed form of conditional waiver and release of rights upon progress payment in accordance with California Civil Code Section 8132, from Design-Builder and its Subcontractors covering the amount of the current Application for Payment;

(3) Completed and executed forms of unconditional waiver and release of rights upon progress payment in accordance with California Civil Code Section 8134, from Design-Builder and its Subcontractors covering the amount of the previous Application for Payment (but no later than two months prior to the current Application for Payment);

(4) Certification from Contractor-retained or Subcontractor-retained design subconsultants that, based upon their on-site observations, the Design-Build Work has progressed as indicated in Design-Builder's Application for Payment, and has been installed in accordance with the design documents prepared by such design subconsultant;

(5) At its sole discretion, the City reserves the right to request (i) an executed subcontract including bonds, insurance, certificates, and endorsements and all other exhibits and attachments for each item of

material, labor and service for which a disbursement has been requested and (ii) certifications from each Subcontractor and Sub-subcontractor of any tier, that each is current in the payment of any supplemental fringe benefits required pursuant to any collective bargaining agreement to which any such Subcontractor or Sub-subcontractor is a Party or is otherwise bound; and

- (6) Such other documentation as the City may reasonably request.

Any Payment made by City to Design-Builder in the absence of any of the preceding documents in no way relieves the Design-Builder from providing all these documents for the current and/or any future payment.

**9.3.3.1** As a further condition precedent City's obligation to make monthly progress payment to Design-Builder, Design-Builder must be current in its submittal of documentation required by the Contract Documents including, but not limited to the following:

- (1) A Subcontractor Procurement Log listing executed subcontracts including bonds, insurance, certificates, and endorsements and all other exhibits and attachments for each item of material, labor and service for which a disbursement has been requested;
- (2) Log of all licenses, leases, permits, approvals and agreements relating to the construction of the Project;
- (3) Design-Builder's daily logs;
- (4) Record Documents and As-Built Drawings and Specifications updated with current Project information as described in Subparagraph 3.10.1 above;
- (5) Updated Project Schedule;
- (6) RFI Log;
- (7) Change Order Request Log and Change Order Log, including a list of any Change Orders and Construction Change Directives, contemplated or under negotiation at the date of such payment request, the status, and a rough order of magnitude cost for each such change.
- (8) Certified Payrolls for the time period covered in the Application for Payment.

Any payment made by City to Design-Builder in the absence of any of the preceding documents in no way relieves the Design-Builder from providing all these documents for the current and/or any future payment.

**9.3.4** Initial Payment Application. Design-Builder shall ensure that all administrative actions, submittals, payment procedures and requirements set forth in the Contract Documents for the first Application for Payment must precede or coincide with the initial Application for Payment, including:

- (1) A description of the types of Work and the amounts thereof to be provided by the Design-Builder (as opposed to the Design Consultants or Subcontractors);
- (2) A list of Design Consultants, Subcontractors, principal suppliers and fabricators;
- (3) A Submittal Schedule;
- (4) Copies of all necessary permits;

(5) All insurance certificates and endorsements for Design-Builder, Design Consultants and all Subcontractors are in place;

(6) Payment and Performance Bonds for Design-Builder and Subcontractors, as applicable, are in place; and

(7) Job signs have been installed.

**9.3.5 Payment to Design Consultants and Subcontractors.** Within ten (10) calendar days of Design-Builder's receipt of payment from City for Work performed by a Design Consultant or Subcontractor, the Design-Builder shall pay all Design Consultants and Subcontractors for and on account of Work of the Contract performed by each. The Design-Builder shall by appropriate agreement with each Design Consultant, Subcontractor and Supplier, require each Subcontractor to make payments to Sub-subcontractor in a similar manner. The City will, on request, furnish to a Design Consultant, Subcontractor, Sub-subcontractor, or supplier, if practicable, information regarding percentages of completion or amounts applied for by the Design-Builder and action taken thereon by the City and Design-Builder on account of portions of the Work done by each. Pursuant to Public Contract Code Section 22167 in a contract between the Design Builder and a Design Consultant or Subcontractor, or between a Subcontractor and Sub-Subcontractor, the percentage of the retention proceeds withheld may not exceed the percentage specified in the Agreement between the City and Design-Builder. If the Design-Builder provides written notice to any Subcontractor, prior to or at the time the bid is requested, that a performance and payment bond may be required and the Subcontractor subsequently is unable or refuses to furnish a bond to Design-Builder, then the Design-Builder may withhold retention proceeds in excess of the percentage specified in the Agreement between the City and Design-Builder from any payment made by the Design-Builder to the Subcontractor.

**9.3.6 Substantial Completion Payment Application.** Following issuance of the Certificate of Substantial Completion by the City's Project Manager and approval thereof by City, the Design-Builder shall submit an Application for Payment at Substantial Completion. In addition to submittals required for all applications for progress payments, the Design-Builder shall complete the following administrative actions and submittals, all of which shall precede or coincide with this application:

(1) List all incomplete items of Work and the value of each item of incomplete Work;

(2) Obtain and submit all documentation necessary to enable the City's full and unrestricted use of the Work or portions thereof, and access to services and utilities, and to supply any change-over information necessary to the City's occupancy, use, operation, and maintenance;

(3) Discontinue and remove temporary facilities and services from the Site, along with construction tools and facilities, forms, and similar items except for Design-Builder's field office;

(4) Obtain all temporary occupancy permits and similar approvals for the use of the facilities;

(5) Inspect, test, and adjust performance of every system of facility of the Work to ensure that overall performance is in compliance with terms of the Contract Documents;

(6) Submit a report of such test results to the City;

(7) Provide instruction for the City's operating personnel on systems and equipment operational requirements;

(8) Report performance of completed installations after adjustment that appear unable to comply with the requirements of the Contract Documents; and

- (9) Submit the operating manual(s) for operating and maintaining the building.

**9.3.7 Warranty of Title.** The Design-Builder warrants that title to all Work covered by an Application for Payment will pass to the City no later than the time of payment. The Design-Builder further warrants that upon submittal of an Application for Payment all Work for which Applications for Payment have been previously issued and payments received from the City shall, to the best of the Design-Builder's knowledge, information, and belief, be free and clear of liens, stop notices, claims, security interests, or encumbrances in favor of the Design-Builder, Design Consultants, Subcontractors, Sub-subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials, and/or equipment relating to the Work. This provision shall not relieve the Design-Builder from the responsibility for materials and Work upon which payments have been made, the restoration of damaged Work, or waive the right of the City to require the fulfillment of the terms of the Contract.

**9.3.8 Equipment or Materials.** If, during the progress of the Work, the Design-Builder, with the written approval of the City, purchases and stores in an approved manner on the Site any equipment or materials required to complete the Work prior to the normal need of such equipment or materials, Design-Builder will be paid on the same basis as provided in Paragraph 9.3, except that the value of such materials or equipment shall be claimed as a separate item and so reported until it shall have been incorporated in the Work. City will not pay for the materials or equipment at the time they are ordered and will not pay for materials or equipment until they are delivered to the Site.

**9.3.8.1** If required by the City, such payments shall be conditionals upon submission by the Design-Builder of bills of sale, or such procedure as will establish the City Title to such equipment or materials, or otherwise adequately protect the City's interests.

**9.3.8.2** Any equipment or materials stored and paid for by the City prior to being incorporate in the Work shall not be used for any other purpose and shall not be removed from the Site.

## **9.4 Decisions to Withhold Payment**

**9.4.1 Basis for Decision to Withhold.** The City's Project Manager may withhold payment in whole or in part, to the extent reasonably necessary to protect the City. If the City's Project Manager is unable to approve payment in the amount of the Design-Builder's Application for Payment, the City's Project Manager will notify the Design-Builder of the reasons for failing to approve the payment. If the Design-Builder and City's Project Manager cannot agree on a revised amount, the City's Project Manager will promptly issue payment for the amount for which the City's Project Manager is able to make such representations to the City. The City's Project Manager may refuse to make payment or, because of subsequently discovered evidence, the City's Project Manager or the City may nullify the whole or a part of a payment previously issued, to such extent as may be necessary in the City's Project Manager's opinion to protect the City from loss for which the Design-Builder is responsible, including loss resulting from acts and omissions described in Subparagraph 3.3.2 and 3.18.1 or because of:

- (1) Defective work not remedied;
- (2) Third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the City is provided by the Design-Builder;
- (3) Failure of the Design-Builder to make payments properly to Design Consultants, Subcontractors or suppliers for labor, materials, services or equipment;
- (4) Reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;

- (5) Damage to the City or another contractor;
- (6) Reasonable evidence that the Work will not be completed within the Contract Time;
- (7) Persistent failure to carry out the Work in accordance with the Contract Documents;
- (8) Liquidated damages, if any, which accrued as of the date of the Application for Payment;
- (9) Such other sum as the City is entitled to recover from the Design-Builder; and
- (10) Contractor's failure to timely submit:
  - (a) Daily logs;
  - (b) Certification from City and Design-Builder that Record Documents and As-Built Drawings and Specifications have been updated with current Project information as described in Paragraph 3.10 above;
  - (c) Updated Construction Schedule;
  - (d) RFI logs;
  - (e) Change Order Log; and
  - (f) Certifications from each Subcontractor and Sub-subcontractor of any tier, that each is current in the payment of any supplemental fringe benefits required pursuant to any collective bargaining agreement to which any such Subcontractor is a Party or is otherwise bound.

**9.4.2** Withhold for Disputes. In the event of a dispute between City and Design-Builder, the City may withhold from payments an amount not to exceed 150% of the disputed amount. When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.

**9.4.3** Withhold for Stop Notice Claims.

**9.4.3.1** If at any time there shall be evidence of the existence, whether or not same has been asserted, of any stop notice, or claim arising out of or in connection with the performance or default in performance of this Contract or any subcontract or supply contract entered into by Design-Builder to perform this Contract, and if the City might become liable for the discharge of or satisfaction of such stop notice or claim, then the City shall have the right to retain out of any payment then due or thereafter to become due, in addition to the amounts set forth above, an amount sufficient to discharge such stop notice or satisfy such claim and to reimburse the City and the Project Manager(s) of the City for all costs and expenses in connection therewith, including attorneys' fees. Further, the City, in its sole discretion, shall have the right to discharge or satisfy such stop notice or claim and pay all costs and expenses in connection therewith if the Design-Builder does not have such stop notice or claim discharged or satisfied within ten (10) calendar days after receiving notice to remove the stop notice or claim from City or unless some other procedure for discharge or satisfaction of such claim is agreed between City and Design-Builder. If the amounts retained are insufficient for the aforesaid purposes, or if such stop notice or claim remains undischarged or unsatisfied after all payments have been made to the Design-Builder, then the Design-Builder shall refund to the City all monies that may have been paid to discharge such stop notice or satisfy such claims, including the costs, expenses, and attorney's fees in connection therewith.

**9.4.3.2** The City shall release any payments withheld due to a stop notice claim if the Design-Builder obtains a release bond that is: (i) issued by a surety acceptable to City admitted to issue surety bonds by the

California Department of Insurance in the State of the Project; (ii) is in form and substance satisfactory to the City; and (ii) is in an amount of not less than 125% of the amount of any stop notice claim.

## **9.5 Progress Payments**

**9.5.1 City Payments to Design-Builder.** After the City's Project Manager has issued a Certificate for Payment, the City, subject to its rights under Paragraph 9.5 herein, shall make payment in the manner and within the time provided in the Contract Documents, and shall so notify the City's Project Manager.

**9.5.2 Joint Checks or Direct Payments.** Neither the City nor City's Project Manager shall have an obligation to pay or to see to the payment of money to a Subcontractor except as may otherwise be required by law. City, however, reserves the right, in its sole discretion for reasonable cause, to make payments to Design-Builder in the form of checks payable jointly to Design-Builder and to any of Design-Builder's Subcontractors or suppliers or, upon notice to Design-Builder with the opportunity to object, payments directly to design consultants, Subcontractors and suppliers, in satisfaction of City's obligation to make payments to Design-Builder.

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

**9.5.4** From each progress payment, five percent (5%) will be deducted and retained by the City and the remainder, less the amount of all previous payments and less the amounts needed to satisfy outstanding stop notices, will be paid to the Design-Builder. The Design-Builder may, at the Design-Builder's sole cost and expense, substitute securities equivalent to any monies withheld by the City to insure performance under this Contract. Such security shall be deposited with the City or a state or federally chartered bank as escrow agent, who shall pay such monies to the Design-Builder upon satisfactory completion of the Contract. The Design-Builder shall be the beneficiary of any security substituted for monies withheld and shall receive any accrued interest thereon. Securities eligible for investment shall include those listed in Government Code Section 16430 or bank or savings and loan certificates of deposit. No such substitution shall be accepted until the Escrow Agreement, Forms of Security and any other document related to said substitution is reviewed and found acceptable by the City, nor unless the Design-Builder shall have notified the City of its intention to substitute securities for retainage within ten (10) days of the signing of the Agreement. All substitutions requests must comply with Public Contract Code Section 22300.

## **9.6 Substantial Completion**

**9.6.1 Design-Builder Request for Inspection and Punch List.** When the Design-Builder considers that the Work is substantially complete, the Design-Builder shall prepare and submit to the City's Project Manager and City a request for such inspection a comprehensive Punch List of items to be completed or corrected prior to Final Payment. Failure to include an item on such Punch List does not alter the responsibility of the Design-Builder to complete all Work in accordance with the Contract Documents.

**9.6.2 City Inspection.** Upon receipt of the Design-Builder's Punch List, the City's Project Manager will make an inspection to determine whether the Work or designated portion thereof is Substantially Complete. If the inspection discloses any item, whether or not included on the Design-Builder's Punch List, which is not sufficiently complete in accordance with the Contract Documents so that the City can occupy or utilize the Work or designated portion thereof for its intended use, the Design-Builder shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by City. In such case, the Design-Builder shall then submit a request for another inspection by City to determine Substantial Completion.

**9.6.3 Certificate of Substantial Completion.** When the Work or designated portion thereof is substantially complete, the City's Project Manager will prepare a Certificate of Substantial Completion which shall establish the date

of Substantial Completion, shall establish responsibilities of the City and Design-Builder for security, maintenance, heat, utilities, damage to the Work, and insurance, and shall fix the time within which the Design-Builder shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of all Work.

**9.6.4** City's Acceptance. The Certificate of Substantial Completion prepared by City's Project Manager shall be submitted to the Design-Builder for written acceptance of responsibilities assigned to Design-Builder and City in such Certificate. Upon such acceptance and consent of surety, provided the requirements for Substantial Completion Payment set forth in the Agreement are met, the City shall make payment to the Design-Builder for the cost of undisputed Work in place. City, however, shall be entitled to withhold retainage equaling 150% of the estimated cost of the following items until Final Completion:

- (1) Punch list items;
- (2) All items necessary to obtain the Final Certificate of Occupancy identified in the Contract Documents as the Work of Design-Builder;
- (3) As-Built and Record Documents;
- (4) Potential stop notice claims of individuals or entities who have not provided Conditional Waivers and Releases Upon final Payment; and
- (5) Any Claims the City may have against the Design-Builder.

If the Design-Builder has not completed all items enumerated above within thirty (30) calendar days after the issuance of the Certificate of Substantial Completion, the City shall have the right to demand completion or correction of the items within a 48-hour period. If the Design-Builder does not commence the requested Work within the 48-hour period or provide City with written notice of a legitimate reason why Design-Builder is not able to commence the Work within the 48-hour period, the City shall have the unilateral right to complete the Work and deduct the cost of completion of the Work from any money held pending Final Completion.

## **9.7 Partial Occupancy or Use**

**9.7.1** City's Rights and Allocation of Responsibility. The City may occupy or use any completed or partially completed portion of the Work at any stage provided such occupancy or use is consented to by the insurer providing builder's risk property insurance to the Project and is not prohibited by the applicable legal requirements. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the City and Design-Builder have agreed in writing as to the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work, and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Design-Builder considers a portion substantially complete, the Design-Builder shall prepare and submit a list to City and City's Project Manager as provided under Subparagraph 9.7.2. Consent of the Design-Builder to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the City and Design-Builder.

**9.7.2** Joint Inspection. Immediately prior to such partial occupancy or use, the City, Design-Builder and City's Project Manager shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

**9.7.3** No Acceptance. Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

**9.7.4 Conditions.** The Design-Builder agrees to City's use and partial occupancy of a portion or unit of the Project before formal acceptance by the City under the following conditions:

(1) Occupancy by the City shall not be construed by the Design-Builder as being an acceptance by City of that part of the Project to be occupied;

(2) Design-Builder shall not be held responsible for any damage to the occupied part of the Project resulting solely from the City's occupancy;

(3) Occupancy by the City shall not be deemed to constitute a waiver of existing claims on behalf of the City or Design-Builder against each other;

(4) If the Project consists of more than one building, and one of the buildings is to be occupied, the City, prior to occupancy of the building, shall secure permanent property insurance on the building to be occupied and any necessary partial occupancy permits from the governmental agencies in jurisdiction. Final approval and occupancy permits from agencies in jurisdiction are still the responsibility of the Design-Builder, which may be required for use and occupancy;

(5) Design-Builder shall make available in the areas occupied, on a 24-hour day and seven-day week basis if required, any utility services, heating, and cooling as are in condition to be put in operation at the time of early occupancy. All responsibility for the operation and maintenance of said equipment shall remain with the Design-Builder while it is so operated. However, an itemized list of each piece of equipment so operated, with the date operation commences, shall be made and certified by the City's Project Manager. This list shall be the basis for the commencement of guarantee periods on the equipment being operated for the benefit of the City's early occupancy. The City shall pay for all utility costs and operational expenses which arise out of the occupancy by the City during construction;

(6) City's use and partial occupancy prior to Project acceptance does not relieve the Design-Builder of his responsibility to maintain all insurance and bonds required of the Design-Builder under the Contract until the Project is complete and the Notice of Completion is recorded by the City; and

(7) If time and/or costs are impacted by City's partial occupancy or use, Design-Builder may submit a Claim for such financial and/or Schedule impact in accordance with Article 4.

## 9.8 Final Completion and Final Payment

**9.8.1 Inspection.** Upon receipt of written notice that the Work is ready for final inspection and acceptance and upon receipt of a Final Application for Payment, the City's Project Manager will promptly make such inspection and, when the City finds the Work acceptable under the Contract Documents and the Contract fully performed, the City's Project Manager will promptly issue a final Certificate for Payment stating that to the best of the City's Project Manager's knowledge, information and belief, and on the basis of the City's Project Manager's on-site visits and inspections, the Work has been fully and satisfactorily completed in strict compliance with the Contract Documents and that the entire balance found to be due the Design-Builder and noted in the final Certificate is due and payable. The City's Project Manager's Final Certificate for Payment will constitute a further representation that conditions listed in Subparagraph 9.8.2 as precedent to the Design-Builder's being entitled to Final Payment have been fulfilled.

**9.8.2 Documentation.** In addition to the requirements for Final Payment set forth in the other Contract Documents, the Final Payment shall not become due until (i) Design-Builder has fully performed the Contract, including all Punch List work; (ii) a Final Certificate of Occupancy (or equivalent inspection sign-off) has been issued (unless failure to issue is due to circumstances beyond the control of Design-Builder); (iii) sixty (60) calendar days have elapsed since City's recordation of a Notice of Completion; and (iii) Design-Builder has submitted to the City:

- (1) A full, complete and proper Final Application for Payment;
- (2) A current Sworn Statement from the Design-Builder setting forth all Subcontractors and material suppliers with whom Design-Builder has subcontracted, the amount of each subcontract, the amount requested for each Design Consultant, Subcontractor and supplier in the, payment application, and the balance remaining on the subcontract that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the City or the City's property might be responsible or encumbered (less amounts withheld by City) have been paid or otherwise satisfied;
- (3) A current Sworn Statement from each Design Consultant and Subcontractor setting forth all Sub-subcontractors and material suppliers with whom Subcontractor has subcontracted, the amount of each sub-subcontract, the amount requested for each Sub-subcontractor and supplier in the payment application, and the balance remaining on the subcontract that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the City or the City's property might be responsible or encumbered (less amounts withheld by City) have been paid or otherwise satisfied;
- (4) Completed and executed forms of conditional waiver and release of rights upon final payment in accordance with California Civil Code Section 8136 from Design-Builder and all persons eligible to record mechanics' liens and file stop notices in connection with the Work, covering the final payment period;
- (5) Completed and executed forms of unconditional waiver and release of rights upon progress payment in accordance with California Civil Code Section 8138 from Design-Builder and all persons eligible to record mechanics' liens and file stop notices in connection with the Work, covering the previous payment period;
- (6) Completed and executed affidavits from Design-Builder, Design Consultants and Subcontractors, attaching certificates and endorsements evidencing that insurance required by the Contract Documents to remain in force after Final Payment, if any, is currently in effect and will not be canceled or allowed to expire until at least 30 days prior written notice has been given to the City;
- (7) A written statement that the Design-Builder knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents;
- (8) Consent of surety(ies) to Final Payment;

(9) Design-Builder's written assurance that identified corrective work not complete and accepted will be completed by a stated date agreeable to City;

(10) The required Record Documents and As-Built Construction Documents including, but not limited to, shop drawings and other submittals;

(11) Reasonable proof that taxes, fees and similar obligations of Design-Builder have been paid;

(12) A certificate in form and substance acceptable to City and signed by the City's Project Manager certifying that, to the best of its knowledge, the Work has been completed in accordance with the Contract Documents, all applicable laws and restrictions; that the Work, as completed, complies in all material respects with all applicable zoning, environmental, building, and land use laws which apply to the Project; that to the knowledge of the City's Project Manager, no governmental entity has issued any notice of violation or nonconformity in connection with the improvements; that direct connection has been made to all abutting gas, sewer, telephone, and electrical facilities necessary for occupancy and use of the Project; and that the Project is ready for occupancy/use.

(13) A certificate in form and substance acceptable to City signed by the Design-Builder's Design Consultants certifying that, to the best of their knowledge, that such Work has been completed in accordance with the Contract Documents, all Applicable Laws, and restrictions;

(14) All warranties from vendors and Subcontractors, maintenance manuals, instructions and related agreements, equipment certifications and similar documents, and maintenance and operating instructions, which shall include:

(a) Schematic piping and wiring diagrams;

(b) Valve charts and schedules;

(c) Electrical panel schedules complete and posted in panels;

(d) Lubrication charts and schedules;

(e) Guides for troubleshooting;

(f) Pertinent diagrams of equipment with main parts designated for identification;

(g) Manufacturer's data and capacity data on all equipment;

(h) Operating and maintenance instructions for all items of equipment and all control systems;

(i) Manufacturer's parts list; and

(j) Testing procedures for operating tests;

(15) Tools, spare parts and required extra materials (i.e., attic stock), and similar items;

(16) Keys and proof of the final change-over of locks. In addition, Design-Builder must advise the City's personnel of the change-over in security provisions;

(17) Written start-up testing performance reports of all systems after completion of start-up testing, and complete instruction of the City's operating and maintenance personnel;

(18) Proof of adherence to final cleaning requirements of the Contract Documents; and

(19) Proof of touch up and other repairs and restoration of all marred and exposed finishes.

**9.8.3** Release of Stop Notices. If a Design Consultant, Subcontractor or supplier refuses to furnish a release or waiver required by City or files a stop notice, the Design-Builder shall furnish a bond satisfactory to the City to release the stop notice and indemnify the City against such stop notice and City shall enforce its right under Subparagraph 9.4.3 herein.

**9.8.4** Delay Not Caused by Design-Builder. If, after Substantial Completion of the Work, Final Completion thereof is materially delayed through no fault of the Design-Builder or by issuance of Change Orders affecting final completion, the City shall, upon application by the Design-Builder and certification by the City, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted provided, however, that the retainage amount held following such payment shall be equal to 150% of the estimated cost of completing the Work as determined by the City. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Design-Builder to the City prior to certification of such payment. Such payment shall be made under terms and conditions governing Final Payment.

**9.8.5** Design-Builder's Acceptance of Final Payment. Acceptance of Final Payment by the Design-Builder, a Design Consultant, a Subcontractor, or material supplier shall constitute a waiver of any and all Claims by that payee, of whatsoever nature, character or kind, except those previously made in writing and identified by that payee as unsettled at the time of Final Application for Payment.

**9.8.6** City's Final Payment. The making of Final Payment shall not constitute a waiver of Claims by the City arising from:

(1) Unsettled stop notices;

(2) Faulty or defective work appearing after Substantial Completion of the Work;

(3) Failure of the Work to comply with the requirements of the Contract Documents;

(4) Terms of any special warranties required by the Contract Documents; or

(5) Any other Claim unless specifically waived by the City in writing.

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

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

The Design-Builder is responsible for establishing, maintaining, and supervising the necessary safety precautions needed to permit the performance of the Work without endangering public safety and property. A Site Specific Safety Program and the Design-Builder's Safety Policy must be prepared and submitted for the City's review and comments. Design-Builder shall comply with the review comments of City. The Site Specific Safety Program shall include the following:

- (1) The identity of outside safety consultant or Design-Builder's safety officer and on-site safety officer;
- (2) The schedule for the Design-Builder's safety inspections;
- (3) The type and frequency of training conducted for Design-Builder's personnel including tailgate meeting, lifting training, emergency procedure, etc.;
- (4) Information on the types of heavy equipment to be used and the necessary precaution to be taken if there is an accident;
- (5) A copy of the Design-Builder's Hazardous Communications Program;
- (6) A list of any possible fire hazards and the fire fighting equipment for the particular Site;
- (7) A detailed description of hazardous or unusual procedures necessary for the particular Site;
- (8) Information on any material impact of the construction on the surrounding area including traffic flow, parking, street closure, utility shutoffs, and pedestrian crossing;
- (9) Placement, quantity and type of safety warning lights, signs or other devices during construction;
- (10) Written procedures in the event of an injury, fire, hazardous material experience, or other emergency during construction; and
- (11) Description of the location and enclosure of the approved staging area.

Design-Builder shall also comply with any safety requirements required by insurers providing coverage for the Project. Notwithstanding the foregoing, Design-Builder specifically assumes all risk of damages or injury to any persons or property, wherever located, resulting from any action or operation of the Design-Builder or Design-Builder's Subcontractors or Sub-subcontractors under the Contract Documents or in connection with the Work.

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

**10.2.1 Design-Builder's Responsibility for Damage or Loss.** Except as otherwise provided in the Contract Documents and except as to the cost of repair or restoration of damage to the Work caused by Force Majeure events, the Design-Build shall bear all losses resulting to him/her on account of the amount or character of the Work, or from any unforeseen obstructions or difficulties which may be encountered, or from any encumbrances on the line of the Work, or because the nature of the ground in or on which the Work is done is different from what is assumed. The Design-Builder shall bear the risk for any City equipment, material, or supplies with which Design-Builder has been entrusted and shall bear responsibility for all bodily injuries to persons, including accidental death, which may be caused by Design-Builder's performance of the Work. The Design-Builder and the City agree that Force Majeure events are defined as extraordinary events beyond the Design-Builder's control including, but not limited to, war, riots, Acts of God, terrorism, and third party accidents.

**10.2.2 Design-Builder's Remedy of Damage or Loss.** The Design-Builder shall promptly remedy all damage or loss to any property referred to in this Article arising, in whole or in part, from the Work performed by the Design-Builder or by any Subcontractor, any Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable, and for which the Design-Builder is responsible, except damage or loss attributable to the acts or omission of the City, the City, or anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable, and not attributable to the fault or negligence of the Design-

Builder. The foregoing obligations of the Design-Builder are in addition to the Design-Builder's indemnification obligations under Paragraph 3.18 herein.

**10.2.3 Precautions and Protection.** The Design-Builder shall take necessary precautions for safety of, and shall provide necessary protection to prevent damage, injury or loss to:

- (1) Employees on the Site and other persons who may be affected thereby;
- (2) The Work and materials and equipment to be incorporated therein, whether in storage on or off the Site, under care, custody or control of the Design-Builder or the Design-Builder's Subcontractors or Sub-subcontractors; and
- (3) Other property at the Site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures, and utilities not designated for removal, relocation, or replacement in the course of construction.

**10.2.4 Notice and Compliance with Applicable Law.** The Design-Builder shall give notices and comply with Applicable Laws bearing on safety of persons or property or their protection from damage, injury or loss. Design-Builder shall comply with all laws and regulations, including the California Labor Code and with all California Occupational Safety and Health Act ("OSHA"), Environmental Protection Agency, and South Coast Air Quality Management District regulations, concerning safety requirements and protection of workers including, but not limited to, those regulations concerning scaffolding, bracing, shoring, trench excavating and removal, and handling and disposal of hazardous waste. Design-Builder shall fully defend, indemnify, and hold harmless the City, its members, officers, employees, and agents, including, but not limited to, the City's Project Manager, from any and all citations and/or memoranda assessed against the City due to regulatory violations of the Design-Builder, Design-Builder's Subcontractors, or Sub-subcontractors.

**10.2.5 Safeguards.** The Design-Builder shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgate safety regulations, and notify City's and users of adjacent Sites and utilities. The Design-Builder shall also be responsible for all measures necessary to protect any property adjacent to the Project and improvements thereon. Any damage to adjacent property or improvements shall be promptly repaired or replaced by Design-Builder at its sole cost and expense within the Contract Sum.

**10.2.6 Excavation.** As required by Section 6705 of the California Labor Code and in addition thereto, whenever Work under the Contract involves the excavation of any trench or trenches five feet or more in depth, the Contractor shall submit for acceptance by the City or by a registered civil or structural engineer employed by the City, to whom authority to accept has been delegated, in advance of excavation, a detailed plan showing the design of shoring, bracing, sloping or other provisions to be made for worker protection from the hazard of caving ground during the excavation of such trench or trenches. If such plan varies from the shoring system standards established by the construction safety orders of the Division of Industrial Safety, the plan shall be prepared by a registered civil or structural engineer employed by the Design-Builder and all costs therefore shall be included in the price named in the contract for completion of the work as set forth in the Contract Documents. Nothing in this section shall be construed to impose tort liability on the City, the City, nor any of their officers, agents, Project Managers or employees.

**10.2.7 Notice of Hazards.** When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Design-Builder shall exercise utmost care, carry on such activities under supervision of properly qualified personnel, and shall provide City and City's Project Manager with reasonable advance notice of such activity.

**10.2.8 Loading.** The Design-Builder shall not load or permit any part of the construction or Site to be loaded so as to endanger its safety. The Design-Builder shall be responsible for the protection of all existing structures and improvements, both above and underground, including both the exterior and interior finishes within the adjoining working areas, and shall provide adequate temporary removal as necessary. Any existing structures or improvements damaged during construction shall be repaired or replaced with materials, workmanship, fixtures, or equipment of the same kind, quality and size as the original, prior to damage. Any materials or equipment temporarily removed and damaged shall be re-erected or installed in a manner approved by the City.

**10.2.8.1** The Design-Builder shall review the structural capability of the construction and Site prior to allowing installation of temporary lifting devices or staging equipment or the temporary off-loading of materials. Design-Builder shall not exceed design loads without making modifications to the construction or Site to support such loads.

**10.2.8.2** All modifications to the construction or Site to support temporary lifting devices, staging equipment, or loading shall be submitted to City for review and acceptance.

**10.2.9 Accident Prevention.** The Design-Builder shall designate a responsible member of the Design-Builder's organization at the Site whose duty shall be the prevention of accidents. This person shall be the Design-Builder's Superintendent unless otherwise designated by the Design-Builder in writing to the City.

**10.2.10 Accident Reporting.** The Design-Builder shall immediately report all accidents and injuries to City, and shall submit on a form approved by City within 24 hours of such accident or injury setting forth essential information for investigation of the accident or injury including, but not limited to, name, address, and phone number of all injured workers and witnesses, location on the jobsite, nature of injury, medical treatment, identity of ambulance company, and hospital.

**10.2.11 Adjoining Property.** Design-Builder shall employ all necessary measures to protect adjoining adjacent property and shall provide barricades, temporary fences, and covered walkways required to protect the safety of passersby, as required by prudent construction practices, local building codes, ordinances, or other laws and the Contract Documents.

### **10.3 Hazardous Materials**

**10.3.1 Notice to City.** The Design-Builder agrees that it is solely responsible for investigation and performing remedial actions on all hazardous materials and other related environmental requirements located on the Project Site. Any hazardous materials that are encountered beyond those described in the Contract Documents or Proposal Requirements, or which reasonably could not have been discovered within the time permitted or the Design-Builder to prepare its Proposal, may properly be the subject to a Change Proposal. The City agrees that the Design-Builder cannot be considered a hazardous materials generator of any such materials in existence on the Site at the time it is given possession of the Site. In the event the Design-Builder encounters on the Site materials which it reasonably believes to be "hazardous materials" as that term is defined by federal and state law, which have not been rendered harmless, the Design-Builder shall immediately stop work in the area affected and report the condition to the City in writing. The work in the affected area shall not thereafter be resumed until a suitable testing agency certifies the material as nonhazardous or the material is removed or rendered harmless as certified by a suitable testing agency.

#### **10.3.2 Safety Data Sheets and Compliance with Proposition 65.**

**10.3.2.1** Design-Builder is required to ensure that material safety data sheets are available in a readily accessible place at the Work Site, for any material requiring a material safety data sheet per the federal "hazard communication" standard, or employees' right-to-know law. The Design-Builder is also required to insure proper labeling on any substance brought into the Project Site, and that any person working with the material, or within the

general area of the material, is informed of the hazards of the substance and follows proper handling and protection procedures.

**10.3.2.2** Design-Builder is required to comply with the provisions of California Health and Safety Code Sections 25249.5 et seq., which requires the posting and giving of notice to persons who may be exposed to any chemical known to the State of California to cause cancer. The Design-Builder agrees to familiarize itself with the provisions of this section, and to comply fully with its requirements.

#### **10.4 Design-Builder Materials**

The City shall not be responsible for materials and substances brought to the Site by the Design-Builder unless such materials or substances were required by the Contract Documents.

#### **10.5 Emergencies**

In an emergency affecting safety of persons or property, the Design-Builder shall act, at the Design-Builder's discretion, to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed by the Design-Builder on account of an emergency shall be determined as provided in Paragraph 4.5 and Article 7.

#### **10.6 Protection of the Work**

Design-Builder shall protect all materials, equipment, supplies and Work from injury or damage due to heat, storms, rain or wind. If unusually severe weather makes it impossible to continue operations safely in spite of necessary weather precautions, Design-Builder shall cease Work and notify City and City of such cessation in accordance with the requirements of Article 4. Design-Builder shall not permit open fires on the Project. If Design-Builder fails to adequately protect the Work, Design-Builder is responsible for all damage incurred by City and is responsible for payment of the deductible on the Builder's Risk Policy.

#### **10.7 Protection of Existing Property**

The Design-Builder shall be responsible for all measures necessary to protect existing property to remain. This shall include, but is not limited to, padding and draping elevators used in construction, draping of openings and other measures to isolate areas remaining in use, relocation of furniture, fixtures, and equipment, protective covering/draping of furniture, fixtures, and equipment, and protection of landscape materials, planting, and interior and exterior finishes at and adjacent to the Work. Property damaged by the Design-Builder shall be repaired or replaced by the Design-Builder to the satisfaction of the City without increase to the Contract Sum. Such measures shall be taken at a frequency required to provide such protection and to keep the areas operational as indicated elsewhere in the Agreement.

### **11. INSURANCE AND BONDS**

#### **11.1 Performance Bond and Payment Bond**

##### **11.1.1 Bond Requirements.**

**11.1.1.1** Design-Builder shall furnish a Labor and Material Payment Bond and a Performance Bond in the forms provided in Attachments 10 and 11, respectively, or on any other form provided by City or approved by City Attorney. The bond amounts shall include any contingency that is part of the GMP and contract value. Design-Builder shall deliver to City no later than fourteen (14) calendar days of award of the Contract, evidence satisfactory to City that Design-Builder is capable of furnishing the bonds. The performance bond shall be furnished as a guarantee

of the faithful performance of the requirements of the Contract Documents in an amount equal to one hundred percent (100%) of the Contract Sum. The payment bond shall secure payment of all claims, demands, stop notices, mechanics liens, or charges of material suppliers, mechanics, or laborers employed by the Design-Builder or by any Subcontractor or any person, firm, or entity eligible to file a stop notice with respect to the Work in an amount equal to one hundred percent (100%) of the Contract Sum. Bonds may be obtained through Design-Builder's usual source and the cost thereof shall be included in the Contract Sum. In the event of changes in the Work, that increase the Contract Sum, the amount of each bond shall increase and at all times remain equal to the Contract Sum.

**11.1.1.2** The bonds shall be executed by a California admitted surety with an A.M. Best's Company rating satisfactory to the City. If an A.M. Best's rating is not available, the proposed surety must meet comparable standards of another rating service satisfactorily to City. Bonds issued by a California admitted surety listed in the latest versions of the U.S. Department of Treasury Circular 570 shall be deemed to be accepted unless specifically rejected by City. Bonds from a California admitted surety not listed in Treasury Circular 570 must be accompanied by all of the documents enumerated in California Code of Civil Procedure Section 995.660(a).

**11.1.1.3** All such bonds shall be accompanied by a power of attorney from the surety company authorizing the person executing the bond to sign on behalf of the company. If the bonds are executed outside the State of California, all copies of the bonds must be countersigned by a California representative of the surety. The signature of the person executing the bond shall be acknowledged by a Notary Public as the signature of the person designated in the power of attorney.

**11.1.1.4** If, during the continuance of the Contract, any of the sureties, in the opinion of the City, are or become non-responsible or otherwise unacceptable to City, City may require other new or additional sureties, which the Contractor shall furnish to the satisfaction of City within ten (10) days after notice, and in default thereof the Contract may be suspended and the materials may be purchased or the work completed as provided in Article 5 herein.

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

**11.1.3** Amount of the Contract, as used to determine amounts of bonds, shall be the total amount fixed in the Contract for performance of required Work (or corrected total if errors are found).

**11.1.4** In the event of increases in the Contract Sum by Change Orders, or otherwise, the Design-Builder shall submit to the City evidence of additional bond coverage for such increases in the Contract Sum. Design-Builder shall be compensated for such additional bond coverage.

## **11.2 Insurance (See Attachment 12)**

## **12. UNCOVERING AND CORRECTION OF WORK**

### **12.1 Uncovering of Work**

**12.1.1** Specific Request. If a portion of the Work is covered contrary to the City's request or to requirements specifically expressed in the Contract Documents, it must, if required in writing by the City, be uncovered for the City examination and be replaced at the Design-Builder's expense within the Contract Sum and without change in the Contract Time.

**12.1.2** No Specific Request. If a portion of the Work has been covered, which the City or City has not specifically requested to examine prior to its being covered, the City or City may request to see such Work and it shall be uncovered by the Design-Builder. If such Work is in accordance with the Contract Documents, costs of uncovering

and replacement shall, by appropriate Change Order, be at the City's expense. If such Work is not in accordance with the Contract Documents, correction shall be at the Design-Builder's expense within the Contract Sum unless the condition was caused by the City or a Separate Design-Builder in which event the City shall be responsible for payment of such costs.

## **12.2 Correction of Work**

**12.2.1 Before or After Final Completion.** The Design-Builder shall promptly correct Work rejected by the City or City, as failing to conform to the requirements of the Contract Documents, whether discovered before or after Final Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing, inspections, and compensation for the City's services and expenses made necessary thereby, shall be at the Design-Builder's expense within the Contract Sum.

### **12.2.2 After Substantial Completion.**

**12.2.2.1** In addition to the Design-Builder's warranty obligations under Paragraph 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Subparagraph 9.8.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Design-Builder shall correct it promptly after receipt of written notice from the City to do so, unless the City has previously given the Design-Builder a written acceptance of such condition. Such corrective work shall be performed without charge or cost to City after Final Completion of the Work. The City shall give such notice promptly after discovery of the condition. If the Design-Builder fails to correct nonconforming Work within a reasonable time after receipt of notice from the City or City, the City may correct the nonconforming work in accordance with Paragraph 2.5.

**12.2.2.2** The one-year period for correction of Work shall not be extended by corrective Work performed by the Design-Builder pursuant to this Paragraph 12.2.

**12.2.3 Removal.** The Design-Builder shall remove from the Site portions of the Work which are not in accordance with the requirements of the Contract Documents and are neither corrected by the Design-Builder nor accepted by the City.

**12.2.4 Destruction or Damage.** The Design-Builder shall bear the cost within the Contract Sum of correcting destroyed or damaged construction, whether completed or partially completed, of the City or Separate Design-Builders caused by the Design-Builder's correction or removal of Work which is not in accordance with the requirements of the Contract Documents.

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

### **12.3 Acceptance of Nonconforming Work**

If the City prefers to accept Work which is not in accordance with the requirements of the Contract Documents, the City may do so instead of requiring its removal and correction. In such case, the Contract Sum will be reduced by an amount equal to the cost of replacing the Work to make it as originally specified or intended. Such adjustment shall be effected whether or not Final Payment has been made.

## **13. TERMINATION OR SUSPENSION OF THE CONTRACT**

### **13.1 Termination by the Design-Builder**

**13.1.1 Work Stoppage Not Caused by City.** If the Work is stopped for a period of ninety (90) consecutive days through no act or fault of the Design-Builder or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Design-Builder, for any of the following reasons: issuance of an order of a court or other public authority having jurisdiction which requires all Work to be stopped; an act of government, such as a declaration of national emergency which requires all Work to be stopped; and Design-Builder has given City written notice within ten (10) days of the occurrence of such ground for termination, then the Design-Builder may, upon thirty (30) additional calendar days written notice to City and, unless the reason has theretofore been cured, terminate its performance and recover from the City payment for Work executed to date and reasonable demobilization costs.

**13.1.2 Work Stoppage Caused by City.** If the Work is stopped for a period of 120 consecutive days through no act or fault of the Design-Builder or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Design-Builder because the City has persistently failed to fulfill the City's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Design-Builder may give City ten (10) calendar days written notice to cure. If the City fails to cure, the Design-Builder may, upon ten (10) additional calendar days' written notice to the City and the City, terminate the Contract and recover from the City as provided in Subparagraph 13.1.1 above.

### **13.2 Termination by the City for Cause**

**13.2.1 Grounds.** The City may terminate the Design-Builder's performance of the Contract if:

- (1) Design-Builder fails promptly to begin the Work under the Contract Documents; or
- (2) Design-Builder refuses or fails to supply enough properly skilled workers or proper materials; or
- (3) Design-Builder fails to perform the Work in accordance with the Contract Documents, including conforming to applicable standards set forth therein in constructing the Project, or refuses to remove and replace rejected materials or unacceptable Work; or
- (4) Design-Builder discontinues the prosecution of the Work (exclusive of work stoppage: (i) due to termination by City; or (ii) due to and during the continuance of a Force Majeure event or suspension by City); or
- (5) Design-Builder fails to resume performance of Work which has been suspended or stopped, within a reasonable time after receipt of notice from City to do so or (if applicable) after cessation of the event preventing performance; or

(6) Any representation or warranty made by Design-Builder in the Contract Documents or any certificate, schedule, instrument, or other document delivered by Design-Builder pursuant to the Contract Documents shall have been false or materially misleading when made; or

(7) Design-Builder fails to make payment to Subcontractors for materials or labor in accordance with the respective Contract Documents and applicable law; or

(8) Design-Builder disregards laws, ordinances, or rules, regulations, or orders of a public authority having jurisdiction; or

(9) Design-Builder otherwise is guilty of breach of a provision of the Contract Documents; or

(10) Design-Builder becomes insolvent, is adjudicated bankrupt, or makes a general assignment for the benefit of creditors and fails to provide City with adequate assurances of Design-Builder's ability to satisfy its contractual obligations.

**13.2.2 City's Rights.** When any of the reasons specified in Subparagraph 13.2.1 exist, the City may, in addition to and without prejudice to any other rights or remedies of the City, and after giving the Design-Builder five (5) calendar days written notice, terminate employment of the Design-Builder and may:

(1) Take possession of the Site and of all materials, equipment, tools and construction equipment, and machinery thereon owned by the Design-Builder;

(2) Suspend any further payments to Design-Builder;

(3) Accept assignment of subcontracts pursuant to Paragraph 5.3; and

(4) Finish the Work by whatever reasonable method the City may deem expedient. Upon request of the Design-Builder, the City shall furnish to the Design-Builder a detailed accounting of the costs incurred by the City in finishing the Work.

**13.2.3 Costs.** If City's costs to complete and damages incurred due to Design-Builder's default exceed the unpaid Contract balance, the Design-Builder shall pay the difference to the City.

**13.2.4 Erroneous Termination.** If it has been adjudicated or otherwise determined that City has erroneously or negligently terminated the Design-Builder for cause, then said termination shall automatically convert to a termination by the City for convenience as set forth in Paragraph 13.4.

### **13.3 Suspension by the City**

#### **13.3.1 Suspension For Convenience.**

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

**13.3.1.2** Design-Builder shall promptly recommence the Work upon written notice from City directing Design-Builder to resume the Work. The Contract Sum and Contract Time shall be adjusted for any increases in the cost and time caused by suspension, delay, or interruption provided Design-Builder complies with the Change Order and Claims proceedings set forth the Articles 4 and 7 of these General Conditions. No adjustment shall be made to the extent:

(1) That performance is, was, or would have been so suspended, delayed, or interrupted by another cause for which the Design-Builder is responsible; or

(2) That an equitable adjustment is made or denied under another provision of the Contract.

**13.3.2** Suspensions For Cause. City has the authority by written order to suspend the Work without liability to City wholly or in part for Design-Builder's failure to:

- (1) Correct conditions unsafe for the Project personnel or general public; or
- (2) Carry out the Contract; or
- (3) Carry out orders of City.

**13.3.3** Responsibilities of Design-Builder During Suspension Periods. During periods that Work is suspended, Design-Builder shall continue to be responsible for the Work and shall prevent damage or injury to the Project, provide for drainage, and shall erect necessary temporary structures, signs or other facilities required to maintain the Project and continue to perform according the Article 10 of these General Conditions.

#### **13.4 Termination by the City for Convenience**

**13.4.1** Grounds. Without limiting any rights which City may have by reason of any default by Design-Builder hereunder, City may terminate Design-Builder's performance of the Contract in whole or in part, at any time, for convenience or any other reason upon written notice to Design-Builder. Such termination shall be effective as of the date stated in the written notice, which shall be no less than fifteen (15) calendar days from the date of the notice.

**13.4.2** Design-Builder Actions. Immediately upon receipt of such notice, Design-Builder shall: (i) cease performance of the Work of this Agreement to the extent specified in the notice; (ii) take actions necessary or that the City may direct, for the protection and preservation of the Work; (iii) settle outstanding liabilities, as directed by City; (iv) transfer title and deliver to City Work in progress, specialized equipment necessary to perform the Work, and Record Documents; and, (v) except for Work directed by City to be performed, incur no further costs or expenses. At the option of the City, all or any of the subcontracts entered into by Design-Builder prior to the date of termination shall be terminated or shall be assigned to City.

**13.4.3** Compensation. If the Parties are unable to agree on the amount of a termination settlement, the City shall pay the Design-Builder the following amounts:

- (1) For Work performed before the effective date of termination, the total (without duplication of any items) of:
  - (a) The Cost of the Work; and
  - (b) A sum, as profit on (1)(a), above, determined by the City to be fair and reasonable;
- (2) The reasonable costs of settlement of the Work terminated, including:
  - (a) Accounting, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data; and

(b) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

### **13.5 Authority of City**

In determination of the question of whether there has been such noncompliance with the Contract as to warrant the suspension or termination of the Contract, the decision of the City will be binding on all parties.

### **13.6 Termination by Acts of God**

In the event the Project is damaged by an "Act of God" as defined in Public Contract Code section 7105, the City may elect to terminate the Contract. If the City terminates the Contract pursuant to this paragraph, compensation to the Contractor shall be solely for any Work completed, any materials purchased, any bonds and insurance paid and for any equipment used prior to the occurrence of the "Act of God".

In no event shall Design-Builder be entitled to recover overhead or profit on Work not performed.

## **14. EMPLOYMENT OF LABOR/WAGE RATES**

### **14.1 Determination of Prevailing Rates**

Pursuant to California Labor Code, Part VII, Chapter 1, Article 2, Sections 1770, et seq., the City has obtained from the Director of the Department of Industrial Relations (DIR) pursuant to the California Labor Code, the general prevailing rates of per diem wages and the prevailing rates for holiday and overtime work in the locality in which the Work is to be performed. Copies of said rates are on file with the Real Estate Services Department, City of San Salinas, will be made available for inspection during regular business hours and are also available online at [www.dir.ca.gov/dlsr/DPreWageDetermination.htm](http://www.dir.ca.gov/dlsr/DPreWageDetermination.htm). The wage rate for any classification not listed, but which may be required to execute the Work, shall be commensurate and in accord with specified rates for similar or comparable classifications for those performing similar or comparable duties. In accordance with Section 1773.2 of the California Labor Code, the Design-Builder shall post, at appropriate and conspicuous locations on the jobsite, a schedule showing all applicable prevailing wage rates and shall comply with the requirements of Labor Code Sections 1773, et seq.

### **14.2 Subcontractors**

**14.2.1 Ineligible Subcontractors.** Pursuant to the provisions of Section 1777.1 of the California Labor Code, the Labor Commissioner publishes and distributes a list of contractors ineligible to perform work as a subcontractor on a public works project. This list of debarred contractors is available from the DIR website at [http://www.dir.ca.gov/dir/Labor\\_law/DSLE/Debar.html](http://www.dir.ca.gov/dir/Labor_law/DSLE/Debar.html).

**14.2.2 Employment of Apprentices.** The Design-Builder and all Subcontractors performing Work for the Project shall comply with all requirements pertaining to the employment of apprentices pursuant to the provisions of the California Labor Code including, but not limited to, California Labor Code Section 1777.5.

**14.2.3** The Design-Builder shall comply with all of the requirements of Public Contract Code Section 22164(c). As required by this section Design-Builder agrees that it "and its subcontractors at every tier will use a skilled and trained workforce to perform all work on the project or contract that falls within an apprenticeable occupation in the building and construction trades." Design-Builder agrees that it and all of its subcontractors at every tier will comply with the requirements of Public Contract Code Section 22164(c) and will provide the City with written evidence that Design-Builder and all of its subcontractors at every tier are complying with these requirements by the 10<sup>th</sup> day of each month that Work is performed.

### **14.3 Payment of Prevailing Rates**

There shall be paid each worker of the Design-Builder, or any Subcontractor, of any tier, engaged in the Work, not less than the general prevailing wage rate, regardless of any contractual relationship which may be alleged to exist between the Design-Builder or any Subcontractor, of any tier, and such worker.

### **14.4 Prevailing Rate Penalty**

The Design-Builder shall, as a penalty, forfeit **fifty dollars (\$50.00)** to the City for each calendar day or portion thereof, for each worker paid less than the prevailing rates as determined by the Director of the Department of Industrial Relations for such work or craft in which such worker is employed by the Design-Builder or by any Subcontractor in connection with the Work. Pursuant to California Labor Code Section 1775, the difference between such prevailing wage rates and the amount paid to each worker for each calendar day, or portion thereof, for which each worker was paid less than the prevailing wage rate, shall be paid to each worker by the Design-Builder.

### **14.5 Payroll Records**

Pursuant to California Labor Code Section 1776, the Design-Builder and each Subcontractor, of any tier, shall keep accurate payroll record, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker or other employee employed by them in connection with the Work. The payroll records enumerated herein shall be verified by a written declaration made under penalty of perjury that the information contained in the payroll record is true and correct and that the Design-Builder or Subcontractor has complied with the requirements of the California Labor Code Sections 1771, 1811, and 1815 for any Work performed by his or her employees on the Project. The payroll records shall be available for inspection at all reasonable hours at the principal office of the Design-Builder on the following basis:

(1) a certified copy of an employee's payroll record shall be made available for inspection or furnished to such employee or his/her authorized representative on request;

(2) a certified copy of all payroll records shall be made available for inspection or furnished upon request to the City, the Division of Labor Standards Enforcement and the Division of Apprenticeship Standards of the Department of Industrial Relations;

(3) a certified copy of payroll records shall be made available upon request to the public for inspection or copies thereof made; provided, however, that a request by the public shall be made through either the City, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been previously provided to the City, the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, the requesting party shall, prior to being provided the records, reimburse the cost of preparation by the Design-Builder, Subcontractor and the entity through which the request was made; the public shall not be given access to such records at the principal office of the Design-Builder;

(4) the Design-Builder shall file a certified copy of the payroll records with the entity that requested such records within ten (10) days after receipt of a written request;

(5) any public agency by the City, the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement shall be marked or obliterated in such a manner as to prevent disclosure of an individual's name, address and social security number. The name and address of the Design-Builder or any Subcontractor of any tier, performing a part of the Work shall not be marked or obliterated. The Design-Builder shall inform the City of the

location of payroll records, including the street address, city and City and shall, within five (5) working days, provide a notice of a change of location and address.

In the event Design-Builder does not comply with the requirements of this subsection, the Design-Builder shall have ten (10) days in which to comply, subsequent to a receipt of written notice specifying in what respects the Design-Builder must comply herewith. Should non-compliance still be evident after a ten (10) day period, the Design-Builder shall, as a penalty to the City, forfeit **twenty-five dollars (\$25.00)** for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, such penalty shall be withheld from any portion of the Contract Sum the due or to become due to the Design-Builder.

#### **14.6 Limits on Hours of Work**

Pursuant to California Labor Code Section 1810, eight (8) hours of labor shall constitute a legal day's work. Pursuant to California Labor Code Section 1811, the time of service of any worker employed at any time by the Design-Builder or by a Subcontractor, or any tier, upon the Work or upon any part of the Work, is limited and restricted to eight (8) hours during any one calendar day and forty (40) hours during any one calendar week, except as hereafter provided. Notwithstanding the foregoing provisions, Work performed by employees of Design-Builder or any Subcontractor, of any tier, in excess of eight (8) hours per day and forty (40) hours during any one week, shall be permitted upon compensation for all hours worked in excess of eight (8) hours per day at not less than one and one-half (1½) times the basic rate of pay.

#### **14.7 Penalty for Excess Hours**

The Design-Builder shall pay to the City a penalty of **twenty-five dollars (\$25.00)** for each worker employed on the Work by the Design-Builder or any Subcontractor, of any tier, for each calendar day during which such worker is required or permitted to work more than eight (8) hours in any calendar day and forty (40) hours in any one calendar week, in violation of the provisions of the California Labor Code, unless compensation to the worker so employed by the Design-Builder is not less than one and one-half (1½) times the basic rate of pay for all hours worked in excess of eight (8) hours per day.

#### **14.8 Design-Builder Responsibility**

Any work performed by workers necessary to be performed after regular work hours or on Sundays or other holidays shall be performed without adjustment of the Contract Sum and/or without additional expense to the City.

#### **14.9 Employment of Apprentices**

Any apprentices employed to perform any of the Work shall be paid the standard wage to apprentices under the regulations of the craft or trade for which such apprentice is employed, and such individual shall be employed only for the Work of the craft or trade to which such individual is registered. Only apprentices, as defined in California Labor Code Section 3077, who are in training under apprenticeship standards and written apprenticeship agreements under California Labor Code Sections 3070 et seq. are eligible to be employed of the Work. The employment and training of each apprentice shall be in accordance with the provisions of the apprenticeship standards and apprentice agreements under which such apprentice is training. The Design-Builder shall comply with all of the requirements of Public Contract Code Section 22164(c). As required by this section Design-Builder agrees that it "and its subcontractors at every tier will use a skilled and trained workforce to perform all work on the project or contract that falls within an apprenticeable occupation in the building and construction trades." Design-Builder agrees that it and all of its subcontractors at every tier will comply with the requirements of Public Contract Code Section 22164(c) and will provide the City with written

evidence that Design-Builder and all of its subcontractors at every tier are complying with these requirements by the 10<sup>th</sup> day of each month that Work is performed.

#### **14.10 Apprenticeship Certificate**

When the Design-Builder or any Subcontractor, of any tier, in performing any of the Work employs workers in any Apprenticeable Craft or Trade, as hereinafter defined, the Design-Builder and such Subcontractor shall apply to the Joint Apprenticeship Committee administering the apprenticeship standards of the craft or trade in the area of the site of the Work for a certificate approving the Design-Builder or such Subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected, provided, however, that the approval as established by the Joint Apprenticeship Committee or Committees, subsequent to approving the Design-Builder or Subcontractor, shall arrange for the dispatch of apprentices to the Design-Builder or such Subcontractor in order to comply with California Labor Code Section 1777.5. The Design-Builder and Subcontractor shall submit contract award information to the applicable Joint Apprenticeship Committee, which shall include an estimate of journeyman hours to be performed under the Contract, the number of apprentices to be employed, and the approximate dates the apprentices will be employed. There shall be an affirmative duty upon the Joint Apprenticeship Committee or Committees, administering the apprenticeship standards of the crafts or trades in the area of the site of the Work, to ensure equal employment and affirmative action and apprenticeship for women and minorities. Design-Builders or Subcontractors shall not be required to submit individual applications for approval to local Joint Apprenticeship Committees provided they are already covered by the local apprenticeship standards.

#### **14.11 Ratio of Apprentices to Journeymen**

The ratio of Work performed by the apprentices to journeymen, who shall be employed in the Work, may be the ratio stipulated in the apprenticeship standards under which the Joint Apprenticeship Committee operates, but in no case shall the ratio be less than one hour of apprentice work for each five hours of labor performed by a journeyman, except as otherwise provided in California Labor Code Section 1777.5. The minimum ratio of the land surveyor classification shall not be less than one apprentice for each five journeymen. Any ratio shall apply during any day or portion of a day when any journeyman, or the higher standard stipulated by the Joint Apprenticeship Committee, is employed at the site of the Work and shall be computed on the basis of the hours worked during the day by journeymen so employed, except for the land surveyor classification. The Design-Builder shall employ apprentices for the number of hours computed as above before the completion of the Work. The Design-Builder shall, however, endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the site of the Work. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Division of Apprenticeship Standards, upon application of a Joint Apprenticeship Committee, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification. The Design-Builder or any Subcontractor covered by this Article and California Labor Code Section 1777.5, upon the issuance of the approval certificate, or if it has been previously approved in such craft, or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the Design-Builder that it employs apprentices in such craft or trade in the State of California on all of its contracts on an annual average of not less than one apprentice to each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the Design-Builder from the 1-to-5 ratio as set forth in this Article and California Labor Code Section 1777.5. This Article shall not apply to contracts of general contractors, or to contracts of specialty contractors not bidding for work through a general or prime contractor, involving less than **Thirty Thousand Dollars (\$30,000.00)** or twenty (20) working days. The term "Apprenticeable Craft or Trade" as used herein shall mean a craft or trade determined as an Apprenticeable occupation in accordance with rules and regulations prescribed by the Apprenticeship Council.

#### **14.12 Exemption from Ratios**

The Joint Apprenticeship Committee shall have the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting the Design-Builder from the 1-to-5 ratio set forth in this Article when it finds that any one of the following conditions are met:

(1) unemployment for the previous three-month period in such area exceeds an average of fifteen percent (15%); or

(2) the number of apprentices in training in such area exceeds a ratio of 1-to-5 in relation to journeymen; or

(3) the Apprenticeable Craft or Trade is replacing at least one-thirtieth (1/30) of its journeymen annually through apprenticeship training, either on a statewide basis or on a local basis, or

(4) if assignment of an apprentice to any work performed under the Contract Documents would create a condition which would jeopardize such apprentice's life or the life, safety or property of fellow employees or the public at large, or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

When such exemptions from the 1-to-5 ratio between apprentices and journeymen are granted to an organization which represents contractors in a specific trade on a local or statewide basis, the member contractors will not be required to submit individual applications for approval to local Joint Apprenticeship Committees, provided they are already covered by the local apprenticeship standards.

#### **14.13 Contributions to Trust Funds**

The Design-Builder or any Subcontractor, of any tier, who, performs any of the Work by employment of journeymen or apprentices in any Apprenticeable Craft or Trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any such craft or trade in the area of the site of the Work, to which fund or funds other contractors in the area of the site of the Work are contributing, shall contribute to the fund or funds in each craft or trade in which it employs journeymen or apprentices in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept such funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The Division of Labor Standards Enforcement is authorized to enforce the payment of such contributions of such fund(s) as set forth in California Labor Code Section 227. Such contributions shall not result in an increase in the Contract Sum.

#### **14.14 Design-Builder's Compliance**

The responsibility of compliance with this Article for all Apprenticeable Trades or Crafts is solely and exclusively that of the Design-Builder. All decisions of the Joint Apprenticeship Committee(s) under this Article are subject to the provisions of California Labor Code Section 3081. In the event the Design-Builder willfully fails to comply with the provisions of this Article and California Labor Code Section 1777.5, pursuant to California Labor Code Section 1777.7, the Design-Builder shall:

(1) be denied the right to bid on any public works contract for a period of one (1) year from the date the determination of non-compliance is made by the Administrator of Apprenticeship; and

(2) forfeit, as a civil penalty, the sum of **Fifty Dollars (\$50.00)** for each calendar day of noncompliance.

Notwithstanding the provisions of California Labor Code Section 1727, upon receipt of such determination, the City shall withhold such amount from the Contract Sum then due or to become due. Any such determination shall be issued after a full investigation, a fair and impartial hearing, and reasonable notice thereof in accordance with reasonable rules and procedures prescribed by the California Apprenticeship Council. Any funds withheld by the City pursuant to this Article shall be deposited in the General Fund or other similar fund of the City. The interpretation and enforcement of California Labor Code Sections 1777.5 and 1777.7 shall be in accordance with the rules and procedures of the California Apprenticeship Council.

#### **14.15 Senate Bill 854 (Chapter 28, Statutes of 2014) and Senate Bill 96 (Chapter 28, Statutes of 2017) Requirements**

**14.15.1** Design-Builder shall comply with Senate Bill 854 and Senate Bill 96. The requirements include, but are not limited to, the following:

**14.15.1.1** No contractor or subcontractor may be listed on a bid proposal (submitted on or after March 1, 2015) for a public works project unless registered with the DIR pursuant to Labor Code Section 1725.5, with limited exceptions from this requirement for bid purposes only as allowed under Labor Code Section 1771.1(a).

**14.15.1.2** No contractor or subcontractor may be awarded a contract for public work or perform work on a public works project (awarded on or after April 1, 2015) unless registered with the DIR pursuant to Labor Code Section 1725.5.

**14.15.1.3** This Project is subject to compliance monitoring and enforcement by the DIR.

**14.15.1.4** As required by the DIR, Design-Builder is required to post job site notices, as prescribed by regulation, regarding compliance monitoring and enforcement by the DIR.

**14.15.1.5** Design-Builder and all of its subcontractors at every tier must submit certified payroll records online to the Labor Commissioner for all new public works projects issued on or after April 1, 2015, and for all public works projects, new or ongoing, on or after January 1, 2016.

(1) The certified payroll must be submitted at least monthly to the Labor Commissioner.

(2) The City reserves the right to require Design-Builder and all subcontractors at every tier to submit certified payroll records more frequently than monthly to the Labor Commissioner.

(3) The certified payroll records must be in a format prescribed by the Labor Commissioner.

**14.15.1.6** Registration with the Department of Industrial Relations and the submission of certified payroll records to the Labor Commissioner are not required if the public works project is \$25,000 or less when the project is for construction, alteration, demolition, installation or repair work, or if the public works project is \$15,000 or less when the project is for maintenance work.

**14.15.2** Labor Code Section 1725.5 states the following:

“A contractor shall be registered pursuant to this section to be qualified to bid on, be listed in a bid proposal, subject to the requirements of Section 4104 of the Public Contract Code, or engage in the performance of any public work contract

that is subject to the requirements of this chapter. For the purposes of this section, "contractor" includes a subcontractor as defined by Section 1722.1.

(a) To qualify for registration under this section, a contractor shall do all of the following:

(1) (A) Register with the Department of Industrial Relations in the manner prescribed by the department and pay an initial nonrefundable application fee of **four hundred dollars (\$400)** to qualify for registration under this section and an annual renewal fee on or before July 1 of each year thereafter. The annual renewal fee shall be in a uniform amount set by the Director of Industrial Relations, and the initial registration and renewal fees may be adjusted no more than annually by the director to support the costs specified in Section 1771.3.

(B) Beginning June 1, 2019, a contractor may register or renew according to this subdivision in annual increments up to three years from the date of registration. Contractors who wish to do so will be required to prepay the applicable nonrefundable application or renewal fees to qualify for the number of years for which they wish to preregister.

(2) Provide evidence, disclosures, or releases as are necessary to establish all of the following:

(A) Workers' compensation coverage that meets the requirements of Division 4 (commencing with Section 3200) and includes sufficient coverage for any worker whom the contractor employs to perform work that is subject to prevailing wage requirements other than a contractor who is separately registered under this section. Coverage may be evidenced by a current and valid certificate of workers' compensation insurance or certification of self-insurance required under Section 7125 of the Business and Professions Code.

(B) If applicable, the contractor is licensed in accordance with Chapter 9 (commencing with Section 7000) of the Business and Professions Code.

(C) The contractor does not have any delinquent liability to an employee or the state for any assessment of back wages or related damages, interest, fines, or penalties pursuant to any final judgment, order, or determination by a court or any federal, state, or local administrative agency, including a confirmed arbitration award. However, for purposes of this paragraph, the contractor shall not be disqualified for any judgment, order, or determination that is under appeal, provided that the contractor has secured the payment of any amount eventually found due through a bond or other appropriate means.

(D) The contractor is not currently debarred under Section 1777.1 or under any other federal or state law providing for the debarment of contractors from public works.

(E) The contractor has not bid on a public works contract, been listed in a bid proposal, or engaged in the performance of a contract for public works without being lawfully registered in accordance with this section, within the preceding 12 months or since the effective date of the requirements set forth in subdivision (e), whichever is earlier. If a contractor is found to be in violation of the requirements of this paragraph, the period of disqualification shall be waived if both of the following are true:

(i) The contractor has not previously been found to be in violation of the requirements of this paragraph within the preceding 12 months.

(ii) The contractor pays an additional nonrefundable penalty registration fee of **two thousand dollars (\$2,000)**.

(b) Fees received pursuant to this section shall be deposited in the State Public Works Enforcement Fund established by Section 1771.3 and shall be used only for the purposes specified in that section.

(c) A contractor who fails to pay the renewal fee required under paragraph (1) of subdivision (a) on or before the expiration of any prior period of registration shall be prohibited from bidding on or engaging in the performance of any contract for public work until once again registered pursuant to this section. If the failure to pay the renewal fee was inadvertent, the contractor may renew its registration retroactively by paying an additional nonrefundable penalty renewal fee equal to the amount of the renewal fee within 90 days of the due date of the renewal fee.

(d) If, after a body awarding a contract accepts the contractor's bid or awards the contract, the work covered by the bid or contract is determined to be a public work to which Section 1771 applies, either as the result of a determination by the director pursuant to Section 1773.5 or a court decision, the requirements of this section shall not apply, subject to the following requirements:

- (1) The body that awarded the contract failed, in the bid specification or in the contract documents, to identify as a public work that portion of the work that the determination or decision subsequently classifies as a public work.
- (2) Within 20 days following service of notice on the awarding body of a determination by the Director of Industrial Relations pursuant to Section 1773.5 or a decision by a court that the contract was for public work as defined in this chapter, the contractor and any subcontractors are registered under this section or are replaced by a contractor or subcontractors who are registered under this section.
- (3) The requirements of this section shall apply prospectively only to any subsequent bid, bid proposal, contract, or work performed after the awarding body is served with notice of the determination or decision referred to in paragraph (2).
- (e) The requirements of this section shall apply to any bid proposal submitted on or after March 1, 2015, to any contract for public work, as defined in this chapter, executed on or after April 1, 2015, and to any work performed under a contract for public work on or after January 1, 2018, regardless of when the contract for public work was executed.
- (f) This section does not apply to work performed on a public works project of **twenty-five thousand dollars (\$25,000)** or less when the project is for construction, alteration, demolition, installation, or repair work or to work performed on a public works project of **fifteen thousand dollars (\$15,000)** or less when the project is for maintenance work.”

**14.15.3** Labor Code Section 1771.1 states the following:

- “(a) A contractor or subcontractor shall not be qualified to bid on, be listed in a bid proposal, subject to the requirements of Section 4104 of the Public Contract Code, or engage in the performance of any contract for public work, as defined in this chapter, unless currently registered and qualified to perform public work pursuant to Section 1725.5. It is not a violation of this section for an unregistered contractor to submit a bid that is authorized by Section 7029.1 of the Business and Professions Code or by Section 10164 or 20103.5 of the Public Contract Code, provided the contractor is registered to perform public work pursuant to Section 1725.5 at the time the contract is awarded.
- (b) Notice of the requirement described in subdivision (a) shall be included in all bid invitations and public works contracts, and a bid shall not be accepted nor any contract or subcontract entered into without proof of the contractor or subcontractor's current registration to perform public work pursuant to Section 1725.5.
- (c) An inadvertent error in listing a subcontractor who is not registered pursuant to Section 1725.5 in a bid proposal shall not be grounds for filing a bid protest or grounds for considering the bid nonresponsive, provided that any of the following apply:
- (1) The subcontractor is registered prior to the bid opening.
  - (2) Within 24 hours after the bid opening, the subcontractor is registered and has paid the penalty registration fee specified in subparagraph (E) of paragraph (2) of subdivision (a) of Section 1725.5.
  - (3) The subcontractor is replaced by another registered subcontractor pursuant to Section 4107 of the Public Contract Code.
- (d) Failure by a subcontractor to be registered to perform public work as required by subdivision (a) shall be grounds under Section 4107 of the Public Contract Code for the contractor, with the consent of the awarding authority, to substitute a subcontractor who is registered to perform public work pursuant to Section 1725.5 in place of the unregistered subcontractor.
- (e) The department shall maintain on its Internet Web site a list of contractors who are currently registered to perform public work pursuant to Section 1725.5.
- (f) A contract entered into with any contractor or subcontractor in violation of subdivision (a) shall be subject to cancellation, provided that a contract for public work shall not be unlawful, void, or voidable solely due to the failure of the awarding body, contractor, or any subcontractor to comply with the requirements of Section 1725.5 or this section.
- (g) If the Labor Commissioner or his or her designee determines that a contractor or subcontractor engaged in the performance of any public work contract without having been registered in accordance with this section, the contractor or subcontractor shall forfeit, as a civil penalty to the state, **one hundred dollars (\$100)** for each day of work performed in violation of the registration requirement, not to exceed an aggregate penalty of **eight thousand dollars (\$8,000)** in addition to any penalty registration fee assessed pursuant to clause (ii) of subparagraph (E) of paragraph (2) of subdivision (a) of Section 1725.5.

(h)(1) In addition to, or in lieu of, any other penalty or sanction authorized pursuant to this chapter, a higher tiered public works contractor or subcontractor who is found to have entered into a subcontract with an unregistered lower tier subcontractor to perform any public work in violation of the requirements of Section 1725.5 or this section shall be subject to forfeiture, as a civil penalty to the state, of **one hundred dollars (\$100)** for each day the unregistered lower tier subcontractor performs work in violation of the registration requirement, not to exceed an aggregate penalty of **ten thousand dollars (\$10,000)**.

(2) The Labor Commissioner shall use the same standards specified in subparagraph (A) of paragraph (2) of subdivision (a) of Section 1775 when determining the severity of the violation and what penalty to assess, and may waive the penalty for a first time violation that was unintentional and did not hinder the Labor Commissioner's ability to monitor and enforce compliance with the requirements of this chapter.

(3) A higher tiered public works contractor or subcontractor shall not be liability for penalties assessed pursuant to paragraph (1) if the lower tier subcontractor's performance is in violation of the requirements of Section 1725.5 due to the revocation of a previously approved registration.

(4) A subcontractor shall not be liable for any penalties assessed against a higher tiered public works contractor or subcontractor pursuant to paragraph (1). A higher tiered public works contractor or subcontractor may not require a lower tiered subcontractor to indemnify or otherwise be liable for any penalties pursuant to paragraph (1).

(i) The Labor Commissioner or his or her designee shall issue a civil wage and penalty assessment, in accordance with the provisions of Section 1741, upon determination of penalties pursuant to subdivision (g) and subparagraph (B) of paragraph (1) of subdivision (h). Review of a civil wage and penalty assessment issued under this subdivision may be requested in accordance with the provisions of Section 1742. The regulations of the Director of Industrial Relations, which govern proceedings for review of civil wage and penalty assessments and the withholding of contract payments under Article 1 (commencing with Section 1720) and Article 2 (commencing with Section 1770), shall apply.

(j)(1) Where a contractor or subcontractor engages in the performance of any public work contract without having been registered in violation of the requirements of Section 1725.5 or this section, the Labor Commissioner shall issue and serve a stop order prohibiting the use of the unregistered contractor or the unregistered subcontractor on all public works until the unregistered contractor or unregistered subcontractor is registered. The stop order shall not apply to work by registered contractors or subcontractors on the public work.

(2) A stop order may be personally served upon the contractor or subcontractor by either of the following methods:

(A) Manual delivery of the order to the contractor or subcontractor personally.

(B) Leaving signed copies of the order with the person who is apparently in charge at the site of the public work and by thereafter mailing copies of the order by first class mail, postage prepaid to the contractor or subcontractor at the address on file with either of the following:

(i) The Contractors' State License Board.

(ii) The Secretary of State.

(3) The stop order shall be effective immediately upon service and shall be subject to appeal by the party contracting with the unregistered contractor or subcontractor, by the unregistered contractor or subcontractor, or both. The appeal, hearing, and any further review of the hearing decision shall be governed by the procedures, time limits, and other requirements specified in subdivision (a) of Section 238.1.

(k) Failure of a contractor or subcontractor, owner, director, officer, or managing agent of the contractor or subcontractor to observe a stop order issued and served upon him or her pursuant to subdivision (j) is guilty of a misdemeanor punishable by imprisonment in City jail not exceeding 60 days or by a fine not exceeding **ten thousand dollars (\$10,000)**, or both.

(l) This section shall apply to any bid proposal submitted on or after March 1, 2015, and any contract for public work entered into on or after April 1, 2015. This section shall also apply to the performance of any public work, as defined in this chapter, on or after January 1, 2018, regardless of when the contract for public work was entered.

(m) Penalties received pursuant to this section shall be deposited in the State Public Works Enforcement Fund established by Section 1771.3 and shall be used only for the purposes specified in that section.

(n) This section shall not apply to work performed on a public works project of **twenty-five thousand dollars (\$25,000)** or less when the project is for construction, alteration, demolition, installation, or repair work or to work performed on a public works project of **fifteen thousand dollars (\$15,000)** or less when the project is for maintenance work."

**14.15.4** Labor Code Section 1771.4 states the following:

“a) All of the following are applicable to all public works projects that are otherwise subject to the requirements of this chapter:

(1) The call for bids and contract documents shall specify that the project is subject to compliance monitoring and enforcement by the Department of Industrial Relations.

(2) The awarding body shall post or require the prime contractor to post job site notices, as prescribed by regulation.

(3) Each contractor and subcontractor shall furnish the records specified in Section 1776 directly to the Labor Commissioner, in the following manner:

(A) At least monthly or more frequently if specified in the contract with the awarding body.

(B) In a format prescribed by the Labor Commissioner.

(4) If the contractor or subcontractor is not registered pursuant to Section 1725.5 and is performing work on a project for which registration is not required because of subdivision (f) of Section 1725.5, the unregistered contractor or subcontractor is not required to furnish the records specified in Section 1776 directly to the Labor Commissioner but shall retain the records specified in Section 1776 for at least three years after completion of the work.

(5) The department shall undertake those activities it deems necessary to monitor and enforce compliance with prevailing wage requirements.

(b) The Labor Commissioner may exempt a public works project from compliance with all or part of the requirements of subdivision (a) if either of the following occurs:

(1) The awarding body has enforced an approved labor compliance program, as defined in Section 1771.5, on all public works projects under its authority, except those deemed exempt pursuant to subdivision (a) of Section 1771.5, continuously since December 31, 2011.

(2) The awarding body has entered into a collective bargaining agreement that binds all contractors performing work on the project and that includes a mechanism for resolving disputes about the payment of wages.

(c) The requirements of paragraph (1) of subdivision (a) shall only apply to contracts for public works projects awarded on or after January 1, 2015.

(d) The requirements of paragraph (3) of subdivision (a) shall apply to all contracts for public work, whether new or ongoing, on or after January 1, 2016.”

**15. MISCELLANEOUS PROVISIONS**

**15.1 Governing Law**

The Contract shall be governed by the laws of the State of California without regard to choice of law principles thereof. The exclusive venue of any legal action brought by the City, the Design-Builder, or any Consultant or Subcontractor, with regard to this Agreement or Project, shall be in the Superior Court of California, County of Monterey. Design-Builder agrees to incorporate this provision into all consultant subcontract agreements.

**15.2 Successors and Assigns**

The City and Design-Builder respectively bind themselves, their partners, successors, assigns, and legal Project Managers to the other Party hereto and to partners, successors, assigns, and legal Project Managers of such other Party in respect to covenants, agreements, and obligations contained in the Contract Documents. The Design-Builder shall not sublet or assign the Work of this Contract or any portion thereof or any monies due thereunder, without the express prior written consent and approval of City. City may freely assign its rights hereunder, without limitation, to a separate entity and Design-Builder agrees, upon such entity's request, to continue and complete performance of the Work upon payment of any undisputed outstanding amounts due Design-Builder for services performed up to and

including the effective date of the assignment, provided adequate proof of funding to completion is offered by assignee. Any entity which shall succeed to the rights of City shall be entitled to enforce the rights of City hereunder. If requested by such entity, Design-Builder will execute a separate letter or other agreement with such entity further evidencing Design-Builder's commitment to continue performance of the Contract.

### **15.3 Written Notice**

Written notice shall be deemed to have been duly served if delivered in person, or by US Mail, courier service, or package delivery service (such as UPS and FedEx) to the individuals identified for receipt of notice in the Agreement.

### **15.4 Rights and Remedies**

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

**15.4.2 No Waiver.** No action or failure to act by the City, the City, or the Design-Builder shall constitute a waiver of any right or duty afforded any of them under the Contract, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically provided in the Contract Documents or as may be otherwise agreed in writing.

### **15.5 Tests and Inspections**

**15.5.1 Required Tests, Inspections, and Costs.** If the Contract Documents, City instructions, laws, ordinances, or any public authority require any Work to be specially tested or approved, Design-Builder shall give notice, in accordance with such authority, of its readiness for observation or inspection, at least two (2) working days prior to being tested or covered up. If inspection is by authority other than City, Design-Builder shall inform City of date fixed for such inspection. All required certificates of inspection shall be secured by Design-Builder. If any Work required to be tested should be covered up without approval or consent of City, Design-Builder must, if required by City, uncover the Work for examination and satisfactorily reconstruct at Design-Builder's expense within the Contract Sum in compliance with Contract. Cost of testing and any materials found not to be in compliance with the Contract shall be paid by Design-Builder within the Contract Sum. Other costs for tests and inspection of materials shall be paid by City. Where such inspection and testing are to be conducted by an independent laboratory or agency, such materials or samples of materials to be tested shall be selected by such laboratory or agency or City's Project Manager, and not by Design-Builder. Design-Builder shall notify City a sufficient time in advance of manufacture of materials to be supplied by it under Contract, which must, by terms of contract, be tested, in order that City may arrange for testing of same at source of supply. Prior to having satisfactorily passed such testing and inspection, or prior to receipt of notice from said Project Manager that such testing and inspection will not be required, the materials shall not be incorporated into the Work without prior approval of City and subsequent testing and inspection. Re-examination of questioned work may be ordered by City and, if so ordered, Work must be uncovered by Design-Builder. If such uncovered Work be found in accordance with Contract Documents, City shall pay costs of re-examination and replacement. If such uncovered Work be found not in accordance with Contract Documents, Design-Builder shall pay such costs within the Contract Sum.

**15.5.2 Additional Tests and Inspections.** If the City or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection, or approval not included under Subparagraph 14.5.1, the City will instruct the Design-Builder to make arrangements for such additional testing, inspection or approval by an entity acceptable to the City, and the Design-Builder shall give timely notice to the City of when and where tests and inspections are to be made so that the City may be present for such procedures. Such costs shall be at the City's expense, if applicable. If such procedures for testing, inspection, or approval under Subparagraphs 15.5.1 and 15.5.2

reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, all costs made necessary by such failure, including those of repeated procedures and compensation for City's testing and inspection services and expenses, shall be at the Design-Builder's expense, within the Contract Sum. Cost of retesting, reinspection, and reapprovals as described herein, including compensation for the City's testing and inspection services and expenses, shall be paid for by the City and deducted from the Contract Sum by a Change Order or Construction Change Directive.

**15.5.3 Documentation.** Required certificates of testing, inspection, or approval shall, unless otherwise required by the Contract Documents, be secured by the Design-Builder and promptly delivered to the City. Delivery of such documentation is a condition precedent to City's obligation to make payment to Design-Builder.

**15.5.4 Observation of Tests.** If the City is to observe tests, inspections, or approvals required by the Contract Documents, City will do so promptly and, where practicable, at the normal place of testing.

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

## **15.6 Record Retention and Audits**

All books, account, reports, files, correspondence, data, and other records relating to this Contract shall be maintained by the Design-Builder and shall be subject at all reasonable times to review, inspection, and audit by the City or its designated Project Managers for a period of five (5) years after Final Completion of the Work. Such records shall be produced by the Design-Builder within a reasonable time at a place designated by the City, upon written notice to the Design-Builder.

## **15.7 Independent Design-Builder**

Design-Builder is employed hereunder to render a service within the scope of its training and experience, and Design-Builder shall be an independent Design-Builder and not an employee of the City. As such, City shall not be called upon to assume any liability for the direct payment of any salary to any employee or Subcontractor of Design-Builder, nor to pay any benefit to any employee or Subcontractor or vendor under the Workers' Compensation laws. None of Design-Builder's officers, agents, employees, and Subcontractors, nor any of their agents, officers, and employees, shall be deemed officers, agents, employees, and Subcontractors of the City, and the City shall not be liable or responsible to them for anything whatsoever other than liability to Design-Builder set forth in this Contract.

## **15.8 Keys and Access**

If the City furnishes keys and/or access cards to the Design-Builder to provide access to City's property, the Design-Builder shall assure that such access instruments are not duplicated and shall return all such instruments in good condition upon request of the City or prior to receipt of final payment, whichever is earlier. If the Design-Builder fails to return all access instruments furnished to it, the Design-Builder shall be responsible, within the Contract Sum, for all Work, materials, and costs associated with reestablishing secured access.

## **15.9 Survival of Terms**

Any indemnity, warranty or guarantee given by the Design-Builder to City under the Contract Documents shall survive the expiration or termination of the Contract Documents and shall be binding upon Design-Builder until any action thereunder is barred according to terms in the Contract Documents or by the applicable statute of limitations or statute of repose.

## **15.10 Cooperation With Labor**

**15.10.1 General.** The Parties agree and declare that Design-Builder and City are separate and independent entities and that Design-Builder has full responsibility for performance of the Work and direction of the work force, subject to and under the duty of Design-Builder to cooperate with City and its Separate Contractors. Design-Builder recognizes that in the performance of its Work it may be required to work with and near Separate Contractors and Project Managers of City on the jobsite. The Design-Builder shall only employ or use labor in connection with the Work capable of working harmoniously with all trades, crafts, and any other individuals associated with the Project. The Design-Builder shall also use best efforts to minimize the likelihood of any strike, work stoppage, slowdowns, disputes, or other labor disturbance. If the Work is to be performed by trade unions, the Design-Builder shall make all necessary arrangements to reconcile, without delay, damage, or cost to the City and without recourse to the City or the City, any conflict between the Contract Documents and any agreements or regulations of any kind at any time in force among members or councils that regulate or distinguish the activities that shall not be included in the Work of any particular trade. Except as specifically provided in Paragraph 8.4 herein, Design-Builder shall be liable to City for all damages suffered by City as a result of work stoppage, slowdowns, or strikes related to labor disputes.

### **15.10.2 Picketing.**

**15.10.2.1** Design-Builder agrees that should there be picketing or a threat of picketing by any labor organization at or near the Site, Design-Builder, in cooperation with City, shall establish a reserve gate system and require employees of Design-Builder, Subcontractors, and suppliers to use one or more designated gates. In that event, it shall be the affirmative obligation of Design-Builder, as a material consideration of this Agreement to ensure that employees of Design-Builder, Subcontractors, and suppliers use only the gates or other entryways designated by City from time to time on the Project.

**15.10.2.2** Notwithstanding the establishment or non-establishment of a reserve gate, in the event employees of Design-Builder, Subcontractors or suppliers refuse to work because of any labor disputes or grievances (including any "secondary" or "sympathy" strike or boycott directed against the Project) not caused by City or its Separate Contractors and not the result of an industry-wide strike and that actually prevent performance of the Work, Design-Builder shall not be relieved of its obligation to supply enough properly skilled workers to perform the Work without interruption or further delay.

**15.10.3 Labor Disputes.** Design-Builder and City agree to cooperate fully with each other and their Project Manager and attorneys with respect to any labor dispute that should arise on the Site, including, but not limited to the giving of testimony and evidence to the agent or judge of the National Labor Relations Board or testimony in connection with proceedings in state or federal court. Design-Builder hereby warrants that it is not now nor will Design-Builder be delinquent in the payment or reporting to any labor management benefit trust.

## **15.11 No Personal Liability**

Notwithstanding any contrary provision in this Agreement or the Contract Documents, no member, principal, officer, employee, agent, Project Manager, or subsidiary of City (each a "direct affiliate of City"), or member, general partner, limited partner, principal, officer, employee, agent, or Project Manager of any direct affiliate of City (together with direct affiliates of City, the "affiliates of City") shall have any personal liability or the performance of any contractual obligations, or in respect of any liability of City under this Agreement and no monetary or other judgment shall be sought or enforced against any such individuals or their assets, all such personal contractual liability being expressly waived by Design-Builder. Further, the covenants and obligations contained in this agreement on the part of City shall be covenants and obligations of the City only, and not of any affiliate of City. No affiliate of City shall be individually liable for breach of any covenant or obligation of City, and no recourse shall be had against the assets of any affiliate of City (except to the extent of City's assets but excluding therefrom any negative capital account of any such affiliate of City) for payment of any sums due or enforcement of any other relief, based upon any claim made by Design-Builder for breach of any

of City's covenants or obligations. Notwithstanding the foregoing, Design-Builder does not waive any rights under applicable law of the state of the Project concerning the commission of fraud or conversion.

#### **15.12 Compliance With Restrictions**

Design-Builder shall comply with all conditions, restrictions and reservations of record, statutes, regulations, and ordinances, including, without limitation, all pollution control, environmental protection, zoning, planning, land use requirements, all restrictions and requirements affecting the Project and adjoining properties, and disabled access imposed by the City, the City and all other governmental entities including, without limitation, the requirements of any general plan and environmental requirements in connection with use, occupancy and building permits, and requirements of public utilities which affect construction of the Work in effect at the time of execution of this Agreement.

**END OF GENERAL CONDITIONS**