



# Standard Form of Agreement Between Design-Builder and Design-Build Subcontractor - Lump Sum

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

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This **AGREEMENT** is made as of the 21st day of October in the year of 2019, by and between the following parties, for services in connection with the Project identified below:

## **DESIGN-BUILDER:**

555 First Street  
San Fernando, CA 91340

## **DESIGN-BUILD SUBCONTRACTOR:**

Acme Construction  
P.O. Box 1234  
Los Angeles, CA 90001

## **PROJECT:**

Sample Project  
1000 A. Street  
Los Angeles, CA 90001

## **OWNER:**

UC Anywhere  
123 Any Street  
Los Angeles, CA 90001

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

# Article 1

## General

### 1.1 Basic Purpose.

**1.1.1** Design-Builder has contracted with Owner to provide the services necessary for the design and construction of the Project as set forth in the Design-Build Agreement. Design-Build Subcontractor, through itself, Design Consultants and Sub-Subcontractors, agrees to provide all design, construction and other aspects of the Work consistent with the Contract Documents. Design-Builder and Design-Build Subcontractor agree that to the extent applicable to the performance of the Work hereunder, Design-Build Subcontractor shall have the same rights, responsibilities, and obligations as to Design-Builder as Design-Builder by the Design-Build Agreement has against and to Owner, except as may be modified herein.

### 1.2 Basic Definitions.

**1.2.1** Terms used in this Agreement shall have the meanings set forth in the Design-Build Agreement between Owner and Design-Builder unless otherwise provided herein, with the following specific terms defined as follows:

**1.2.1.1** *Agreement* refers to this executed contract between Design-Builder and Design-Build Subcontractor under DBIA Document 565, *Standard Form of Agreement Between Design-Builder and Design-Build Subcontractor - Lump Sum* (2010 Edition). In keeping with the DBIA License Agreement requirements regarding modifications to the Standard Form DBIA Contract Document No. 565, both parties acknowledge that this Agreement for this Project contains modifications to the terms of the Standard Form DBIA Contract Document No. 565. For the sake of clarity, all such modifications appear in this Agreement without specific notation and both parties have read and agree to all the terms of this Agreement for this Project.

**1.2.1.2** *The Basis of Design Documents* are those documents referenced in the Design-Build Agreement which define the scope of work which the Design-Builder is obligated to perform for the Owner. The Basis of Design Documents referenced in the Design-Build Agreement may include, but are not limited to, RFP documents, Owner Project Criteria, program requirements, scoping documents, Legal Requirements, bidding requirements, reports, exhibits, plans, specifications, as-builts, and/or any other document which describes the scope of work which Design-Builder is obligated to perform for the Owner. Design-Build Subcontractor agrees to be bound to Design-Builder in the same manner and to the same extent as Design-Builder is bound to Owner under the Design-Build Agreement and Contract Documents, to the extent of the work provided for in this Agreement. Further, wherever the Design-Build Agreement and Contract Documents refer to Design-Builder, and the Work or requirement therein pertains to Design-Build Subcontractor's trade, craft, or type of Work, then such Work or requirement shall be interpreted to apply to Design-Build Subcontractor instead of Design-Builder. The term Basis of Design Documents shall also include those items listed in Attachment A, which is an integral part of this Agreement.

**1.2.1.3** *Construction Documents* are the documents consisting of Drawings and Specifications, prepared or assembled consistent with the Basis of Design Documents unless a deviation from the Basis of Design Documents is specifically set forth in a Change Order.

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

**1.2.1.5** *Design-Build Agreement* refers to the contract between Design-Builder and Owner for the design and construction of the Project and all exhibits, attachments, and other Contract Documents enumerated and incorporated therein.

**1.2.1.6 Primary Design Consultant** is the architect or other primary design firm which has been hired by Design-Builder to provide comprehensive project design services in accordance with the Design-Build Agreement.

**1.2.1.7 Design Consultant** is a qualified, licensed design professional who is employed or retained by Design-Build Subcontractor to furnish design services required under the Contract Documents. A Design Sub-Consultant is a qualified, licensed design professional who is retained by the Design Consultant or employed or retained by anyone under contract to Design Consultant, to furnish design services required under the Contract Documents.

**1.2.1.8 Force Majeure Events** are those events that are beyond the control of the Design-Build Subcontractor, Design-Builder and Owner, including the events of wars, floods, labor disputes, earthquakes, epidemics, adverse weather conditions not reasonably anticipated, and other acts of God.

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

**1.2.1.10 Legal Requirements** are all applicable federal, state and local laws, codes, ordinances, rules, regulations, orders, and requirements of any insurance underwriter, government or authority having jurisdiction over the parties, the Project or Site, the practices involved in the Project or Site, or any Work. Any provisions of the Design-Build Agreement which relate to the concept of Legal Requirements shall also be in effect within this Agreement.

**1.2.1.11 Owner's Project Criteria** are developed by or for Owner to describe Owner's program requirements and objectives for the Project, including use, space, price, time, site and expandability requirements, as well as submittal requirements and other requirements governing Design-Builder's performance of the Work. Owner's Project Criteria may include conceptual documents, design criteria, design performance specifications, design specifications, and LEED® or other sustainable design criteria and other Project-specific technical materials and requirements. Any provisions of the Design-Build Agreement which relate to the concept of Owner's Project Criteria shall also be in effect within this Agreement.

**1.2.1.12 Project Schedule** refers to the schedule setting forth the dates by which the various stages of both the design and construction of the Project must be performed so as to satisfy Design-Builder's obligations to Owner.

**1.2.1.13 Site** is the land or premises on which the Project is located.

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

**1.2.1.15 Substantial Completion or Substantially Complete** is the date on which the Project, or an agreed upon portion of the Project, is sufficiently complete so that Owner can occupy and use the Project or a portion thereof for its intended purposes. Any provisions of the Design-Build Agreement which relate to Substantial Completion shall govern this Agreement.

**1.2.1.16 Work** is comprised of all Design-Build Subcontractor's design, construction and other services required by the Contract Documents, including procuring and furnishing all supervision, labor, inspection, testing, start-up, materials, tools, equipment, machinery, transportation, temporary utilities, temporary facilities and all other items and services reasonably inferable from this Agreement and the other Contract Documents necessary to complete the Design-Build Subcontractor's portion of the Project as described herein,

including but not limited to the Work identified in Attachment C.

**1.2.1.17** *Design-Builder* as used throughout this Agreement, its related attachments, and within other documents associated with the Project, shall be deemed to have the same meaning as the term *Contractor* whenever the term *Contractor* is used in this Agreement, its related attachments, and within other documents associated with the Project.

**1.2.1.18** *Design-Build Subcontractor* as used throughout this Agreement, its related attachments, and within other documents associated with the Project, shall be deemed to have the same meaning as the term *Subcontractor* whenever the term *Subcontractor* is used in this Agreement, its related attachments, and within other documents associated with the Project.

### **1.3 Contract Documents.**

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

**1.3.1.1** All written modifications, amendments, minor changes and change orders to this Agreement;

**1.3.1.2** This Agreement, including all exhibits and attachments.

**1.3.1.3** The Design-Build Agreement; to the extent the Design-Build Agreement relates to the Work and the terms and conditions under which the Work shall be performed.

**1.3.1.4** The Basis of Design Documents;

**1.3.1.5** The Construction Documents.

### **1.4 Interpretation and Intent.**

**1.4.1** Design-Builder and Design-Build Subcontractor, prior to execution of the Agreement, have carefully reviewed all the Contract Documents, including the various documents comprising the Basis of Design Documents, for any conflicts or ambiguities. Design-Builder and Design-Build Subcontractor have discussed and resolved any identified conflicts or ambiguities prior to execution of the Agreement.

**1.4.2** The Contract Documents are intended to be complementary and interpreted in harmony so as to avoid conflict, with words and phrases interpreted consistent with construction and design industry standards. In the event inconsistencies, conflicts, or ambiguities between or among the Contract Documents are covered after execution of the Agreement, the Design-Builder and Design-Build Subcontractor shall attempt to resolve such ambiguities, conflicts, or inconsistencies informally, recognizing that the Contract Documents shall take precedence in the order in which they are listed in Section 1.3 hereof.

**1.4.3** If Owner's Project Criteria contain design specifications, Design-Build Subcontractor shall be entitled to reasonably rely on the accuracy of the information represented in the design specifications and its compatibility with other information set forth in Owner's Project Criteria, including any performance specifications, to the same extent as Design-Builder is entitled to so rely in the Design-Build Agreement.

### **1.5 Mutual Obligations and Acknowledgments.**

**1.5.1** Design-Builder and Design-Build Subcontractor commit at all times to cooperate fully with each other, and proceed on the basis of trust and good faith, to permit each party to realize the benefits afforded under the Contract Documents. Design-Builder and Design-Build Subcontractor shall perform their respective responsibilities, obligations and services in a timely manner to facilitate the other's timely and efficient performance and so as not to delay or interfere with the other's performance of its obligations under the Contract Documents.

**1.5.2** Design-Builder and Design-Build Subcontractor acknowledge that they may have cooperated with each other in the procurement of the Design-Build Agreement and that

Design-Builder and Design-Build Subcontractor have met to review, discuss, and familiarize themselves with the Design-Build Agreement, including the Basis of Design Documents.

**1.5.3** Design-Builder and Design-Build Subcontractor acknowledge that the design services performed by Design-Build Subcontractor hereunder relate to a part of the overall design of the Project and the importance of having Design-Build Subcontractor's design integrated into the Project's overall design concept. The parties commit to working with each other, and with Design-Builder's Primary Design Consultant, to facilitate the coordination and integration of Design-Build Subcontractor's design services and Work Product with the overall design concept and Construction Documents. Design-Builder is responsible for the services performed by the Primary Design Consultant, or other Subcontractors or Design-Build Subcontractors of Design-Builder, but nothing herein is intended to relieve Design-Build Subcontractor of its obligations to coordinate its Work with the services performed by the Primary Design Consultant, other Subcontractor, or Design-Build Subcontractors.

## **1.6 Entire Agreement.**

**1.6.1** Subject to the limitation in Section 1.3.1.5, the Contract Documents, all of which are incorporated by reference into this Agreement, form the entire agreement between Design-Builder and Design-Build Subcontractor and are as fully binding on the parties as if repeated herein. No oral representations or other agreements have been made by the parties except as specifically stated in the Contract Documents.

## **Article 2**

### **Design-Build Subcontractor's Services and Responsibilities**

#### **2.1 General.**

**2.1.1** Design-Builder and Design-Build Subcontractor will meet periodically to discuss issues affecting the administration and schedule of the Work, and implement the necessary procedures, including but not limited to those relating to design submissions, schedule updates, submittals, and payment, to facilitate the ability of the parties to perform their obligations under this Agreement.

**2.1.2** Design-Build Subcontractor's Representative shall be reasonably available to Design-Builder and shall have the necessary expertise and experience required to supervise the Work. Design-Build Subcontractor's Representative shall communicate regularly with Design-Builder and shall be vested with the authority to act on behalf of Design-Build Subcontractor. The Design-Build Subcontractor's Representative is subject to the approval of the Design-Builder and shall not be changed without the written approval of the Design-Builder. Design-Build Subcontractor shall replace its Representative upon the reasonable request of Design-Builder.

**2.1.3** Design-Build Subcontractor shall only communicate with Owner, Design-Builder's Primary Design Consultant or separate contractors of Design-Builder or Owner through Design-Builder.

#### **2.2 Review of Site and Contract Documents.**

**2.2.1** Design-Build Subcontractor represents that it has examined the Site and the Contract Documents prior to executing this Agreement so as to reasonably ascertain the nature of the Work and the various conditions affecting the Work.

**2.2.2** Design-Build Subcontractor shall promptly report to Design-Builder any errors, inconsistencies, omissions, or violations of Legal Requirements that Design-Build Subcontractor discovers. Design-Build Subcontractor shall be liable to Design-Builder for any damages resulting from any such errors, inconsistencies, omissions, or violations of Legal Requirements which Design-Build Subcontractor discovers or reasonably should have discovered and fails to report to Design-Builder.

#### **2.3 Design and Pre-Construction Services.**

**2.3.1** Design-Build Subcontractor shall, consistent with applicable state licensing laws, provide the architectural, engineering and other design professional services required to perform the Work. Design-Build Subcontractor agrees that such services shall be provided through qualified, licensed design professionals who are either (i) employed by Design-Build Subcontractor or (ii) procured by Design-Build Subcontractor from qualified, licensed Design Consultants.

**2.3.2** Design-Build Subcontractor shall not engage the services of any Design Consultant without first obtaining the approval of Design-Builder, which approval shall not be unreasonably withheld. Design-Build Subcontractor agrees that each Design Consultant shall be fully bound to Design-Build Subcontractor in the same manner as Design-Build Subcontractor is bound to Design-Builder for all the requirements of the Contract Documents which are applicable to the Design Consultant's scope of services. Design-Build Subcontractor shall at all times be responsible for the services performed by its Design Consultants, and shall coordinate the services of its Design Consultants to satisfy Design-Build Subcontractor's obligations under the Contract Documents. Nothing in this Agreement shall relieve Design-Build Subcontractor from responsibility for the services performed by its Design Consultants, or create any legal or contractual relationship between Design-Builder and any Design Consultant.

**2.3.3** The standard of care for all design professional services performed by Design-Build Subcontractor and its Design Consultants pursuant to this Agreement shall be the care and skill ordinarily used by members of the design profession practicing under similar conditions at the same time and locality of the Project.

**2.3.4** Design-Build Subcontractor shall assist Design-Builder regarding the selection of building systems, materials, and equipment, as well as cost, schedule, and construction feasibility assistance for the Work. Such assistance shall include providing advice relative to, among other things, labor availability, construction costs, procurement strategies (including scheduling the procurement of items with long-lead times) related to the requirements set forth in the Contract Documents for the Work.

**2.3.5** In accordance with the times set forth in the Project Schedule, Design-Build Subcontractor shall submit to Design-Builder all interim design submissions and revisions for the Work as required by the Contract Documents. Interim design submissions shall be consistent with the Basis of Design Documents as the Basis of Design Documents may have been modified in accordance with the Contract Documents. Such interim design submissions shall be in the form and quantity called for in the Contract Documents and may include design criteria, drawings, diagrams and specifications setting forth the Project requirements. The submissions shall also show the relationship of the Work to the overall Project design. Design-Builder and Design-Build Subcontractor agree that prior to the scheduled date for submitting all design submissions to Owner, Design-Builder, Design-Build Subcontractor and Design-Build Subcontractor's Design Consultant will hold meetings for the purpose of discussing and monitoring the design for consistency with the requirements of the Contract Documents.

**2.3.6** In accordance with the Contract Documents and within the times set forth in the Project Schedule, Design-Build Subcontractor shall submit to Design-Builder Construction Documents setting forth in detail drawings and specifications describing the requirements for construction of the Work and showing the relationship of the Work to the overall Project. The Construction Documents shall be consistent with the latest set of interim design submissions, as such submissions may have been modified in a design review meeting. Design-Build Subcontractor shall provide the Construction Documents in the form and quantity called for in the Contract Documents. Design-Build Subcontractor shall perform agreed upon revisions and submit revised Construction Documents to Design-Builder for Design-Builder's and Owner's approval.

**2.3.7** Design-Build Subcontractor shall attend and participate in such meetings as are held between and among Owner, Design-Builder and Design-Builder's Primary Design Consultant to discuss interim design submissions and the Construction Documents for the Work. Design-Build Subcontractor shall identify during each such meeting, among other things, the evolution of the design and any changes or deviations from the Contract Documents, including the Basis of Design Documents, or, if applicable, previously submitted design submissions. To the extent that Design-Build Subcontractor fails to identify such changes or fails to produce Construction Documents for the Work consistent with the Basis of Design Documents and identified and

approved changes and Design-Builder incurs additional uncompensated costs as a result, Design-Build Subcontractor shall be responsible for such costs. Minutes of the meetings, including a full listing of all changes, will be maintained by Design-Builder and provided to all attendees for review. Design-Build Subcontractor shall review such minutes and provide notice of any objections thereto within five days from the date the minutes are made available to Design-Build Subcontractor; and if no such written objection is provided to Design-Builder by Design-Build Subcontractor, the minutes shall be deemed to be accurate. The Construction Documents for the Work shall be consistent with the latest set of interim design submissions as such submissions may have been modified in a design review meeting and recorded in the meeting minutes.

**2.3.8** In addition to the interim design submissions and Construction Documents, if requested by Design-Builder, Design-Build Subcontractor shall prepare (i) those design documents and pricing information for the Work that may be necessary for budgetary purposes and (ii) interim design submissions and Construction Documents for the Work required to permit commencement of construction on a portion of the Project before the entire Construction Documents for the Project are completed.

**2.3.9** Design-Builder's and Owner's review and/or approval of interim design submissions and the Construction Documents are for the purpose of mutually establishing a conformed set of Construction Documents for the Work compatible with the requirements of the Contract Documents. The review and/or approval by either Design-Builder or Owner of any interim design submission or the Construction Documents shall not be deemed to transfer any design liability from Design-Build Subcontractor to Design-Builder or Owner.

**2.3.10** Design-Build Subcontractor will, at its own cost, revise any interim design submission or Construction Document it has provided to correct any errors, mistakes or omissions. Such revisions shall be performed timely and so as not to jeopardize the Project Schedule.

## **2.4 Construction Services Generally.**

**2.4.1** Design-Build Subcontractor shall perform all construction activities efficiently and with the requisite expertise, skill and competence to satisfy the requirements of the Contract Documents and the Project Schedule.

**2.4.2** At the request of Design-Builder, Design-Build Subcontractor shall attend meetings with Design-Builder, Owner, and/or separate design professionals or contractors of Design-Builder or Owner to discuss design and/or construction issues which may arise during the Project.

## **2.5 Submittals and Substitutions.**

**2.5.1** In accordance with the Contract Documents and the Project Schedule, Design-Build Subcontractor shall submit for Design-Builder's review and approval submittals, including shop drawings produced electronically to suit the requirements of Design-Builder which may include BIM technology utilizing software protocols which are acceptable to Design-Builder, product data and samples. Design-Builder shall advise Design-Build Subcontractor on or before the meeting required by Section 2.1.1 hereof of the submittal requirements for the Project. Any variances with the Construction Documents shall be specifically identified in Design-Build Subcontractor's submittals. Design-Builder's review and approval shall not relieve Design-Build Subcontractor of its responsibilities to perform the Work in accordance with the Construction Documents unless Design-Builder expressly approves in writing any such variance in its response to Design-Build Subcontractor's submittals. Design-Build Subcontractor shall make any necessary revisions to the submittals requested by Design-Builder.

**2.5.2** Design-Build Subcontractor shall not make any substitutions in the Work or procedures or methods specified by Owner, Design-Builder or the Construction Documents for performing the Work unless it first receives written approval for such substitution from Design-Builder.

## **2.6 Sub-Subcontractors.**

**2.6.1** Design-Build Subcontractor shall employ only Sub-Subcontractors who are reasonably satisfactory to Design-Builder and who are duly licensed and qualified to perform the Work

consistent with the Contract Documents. Design-Build Subcontractor agrees that each Sub-Subcontractor shall be fully bound to Design-Build Subcontractor in the same manner as Design-Build Subcontractor is bound to Design-Builder for all the requirements of the Contract Documents to the extent applicable to the Sub-Subcontractor's scope of work.

**2.6.2** Design-Build Subcontractor assumes responsibility to Design-Builder for the proper performance of the Work of Sub-Subcontractors and any acts and omissions in connection with such performance. Design-Build Subcontractor shall coordinate the activities of all Sub-Subcontractors. Nothing in this Agreement is intended or deemed to relieve Design-Build Subcontractor from responsibility for the work performed by its Sub-Subcontractors, or create any legal or contractual relationship between Owner or Design-Builder and any Sub-Subcontractor, including but not limited to any third-party beneficiary rights.

## **2.7 Work of Others.**

**2.7.1** Design-Build Subcontractor agrees to reasonably cooperate with, and coordinate its activities so as not to interfere with, those parties performing work at the Site, including Owner's and Design-Builder's separate contractors, so that the Project can be completed in an orderly and coordinated manner without unreasonable disruption.

**2.7.2** If any part of the Work depends upon other work performed by Design-Builder, or Design-Builder's or Owner's separate contractors, Design-Build Subcontractor shall, prior to proceeding with that part of the Work, inspect such other work and promptly notify Design-Builder of any discovered discrepancies or defects that would render it unacceptable for the proper performance of the Work. Design-Build Subcontractor shall not proceed with such part of the Work without further direction from Design-Builder. Design-Builder shall promptly correct or cause to be corrected any such discrepancy or defect in the other work. Except to the extent such discrepancies or defects in such other work are latent, Design-Build Subcontractor shall be liable for appropriate losses or damages incurred due to any discrepancies or defects in such other work not reported to Design-Builder by Design-Build Subcontractor.

## **2.8 Site Cleanup.**

**2.8.1** Design-Build Subcontractor shall at all times keep the Site reasonably free from debris, trash and construction wastes resulting from the performance of the Work. Upon Substantial Completion of the Work, or a portion of the Work, Design-Build Subcontractor shall remove all debris, trash, construction wastes, materials, equipment, machinery and tools arising from the Work or applicable portions thereof to permit Owner to occupy the Project or a portion of the Project for its intended use.

## **2.9 Inspection.**

**2.9.1** At all reasonable times, Design-Build Subcontractor shall provide sufficient facilities for inspection of the Work by Design-Builder at the Site and at all locations where portions of the Work are in progress or various stages of completion. When appropriate portions of the Work are ready for inspection, Design-Build Subcontractor shall notify Design-Builder.

## **2.10 Patents and Copyrights.**

**2.10.1** Design-Build Subcontractor shall pay all license fees and royalties due for items, materials, methods, systems or processes applicable to the Work which are subject to copyrights or patent rights and which are selected by Design-Build Subcontractor.

## **2.11 Legal Requirements.**

**2.11.1** Design-Build Subcontractor shall perform the Work in accordance with all applicable Legal Requirements.

**2.11.2** Only in the event Design-Builder receives compensation or a time extension from the Owner will the Contract Price and/or the times for completion of the Work be adjusted to compensate Design-Build Subcontractor for the effects, if any, of any changes in the Legal Requirements enacted after the date of the Agreement affecting the performance of the Work.



## **2.12 Government Approvals and Permits.**

**2.12.1** Design-Build Subcontractor shall obtain and pay for the necessary permits, approvals, licenses, government charges and inspection fees required for the prosecution of the Work.

**2.12.2** Design-Build Subcontractor shall provide reasonable assistance to Design-Builder in obtaining those permits, approvals and licenses, if any, that are the responsibility of Owner or Design-Builder and related to the Work.

**2.12.3** Design-Build Subcontractor shall make any revisions to the Construction Documents necessary to secure permits, approvals, and licenses, including those which have been denied for failure of the Construction Documents to meet Legal Requirements.

## **2.13 Project Safety.**

**2.13.1** Design-Build Subcontractor recognizes the importance of performing the Work in a safe manner so as to prevent damage, injury or loss to (i) all individuals at the Site, whether working or visiting, (ii) the Work, including materials and equipment incorporated into the Work or stored on-Site or off-Site, (iii) the work of others on the Project, and (iv) all other property at the Site or adjacent thereto. Design-Build Subcontractor assumes responsibility for implementing and monitoring all safety precautions and programs related to the performance of the Work.

**2.13.2** Design-Build Subcontractor and Sub-Subcontractors shall comply with all Legal Requirements relating to safety, as well as any Owner-specific and/or Design-Builder-specific safety requirements set forth in the Contract Documents or established for the Project, provided that such Owner-specific and/or Design-Builder-specific requirements do not violate any applicable Legal Requirement. Design-Build Subcontractor will immediately report in writing any safety-related injury, loss, damage or accident arising from the Work to Design-Builder's Representative and, to the extent mandated by Legal Requirements, to all government or quasi-government authorities having jurisdiction over safety-related matters involving the Project or the Work.

## **2.14 Warranty and Guarantee.**

**2.14.1** Design-Build Subcontractor warrants to Design-Builder that the construction, including all materials and equipment furnished as part of the construction, shall be new unless otherwise specified in the Contract Documents, of good quality, in conformance with the Contract Documents and free of defects in materials and workmanship. Design-Build Subcontractor's warranty obligation excludes defects caused by abuse, alterations, or failure to maintain the Work in a commercially reasonable manner. Nothing in this warranty is intended to limit any manufacturer's warranty which provides Owner and/or Design-Builder with greater warranty rights than set forth in this Section 2.14 or the Contract Documents. Design-Build Subcontractor will provide and, if requested, assign to Design-Builder all manufacturers' warranties upon Substantial Completion. In the event Design-Build Subcontractor is a corporation or limited liability company and upon Design-Build Subcontractor's execution of this Subcontract, all officers and directors of the corporation or all partners and principals of the limited liability company shall be deemed, jointly and severally, to be personally liable to Design-Builder for the full and faithful performance of this entire Subcontract and any modifications thereto in every case where Design-Build Subcontractor does not supply a corporate surety bond to Design-Builder to guarantee the faithful performance hereof.

## **2.15 Correction of Defective Work.**

**2.15.1** Design-Build Subcontractor agrees to correct any of the Work that is found not to be in conformance with the Contract Documents, including that part of the Work subject to Section 2.14 hereof, within a period of one year from the date of Substantial Completion of the entire Work, or within such longer period to the extent required by any specific warranty included in the Contract Documents.

**2.15.2** Design-Build Subcontractor shall, within seven (7) days of receipt of written notice from

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

If Design-Builder does perform such corrective Work, Design-Build Subcontractor shall be responsible for all reasonable costs incurred by Design-Builder in performing such correction. If the nonconforming Work creates an emergency requiring an immediate response, the seven (7) day period identified herein shall be deemed inapplicable.

**2.15.3** The one year period referenced in Section 2.15.1 above applies only to Design-Build Subcontractor's obligation to correct nonconforming Work and is not intended to constitute a period of limitations for any other rights or remedies Design-Builder may have regarding Design-Build Subcontractor's obligations under the Contract Documents, or damages suffered by Design-Builder due to Design-Build Subcontractor's failure to properly perform its Work.

## **2.16 Start-Up and Training.**

**2.16.1** If required as part of Design-Build Subcontractor's Work, Design-Build Subcontractor shall be responsible for the start-up, testing, and commissioning of the Work, and shall train Owner's personnel with respect to the operation and maintenance of the Work.

## **2.17 Hazardous Conditions.**

**2.17.1** Design-Build Subcontractor is responsible for Hazardous Conditions introduced to the Site by itself, Sub-Subcontractors or anyone for whose acts they may be liable. Design-Build Subcontractor shall indemnify, defend and hold harmless Owner, Design-Builder and their officers, directors, employees and agents from and against all claims, losses, damages, liabilities, and expenses, including attorneys' fees and expenses, arising out of or resulting from those Hazardous Conditions introduced to the Site by Design-Build Subcontractor, Sub-Subcontractors or anyone for whose acts they may be liable.

# **Article 3**

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

### **3.1 Timely Reviews and Approvals.**

**3.1.1** Design-Builder shall provide timely reviews and approvals of all interim design submissions, Construction Documents and submittals, consistent with the turnaround times set forth in the Project Schedule, or as agreed to by the parties at the meeting required under Section 2.1.1 hereof.

### **3.2 Design-Builder's Representative.**

**3.2.1** Design-Builder's Representative shall be responsible for providing Design-Builder-supplied information and approvals in a timely manner to permit Design-Build Subcontractor to fulfill its obligations under the Contract Documents.

### **3.3 Furnishing of Services and Information.**

**3.3.1** Unless expressly stated to the contrary in the Contract Documents, and to the extent Design-Builder has received such items from Owner, Design-Builder shall provide for

Design-Build Subcontractor's information the items listed below. Design-Builder does not warrant the accuracy or completeness of such items provided, however, that Design-Build Subcontractor is entitled to rely on these items to the same extent Design-Builder is entitled to rely upon such items in the Design-Build Agreement:

**3.3.1.1** Surveys describing the property, boundaries, topography and reference points for use during construction, including existing service and utility lines;

**3.3.1.2** Geotechnical studies describing subsurface conditions, and other surveys describing other latent or concealed physical conditions at the Site;

**3.3.1.3** Temporary and permanent easements, zoning and other requirements and encumbrances affecting land use, or necessary to permit the proper construction of the Project and enable Design-Build Subcontractor to perform the Work;

**3.3.1.4** A legal description of the Site;

**3.3.1.5** Record drawings of any existing structures at the Site;

**3.3.1.6** Environmental studies, reports and impact statements describing the environmental conditions, including Hazardous Conditions, in existence at the Site;

**3.3.1.7** Owner's Project Criteria;

**3.3.1.8** All permits, approvals, and licenses set forth in the Owner's Permit List attached as an exhibit to the Design-Build Agreement; and

**3.3.1.9** Test and inspection reports.

**3.3.2** Upon Design-Build Subcontractor's reasonable request, Design-Builder shall provide Design-Build Subcontractor with information in Design-Builder's possession regarding Owner's financial ability to pay for the Work set forth in this Agreement.

**3.3.3** Design-Builder shall make available to the Design-Build Subcontractor the Project Schedule and appropriate updates thereto.

**3.3.4** Design-Builder shall, upon request of Design-Build Subcontractor, provide Design-Build Subcontractor with interim design documents and Construction Documents for portions of the Project that are not being designed by Design-Build Subcontractor.

**3.3.5** Design-Builder shall obtain those permits, approvals and licenses that are not required to be provided by Owner pursuant to the Design-Build Agreement or by Design-Build Subcontractor pursuant to Section 2.12.1 hereof. Design-Builder shall provide reasonable assistance to Design-Build Subcontractor in obtaining those permits, approvals and licenses that are Design-Build Subcontractor's responsibility.

### **3.4 Notification of Errors.**

**3.4.1** Design-Builder shall notify Design-Build Subcontractor of any errors, inconsistencies, or omissions Design-Builder discovers in the Work. Notwithstanding anything to the contrary in this Agreement, nothing in this Agreement shall relieve Design-Build Subcontractor of responsibility for errors, inconsistencies, or omissions in the Work.

### **3.5 Attendance at Design Meetings.**

**3.5.1** Design-Builder shall afford Design-Build Subcontractor and its Sub-Subcontractors the opportunity to attend all necessary design meetings with Owner, Design-Builder's Primary Design Consultant or others furnishing portions of the design for the Project.

### **3.6 Review and Approval of Submittals.**

**3.6.1** Design-Builder shall review and return submittals, including shop drawings, product data and samples, submitted by Design-Build Subcontractor. Design-Builder's review of submittals shall be only for the purpose of confirming general conformance with the Construction Documents. Design-Builder's review shall not relieve Design-Build Subcontractor of its responsibilities to perform the Work in accordance with the Construction Documents unless Design-Builder expressly approves in writing any such variance in its response to Design-Build Subcontractor's submittals. If revisions are necessary to a submittal prior to Design-Builder's approval, Design-Builder shall inform Design-Build Subcontractor of any such necessary revisions.

### **3.7 Design-Builder's Separate Contractors.**

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

## **Article 4**

### **Ownership of Work Product**

#### **4.1 Work Product.**

**4.1.1** All drawings, specifications and other documents and electronic data furnished by Design-Build Subcontractor to Design-Builder under this Agreement ("Work Product") are deemed to be instruments of service and Design-Build Subcontractor shall retain ownership and property interests therein provided, however, that Design-Build Subcontractor hereby grants Design-Builder (for the purpose of allowing Design-Builder to grant to Owner), upon Design-Builder's payment to Design-Build Subcontractor of amounts properly due under this Agreement, a license to use the Work Product in connection with completing this Project. Notwithstanding the preceding sentence, if the Design-Build Agreement grants ownership and/or property rights to Owner that conflict with the above, then Design-Build Subcontractor hereby grants such rights to Design-Builder (for the purpose of allowing Design-Builder to grant to Owner) under the same terms and conditions that Design-Builder grants such rights to Owner.

#### **4.2 Agreement to Grant Rights to Owner.**

**4.2.1** Design-Build Subcontractor is fully aware of the ownership and property rights to use the Work Product which may be granted to Owner therein. Design-Build Subcontractor accepts and agrees to Owner's ownership and property rights with respect to the Work Product contained in the Design-Build Agreement.

#### **4.3 Indemnification for Use of Work Product.**

**4.3.1** If either Design-Builder or Design-Build Subcontractor uses the Work Product on any other project, such party agrees that it shall do so at its sole risk and without liability or legal exposure to the other party, Owner, or anyone working through them. Such party further agrees that it shall defend, indemnify and hold harmless the other party and Owner from and against any and all claims, damages, liabilities, losses and expenses, including attorneys' fees, arising out of or resulting from such use of the Work Product on another project.

#### **4.4 Use of Work Product On Termination or Default**

**4.4.1** If Design-Builder terminates this Agreement for its convenience as set forth in Section 8.2 hereof, or if Design-Build Subcontractor elects to terminate this Agreement in accordance with Section 8.5 of this Agreement, Design-Build Subcontractor, upon Design-Builder's payment in full of the amounts due Design-Build Subcontractor under the Contract Documents, grants Design-Builder and Owner the same rights as set forth in Section 4.1.1 above to use the Work Product to complete the Project and subsequently occupy the Project, conditioned on the following:

**4.4.1.1** Use of the Work Product is at Design-Builder's sole risk without liability or legal exposure to Design-Build Subcontractor or anyone working by or through Design-Build Subcontractor, and on Design-Builder's obligation to provide the indemnity set forth in Section 4.3 herein.

**4.4.2** If this Agreement is terminated due to Design-Build Subcontractor's default pursuant to Section 8.3 of this Agreement, then Design-Builder shall have the same rights as set forth in Section 4.1.1 above to use the Work Product to complete the Project and subsequently occupy the Project, and Design-Builder and Owner shall thereafter have the same rights and obligations as set forth in Section 4.1.1 above. Notwithstanding the preceding sentence, if it is ultimately determined that Design-Build Subcontractor was not in default, Design-Builder shall be deemed to have terminated the Agreement for convenience, and Design-Build Subcontractor shall be entitled to the rights and remedies set forth in Section 4.4.1 above.

## **Article 5**

### **Time of Performance**

#### **5.1 Date of Commencement.**

**5.1.1** The Work shall commence within ten (10) days from the date of this Agreement unless the parties mutually agree otherwise in writing.

#### **5.2 Time of Completion.**

**5.2.1** It shall be Design-Build Subcontractor's obligation to conform to Design-Builder's Project Schedule, which will be made available to Design-Build Subcontractor and will be subject to change from time to time to accommodate the reasonable needs of the Project. Design-Build Subcontractor shall, within ten days of its receipt of this Agreement, provide to Design-Builder proposed durations and sequencing of Design-Build Subcontractor's work. Design-Builder shall not be required to incorporate such proposed information into the Project Schedule if in the Design-Builder's judgment such durations and sequencing would be incompatible with the reasonable requirements for the overall Project Schedule. Design-Build Subcontractor shall also prepare and obtain approval as required by the Contract Documents for all shop drawings, details, samples, and do all other things necessary and incidental to the prosecution of his work in conformance with the said Project Schedule. Design-Build Subcontractor shall coordinate the work covered by this Agreement with that of all other contractors, subcontractors, and of the Design-Builder in a manner that will facilitate the efficient completion of the entire work. Design-Builder shall have complete control of the premises on which the work is to be performed and shall have the right to decide the time or order in which the various portions of the work shall be installed or the priority of the work of other subcontractors, and, in general, all matters representing the timely and orderly conduct of the work of Design-Build Subcontractor on the premises.

Should Design-Build Subcontractor be delayed or caused to lose productivity in the prosecution or completion of the work by the act, neglect or default of Owner, of Primary Design Consultant, or of Design-Builder, or should Design-Build Subcontractor be delayed or caused to lose productivity waiting for materials, if required by this Agreement to be furnished by Owner or Design-Builder, or by damage caused by fire or other casualty for which Design-Build Subcontractor is not responsible, or by the combined action of the workers, in no way caused by, or resulting from default or collusion on the part of Design-Build Subcontractor, or in the event of a lockout by Design-Builder, then the time herein fixed for the completion of the work shall be extended the number of days that Design-Build Subcontractor has thus been delayed or has lost productivity, but no allowance or extension shall be made unless a claim therefore is presented in writing to the Design-Builder within 48 hours of the commencement of such delay or productivity loss, and under no circumstances shall the time of completion be extended to a date which will prevent Design-Builder from completing the entire project within the time that Owner allows Design-Builder for such completion.

No claims for additional compensation or damages for delays or loss of productivity, whether caused in whole or in part by Design-Builder or by other subcontractors or Owner, will be

recoverable from Design-Builder, and said extension of time for the completion of Design-Build Subcontractor's work shall be the sole remedy of Design-Build Subcontractor; provided, however, that in the event, and in such event only, that Design-Builder obtains additional compensation from Owner on account of such delays or loss of productivity, Design-Build Subcontractor, shall be entitled to such portion of the additional compensation so received by Design-Builder from Owner as is equitable under all of the circumstances. Nothing herein contained shall require Design-Builder to make any claim against Owner for such delays or loss of productivity, and it is specifically agreed that the failure of Design-Builder to prosecute any such claim against Owner shall not entitle Design-Build Subcontractor to any claim for damages against Design-Builder.

### **5.3 Time is of the Essence.**

**5.3.1** Design-Builder and Design-Build Subcontractor mutually agree that time is of the essence with respect to the dates and times set forth in the Contract Documents and the Project Schedule.

### **5.4 Delays to the Work.**

**5.4.1** Notwithstanding any other provision to the contrary, any delay and resulting damages that arise out of, or relate to, problems caused by Owner or for which Owner is responsible shall be resolved pursuant to Section 13.3 hereof.

**5.4.2** If the Project is delayed due to the Design-Build Subcontractor or anyone for whom Design-Build Subcontractor is responsible, and not due to Design-Builder or Owner, Design-Build Subcontractor shall compensate and indemnify Design-Builder for all costs, damages, and expenses arising from such delay, including but not limited to any liquidated damages or other damages that Owner may assess against Design-Builder which are attributable to Design-Build Subcontractor or anyone for whom Design-Build Subcontractor is responsible. In addition, Design-Build Subcontractor shall, at the direction of Design-Builder and at Design-Build Subcontractor's own cost and expense, work such overtime and take such other measures as may be necessary to make up for all time lost in the completion of the Project due to such delay.

## **Article 6**

### **Contract Price**

#### **6.1 Contract Price.**

**6.1.1** Design-Builder shall pay Design-Build Subcontractor in accordance with Article 7 hereof the sum of Two Million Three Hundred Forty-Eight Thousand Six Hundred Twenty-Three Dollars (\$2,348,623.00) ("Contract Price"), subject to adjustments made in accordance with the Contract Documents. Unless otherwise provided in the Contract Documents, the Contract Price is deemed to include all sales, use, consumer and other taxes mandated by applicable Legal Requirements. Design-Builder is not responsible for Design-Build Subcontractor's bidding or estimating mistakes or miscalculation of market conditions or for the potential risks or rewards of future cost fluctuation.

#### **6.2 Markups for Changes.**

**6.2.1** In the event of modification to the scope of work to be performed by Design-Build Subcontractor, the "markup" rate on any Change Order Request shall be constrained to the terms Design-Builder is bound to in the Design Build Agreement with Owner or as specifically outlined in Attachment B of this Agreement.

## **Article 7**

### **Procedure for Payment**

#### **7.1 Schedule of Values.**

**7.1.1** Unless required by Design-Builder upon execution of this Agreement, within ten (10) days

of execution of the Agreement, Design-Build Subcontractor shall submit for Design-Builder's review and approval a schedule of values for all of the Work. The Schedule of Values will (i) subdivide the Work into its respective parts; (ii) include values for all items comprising the Work and (iii) upon approval of Design-Builder serve as the basis for monthly progress payments made to Design-Build Subcontractor throughout the Work. See also the requirements for payments via an electronic payment system as outlined in Attachment B.

## **7.2 Progress Payments.**

**7.2.1** Design-Build Subcontractor's shall submit monthly Applications for Payment requesting payment for all Work performed as of the date of the Application for Payment. The Application for Payment shall be accompanied by all supporting documentation required by the Contract Documents, including but not limited to statutory lien waivers and releases from Design-Build Subcontractor and its Design Consultants and Subcontractors of every tier.

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

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

**7.2.4** Design-Builder shall make payment on Design-Build Subcontractor's properly submitted and accurate Application for Payment within three (3) days after Design-Builder's receipt of payment from Owner on account of Design-Build Subcontractor's monthly Application for Payment, but in each case less the total of payments previously made, and less amounts properly withheld under this Agreement.

## **7.3 Retainage on Progress Payments.**

**7.3.1** Design-Builder will retain from each of Design-Build Subcontractor's Application for Payment five percent (5.00%). Unless mutually agreed otherwise between the parties, retainage will be included in Design-Builder's final payment to Design-Build Subcontractor, provided Design-Builder has received such retained amounts from Owner.

## **7.4 Withholding of Payments.**

**7.4.1** Design-Builder may withhold, or on account of subsequently discovered evidence, nullify the whole or a part of any payment due to such extent as may be necessary to protect Design-Builder from loss on account of (1) defective work not remedied; (2) claims filed or reasonable evidence indicating probable filing of claim; (3) failure of Design-Build Subcontractor to make payments promptly to his design consultants or subcontractors or for material, labor, or for fringe benefits; (4) a reasonable doubt that this Agreement can be completed for the balance then unpaid; (5) damage to another subcontractor. In the event Design-Builder elects to withhold funds on account of any of the referenced items above, Design-Builder may withhold one hundred fifty percent of the value of such item or items. When the above grounds are removed, such amounts as are then due and owing shall be paid or credited to Design-Build Subcontractor.

## **7.5 Final Payment.**

**7.5.1** Design-Build Subcontractor shall submit its Final Application for Payment to Design-Builder in accordance with Section 7.5.2 below. Design-Builder shall make payment on Design-Build Subcontractor's properly submitted and accurate Final Application for Payment within ten (10) days after Design-Builder's receipt of final payment from Owner on account of

Design-Build Subcontractor's Final Application for Payment, provided also that Design-Build Subcontractor has satisfied the requirements for final payment set forth in Section 7.5.2 below.

**7.5.2** At the time of submission of its Final Application for Payment, Design-Build Subcontractor shall provide the following information:

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

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

**7.5.2.3** Consent of Design-Build Subcontractor's surety, if any, to final payment;

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

**7.5.2.5** Certificates of insurance confirming that required coverages will remain in effect consistent with the requirements of the Contract Documents.

**7.5.3** Upon receiving final payment from Design-Builder, Design-Builder Subcontractor waives all claims against Design-Builder except those claims, if any, that are expressly identified in writing by Design-Build Subcontractor at the time it accepts final payment from Design-Builder.

## **7.6 Pay When Paid.**

**7.6.1** In the event of delayed payment or non-payment by Owner, Design-Build Subcontractor agrees that its claim for payment against Design-Builder (and the surety on any payment bond applicable to Design-Builder) shall be suspended and abated, on an interest-free basis, until such time as Design-Builder has had the opportunity to fully exhaust all of its legal remedies for payment against Owner, Owner's property and /or any construction lender to Owner. Nothing herein shall be deemed to deny or limit Design-Build Subcontractor's separate mechanic's lien or stop payment notice rights against the Project property or funds.

## **7.7 Interest.**

**7.7.1** Payments due and unpaid under this Agreement shall bear interest commencing five (5) days after payment is due at the rate of three percent (3%) per annum.

## **7.8 Advance Payments.**

**7.8.1** Design-Builder has the right, at its sole option, to advance any payment due Design-Build Subcontractor under this Agreement.

## **7.9 Payment Not Acceptance.**

**7.9.1** No payment to Design-Build Subcontractor under this Agreement shall be evidence of, or construed to be, acceptance of defective, faulty, improper or non-conforming work.

## **7.10 Design-Build Subcontractor's Payment Obligations.**

**7.10.1** Design-Build Subcontractor will pay its Design Consultants and Sub-Subcontractors, in accordance with its contractual obligations to such parties, all the amounts Design-Build Subcontractor has received from Design-Builder on account of their work. Design-Build Subcontractor will impose similar requirements on its Design Consultants and Sub-Subcontractors to pay those parties with whom they have contracted. Design-Build Subcontractor will indemnify and defend Owner and Design-Builder against any claims for payment and mechanic's liens as set forth in Section 11.3 hereof, providing Design-Builder is not in breach of its contractual obligations to make payment to Design-Build Subcontractor for its Work.



## **7.11 Record Keeping and Finance Controls.**

**7.11.1** With respect to changes in the Work performed on a cost basis by Design-Build Subcontractor pursuant to the Contract Documents, Design-Build Subcontractor shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management, using accounting and control systems in accordance with generally accepted accounting principles and as may be provided in the Contract Documents. During the performance of the Work and for a period of three (3) years after final payment of the Work, Design-Builder and Design-Builder's accountants shall be afforded access to and the right to audit from time-to-time, upon reasonable notice, Design-Build Subcontractor's records, books, correspondence, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to the changes in the Work performed on a cost basis in accordance with the Contract Documents, all of which Design-Build Subcontractor shall preserve for a period of three (3) years after final payment. Such inspection shall take place at Design-Build Subcontractor's offices during normal business hours unless another location and time is agreed to by the parties. Any multipliers or markups agreed to by the Design-Builder and Design-Build Subcontractor as part of this Agreement are only subject to audit to confirm that such multiplier or markup has been charged in accordance with this Agreement, with the composition of such multiplier or markup not being subject to audit.

## **Article 8**

### **Stop Work and Termination**

#### **8.1 Design-Builder's Right To Stop Work.**

**8.1.1** Design-Builder may, without cause and for its convenience, order Design-Build Subcontractor in writing to stop and suspend the Work. Such suspension shall not exceed sixty (60) consecutive days or aggregate more than ninety (90) days during the duration of the Project.

#### **8.2 Design-Builder's Right to Terminate for Convenience.**

**8.2.1** In the event the Design-Build Agreement is terminated prior to its completion, Design-Build Subcontractor shall be entitled only to payment for the work actually completed by it at the pro rata of the price herein set forth unless Design-Builder itself receives additional compensation or damages on account of such termination; in which event, Design-Build Subcontractor shall be entitled to such proportion of the additional compensation or damages actually received as is equitable under all of the circumstances. Nothing herein contained shall require Design-Builder to make any claim against Owner for such additional compensation or damages in the event of termination before completion, and it is specifically agreed that the failure of Design-Builder to prosecute any such claim against Owner shall not entitle Design-Build Subcontractor to any claim for additional compensation or damages against Design-Builder.

**8.2.2** Design-Builder reserves the absolute right to terminate this Agreement for its convenience. In the event of such termination for convenience, Design-Build Subcontractor shall be entitled to payment only as follows: An amount equal to the lesser of the Agreement value of the Work performed through the date of termination, or the actual direct costs for labor, materials, and equipment incurred by Design-Build Subcontractor for the Work completed plus a sum equal to ten percent (10%) of such costs for home office, overhead and profit, reduced by the amount of all payments made to Design-Build Subcontractor prior to such termination. Title to all materials included in the computation of such costs and of all purchase orders placed by Design-Build Subcontractor for labor and/or materials shall pass to Design-Builder upon payment to Design-Build Subcontractor.

**8.2.3** Upon receipt of notice of Design-Builder's termination for convenience, Design-Build Subcontractor shall, unless the notice directs otherwise, immediately discontinue the Work and placing of orders for materials, facilities and supplies in connection with the performance of this Agreement, and shall, if requested, make every reasonable effort to procure cancellation of all existing orders or contracts upon terms satisfactory to Design-Builder or, at the option of Design-Builder, give Design-Builder the right to assume those obligations directly, including all

benefits to be derived therefrom. Design-Build Subcontractor shall thereafter do only such Work as may be necessary to preserve and protect the Work already in progress and to protect material and equipment on the job site or in transit thereto. Should the Owner suspend the entire Work or any part which includes the Agreement Work for the convenience of the Owner and such suspension is not due to any act or omission of Design-Builder, or any other person or entity for whose acts or omissions Design-Builder may be liable, Design-Builder shall notify Design-Build Subcontractor in writing and, upon receiving notification, Design-Build Subcontractor shall immediately suspend the Agreement Work. To the extent provided for under the Design-Build Agreement and to the extent Design-Builder recovers such on Design-Build Subcontractor's behalf, the Agreement price and the Agreement time shall be equitably adjusted by Agreement Change Order for the cost and delay resulting from any such suspension.

### **8.3 Recourse by Design-Builder.**

**8.3.1** In the event that Design-Build Subcontractor defaults at any time by not meeting design or permitting milestones, refusing or neglecting to supply a sufficient number of properly skilled workmen or a sufficient quantity of materials of proper quality, or fails to correct deficient work, or is adjudicated bankrupt, or files an arrangement proceeding, or commits any act of insolvency, or makes an assignment for the benefit of creditors without Design-Builder's consent, or fails to make prompt payment to its designers, subcontractors, suppliers and/or laborers, or fails in any respect to properly and diligently prosecute the Work covered by this Agreement, or becomes delinquent with respect to contributions or payments required to be made to any Health and Welfare, Pension, Vacation, Apprenticeship or other employee benefit program or trust, or otherwise fails to perform fully any of the agreements herein contained, Design-Builder may, at his option, after giving written notice to Design-Build Subcontractor: supplement and/or correct Design-Build Subcontractor's Work efforts by providing or causing to be provided any design, engineering, labor, materials, equipment, subtrade, or any other type of work or payment as may be necessary to cure the default of Design-Build Subcontractor; and/or terminate Design-Build Subcontractor's right to proceed with a portion of or the remainder of Design-Build Subcontractor's Work in which event Design-Builder shall have the right to enter upon the premises of the project and take possession, for the purpose of completing the work included under this Agreement, of Design-Build Subcontractor's designs, calculations, drawings, electronic models, permits, materials, tools, and appliances, and may employ any other person(s) or firm(s) to finish Design-Build Subcontractor's Work and provide the materials therefore. In the case of termination of the remainder of Design-Build Subcontractor's work, Design-Build Subcontractor shall not be entitled to receive any further payment under this Agreement until the work undertaken by Design-Builder in its Design-Build Agreement is finished. In the case of such supplementation, correction or termination of Design-Build Subcontractor's Work, Design-Builder shall be entitled to recover all expenses and damages incurred for completing Design-Build Subcontractor's Work including, but not limited to, the cost of: design, engineering, labor, materials, equipment, subtrade work, general conditions, onsite supervision, insurance, bonds, and any payments made on behalf of Design-Build Subcontractor plus a markup of fifteen percent on all such expenses and damages, hereinafter referred to collectively as Completion Costs. Such Completion Costs shall be deducted from any payment then due or to become due to Design-Build Subcontractor. If the unpaid balance of the amount to be paid under this Agreement exceeds the Completion Costs incurred by Design-Builder the excess shall be paid by Design-Builder to Design-Build Subcontractor as it becomes due under the terms of this Agreement; but, if the Completion Costs exceed such unpaid balance, then Design-Build Subcontractor shall promptly pay to Design-Builder the amount by which the Completion Costs exceed such unpaid balance and Design-Builder shall have a lien upon all Design-Build Subcontractor's materials, tools and appliances taken possession of, as aforesaid, to secure the payment thereof. The notice referred to in this provision will be sufficient and complete when handed to a supervising employee employed by Design-Build Subcontractor or when sent to Design-Build Subcontractor at its address shown in this Agreement or sent via facsimile or e-mail to the then current facsimile number or e-mail address of the Design-Build Subcontractor.

### **8.4 Design-Build Subcontractor's Right To Stop Work**

**8.4.1** If (i) Owner fails to pay amounts due Design-Builder under the Design-Build Agreement for Work performed by Design-Build Subcontractor, and if such failure is not due to the fault of

Design-Build Subcontractor, and Design-Build Subcontractor has not been paid such amounts due, or (ii) Design-Builder fails to pay any amounts due Design-Build Subcontractor under this Agreement, Design-Build Subcontractor may, in addition to any other rights afforded under the Contract Documents or at law, stop work in accordance with Section 8.4.2.

**8.4.2** Design-Build Subcontractor shall provide Design-Builder with written notice that Design-Build Subcontractor will stop work unless said failure to pay the amount is cured within seven (7) days from Design-Builder's receipt of Design-Build Subcontractor's notice. If Design-Builder does not cure the problem within such seven (7) day period, Design-Build Subcontractor may stop work. In such case, Design-Build Subcontractor shall be entitled to make a claim for adjustment to the Contract Price and the times for completion of the Work to the extent it has been adversely impacted by such stoppage. To the extent Design-Builder's failure to pay is related to a dispute between the parties, the dispute will be resolved in accordance with Article 13 and the parties will continue performance in accordance with Section 13.6.

## **8.5 Design-Build Subcontractor's Right to Terminate For Cause.**

**8.5.1** Design-Build Subcontractor, in addition to any other rights and remedies afforded under the Contract Documents or at law, may terminate the Agreement for cause in accordance with Section 8.5.2 below if Design-Builder fails to cure the problems set forth in Section 8.4.1 above within thirty (30) days after Design-Build Subcontractor has stopped the work.

**8.5.2** Upon the occurrence of the event set forth in Section 8.5.1 above, and if Design-Build Subcontractor intends to terminate this agreement then Design-Build Subcontractor shall provide written notice to Design-Builder that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be cured, within seven (7) days of Design-Builder's receipt of such notice. If Design-Builder fails to cure, or reasonably commence to cure, such problem, then Design-Build Subcontractor shall give a second written notice to Design-Builder of its intent to terminate within an additional seven (7) day period. If Design-Builder, within such second seven (7) day period, fails to cure, or reasonably commence to cure, such problem, then Design-Build Subcontractor may declare the Agreement terminated for default by providing written notice to Design-Builder of such declaration. In such case, Design-Build Subcontractor shall be entitled to recover in the same manner as if Design-Builder had terminated this Agreement for its convenience under Section 8.2 of the Agreement.

## **8.6 Bankruptcy of Design-Builder or Design-Build Subcontractor.**

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

**8.6.1.1** The Bankrupt Party, its trustee or other successor, shall furnish, upon request of the non-Bankrupt Party, adequate assurance of the ability of the Bankrupt Party to perform all future material obligations under the Contract Documents, which assurances shall be provided within ten (10) days after receiving notice of the request; and

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

If the Bankrupt Party fails to comply with its foregoing obligations, the non-Bankrupt Party shall be entitled to request the bankruptcy court to reject the Agreement, declare the Agreement terminated and pursue any other recourse available to the non-Bankrupt Party under this Article 8.

**8.6.2** The rights and remedies under Section 8.6.1 above shall not be deemed to limit the ability of the non-Bankrupt Party to seek any other rights and remedies provided by the Contract Documents or by law, including its ability to seek relief from any automatic stays under the United States Bankruptcy Code.

## Article 9

### Representatives of the Parties

#### 9.1 Design-Builder's Representatives.

**9.1.1** Design-Builder designates the individual listed below as its Senior Representative ("Design-Builder's Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under Section 13.4 of the Agreement: *(Identify individual's name, title, address and telephone numbers)*

Rick Fochtman, Executive Vice President  
3633 East Inland Empire Blvd., Suite 800  
Ontario, CA 91764  
909.941.5225

**9.1.2** Design-Builder designates the individual listed below as its Design-Builder's Representative, which individual has the authority and responsibility set forth in Section 3.2 of the Agreement: *(Identify individual's name, title, address and telephone numbers)*

Laurie Schneider, Systems & Integration Manager  
3633 East Inland Empire Blvd., Suite 800  
Ontario, CA 91764  
909.941.5225

#### 9.2 Design-Build Subcontractor's Representatives.

**9.2.1** Design-Build Subcontractor designates the individual listed below as its Senior Representative ("Design-Build Subcontractor's Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under Section 13.4 of the Agreement: *(Identify individual's name, title, address and telephone numbers)*

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

Address: \_\_\_\_\_

Telephone No.: \_\_\_\_\_

**9.2.2** Design-Build Subcontractor designates the individual listed below as its Design-Build Subcontractor's Representative, which individual has the authority and responsibility set forth in Section 2.1.2 of the Agreement: *(Identify individual's name, title, address and telephone numbers)*

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

Address: \_\_\_\_\_

Telephone No.: \_\_\_\_\_

## Article 10

### Insurance and Bonds

## **10.1 Design-Build Subcontractor's Insurance Requirements.**

**10.1.1** Design-Build Subcontractor is responsible for procuring and maintaining, from insurance companies authorized to do business in the state in which the Project is located, the insurance coverages set forth Attachment D to this Agreement, with the minimum ratings set forth in said Attachment for certain claims which may arise from or out of the performance of this Agreement and obligations under the Contract Documents.

**10.1.2** Design-Build Subcontractor shall require its Design Consultants and Sub-Subcontractors to procure and maintain, from insurance companies authorized to do business in the state in which the Project is located, the insurance coverages set forth in Attachment D.

**10.1.3** Design-Build Subcontractor's and its Design Consultants and Sub-Subcontractors' insurance coverage set forth in Attachment D shall specifically delete any design-build or similar exclusions that could compromise coverages because of the design-build delivery of the Project.

**10.1.4** To the extent Design-Builder requires Design-Build Subcontractor or its Design Consultant to provide professional liability insurance for claims arising from the negligent performance of design services by Design-Build Subcontractor or the Design Consultant, the coverage limits, duration and other specifics of such insurance shall be as set forth in Attachment D. Such policies shall be provided prior to the commencement of any design services hereunder.

**10.1.5** Prior to commencing any services hereunder, Design-Build Subcontractor shall provide Design-Builder with certificates evidencing that (i) all insurance obligations required by the Contract Documents are in full force and in effect and will remain in effect for the duration required by the Contract Documents and (ii) no insurance coverage will be canceled, renewal refused, or materially changed unless at least thirty (30) days prior written notice is given to Design-Builder.

**10.1.6** Except as otherwise stated in Attachment D, the insurance policies required herein shall list Design-Builder, and any other entities required by the Contract Documents, if any, as an additional insured.

**10.1.7** If any of the foregoing insurance coverages are required to remain in force after final payment, an additional certificate evidencing continuation of such coverage shall be submitted with the final Application for Payment.

## **10.2 Property Insurance.**

**10.2.1** In accordance with the Design-Build Agreement, Owner or Design-Builder may procure and maintain property insurance upon the entire Project.

## **10.3 Waiver of Subrogation.**

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

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

**10.4.1** Design-Build Subcontractor shall, upon execution of this Agreement or at any time during its performance of the Work if requested by Design-Builder, provide a 100% performance bond and a labor and material payment bond or other performance security acceptable to Design-Builder.

# **Article 11**

## **Indemnification**

### **11.1 Patent and Copyright Infringement.**

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

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

**11.1.3** Sections 11.1.1 and 11.1.2 above shall not be applicable to any suit, claim or proceeding based on infringement or violation of a patent or copyright (i) relating to a particular process or product of a particular manufacturer specified by Owner or Design-Builder or (ii) arising from modifications to the Work by Owner or Design-Builder after acceptance of the Work. If the suit, claim or proceeding is based upon events set forth in the preceding sentence, Design-Builder shall defend, indemnify and hold harmless Design-Build Subcontractor to the same extent Design-Build Subcontractor is obligated to defend, indemnify and hold harmless Design-Builder in Section 11.1.1 above.

**11.1.4** The obligations set forth in this Section 11.1 shall constitute the sole agreement between the parties relating to liability for infringement or violation of any patent or copyright.

### **11.2 Tax Claim Indemnification.**

**11.2.1** If, in accordance with Design-Builder's direction, an exemption for all or part of the Work is claimed for taxes, Design-Builder shall indemnify, defend and hold harmless Design-Build Subcontractor from and against any liability, penalty, interest, fine, tax assessment, attorneys' fees or other expenses or costs incurred by Design-Build Subcontractor as a result of any action taken by Design-Build Subcontractor in accordance with Design-Builder's directive.

### **11.3 Payment Claim Indemnification.**

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

Subcontractor liable for costs and expenses incurred, including attorneys' fees.

#### **11.4 Design-Build Subcontractor's General Indemnification.**

**11.4.1** Design-Build Subcontractor, to the fullest extent permitted by law, shall indemnify, hold harmless and defend Owner, Design-Builder, their officers, directors, employees and agents ("Indemnitees") from and against claims, losses, damages, or liabilities of any kind whatsoever, including attorneys' fees and expenses, for bodily injury, sickness or death, economic loss, and property damage or destruction (other than to the Work itself) to the extent resulting from the negligent or wrongful acts or omissions of Design-Build Subcontractor, its Design Consultants, its Sub-Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable. In no event shall Design-Build's indemnity obligations extend to the active negligence, sole negligence or wrongful misconduct of any Indemnitee. The indemnity rights and obligations identified in this Article 11.4.1 and elsewhere in this Agreement shall be, and are, the only indemnity rights and obligations between Design-Builder and Design-Build Subcontractor, in law or equity, arising out of or related to the Project that is the subject of this Agreement or any claims asserted in relation thereto.

**11.4.2** If an employee of Design-Build Subcontractor, Design Consultant, anyone employed directly or indirectly by Design-Build Subcontractor or anyone for whose acts any of them may be liable has a claim against any party indemnified pursuant to Section 11.4.1 above, Design-Build Subcontractor's indemnity obligation set forth in Section 11.4.1 above shall not be limited by any limitation on the amount of damages, compensation or benefits payable by or for Design-Build Subcontractor, its Design Consultants, its Sub-Subcontractors, or other entity under any employee benefit acts, including workers' compensation or disability acts.

## **Article 12**

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

#### **12.1 Owner-Generated Changes.**

**12.1.1** If Owner issues changes affecting the Work, Design-Build Subcontractor agrees, if directed by Design-Builder, to meet with Design-Builder and Owner to review and discuss the changes. Design-Build Subcontractor shall only be entitled to adjustments in its Contract Price and the times for completion of the Work attributable to such Owner-generated changes to the extent Design-Builder actually receives such adjustments from Owner. If Design-Build Subcontractor disputes the adjustment, such dispute shall be resolved pursuant to Section 13.3 of this Agreement.

#### **12.2 Design-Builder Generated Changes.**

**12.2.1** Changes to the Work issued by Design-Builder shall be governed by the provisions set forth in the following sections of this Article 12.

#### **12.3 Change Orders.**

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

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

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

**12.3.1.3** The extent of the adjustment to the times for completion of the Work.

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

## **12.4 Work Change Directives.**

**12.4.1** A Work Change Directive is a written order prepared and signed by Design-Builder directing a change in the Work prior to agreement on an adjustment in the Contract Price and/or the times for completion of the Work.

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

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

**12.5.1** Minor changes in the Work are changes that do not involve an adjustment in the Contract Price and/or times for completion of the Work and do not materially and adversely affect the Work, including the design, quality, performance and workmanship required by the Contract Documents. Design-Builder may make minor changes in the Work consistent with the intent of the Contract Documents, provided, however, that Design-Builder shall promptly inform Design-Build Subcontractor, in writing, of any such changes.

## **12.6 Contract Price Adjustment.**

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

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

**12.6.1.2** A mutually accepted, lump sum, properly itemized and supported by sufficient substantiating data to permit evaluation by Design-Builder;

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

**12.6.1.4** If an increase or decrease cannot be agreed to as set forth in items 12.6.1.1 through 12.6.1.3 above and Design-Builder issues a Work Change Directive, the cost of the change of the Work shall be determined by the reasonable expense and savings in the performance of the Work resulting from the change, including a reasonable overhead and profit, as may be set forth in this Agreement. If the net result of both additions and deletions to the Work is an increase in the Contract Price, reasonable overhead and profit shall be calculated on the basis of the net increase to the Contract Price. Design-Build Subcontractor shall maintain a documented, itemized accounting evidencing the expenses and savings associated with such changes.

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

**12.6.3** If Design-Builder and Design-Build Subcontractor disagree upon whether Design-Build Subcontractor is entitled to be paid for any services required by Design-Builder, or if there are any other disagreements over the scope of Work or proposed changes to the Work, Design-Builder and Design-Build Subcontractor shall resolve the disagreement pursuant to Article 13 hereof. As part of the negotiation process, Design-Build Subcontractor shall furnish Design-Builder with a good faith estimate of the costs to perform the disputed services in accordance with Design-Builder's interpretations. If the parties are unable to agree and Design-Builder expects Design-Build Subcontractor to perform the services in accordance with Design-Builder's interpretations, Design-Build Subcontractor shall proceed to perform the disputed services, conditioned upon Design-Builder issuing a written order to Design-Build Subcontractor (i) directing Design-Build Subcontractor to proceed and (ii) specifying Design-Builder's interpretation of the services that are to be performed.



## **12.7 Emergencies.**

**12.7.1** In any emergency affecting the safety of persons and/or property, Design-Build Subcontractor shall act, at its discretion, to prevent threatened damage, injury or loss. Any change in the Contract Price and/or times for completion of the Work on account of emergency work shall be determined as provided in this Article 12.

# **Article 13**

## **Contract Adjustments and Disputes**

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

**13.1.1** If either Design-Build Subcontractor or Design-Builder believes that it is entitled to relief against the other for any event arising out of or related to the Work or the Project, such party shall provide written notice to the other party of the basis for its claim for relief. Such notice shall be in accordance with specific notice requirements contained in applicable sections of the Contract Documents and, if possible, be made prior to incurring any cost or expense. Design-Build Subcontractor shall provide Design-Builder written notice of claims for which Owner may be responsible in sufficient time for Design-Builder to meet its notice requirements to Owner set forth in the Contract Documents. In the absence of any specific notice requirement, written notice shall be given within a reasonable time, not to exceed ten (10) days, after the occurrence giving rise to the claim for relief or after the claiming party reasonably should have recognized the event or condition giving rise to the request, whichever is later. Such notice shall be in accordance with the Contract Documents and shall include sufficient information to advise the other party of the circumstances giving rise to the claim for relief, the specific contractual adjustment or relief requested and the basis of such request. Design-Build Subcontractor shall comply with all documentation requirements set forth in the Design-Build Agreement when submitting its claim to Design-Builder.

### **13.2 Dispute Avoidance and Resolution.**

**13.2.1** The parties are fully committed to working with each other throughout the Project and agree to communicate regularly with each other at all times so as to avoid or minimize disputes or disagreements. If disputes or disagreements do arise, Design-Build Subcontractor and Design-Builder each commit to resolving such disputes or disagreements in an amicable, professional and expeditious manner so as to avoid unnecessary losses, delays and disruptions to the Work.

### **13.3 Disputes Involving Owner.**

**13.3.1** To the extent a claim, dispute or controversy arises out of, or relates to, problems caused by Owner or for which Owner is responsible ("Owner Disputes"), such Owner Disputes shall be resolved pursuant to the dispute resolution clause set forth in the Design-Build Agreement. Both Design-Builder and Design-Build Subcontractor agree to cooperate in the presentation and prosecution or defense of Owner Disputes. If, after a request for an extension of time or additional compensation from Design-Build Subcontractor, Design-Builder believes that the event causing the delay or additional compensation is the responsibility of Owner, then Design-Builder will cooperate with and assist Design-Build Subcontractor in presenting a request for an extension of time or additional compensation to Owner. Notwithstanding the above, Design-Builder reserves the right not to submit a claim to the Owner. In such cases, the claim shall be resolved pursuant to Section 13.4.

**13.3.2** Notwithstanding any other provisions herein to the contrary, Design-Builder and Design-Build Subcontractor each agree to accept the relief as to a time extension or additional compensation obtained from Owner, if any, as well as all other aspects of the final decision following appeal or the expiration of the time for appeal, as full and final resolution of any Owner Dispute.

**13.3.3** If Design-Builder asserts a claim against Owner involving Design-Build Subcontractor, each party shall bear its own costs for outside counsel and third-party consultants retained to prosecute claims against Owner and for any other litigation costs.

**13.3.4** If Owner contends that the Contract Documents have been breached, or otherwise asserts a claim or set-off against Design-Builder, the party determined to be responsible for the breach either by settlement or by the trier of fact shall be responsible for all costs occasioned by the breach, including counsel and litigation costs. If the trier of fact fails to determine the relative degrees of fault of Design-Builder and Design-Build Subcontractor in connection with any claim by Owner, then Design-Builder and Design-Build Subcontractor agree that the allocation of fault shall be determined pursuant to Section 13.4.

#### **13.4 Disputes Not Involving Owner.**

**13.4.1** For any claim, dispute or controversy not arising out of, or relating to, problems caused by Owner or for which Owner is responsible, Design-Build Subcontractor and Design-Builder will first attempt to resolve such claim, dispute or controversy at the field level through discussions between Design-Builder's Representative and Design-Build Subcontractor's Representative.

**13.4.2** If a claim, dispute or controversy cannot be resolved through Section 13.4.1, Design-Builder's Senior Representative and Design-Build Subcontractor's Senior Representative, upon the request of either party, shall meet as soon as conveniently possible, but in no case later than thirty (30) days after such a request is made, to attempt to resolve such claim, dispute or controversy. Five (5) days prior to any meetings between the Senior Representatives, the parties will exchange relevant information that will assist the parties in resolving the claim, dispute or controversy.

**13.4.3** If after meeting the Senior Representatives determine that the claim, dispute or controversy cannot be resolved on terms satisfactory to both parties, the parties shall submit within thirty (30) days of the conclusion of the meeting by the Senior Representatives the claim, dispute or controversy to non-binding mediation. The mediation shall be conducted by a mutually agreeable impartial mediator, or if the parties cannot so agree, a mediator designated by the American Arbitration Association ("AAA") pursuant to its Construction Industry Mediation Rules. The mediation will be governed by and conducted pursuant to a mediation agreement negotiated by the parties or, if the parties cannot so agree, by procedures established by the mediator. Unless otherwise mutually agreed by Design-Builder and Design-Build Subcontractor and consistent with the mediator's schedule, the mediation shall commence within ninety (90) days of the submission of the dispute for mediation. Persons with authority to resolve the dispute shall be present at the mediation.

#### **13.5 Arbitration.**

**13.5.1** Any claims, disputes or controversies between the parties arising out of or relating to the Agreement, or the breach thereof, which have not been resolved in accordance with the procedures set forth in Section 13.4 above, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules with an arbitrator or arbitrators who are mutually agreeable to both parties and who are experienced construction lawyers with previous arbitrator experience. In addition, the arbitration shall be governed by the Federal Arbitration Act, rather than state arbitration statutes and laws. In any arbitration or action between Design-Builder and Design-Build Subcontractor arising out of or in any way related to this Agreement, and notwithstanding any contrary or different language or provision in the Design-Build Agreement, Design-Builder and Design-Build Subcontractor shall bear their own attorney fees and costs in connection with any such arbitration or action.

**13.5.2** The award of the arbitrator(s) shall be final and binding upon the parties without the right of appeal to the courts. Judgment may be entered upon it in accordance with applicable law by any court having jurisdiction thereof.

**13.5.3** Design-Build Subcontractor and Design-Builder expressly agree that any arbitration pursuant to this Section 13.5 may be joined or consolidated with any arbitration involving any other person or entity (i) necessary to resolve the claim, dispute or controversy, or (ii) substantially involved in or affected by such claim, dispute or controversy. Both Design-Builder and Design-Build Subcontractor will include appropriate provisions in all contracts they execute with other parties in connection with the Project to require such joinder or consolidation.

### **13.6 Duty to Continue Performance.**

**13.6.1** In the event of a dispute between Design-Builder and Design-Build Subcontractor over the scope of Design-Build Subcontractor's Work under this Agreement, or any other dispute regarding the parties' rights and obligations under this Agreement, Design-Build Subcontractor shall follow the written direction of Design-Builder and shall not delay, postpone or otherwise hinder the progress of the Work. Design-Build Subcontractor shall give written notice of claim relating to any work for which extra compensation is claimed within 7 days (or within a lesser time period if required elsewhere in the Contract Documents) after Design-Build Subcontractor becomes aware of its claim, or Design-Build Subcontractor shall be deemed to have abandoned any claim therefore. In the event of such a dispute, it is understood that Design-Build Subcontractor reserves all of its contractual rights as it proceeds under protest pursuant to Design-Builder's written direction.

### **13.7 CONSEQUENTIAL DAMAGES.**

**13.7.1** NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY (EXCEPT AS SET FORTH IN SECTION 13.7.2 BELOW), NEITHER DESIGN-BUILDER NOR DESIGN-BUILD SUBCONTRACTOR SHALL BE LIABLE TO THE OTHER FOR ANY CONSEQUENTIAL LOSSES OR DAMAGES, WHETHER ARISING IN CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, INCLUDING BUT NOT LIMITED TO LOSSES OF USE, PROFITS, BUSINESS, REPUTATION OR FINANCING.

**13.7.2** Notwithstanding Section 13.7.1 above, Design-Builder shall be entitled to recover against Design-Build Subcontractor (i) any liquidated damages or offset that Owner may assess or offset against Design-Builder which are attributable to Design-Build Subcontractor, even though both parties recognize that such liquidated damages or offset may include some damages that might otherwise be deemed to be consequential and (ii) any liability of Design-Build Subcontractor for consequential damages that may be imposed upon the Design-Builder by the Design-Build Agreement.

## **Article 14**

### **Miscellaneous**

#### **14.1 Assignment.**

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

#### **14.2 Successorship.**

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

#### **14.3 Governing Law.**

**14.3.1** The Agreement and all Contract Documents shall be governed by the laws of the place of the Project, without giving effect to its conflict of law principles. Both Design-Builder and Design-Build Subcontractor shall be deemed to have participated in the preparation and drafting of this Agreement and, therefore, in the event any term of this Agreement is determined to be vague or ambiguous such term shall not be construed against either party to this Agreement.

#### **14.4 Severability.**

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

#### **14.5 No Waiver.**

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

#### **14.6 Headings.**

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

#### **14.7 Notice.**

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

#### **14.8 Amendments.**

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

#### **14.9 Survival.**

**14.9.1** Design-Build Subcontractor's obligations under this Agreement shall not be released and shall specifically survive the completion of all services hereunder by Design-Build Subcontractor, final payment to Design-Build Subcontractor, and the termination of this Agreement for any reason.

### **Article 15**

#### **Electronic Data**

##### **15.1 Electronic Data.**

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

##### **15.2 Transmission of Electronic Data.**

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

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

**15.2.3** By transmitting Work Product in electronic form, the transmitting party does not transfer or assign its rights in the Work Product. The rights in the Electronic Data shall be as set forth in Article 4 of the Agreement. Under no circumstances shall the transfer of ownership of Electronic

Data be deemed to be a sale by the transmitting party of tangible goods.

### **15.3 Electronic Data Protocol.**

**15.3.1** The parties acknowledge that Electronic Data may be altered or corrupted, intentionally or otherwise, due to occurrences beyond their reasonable control or knowledge, including but not limited to compatibility issues with user software, manipulation by the recipient, errors in transcription or transmission, machine error, environmental factors, and operator error. Consequently, the parties understand that there is some level of increased risk in the use of Electronic Data for the communication of design and construction information and, in consideration of this, agree, and shall require their independent contractors, Subcontractors and Design Consultants to agree, to the following protocols, terms and conditions set forth in this Section 15.3.

**15.3.2** Electronic Data will be transmitted in the format determined in Section 15.2.1 above, including file conventions and document properties, unless prior arrangements are made in advance in writing.

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

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

**15.4** In the event the Design-Build Agreement contains a provision governing Electronic Data, and there is a conflict between the provision in the Design-Build Agreement and this Article 15, the provision in the Design-Build Agreement takes precedence notwithstanding the order of precedence set forth in Section 1.4.2.

## **Article 16**

### **Confidential Information**

#### **16.1 Confidential and/or Proprietary Information.**

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

**16.1.2** Design-Build Subcontractor may receive information from Design-Builder that is either confidential or proprietary to either Design-Builder or to Owner. Such information shall be labeled as confidential and/or proprietary. Design-Build Subcontractor agrees to maintain the confidential nature of such information and to execute any such additional agreements as may be required by Owner or Design-Builder with respect to such information.

**16.1.3** In the event the Design-Build Agreement contains a provision governing Confidential Information, and there is a conflict between the provision in the Design-Build Agreement and this Article 16, the provision in the Design-Build Agreement takes precedence notwithstanding the order of precedence set forth in Section 1.4.2.

## Article 17

### Other Provisions

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

- Attachment A
- Attachment B
- Attachment C
- Attachment D

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

**DESIGN-BUILDER:**

\_\_\_\_\_  
*(Name of Design-Builder)*

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

Rick Fochtman  
\_\_\_\_\_  
Printed Name

Executive Vice President  
\_\_\_\_\_  
Title

**SUBCONTRACTOR:**

Acme Construction  
\_\_\_\_\_  
*(Name of Subcontractor)*

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

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Title