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**PROGRESSIVE DESIGN-BUILD AGREEMENT  
FOR  
PUEBLO DAM HYDROELECTRIC PROJECT**

*DRAFT*

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PUEBLO DAM HYDROELECTRIC PROJECT**

This **AGREEMENT** is made effective as of \_\_\_\_\_, 2015, by and between the following parties, for services in connection with the Project identified below:

**OWNER:**

*(Name and address)*

**DESIGN-BUILDER:**

*(Name and address)*

**PROJECT:**

*Pueblo Dam Hydroelectric Project, Pueblo, Colorado*

In consideration of the mutual covenants and obligations contained herein, Owner and Design-Builder now agree as follows:

**Article 1.0      Scope of Work**

**1.1      Phased Delivery.** Owner and Design-Builder will implement the Project on a phased basis.

**1.2      Phase 1 Services.** Owner has selected Design-Builder on the basis of Design-Builder's proposal for the performance of design, pricing, and other services for the Project during Phase 1. Design-Builder shall perform such services to the level of completion required for Design-Builder and Owner to establish the Contract Price for Phase 2, as set forth in Section 1.3 below. The Contract Price for Phase 2 shall be developed during Phase 1 on an "open-book" basis. Design-Builder's Compensation for Phase 1 Services is set forth in Section 1, *Phase 1*, of Attachment B, *Compensation*. The level of completion required for Phase 1 Services is defined in Attachment A, *Scope of Work* (either as a percentage of design completion or by defined deliverables).

**1.3      Phase 2 Services.** Design-Builder's Phase 2 services shall consist of the completion of design services for the Project, the procurement of all materials and equipment for the Project, the performance of construction services for the Project, the start-up, testing, and commissioning of the Facility, and the provision of warranty services, all as further described in Attachment A, *Scope of Work*. Upon receipt of Design-Builder's proposed Contract Price for Phase 2, Owner may (a) accept the Contract Price and issue a Notice to Proceed with Phase 2 services, or (b) enter into a negotiation with Design-Builder on the scope and Contract Price, and, if required, on the schedule, for Phase 2 services to achieve a mutually acceptable basis on which to proceed, or (c) reject Design-Builder's proposal for Phase 2 and either (i) cancel the Project, (ii) proceed with another Design-Builder, or (iii) exercise the "off-ramp" final design provisions of Section 1.4, *Off-Ramp*. The Contract Price for Phase 2 Services will be set forth in Section 2, *Phase 2*, of Attachment B, *Compensation*, when mutually agreed between the parties. Once the parties have agreed upon the Contract Price and Owner has issued a Notice to Proceed with Phase 2, Design-Builder shall perform the Phase 2 services, all as further described in Attachment A, *Scope of Work*, as it may be revised.

## **1.4 Off-Ramp**

- 1.4.1** The parties acknowledge that Owner's ability to successfully complete the Project may be significantly impacted if Owner elects to terminate Design-Builder's services at the end of Phase 1, rather than proceeding to Phase 2 under Section 1.3 ("Phase 2 Services") and certain design subconsultants are not available to continue working on the Project. Consequently, Design-Builder hereby agrees that if Owner terminates Design-Builder for any reason, Owner shall have the right to contract directly with such design subconsultants for design-related services on this Project, and Design-Builder shall take such steps as are reasonably necessary to enable Owner to implement such relationship. Design-Builder shall provide in any design subconsultancy agreements that Owner shall have the right to negotiate directly with such design subconsultants for the continuation of their services with respect to the Project, and that any provisions with respect to copyright or the ownership of instruments of service confirm such right of Owner.
- 1.4.2** If the parties are unable to reach an agreement on Design-Builder's proposed Contract Price for Phase 2 under Section 1.3 within the time limit for acceptance specified in the Proposal, as may be extended by the mutual agreement of the parties, then the proposed Contract Price shall be deemed withdrawn and of no effect. In such event, Owner and Design-Builder shall meet and confer as to how the Project will proceed, with Owner having the following options:
- .1** Owner may declare Phase 1 Services completed and authorize Design-Builder to continue to advance the final design of the Project as an extension of Phase 1 or as an Additional Service, as applicable; or
  - .2** Owner may terminate the relationship with Design-Builder and proceed to exercise its available options to perform the final design and construction with parties other than Design-Builder.
- 1.4.3** If Owner fails to exercise either of its options under Section 1.4.2 in a reasonable period of time, Design-Builder may give written notice to Owner that it considers this Agreement completed. If Owner fails to exercise either of the options under Section 1.4.2 within ten (10) days of receipt of Design-Builder's notice, then this Agreement shall be deemed completed.
- 1.4.4** If Owner terminates the relationship with Design-Builder under Section 1.4.2.2, or if this Agreement is deemed completed under Section 1.4.3, then Design-Builder shall have no further liability or obligations to Owner under this Agreement
- 1.5 Completion.** Once Design-Builder has received a Notice to Proceed with Phase 2, Design-Builder shall perform all design and construction services, and provide all material, equipment, tools, labor, manuals, start-up, commissioning and testing services for the Project necessary to complete the Work described in and reasonably inferable from the Contract Documents, including Section 2 of Attachment A (Scope of Work). A requirement of Substantial Completion of the Work is that Design-Builder shall conduct performance tests to demonstrate that the Facility Performance Criteria have been met.

## **Article 2.0 Contract Documents**

- 2.1 Contract Documents.** The Contract Documents are comprised of the following:
- .1** All written modifications, amendments and change orders to this Agreement issued in accordance with Attachment D, *General Conditions*;
  - .2** Written Supplementary Conditions, if any, to the General Conditions;
  - .3** The General Conditions set forth as Attachment D to this Agreement;
  - .4** This Agreement, including all exhibits and attachments;
  - .5** Construction Documents prepared and reviewed in accordance with GC 2.4;

- .6 The following other documents, if any, attached hereto: (*List, for example, Unit Price Schedules, Design-Builder's allowances, Design-Builder's rates for design services, and any other document Owner and Design-Builder elect to make a Contract Document*)

### **Article 3.0 Interpretation and Intent**

- 3.1 Contract Documents.** The Contract Documents are intended to permit the parties to complete the Work and all obligations required by the Contract Documents within the Contract Time(s) for the Phase 1 Compensation and the agreed Contract Price for Phase 2 Services. The Contract Documents are intended to be complementary and interpreted in harmony so as to avoid conflict, with words and phrases interpreted in a manner consistent with construction and design industry standards. In the event of any inconsistency, conflict, or ambiguity between or among the Contract Documents, the Contract Documents shall take precedence in the order in which they are listed in Section 2.1 hereof, except that with respect to the attachments to this Agreement, Attachment F shall take precedence over the other attachments.
- 3.2 Meanings.** Terms, words and phrases used in the Contract Documents, including this Agreement, shall have the meanings given them in GC 1.2.
- 3.3 Entire Agreement.** The Contract Documents form the entire agreement between Owner and Design-Builder and by incorporation herein are as fully binding on the parties as if repeated herein in their entirety. No oral representations or other agreements have been made by the parties except as specifically stated in the Contract Documents.

### **Article 4.0 Ownership of Work Product**

- 4.1 Work Product.** All drawings, specifications and other documents and electronic data furnished by Design-Builder to Owner under this Agreement (“Work Product”) are deemed to be instruments of service and Design-Builder shall retain the ownership and property interests therein, including the copyrights thereto.
- 4.2 Owner's Limited License upon Payment in Full.** Upon Owner's payment in full for the Work performed in each Phase under the Contract Documents, Design-Builder shall be deemed to have granted Owner a limited license to use the Work Product solely in connection with Owner's ownership, use, and occupancy of the Project. Design-Builder shall include such grant of license to use of Work Product in all design subconsultant agreements. Owner shall not use the Work Product on any other project or facility without Design-Builder's express written consent.
- 4.3 Owner's Limited License upon Owner's Termination for Convenience or Design-Builder's Election to Terminate.** If Owner terminates the Project for its convenience as set forth in Article 8.0 (“Termination for Convenience”), or if Design-Builder elects to terminate this Agreement in accordance with GC 9.5 (“Design-Builder's Right to Terminate for Cause”), Design-Builder shall, upon Owner's payment in full of the amounts due Design-Builder under the Contract Documents, be deemed to have granted Owner a limited license to use the Work Product to complete the Project and subsequently use and occupy the Project, conditioned on the following:
- .1 Use of the Work Product is at Owner's sole risk without liability or legal exposure to Design-Builder or anyone working for or through Design-Builder, including Design Consultants of any tier (collectively the “Indemnified Parties”).
  - .2 If Owner elects the “off ramp” option provided in Section 1.4 of this Agreement and retains any of the Design-Builder's design subconsultants, then the risk, liability and legal exposure with respect to Work Product shall be as set forth in the agreement or agreements between Owner and such design subconsultant or subconsultants.
- 4.4 Owner's Limited License upon Design-Builder's Default.** If this Agreement is terminated due to Design-Builder's default pursuant to GC 9.3 (“Owner's Right to Perform and Terminate for

Cause”) and (i) it is determined that Design-Builder was in default, and (ii) Owner has fully satisfied all of its obligations under the Contract Documents, then Design-Builder shall grant Owner a limited license to use the Work Product in connection with Owner’s completion, use and occupancy of the Project. This limited license is conditioned on Owner’s express understanding that its use of the Work Product is at Owner’s sole risk and without liability or legal exposure to any Indemnified Party.

**4.5 Owner’s Indemnification for Use of Work Product.** Owner recognizes that in the event of an early termination of the Work, whether for convenience or for cause, Design-Builder will not have the opportunity to finish or to finalize its Work Product. Therefore, if Owner uses the Work Product under Sections 4.3 or 4.4 in whole or in part, Owner agrees to defend, indemnify and hold harmless the Indemnified Parties from and against any and all claims, damages, liabilities, losses and expenses, including attorneys’ fees, arising out of or resulting from Owner’s use of the Work Product, to the fullest extent permitted by applicable law.

## **Article 5.0 Contract Time**

### **5.1 Dates of Commencement.**

**5.1.1** Design-Builder’s Phase 1 Services shall commence within five (5) days of Design-Builder’s receipt of Owner’s Phase 1 Notice to Proceed unless the parties mutually agree otherwise in writing. The parties shall use their best efforts to complete the Phase 1 Services within \_\_\_\_\_ (\_\_\_\_) days following Owner’s Phase 1 Notice to Proceed.

**5.1.2** The Phase 2 Services shall commence on the date within five (5) days of Design-Builder’s receipt of Owner’s Phase 2 Notice to Proceed (“Date of Commencement”) unless the parties mutually agree otherwise in writing.

### **5.2 Substantial Completion and Final Completion**

**5.2.1** Substantial Completion of the entire Work shall be achieved no later than \_\_\_\_\_ (\_\_\_\_) calendar days after the Date of Commencement (“Scheduled Substantial Completion Date”).

**5.2.2** Interim milestones and/or Substantial Completion of identified portions of the Work shall be achieved in accordance with Attachment C, *Schedule*.

**5.2.3** Final Completion of the Work or identified portions of the Work shall be achieved within \_\_\_\_\_ (\_\_\_\_) days after Substantial Completion.

**5.2.4** All of the dates set forth in this Article 5.0 shall be subject to adjustment in accordance with the General Conditions.

**5.3 Time is of the Essence.** Owner and Design-Builder mutually agree that time is of the essence with respect to the dates and times set forth in the Contract Documents. Owner agrees to provide all site access, materials, information, data, and approvals required under the Contract Documents in a timely manner, as required for Design-Builder to achieve the interim milestones of the Schedule and the Scheduled Substantial Completion Date.

**5.4 Liquidated Damages.** Design-Builder understands that if Substantial Completion is not achieved by the Scheduled Substantial Completion Date (as it may be extended hereunder), Owner will suffer damages which are difficult to determine and accurately specify. Design-Builder agrees that if Substantial Completion is not achieved by \_\_\_\_\_ (\_\_\_\_) days after the Scheduled Substantial Completion Date (the “LD Date”), Design-Builder shall pay Owner \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) as liquidated damages for each day that Substantial Completion extends beyond the LD Date, up to a maximum of:

*[Select one of the following:]*

\_\_\_\_\_ Dollars (\$ \_\_\_\_\_).

or

\_\_\_\_\_ percent ( %) of the Contract Price.

The liquidated damages provided herein shall be in lieu of all liability for any and all extra costs, losses, expenses, claims, penalties and any other damages, whether special or consequential, and of whatsoever nature incurred by Owner which are occasioned by any delay in achieving Substantial Completion.

No Liquidated Damages shall be assessed in the event that Owner takes early beneficial occupancy of the Facility or makes partial use thereof for operating or commercial purposes before Substantial Completion is achieved.

**5.5 Early Completion Bonus.** If Substantial Completion is achieved on or before \_\_\_\_\_ (\_\_\_\_) days before the Scheduled Substantial Completion Date (the “Bonus Date”), Owner shall pay Design-Builder at the time of Final Payment under Section 7.4 hereof an early completion bonus of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_ ) for each day that Substantial Completion is achieved earlier than the Bonus Date.

[**Optional:** Such Early Completion bonus shall not exceed \_\_\_\_\_ Dollars (\$ \_\_\_\_\_ ) in the aggregate.]

#### **Article 6.0 Compensation and Contract Price**

**6.1 Phase 1 Compensation.** For the Phase 1 Services, Owner shall pay Design-Builder compensation in accordance with Section 1, *Phase 1*, of Attachment B, *Compensation*.

**6.2 Phase 2 Contract Price.** For the Phase 2 Services, Owner shall pay Design-Builder in accordance with Section 2, *Phase 2*, of Attachment B, *Compensation*, an agreed Contract Price, subject to adjustments made in accordance with the General Conditions.

#### **Article 7.0 Procedure for Payment**

##### **7.1 Payment for Phase 1 Services**

**7.1.1** Owner shall compensate Design-Builder monthly for Phase 1 Services performed under the Agreement on the following basis:

*(State whether a stipulated sum, actual cost per applicable clauses of Section 2.2 of Attachment B, or other basis. If a stipulated sum, state what portion of the sum shall be payable each month.)*

\_\_\_\_\_

**7.1.2** Owner shall pay Design-Builder for Phase 1 Services within thirty (30) days after Owner’s receipt of each properly submitted and accurate Application for Payment in accordance with the provisions of GC 5.1 (“Payment for Phase 1 Services”) and 5.4 (“Withholding of Payments”).

##### **7.2 Progress Payments for Phase 2 Services**

**7.2.1** An initial payment of \_\_\_\_\_ dollars (\$ \_\_\_\_\_) shall be made within thirty (30) days of the written agreement of the parties as to the amount and compensation method of the Contract Price for Phase 2 Services and credited to Owner’s account at final payment. *(Optional provision – set at \$0 if no initial payment is to be made.)*

**7.2.2** Design-Builder shall submit to Owner on or before the tenth (10th) day of each month, beginning with the first month after the Date of Commencement, Design-Builder’s Application for Payment in accordance with GC 5.3 (“Monthly Progress Payments for Phase 2 Services”).

**7.2.3** Owner shall make payment within thirty (30) days after Owner’s receipt of each properly submitted and accurate Application for Payment in accordance with GC 5.3, but in each case less the total of payments previously made, and less any amounts properly withheld under GC 5.4 (“Withholding of Payments”) and Section 7.3 below (“Retainage on Progress Payments”).

**7.2.4** If Design-Builder's Fee is a fixed amount, the amount of Design-Builder's Fee to be included in Design-Builder's monthly Application for Payment and paid by Owner shall be proportional to the percentage of the Work completed, less payments previously made on account of Design-Builder's Fee.

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

**7.3.1** Owner will retain \_\_\_\_\_ percent (\_\_\_\_%) of each Application for Payment *provided, however,* that when fifty percent (50%) of the Work has been completed by Design-Builder, and if the Work is proceeding satisfactorily, then Owner will not retain any additional amounts from Design-Builder's subsequent Applications for Payment. Owner will also reasonably consider reducing retainage for Subcontractors completing their work early in the Project.

**7.3.2** Upon Substantial Completion of the entire Work or, if applicable, any portion of the Work, pursuant to GC 5.7 ("Substantial Completion"), Owner shall release to Design-Builder all retained amounts relating, as applicable, to the entire Work or completed portion of the Work, less an amount equal to the reasonable value of all remaining or incomplete items of Work as noted in the Certificate of Substantial Completion or other withholdings pursuant to GC 5.4.

**7.4 Final Payment.** Design-Builder shall submit its Final Application for Payment to Owner in accordance with GC 5.8 ("Final Payment"). Owner shall make payment on Design-Builder's properly submitted and accurate Final Application for Payment within ten (10) days after Owner's receipt of the Final Application for Payment, provided that Design-Builder has satisfied the requirements for final payment set forth in GC 5.8.2.

**7.5 Interest.** Payments due and unpaid by Owner to Design-Builder, whether progress payments or final payment, shall bear daily interest commencing five (5) days after payment is due at the rate equivalent to \_\_\_\_\_ percent (\_\_\_\_%) per annum, or the maximum rate permitted by applicable law, whichever is less, which Owner shall pay upon presentation of an invoice therefor.

**7.6 Record Keeping and Financial Controls.** Design-Builder acknowledges that this Agreement is to be administered on an "open book" arrangement relative to Costs of the Work, including the development and agreement upon the Contract Price for Phase 2 Services; provided that if Owner and Design-Builder convert to or agree to a lump sum form of compensation for the Phase 2 Contract Price ("Fixed Contract Price"), then the provisions of this Section 7.6 shall not apply to such Fixed Contract Price and any adjustments made on a lump sum basis. Design-Builder shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management, using accounting and control systems in accordance with generally accepted accounting principles, and in such accounts as may be necessary for Owner's utility accounting purposes. During the performance of the Work and for a period of three (3) years after Final Payment, Owner and Owner's accountants shall be afforded access from time to time, upon reasonable notice, to Design-Builder's records, books, correspondence, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to the Work, all of which Design-Builder shall preserve for a period of three (3) years after Final Payment, *provided, however,* that such access, review, and audit rights shall not extend to any compensation amounts established on the basis of fixed rates for overhead or fee, or an agreed fixed sum, or unit rates for any element of cost.

*(The following Article 8 should only be used if the Owner and Design-Builder agree to establish their respective representatives at the time the Agreement is executed rather than during the performance of the Project.)*

### **Article 8.0 Representatives of the Parties**

## **8.1 Owner's Representatives**

- 8.1.1** Owner designates the individual listed below as its Senior Representative ("Owner's Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under GC 8.2.3: *(Identify individual's name, title, address and telephone numbers)*
- 8.1.2** Owner designates the individual listed below as its Owner's Representative, which individual has the authority and responsibility set forth in GC 3.4 ("Owner's Representative"): *(Identify individual's name, title, address and telephone numbers)*

## **8.2 Design-Builder's Representatives**

- 8.2.1** 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 GC 8.2.3: *(Identify individual's name, title, address and telephone numbers)*
- 8.2.2** Design-Builder designates the individual listed below as its Design-Builder's Representative, which individual has the authority and responsibility set forth in GC 2.1.1: *(Identify individual's name, title, address and telephone numbers)*

## **Article 9.0 Indemnity, Insurance and Bonds**

- 9.1 Indemnity.** Indemnification obligations between the parties shall be as set forth in Article 4.0, above, and in Section 1.0, *Indemnity*, of Attachment E, *Indemnity, and Insurance & Bonding*.
- 9.2 Insurance.** The parties shall procure the insurance coverages set forth in Attachment E, *Indemnity, Insurance & Bonding*, in accordance with the General Conditions.
- 9.3 Bonds and Other Performance Security.** If so required, Design-Builder shall provide a performance bond and labor and material payment bond or other performance security in accordance with Section 8.0, *Bonds*, of Attachment E, *Indemnity, and Insurance & Bonding*.

## **Article 10.0 Other Provisions**

- 10.1** Other provisions, if any, are as follows: (Insert any additional provisions)

## **Article 11.0 Limitations of Liability**

- 11.1 Aggregate Limitation of Liability.** Except for indemnification for third party claims against Owner and to the fullest extent permitted by law, Design-Builder's liability for Owner's damages (including any liquidated damages hereunder) for any cause or combination of causes, whether based upon contract, tort, breach, warranty, negligence, strict liability, or otherwise, will, in the aggregate, not exceed \_\_\_\_\_ per cent (\_\_\_%) of the Contract Price.
- 11.2 Time Limitation.** Any cause of action, suit, proceeding, demand or other claim, shall be deemed waived unless made by Owner in writing and received by Design-Builder within time limitations set forth in applicable law.
- 11.3 Consequential Damages.** In no event shall Design-Builder or any of its Subcontractors be liable for any incidental, indirect, special, punitive, or consequential damages, (including but not limited to loss of use, loss of capacity, loss of revenue, loss of profits, or cost of replacement product or capacity) suffered or incurred by Owner or any of its agents, including other contractors engaged by Owner at the Site, as a result of this Agreement or Design-Builder's performance or non-performance of the Work. In no event shall Owner be liable for any incidental, indirect, special, punitive, economic or consequential damages, (including but not limited to loss of profits) suffered or incurred by Design-Builder as a result of this Agreement or Design-Builder's performance or non-performance of the Work.



**11.4 Full Effect.** All waivers of and limitations of liability contained in this Agreement shall apply whether such liability is claimed to arise in contract, tort (including but not limited to negligence), breach of warranty, breach of contract, strict liability, or otherwise. This General Condition 2.12 takes precedence over any conflicting article or provision of this Agreement or any document incorporated into it or referred to by it.

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

**OWNER:**

**DESIGN-BUILDER:**

\_\_\_\_\_  
*(Name of Owner)*

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

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

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

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

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

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

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

## ATTACHMENT A SCOPE OF WORK

### SECTION 1 PHASE 1

**1.0** Design-Builder shall exercise reasonable skill and judgment in the furnishing of design services. Architectural and engineering services shall be furnished by licensed employees of Design-Builder, or by consultants or subcontractors as permitted by the law of the state where the Project is located. Design-Builder is responsible for the following Preliminary Design-Build Services:

**1.1 Preliminary Evaluation.** Design-Builder shall provide a preliminary evaluation of the Project's feasibility based on the Owner's Program and other relevant information.

**1.2 Preliminary Schedule.** Design-Builder shall provide a preliminary schedule for Owner's written approval. The schedule shall show the activities of Owner and Design-Builder necessary to meet Owner's completion requirements.

**1.3 Preliminary Estimate.** Design-Builder shall prepare for Owner's written approval a preliminary estimate utilizing area, volume, or similar conceptual estimating techniques. The level of detail for the estimate shall reflect the Owner's Program and any additional available information. If the preliminary estimate exceeds Owner's budget, Design-Builder shall make written recommendations to Owner.

**1.4 Preliminary Design Documents.** Design-Builder shall submit for Owner's written approval Preliminary Design Documents, based on the Owner's Program and other relevant information. Preliminary Design Documents shall include drawings, outline specifications and other conceptual documents as further defined herein illustrating the Project's basic elements, scale and their relationship to the site. One set of these Documents shall be furnished to Owner. Design-Builder shall update the preliminary schedule and preliminary estimate based on the Preliminary Design Documents.

**1.5 Division of Responsibility.** Design-Builder shall prepare for Owner's review a proposed Division of Responsibility with respect to the Project, showing (a) equipment, materials, labor, and services to be provided by Design-Builder, (b) access, equipment, materials, data, information, and approvals to be provided by Owner, and (c) any items necessary for the Project to be provided by third parties.

**1.6 Contract Price Proposal.** Based on the Preliminary Design-Build Services, Design-Builder shall prepare for Owner's consideration a proposed Contract Price for the Phase 2 Services.

**1.7 Additional Services.** Design-Builder shall provide the following additional services, if any:

*Procurement of turbine/generator equipment and other long lead time equipment or materials for Phase 2 work*

## **SECTION 2 PHASE 2**

### **2.1 Completion of Design**

#### **2.1.1 Drawings and Specifications**

Design-Builder shall submit for Owner's review and written comment Drawings and Specifications based on the Contract Documents and the Preliminary Design Documents prepared under Phase 1 and any further development of Contract Documents that have been approved in writing by Owner. The Drawings and Specifications shall set forth in detail the requirements for construction of the Work, and shall be based upon codes, laws or regulations enacted at the time of their preparation, *provided, however*, that if such codes, law, or regulations have changed between the date on which Design-Builder submitted its proposed Contract Price and the date of preparation, then Design-Builder shall be entitled to an equitable adjustment in the compensation and/or the Schedule. Construction shall be in accordance with these approved Drawings and Specifications. One set of these documents shall be furnished to Owner prior to commencement of construction.

#### **2.1.2 Manuals**

Design-Builder shall provide a Commissioning and Startup Manual and an Operations and Maintenance Manual for the Facility, each in such form and in such numbers as the parties may agree, and such other manuals as the parties may agree. All such manuals shall be provided no later than ninety (90) days prior to the scheduled date for the commissioning and startup of the Facility.

### **2.2 Construction Services**

**2.2.1 Notice to Proceed** Following Owner's written acceptance of Drawings and Specifications under Paragraph 2.1.1 above, Design-Builder will commence the performance of Construction Services.

**2.2.2 Completion** In order to complete the Work, Design-Builder shall provide all necessary construction supervision, inspection, construction equipment, labor, materials, tools, and subcontracted items.

**2.2.3 Compliance** Design-Builder shall give all notices and comply with all laws and ordinances legally enacted at the date of execution of the Agreement which govern the proper performance of the Work.

**2.2.4 Schedule** Design-Builder shall prepare and submit a Schedule of Work in the form of a revised Attachment C, *Schedule*, for Owner's written approval. This Schedule shall indicate the dates for the start and completion of the various stages of the construction including the dates when information and approvals are required from Owner. It shall be revised as required by the conditions of the Work. The Schedule of Work shall be the basis for Design-Builder's management and control of the project and its reporting of progress to Owner.

**2.2.5 Permits** Design-Builder shall obtain permits and governmental approvals as provided in GC 2.6.

**2.2.6 Safety and Hazardous Conditions** Design-Builder shall take necessary precautions for the safety of its employees on the Project, and shall comply with all applicable provisions of federal, state and municipal safety laws to prevent accidents or injury to persons on, about or adjacent to the Site. Design-Builder, directly or through its Subcontractors, shall erect and properly maintain at all times, as required by the conditions and progress of the Work, necessary safeguards for the protection of workers and the public. However, Design-Builder shall not be responsible for the elimination or abatement of any pre-existing Hazardous Materials at the site or any safety hazards created or otherwise resulting from work at the Site carried on by Owner or its employees, agents, separate contractors or tenants. Owner agrees to cause its employees, agents, separate contractors, and tenants to abide by and fully adhere to all applicable provisions of federal, state

and municipal safety laws and regulations. The above provision shall not relieve Subcontractors of their responsibility for the safety of persons or property in the performance of their work, nor for compliance with all applicable provisions of relevant laws.

**2.2.7 Reports** As provided in GC 2.1.2, Design-Builder shall provide monthly written reports to Owner on the progress of the Work. If the form of compensation of the Phase 2 Contract Price is a Guaranteed Maximum Price or Cost Reimbursable plus Fixed Design-Builder's Fee, then such monthly reports shall include a system of cost reporting for the Work, and also including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes in the Work. If the form of compensation is a stipulated sum, the progress reporting will address progress and payment against an agreed upon schedule of values established prior to the commencement of Phase 2 of the work by the Design-Builder.

**2.2.8 Site Maintenance** At all times Design-Builder shall maintain the Site of the Work free from debris and waste materials resulting from the Work. At the completion of the Work, Design-Builder shall remove from the premises all construction equipment, tools, surplus materials, waste materials and debris.

### **2.3 Hazardous Material**

**2.3.1** A Hazardous Material is any substance or material identified now or in the future as hazardous under any federal, state or local law or regulation, or any other substance or material which may be considered hazardous or otherwise subject to statutory or regulatory requirements governing handling, disposal and/or clean-up. Design-Builder shall not be obligated to commence or continue Work until any known or suspected Hazardous Material discovered at the Site has been removed, rendered or determined to be harmless by Owner as certified by an independent testing laboratory and approved by the appropriate government agency.

**2.3.2** If after the commencement of the Work, known or suspected Hazardous Material or Hazardous Conditions are discovered at the Site, Owner and Design-Builder shall proceed in accordance with the requirements of GC 4.1 ("Hazardous Conditions & Differing Site Conditions").

### **2.4 Patents & Copyright**

**2.4.1** Design-Builder shall pay all royalties and license fees which may be due on the inclusion of any patented or copyrighted materials, methods or systems selected by Design-Builder and incorporated in the Work. Design-Builder agrees to defend, indemnify and hold Owner harmless from all suits or claims for infringement of any patent rights or copyrights arising out of such selection.

**2.4.2** Owner shall pay all royalties and license fees which may be due on the inclusion of any patented or copyrighted materials, methods or systems selected by Owner, specified in Attachment F - Owner's Project Criteria or otherwise directed by Owner to be incorporated in the Work. Owner agrees to defend, indemnify and hold Design-Builder harmless from any suits or claims of infringement of any patent rights or copyrights arising out of any such patented or copyrighted materials, methods or systems specified by Owner.

### **2.5 Warranties and Completion**

**2.5.1** Design-Builder's warranty to Owner with respect to construction, including all materials and equipment furnished as part of the construction, shall be as specified in GC 2.9 ("Construction Warranty").

**2.5.2** Design-Builder's warranty to Owner with respect to the performance of the Facility upon completion shall be as specified in GC 2.11 ("Performance Warranty").

**2.5.3** Those products, equipment, systems or materials incorporated in the Work at the direction of or upon the specific request of Owner shall be covered exclusively by the warranty of the manufacturer. There are no warranties which extend beyond the description on the face thereof.

**2.5.4 All other warranties, express or implied, including any warranty of merchantability and any warranty of fitness for a particular purpose are expressly disclaimed.**

**2.5.5** Design-Builder shall secure required certificates of inspection, testing or approval and deliver them to Owner.

**2.5.6** Design-Builder shall collect all written warranties and equipment manuals and deliver them to Owner.

**2.5.7** With the assistance of Owner's maintenance personnel, Design-Builder shall direct the checkout of utilities and operations of systems and equipment for readiness, and assist in their commissioning and initial start-up and testing, all in accordance with the Commissioning and Startup Manual to be provided by Design-Builder.

## **2.6 Limitations of Liability**

**2.6.1 Limitation of Liability.** Design-Builder's liability for Owner's damages for any cause or combination of causes (including any liquidated damages), whether based upon contract, tort, breach of warranty, negligence, strict liability, or otherwise, shall be limited as set forth in Article 11 of this Agreement.

## **2.7 Additional Services**

Design-Builder shall provide or procure the following Additional Services upon the request of Owner unless such services are specifically included in the Owner's Program or in an attachment to this Agreement. A written agreement between Owner and Design-Builder shall define the extent of such Additional Services and compensation therefor.

*[The additional services described below are illustrative. The Owner should revise as appropriate to the needs of its project.]*

**2.7.1** Documentation of the Owner's Program, establishing the Project budget (beyond the Cost of the Work), investigating sources of financing, general business planning and other information and documentation as may be required to establish the feasibility of the Project.

**2.7.2** Consultations, negotiations, and documentation supporting the procurement of Project financing.

**2.7.3** Surveys, site evaluations, legal descriptions and aerial photographs.

**2.7.4** Appraisals of existing equipment, existing properties, new equipment and developed properties.

**2.7.5** Soils, subsurface and environmental studies, reports and investigations required for submission to governmental authorities or others having jurisdiction over the Project.

**2.7.6** Consultations and representations other than normal assistance in securing building permits, before governmental authorities or others having jurisdiction over the Project.

**2.7.7** Investigation or making measured drawings of existing conditions or the verification of drawings or other Owner-provided information.

**2.7.8** Artistic renderings, models and mockups of the Project or any part of the Project or the Work.

**2.7.9** Inventories of existing furniture, fixtures, furnishings and equipment which might be under consideration for incorporation into the Work.

**2.7.10** Interior design and related services including procurement and placement of furniture, furnishings, artwork and decorations.

**2.7.11** Making revisions to the Preliminary Design, Design Development, or Construction Documents after they have been reviewed by Owner, and which are due to causes beyond the control of Design-Builder.

- 2.7.12 Design, coordination, management, expediting and other services supporting the procurement of materials to be obtained, or work to be performed, by Owner, including but not limited to telephone systems, computer wiring networks, sound systems, alarms, security systems and other specialty systems which are not a part of this Agreement.
  - 2.7.13 Estimates, proposals, appraisals, consultations, negotiations and services in connection with the repair or replacement of an insured loss.
  - 2.7.14 The premium portion of overtime work ordered by Owner including productivity impact costs.
  - 2.7.15 Document reproduction exceeding the allowances provided for in this Agreement.
  - 2.7.16 Obtaining service contractors and training maintenance personnel, assisting and consulting in the use of systems and equipment after the initial startup, and adjusting and balancing of systems and equipment.
  - 2.7.17 Services for tenant or rental spaces or third-party facilities not a part of this Agreement.
  - 2.7.18 Services requested by Owner or required by the Work which are not specified in the Contract Documents and which are not normally part of generally accepted design, construction and start-up and commissioning practice.
  - 2.7.19 Serving or preparing to serve as an expert witness on behalf of Owner in connection with any proceeding, legal or otherwise, regarding the Project.
  - 2.7.20 Preparing reproducible record drawings from marked-up prints, drawings or other documents that incorporate significant changes in the Work made during the Construction Phase.
- 2.8 **Subcontractors.** Work not performed by Design-Builder with its own forces shall be performed by Subcontractors. The provisions of this Agreement and the associated Contract Documents shall be incorporated into all major subcontracts for construction.
- 2.8.1 **Retaining Subcontractors** Design-Builder shall not retain any Subcontractor to whom Owner has a reasonable and timely objection, *provided* that Owner agrees to compensate Design-Builder for any additional costs incurred by Design-Builder as provided in GC 2.7.3. Design-Builder shall not be required to retain any Subcontractor to whom Design-Builder has a reasonable objection.
- 2.8.2 **Management of Subcontractors** Design-Builder shall be responsible for the management of Subcontractors in the performance of their work.
- 2.8.3 **Assignment of Subcontract Agreements** Design-Builder shall provide for assignment of subcontract agreements in the event that Owner terminates this Agreement for cause as provided in GC 11.2 (“Owner’s Right to Perform and Terminate for Cause”). Following such termination, Owner shall notify in writing those subcontractors whose assignments will be accepted, subject to the rights of sureties.

## SECTION 3 OWNER’S RESPONSIBILITIES

### 3.1 Information and Services Provided by Owner

- 3.1.1 Owner shall provide full information regarding requirements for the Project in accordance with GC 3.2 and this Section 3.1, including the Owner’s Program, Facility Performance Criteria and other relevant information, within the times specified in Attachment C, *Schedule*.

**3.1.2** Owner shall provide:

1. all necessary information describing the physical characteristics of the site, including surveys, site evaluations, legal descriptions, existing conditions, subsurface and environmental ~~studies, utilities~~ studies, utilities, reports and investigations;
2. inspection and testing services during construction as required by law or as mutually agreed; and
3. unless otherwise provided in the Contract Documents, necessary approvals, site plan review, rezoning, easements and assessments, necessary permits, fees and charges required for the construction, use, occupancy or renovation of permanent structures, including legal and other require services.

**3.1.3** Design-Builder shall be entitled to rely on the completeness and accuracy of the information and services required by this Section 3.1.

**3.2 Owner's Responsibilities during Phase 1**

**3.2.1** If not developed by Owner and Design-Builder under a prior agreement, Owner shall provide the Owner's Program at the inception of the Design Phase. Owner shall review and timely approve schedules, estimates, and design documents furnished during the Design Phase as set forth in Section 3.1.

**3.2.2** Owner shall arrange for access to and make all provisions for Design-Builder to enter upon public and private property as required for Design-Builder to perform Phase 1 services hereunder.

**3.2.3** Design-Builder shall be entitled to rely on the completeness and accuracy of the information and documents to be provided by Owner under this Section 3.2.

**3.3 Owner's Responsibilities during Phase 2 Design and Construction**

**3.3.1** Owner shall review and approve the Schedule as set forth in Attachment C, *Schedule*, as revised.

**3.3.2** If Owner becomes aware of any error, omission or failure to meet the requirements of the Contract Documents or any fault or defect in the Work, Owner shall give written notice to Design-Builder within five (5) days of so becoming aware.

**3.3.3** Unless otherwise agreed by Design-Builder, Owner shall communicate with Design-Builder's Subcontractors, Suppliers, and Design Consultants only through Design-Builder. Owner shall have no contractual obligations to Subcontractors or Suppliers or Design Consultants.

**3.3.4** Owner may provide insurance for the Project as provided in Attachment E, *Indemnity, Insurance & Bonding*.

**3.3.5** Owner shall provide timely, clear and adequate access to the site and any laydown areas.

**3.3.6** Owner shall provide all equipment, materials, information, data, and approvals required for Design-Builder's performance of the Work in a timely and complete manner.

**3.3.7** Design-Builder shall be entitled to rely on the completeness and accuracy of the information and documents to be provided by Owner under this Section 3.3.

**3.4 Owner's Representative**

Owner's representative, designated in writing and agreed to by Design-Builder:

- .1 shall be fully acquainted with the Project;
- .2 agrees to furnish the information and services required of Owner when required so as not to delay the performance of the Work; and
- .3 have authority to bind Owner in all matters requiring Owner's approval, authorization or written notice.

If Owner changes its representative or the representative's authority as listed above, Owner shall notify Design-Builder in advance in writing. Design-Builder shall have the right to approve any successor representative.

## ATTACHMENT B COMPENSATION

### SECTION 1 PHASE 1 SERVICES

[to be inserted based on RFP and proposal]

### SECTION 2 CONTRACT PRICE FOR PHASE 2 SERVICES

#### 1.0 Choice of Compensation Method for Phase 2 Services

1.1 The parties may elect to use the Guaranteed Maximum Price (“GMP”) form of compensation, a stipulated sum (lump sum) form of compensation, or a cost-reimbursable form of compensation with a Fixed Fee for the Contract Price for the Phase 2 Services.

#### 2.0 **Option 1: Guaranteed Maximum Price (“GMP”)**

##### 2.1 Use of a GMP for Phase 2 Work

2.1.1 Design-Builder agrees that upon Owner’s request it will submit its proposal for the Contract Price on the basis of a GMP for the Phase 2 Services. Design-Builder does not guarantee any specific line item provided as part of the GMP (unless otherwise provided), but agrees that it will be responsible for paying all costs of completing the Work which exceed the GMP, as adjusted in accordance with the Contract Documents. Documents used as a basis for the GMP shall be identified in an agreed revision to this Attachment.

2.1.2 The GMP will include a Contingency which is available for Design-Builder’s exclusive use for costs that are incurred in performing the Work that are not included in a specific line item or the basis for a Change Order under the Contract Documents. By way of example, and not as a limitation, such costs include trade buy-out differentials, overtime, acceleration, costs in correcting defective, damaged or nonconforming Work, design errors or omissions, and Subcontractor defaults. The Contingency is not available to Owner for any reason, including changes in scope or any other item which would enable Design-Builder to increase the GMP under the Contract Documents. Design-Builder shall provide Owner with notice of all anticipated charges against the Contingency included in the Contract Price or which may impact Owner’s Project budget contingency.

2.1.3 If the parties so agree, the Phase 2 Services may be divided into separate work packages or task orders, and Design-Builder shall propose and Owner shall consider for acceptance a separate GMP for each such work package or task order.

#### 2.2 GMP Established at the Commencement Date of Phase 2

2.2.1 **GMP Proposal.** Design-Builder shall submit to Owner a GMP Proposal for the Contract Price as part of the Phase 1 Services which shall include the following, unless the parties mutually agree otherwise:

- .1 A proposed GMP, which shall be the sum of:
  - i. Design-Builder’s Fee as defined in Section 2, *Phase 2*, of Attachment B, *Compensation*; and
  - ii. the estimated Cost of the Work as defined in Section 2, *Phase 2*, of Attachment B, *Compensation*, inclusive of any Design-Builder’s Contingency as defined in Section 1.1.2 above and any allowances and unit prices
  
- .2 A list of the drawings and specifications, including all addenda, used as the basis for the GMP proposal;



- .3 A list of the assumptions, exceptions, and clarifications made by Design-Builder in the preparation of the GMP Proposal, which list is intended to supplement the information contained in the drawings and specifications;
- .4 The Scheduled Substantial Completion Date upon which the proposed GMP is based, to the extent said date has not already been established under Paragraph 5.2.1 of the Agreement, and a schedule upon which the Scheduled Substantial Completion Date is based;
- .5 If applicable, a list of allowances and a statement of their basis;
- .6 If applicable, a schedule of alternate prices;
- .7 If applicable, a schedule of unit prices;
- .8 If applicable, a statement of Additional Services; and
- .9 The time limit for acceptance of the GMP Proposal.

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

**2.2.3 Acceptance of GMP Proposal.** If Owner accepts the GMP Proposal, as may it be amended by Design-Builder, the GMP and its basis shall be set forth in an amendment to this Agreement.

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

- .1 Owner may suggest modifications to the GMP Proposal, whereupon, if such modifications are accepted in writing by Design-Builder, the GMP Proposal shall be deemed accepted and the parties shall proceed in accordance with Section 2.2.3 above;
- .2 Owner may authorize Design-Builder to continue to proceed with the Work on the basis of reimbursement as provided in Section 2, *Phase 2*, of Attachment B, *Compensation*, without a GMP, in which care all references in this Agreement to the GMP shall not be applicable; or
- .3 Owner may terminate this Agreement for convenience in accordance with GC 9.2 ("Termination for Convenience").

If Owner fails to exercise any of the above options, Design-Builder shall have the right to (i) continue with the Work as if Owner had elected to proceed in accordance with Item .2 above, and be paid by Owner accordingly, unless and until Owner notifies it in writing to stop the Work, or (ii) suspend performance of Work in accordance with GC 9.4 ("Design-Builder's Right to Stop Work").

**2.2.5 Conversion.** The parties may agree at any time to convert the agreed GMP to a Fixed Contract Price utilizing a stipulated sum for the completion of the Phase 2 Services.

**2.3 Basis.** Documents used as a basis for the GMP shall be identified in a mutually agreed revision to this Attachment.

### **3.0 Option 2: Fixed Contract Price based upon a Stipulated Sum**

- 3.1 If the parties initially agree that the Phase 2 Services shall be performed on the basis of a Stipulated Sum, then the Design-Builder shall develop the proposed Contract Price on an “open book” basis and present it to Owner for review and approval. Such Fixed Contract Price Proposal shall include all the items listed in subsection 2.2.1 for a GMP Proposal, unless otherwise agreed.
- 3.2 Once the Fixed Contract Price is agreed, then this Agreement shall be amended to establish the Fixed Contract Price as the basis for the performance of the Phase 2 Services and such Fixed Contract Price shall not be subject to financial audit, nor shall Design-Builder be required to report or otherwise provide information to Owner as to actual costs incurred.

**4.0 Option 3: Cost Reimbursable plus Design-Builder’s Fee**

4.1 If the parties agree that the Phase 2 Services shall be performed on a Cost Reimbursable basis plus a Fixed Design-Builder’s Fee without a Guaranteed Maximum Price, then the Design-Builder shall develop an estimated Contract Price on an “open book” basis and present it to Owner for review and approval. Such Cost Reimbursable Contract Price Proposal shall include all the items listed in subsection 2.2.1 for a GMP Proposal, unless otherwise agreed.

4.2 The cost-reimbursable elements of the Work shall be those set forth in Section 4.4 (“Cost of the Work”).

4.3 Design-Builder’s Fee shall be:  
*(Choose one of the following :)*

\_\_\_\_\_ Dollars (\$ \_\_\_\_\_), as adjusted in accordance with the Contract Documents.

*or*

\_\_\_\_\_ percent ( \_\_\_\_\_ %) of the Cost of the Work, as adjusted in accordance with the Contract Documents.

4.3.1 Design-Builder’s Fee will be adjusted as follows for any changes in the Work: *(Insert financial arrangements for adjustments)*

**4.4 Cost of the Work.**

The term “Cost of the Work” shall mean costs reasonably incurred by Design-Builder in the proper performance of the Work. The Cost of the Work shall include only the following:

[The costs included as “Cost of the Work” described below are illustrative. Owner and Design-Builder should agree to appropriate costs based on the needs of the project.]

- .1 Wages of direct employees of Design-Builder performing the Work at the Site or, with Owner’s agreement, at locations off the Site, *provided, however*, that the costs for those employees of Design-Builder performing design services shall be calculated on the basis of prevailing market rates for design professionals performing such services or, if applicable, those rates set forth in an exhibit to this Agreement.
- .2 Wages or salaries of Design-Builder’s supervisory and administrative personnel engaged in the performance of the Work and who are located at the Site or working off-Site to assist in the production or transportation of material and equipment necessary for the Work.
- .3 Wages or salaries of Design-Builder’s personnel stationed at Design-Builder’s principal or branch offices and performing design and Project administration functions. The reimbursable costs of personnel stationed at Design-Builder’s principal or branch offices shall include a \_\_\_\_\_ percent ( \_\_\_\_\_ %) markup to compensate Design-Builder for the Project-related overhead associated with Such personnel.

- .4 Costs incurred by Design-Builder for employee benefits, premiums, taxes, insurance, contributions and assessments required by law, collective bargaining agreements, or which are customarily paid by Design-Builder, to the extent such costs are based on wages and salaries paid to employees of Design-Builder covered under Paragraphs 2.2.1 through 2.2.3 hereof.
- .5 The reasonable portion of the cost of travel, accommodations and meals for Design-Builder's personnel necessarily and directly incurred in connection with the performance of the Work.
- .6 Payments properly made by Design-Builder to Subcontractors and Design Consultants for performance of portions of the Work, including any insurance and bond premiums incurred by Subcontractors and Design Consultants.
- .7 Costs incurred by Design-Builder in repairing or correcting defective, damaged or nonconforming Work, *provided* that such defective, damaged or nonconforming Work was beyond the reasonable control of Design-Builder, or caused by the ordinary mistakes or inadvertence, and not the negligence, of Design-Builder or those working by or through Design-Builder. If the costs associated with such defective, damaged or nonconforming Work are recoverable from insurance, Design-Builder shall use its best efforts to obtain recovery from the appropriate source and credit Owner if recovery is obtained.
- .8 Costs, including transportation, inspection, testing, storage and handling, of materials, equipment and supplies incorporated or reasonably used in completing the Work.
- .9 Costs less salvage value of materials, supplies, temporary facilities, machinery, vehicles, equipment and hand tools not customarily owned by the workers that are not fully consumed in the performance of the Work and which remain the property of Design-Builder, including the costs of transporting, inspecting, testing, handling, installing, maintaining, dismantling and removing such items.
- .10 Costs of removal of debris and waste from the Site.
- .11 The reasonable costs and expenses incurred in establishing, operating and demobilizing the Site office, including the cost of facsimile transmissions, long-distance telephone calls, postage and express delivery charges, telephone service, photocopying and reasonable petty cash expenses.
- .12 Rental charges and the costs of transportation, installation, minor repairs and replacements, dismantling and removal of temporary facilities, machinery, equipment and hand tools not customarily owned by the workers, which are provided by Design-Builder at the Site, whether rented from Design-Builder or others, and incurred in the performance of the Work.
- .13 Premiums for insurance and bonds required by this Agreement or the performance of the Work.
- .14 All fuel and utility costs incurred in the performance of the Work.
- .15 Sales, use or similar taxes, tariffs or duties incurred in the performance of the Work.
- .16 Legal costs, court costs and costs of mediation and arbitration reasonably arising from Design-Builder's performance of the Work, *provided* such costs do not arise from disputes between Owner and Design-Builder.
- .17 Costs for permits, royalties, licenses, tests and inspections incurred by Design-Builder as a requirement of the Contract Documents.
- .18 The cost of defending suits or claims for infringement of patent rights arising from the use of a particular design, process, or product required by Owner, paying legal judgments

against Design-Builder resulting from such suits or claims, and paying settlements made with Owner's consent.

- .19 Deposits which are lost, except to the extent caused by Design-Builder's negligence.
- .20 Costs incurred in preventing damage, injury or loss in case of an emergency affecting the safety of persons and property.
- .21 Other costs reasonably and properly incurred in the performance of the Work to the extent approved in writing by Owner.

**4.5 Non-Reimbursable Costs**

[The costs excluded as "Cost of the Work" described below are illustrative. Owner and Design-Builder should agree to a list of excluded costs based on the needs of the project.]

The following shall be excluded from the Cost of the Work:

- .1 Compensation for Design-Builder's personnel stationed at Design-Builder's principal or branch offices, except as provided for in Paragraphs 4.4.1, 4.4.2 and 4.4.3 hereof.
- .2 Overhead and general expenses, except as provided for in Section 4.4.2 hereof, or which may be recoverable for changes to the Work.
- .3 The cost of Design-Builder's capital used in the performance of the Work.

**ATTACHMENT C**  
**SCHEDULE**

**ATTACHMENT D**  
**GENERAL CONDITIONS**

**GC 1.0        General**

**1.1        Mutual Obligations**

- 1.1.1    Owner and Design-Builder agree to cooperate fully with each other at all time, to permit each party to realize the benefits afforded under the Contract Documents.
- 1.1.2    These General Conditions (“GC”) may be supplemented, varied, or revised through Supplementary Conditions (“SC”), as attached.

**1.2        Basic Definitions**

- 1.2.1    *Agreement* refers to the executed contract between Owner and Design-Builder with respect to the Project.
- 1.2.2    *Bonus Date* has the meaning given in Section 5.5 of the Agreement.
- 1.2.3    *Change in Law* has the meaning given in GC 8.1.2.
- 1.2.4    *Changed Condition* has the meaning given in GC 8.1.
- 1.2.5    *Change Order* has the meaning given in GC 7.1.
- 1.2.6    *Construction Warranty* has the meaning given in GC 2.9.
- 1.2.7    *Construction Warranty Period* is that period specified in GC 2.10.1.
- 1.2.8    *Contract Documents* has the meaning given in Section 2.1 of the Agreement.
- 1.2.9    *Contract Price* has the meaning given in Section 6.2 of the Agreement and Section 2 of Attachment B, Compensation.
- 1.2.10   *Contract Time(s)* shall mean the times for performance of the Work by Design-Builder and the delivery of items and approvals by Owner set forth in Article 5 (“Contract Time”) of the Agreement and Attachment C, Schedule.
- 1.2.11   *Day* or *Days* shall mean calendar days unless otherwise specifically noted in the Contract Documents.
- 1.2.12   *Design Consultant*, if any, is a qualified, licensed design professional who is not an employee of Design-Builder, but is retained by Design-Builder, or employed or retained by anyone under contract with Design-Builder or Subcontractor, to furnish design services required under the Contract Documents.
- 1.2.13   *Design Criteria* means those documents which define the Owner’s criteria for the scope, quality, and function of the proposed facility, and which may be expanded to outline Owner’s project cost limitations and schedule requirements.
- 1.2.14   *Differing Site Conditions* has the meaning given in GC 4.2.1.
- 1.2.15   *Early Completion Bonus* has the meaning given in Section 5.5 of the Agreement.
- 1.2.16   *Electronic Data* has the meaning given in GC 11.1.1.
- 1.2.17   *Extended Performance Warranty* is Design-Builder’s warranty under GC 2.11.2 that the completed Facility shall be capable of meeting the Performance Standards in Attachment F throughout the Performance Warranty Period.
- 1.2.18   *Facility* is the physical facility to be designed and constructed for Owner as part of the Project.
- 1.2.19   *Facility Performance Criteria* means the Owner’s criteria for the performance of the Facility once constructed, and may be divided into two parts, (i) program requirements such as the physical, functional, and quantitative needs of the project, and (ii) performance requirements for the Facility and its component parts, including considerations of the specified quantitative and qualitative limits for inputs, the desired condition of Facility outputs, and the efficiency of the Facility in producing such outputs.

- 1.2.20** *Final Acceptance* of the Project shall be deemed to have occurred upon final payment pursuant to GC 5.8.
- 1.2.21** *General Conditions* refer to this Attachment D, *General Conditions*.
- 1.2.22** *Guaranteed Maximum Price or GMP* means the aggregate amount of the Design-Builder's Fee and the Cost of the Work that Owner shall be obligated to pay Design-Builder for performance of the Phase 2 Services.
- 1.2.23** *Hazardous Conditions* are any materials, wastes, substances and chemicals deemed to be hazardous under applicable Legal Requirements, or which handling, storage, remediation, or disposal are regulated by applicable Legal Requirements.
- 1.2.24** *Hazardous Materials* has the meaning given in Section 2.3 of Attachment A, Scope of Work.
- 1.2.25** *Indemnified Parties*, with respect to Work Product, has the meaning given in Section 4.3.1 of the Agreement.
- 1.2.26** *Legal Requirements* are all federal, state and local laws, codes, ordinances, rules, regulations, orders and decrees of any government or quasi-government entity having jurisdiction over the Project or Site, the practices involved in the Project or Site, or any Work which are applicable as of the date of Design-Builder's proposal to Owner, and, subject to the Change in Law provisions of GC 8.1.2, which become applicable during the Contract Time.
- 1.2.27** *Liquidated Damages* means such damages as may be assessed under Section 5.4 of the Agreement.
- 1.2.28** *Liquidated Damages Date* has the meaning given in Section 5.4 of the Agreement.
- 1.2.29** *Manuals* means the Commissioning and Startup Manual and the Operations and Maintenance Manual provided for in Section 2.1.2 of the Agreement, and such other manuals as the parties may agree to be provided.
- 1.2.30** *Owner's Program* means the overall definition of Owner's requirements for the Project, including Owner's Project Criteria, all materials, equipment and other items to be provided by Owner, and all items to be provided by third parties.
- 1.2.31** *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, Facility Performance Criteria, performance tests, wage rate requirements, MBE/WBE requirements, and other Project-specific technical materials and requirements.
- 1.2.32** *Owner's Representative* means the individual selected and authorized by Owner to act upon Owner's behalf with respect to Design-Builder and the performance of this Agreement, in accordance with GC 3.4, and identified by Owner in writing within ten (10) days of execution of this Agreement.
- 1.2.33** *Performance Warranty* has the meaning given in GC 2.11.
- 1.2.34** *Performance Warranty Period* means the period ending \_\_\_\_ months following successful completion of the performance tests.
- 1.2.35** *Project* is the design and construction of the Owner's Facility, including start-up and the provision of manuals, warranties, as-built drawings and specifications, spare parts, and all other items required to be provided under this Agreement.
- 1.2.36** *Schedule* means that Schedule for the performance of the Work in accordance with the Contract Time(s) set forth in Attachment C, *Schedule*, as revised from time to time.
- 1.2.37** *Site* is the land or premises on which the Facility is located, including any separate laydown or storage areas.

- 1.2.38 *Subcontractor* is any person or entity retained by Design-Builder as an independent contractor to perform a portion of the Work and shall include materialmen and suppliers.
- 1.2.39 *Sub-Subcontractor* is any person or entity retained by a Subcontractor as an independent contractor to perform any portion of a Subcontractor's Work and shall include materialmen and suppliers.
- 1.2.40 *Substantial Completion* is the date on which the Work, or an agreed upon portion of the Work, is sufficiently complete (including performance testing) so that Owner can occupy and use the Project or a portion thereof for its intended purposes.
- 1.2.41 *Certificate of Substantial Completion* is that Certificate issued by Owner to Design-Builder pursuant to GC 5.7.1.
- 1.2.42 *Uncontrollable Circumstances* are those acts, omissions, conditions, events, or circumstances beyond the control of Design-Builder and due to no fault of its own or those for whom Design-Builder is responsible. By way of example (and not limitation), Uncontrollable Circumstances include acts or omissions of Owner or anyone under Owner's control (including separate contractors), changes in the Work, Differing Site Conditions, Hazardous Conditions, wars, floods, labor disputes, unusual delay in transportation, epidemics, earthquakes, adverse weather conditions not reasonably anticipated, and other circumstances beyond the reasonable control of the party affected.
- 1.2.43 *Work* is comprised of all Design-Builder's design, construction, start-up, warranty, and other services required to by the Contract Documents, including procuring and furnishing all materials, equipment, services and labor reasonably inferable from the Contract Documents, plus manuals and documentation required by the Contract Documents.

## **GC 2.0 Design-Builder's Services and Responsibilities**

### **2.1 General Services**

- 2.1.1 Design-Builder's Representative shall be reasonably available to Owner and shall have the necessary expertise and experience required to supervise the Work. Design-Builder's Representative shall communicate regularly with Owner and shall be vested with the authority to act on behalf of Design-Builder. Design-Builder's Representative may be replaced only with the mutual agreement of Owner and Design-Builder.
- 2.1.2 Design-Builder shall provide Owner on a monthly basis a status report detailing the progress of the Work, including whether (i) the Work is proceeding according to schedule, (ii) discrepancies, conflicts, or ambiguities exist in the Contract Documents that require resolution, (iii) health and safety issues exist in connection with the Work, (iv) other items require resolution so as not to jeopardize Design-Builder's ability to complete the Work for the Contract Price and within the Contract Time(s), and (v) such other items as Owner may reasonably require.
- 2.1.3 Design-Builder shall prepare and submit, at least three (3) days prior to the meeting contemplated by GC 2.1.4, a preliminary schedule for the execution of the Work for Owner's review and response. The schedule shall indicate the dates for the start and completion of the various stages of Work, including the dates when Owner information and approvals are required to enable Design-Builder to achieve the Contract Time(s). When agreed between the parties, such schedule shall be attached hereto as Attachment C, Schedule. The Schedule shall be revised as required by conditions and progress of the Work, but such revisions shall not relieve Design-Builder of its obligations to complete the Work within the Contract Time(s), as such dates may be adjusted in accordance with the Contract Documents. Owner's review of and response to the Schedule shall not be construed as relieving Design-Builder of its complete and exclusive control over the means, methods, sequences and techniques for executing the Work.



**2.1.4** The parties will meet, within seven (7) days after execution of the Agreement, to discuss issues affecting the administration of the Work and to implement the necessary procedures, including those relating to submittals, review and approval turn-around times contained in the Schedule, and payment, to facilitate the ability of the parties to perform their obligations under the Contract Documents.

**2.1.5** At the completion of Phase 1 Services, the parties may agree upon a revised Schedule to reflect the intended scope of Phase 2 Services and as the basis for the Contract Price to be agreed for the Phase 2 services.

## **2.2 Design Professional Services**

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

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

**2.3.1** The standard of care for all design professional services performed to execute the Work shall be the care and skill ordinarily used by members of the design profession practicing under similar conditions at the same time and locality of the Project. Design-Builder, its Design Consultants, and its Subcontractors may reasonably rely on the accuracy and completeness of Owner's Project Criteria.

## **2.4 Design Development Services**

**2.4.1** Design-Builder and Owner shall, consistent with any applicable provision of the Contract Documents, agree upon any interim design submissions that Owner may wish to review, which interim design submissions may include design criteria, drawings, diagrams and specifications setting forth the Project requirements. Such agreement may specify the percentage completion of the design documents to be submitted for such review and comment. On or about the time of the scheduled submissions, Design-Builder and Owner shall meet and confer about the submissions, with Design-Builder identifying during such meetings, among other things, the evolution of the design and any significant changes or deviations from the Contract Documents, or, if applicable, previously submitted design submissions. Minutes of the meetings will be maintained by Design-Builder and provided to all attendees for review. Following the design review meeting, Owner shall review and comment on the interim design submissions in a time frame that is consistent with the turnaround times set forth in the Schedule.

**2.4.2** Design-Builder shall submit to Owner Construction Documents setting forth in detail drawings and specifications describing the requirements for construction of the Work. The Construction Documents shall be consistent with the latest set of interim design submissions; as such submissions may have been modified in a design review meeting. The parties shall have a design review meeting to discuss, and Owner shall review and may comment on the Construction Documents in accordance with the procedures set forth GC 2.4.1. Design-Builder shall proceed with construction in accordance with the approved Construction Documents and shall submit one set of approved Construction Documents to Owner prior to commencement of construction.

**2.4.3** Owner's review and approval of interim design submissions and the Construction Documents is for the purpose of mutually establishing a conformed set of Contract Documents compatible with

the requirements of the Work. Neither Owner's review nor approval of any interim design submissions and Construction Documents shall be deemed to transfer any design liability from Design-Builder to Owner.

- 2.4.4 To the extent not prohibited by the Contract Documents or Legal Requirements, Design-Builder may prepare interim design submissions and Construction Documents for a portion of the Work to permit construction to proceed on that portion of the Work prior to completion of the Construction Documents for the entire Work.

## 2.5 Legal Requirements

- 2.5.1 Design-Builder shall perform the Work in accordance with all Legal Requirements and shall provide all notices applicable to the Work as required by the Legal Requirements.
- 2.5.2 The Contract Price and/or Contract Time(s) shall be adjusted to compensate Design-Builder for the effects of any changes in the Legal Requirements enacted after the date of the Agreement affecting the performance of the Work. Such effects may include, without limitation, revisions Design-Builder is required to make to the Construction Documents because of changes in Legal Requirements.

## 2.6 Government Approvals and Permits

- 2.6.1 Except as identified in Attachment G, *Owner's Permit List*, Design-Builder shall obtain and pay for all necessary permits, approvals, licenses, government charges and inspection fees required for the prosecution of the Work by any government or quasi-government entity having jurisdiction over the Project.
- 2.6.2 Design-Builder shall provide reasonable assistance to Owner in obtaining those permits, approvals and licenses that are Owner's responsibility.

## 2.7 Design-Builder's Phase 2 Construction Services

- 2.7.1 Unless otherwise provided in the Contract Documents to be the responsibility of Owner or a separate contractor, Design-Builder shall provide through itself or Subcontractors the necessary supervision, labor, inspection, testing, start-up, material, equipment, machinery, temporary utilities and other temporary facilities to permit Design-Builder to complete construction of the Project consistent with the Contract Documents.
- 2.7.2 Design-Builder shall perform all construction activities efficiently and with the requisite skill and competence to satisfy the requirements of the Contract Documents. Design-Builder shall at all times exercise complete and exclusive control over the means, methods, sequences and techniques of construction.
- 2.7.3 Design-Builder shall employ only Subcontractors who are duly licensed and qualified to perform the Work consistent with the Contract Documents. Owner may reasonably object to Design-Builder's selection of any Subcontractor, provided that the Contract Price and/or Contract Time(s) shall be adjusted to the extent that Owner's decision impacts Design-Builder's cost and/or time of performance.
- 2.7.4 Design-Builder assumes responsibility to Owner for the proper performance of the Work of Subcontractors and any acts, errors or omissions in connection with such performance. Nothing in the Contract Documents is intended or deemed to create any legal or contractual relationship between Owner and any Subcontractor or Sub-Subcontractor, including but not limited to any third-party beneficiary rights.
- 2.7.5 Design-Builder shall coordinate the activities of all Subcontractors.
- 2.7.6 If Owner performs other work on the Project or at the Site with separate contractors under Owner's control, Design-Builder agrees to reasonably cooperate and coordinate its activities with

those of such separate contractors so that the Project can be completed in an orderly and coordinated manner without unreasonable disruption. Unreasonable disruption or interference by Owner's separate contractors may result in a request for a Contract Adjustment under GC 8.1.3.

- 2.7.7 Design-Builder shall keep the Site reasonably free from debris, trash and construction wastes to permit Design-Builder to perform its construction services efficiently, safely and without interfering with the use of adjacent land areas.
- 2.7.8 Upon Substantial Completion of the Work, or a portion of the Work, Design-Builder shall remove all debris, trash, construction wastes, materials, equipment, machinery and tools arising from the Work or applicable portions thereof to permit Owner to occupy the Project or a portion of the Project for its intended use. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents.

## **2.8 Design-Builder's Responsibility for Project Safety**

- 2.8.1 Design-Builder recognizes the importance of performing the Work in a safe manner so as to prevent damage, injury or loss to (i) all individuals at the Site, whether working or visiting, (ii) the Work, including materials and equipment incorporated into the Work or stored on-Site or off-Site, and (iii) all other property at the Site or adjacent thereto. Design-Builder assumes responsibility for implementing and monitoring all safety precautions and programs related to the performance of the Work. Design-Builder shall, prior to commencing construction, designate a Safety Representative with the necessary qualifications and experience to supervise the implementation and monitoring of all safety precautions and programs related to the Work, and shall develop a Project Safety Program which shall be implemented at the Project Site during the performance of the Work. Unless otherwise required by the Contract Documents, Design-Builder's Safety Representative shall be an individual stationed at the Site who may have responsibilities on the Project other than safety. The Safety Representative shall make routine daily inspections of the Site and shall hold weekly safety meetings with Design-Builder's personnel, Subcontractors and others as applicable.
- 2.8.2 Design-Builder and Subcontractors shall comply with all Legal Requirements relating to safety, as well as any Owner-specific safety requirements set forth in the Contract Documents and incorporated into the Project Safety Program, provided that such Owner-specific requirements do not violate any applicable Legal Requirement. Design-Builder will immediately report in writing any safety-related injury, loss, damage or accident arising from the Work to Owner's Representative and, to the extent mandated by Legal Requirements, to all government or quasi-government authorities having jurisdiction over safety-related matters involving the Project or the Work.
- 2.8.3 Design-Builder's responsibility for safety under this GC 2.8 is not intended in any way to relieve Subcontractors and Sub-Subcontractors of their own contractual and legal obligations and responsibility for (i) complying with all Legal Requirements, including those related to health and safety matters, and (ii) taking all necessary measures to implement and monitor all safety precautions and programs to guard against injury, losses, damages or accidents resulting from their performance of the Work.
- 2.8.4 Owner shall require that its officers, employees, guests, visitors, and other contractors entering the Project Site comply with the Project Safety Program then in effect.

## **2.9 Construction Warranty**

- 2.9.1** Design-Builder warrants to Owner that the construction, including all materials and equipment furnished as part of the construction, shall be new unless otherwise specified in the Contract Documents, of good quality, in conformance with the Contract Documents and free of defects in materials and workmanship. Design-Builder's warranty obligation excludes defects caused by abuse, alterations, or failure to maintain the Work by persons other than Design-Builder or anyone for whose acts Design-Builder may be liable.
- 2.9.2** Nothing in this warranty is intended to limit any manufacturer's warranty which provides Owner with greater warranty rights than set forth in this GC 2.9 or the Contract Documents. Design-Builder will provide Owner with all manufacturers' warranties upon Substantial Completion.

## **2.10 Correction of Defective Work**

- 2.10.1 Construction Warranty Period.** Design-Builder agrees to correct any Work that is found not to be in conformance with the Contract Documents, including that part of the Work subject to GC 2.9, within a period of one (1) year from the date of Substantial Completion of the Work or any portion of the Work, or within such longer period to the extent required by the Contract Documents.
- 2.10.2 Correction of Non-Conforming Work.** Design-Builder shall, within seven (7) days of receipt of written notice from Owner that the Work is not in conformance with the Contract Documents, take meaningful steps to commence correction of such nonconforming Work, including the correction, removal or replacement of the nonconforming Work and any damage caused to other parts of the Work affected by the nonconforming Work. If Design-Builder fails to commence the necessary steps within such seven (7) day period, Owner may, in addition to any other remedies provided under the Contract Documents, provide Design-Builder with written notice that Owner will commence correction of such nonconforming Work with its own forces. If Owner does perform such corrective Work, Design-Builder shall be responsible for all reasonable costs incurred by Owner in performing such correction. If the nonconforming Work creates an emergency requiring an immediate response, the seven (7) day periods identified herein shall be deemed inapplicable.
- 2.10.3** The one (1) year period referenced in GC 2.10.1 applies only to Design-Builder's obligation to correct nonconforming Work and is not intended to constitute a period of limitations for any other rights or remedies Owner may have regarding Design-Builder's other obligations under the Contract Documents.

## **2.11 Performance Warranty**

- 2.11.1** Design-Builder warrants to Owner that the Facility will meet the Facility Performance Criteria set forth in Attachment F, *Owner's Project Criteria*. Such Performance Warranty shall be satisfied upon successful completion of the Performance Tests set forth in Attachment F, *Owner's Project Criteria*.

*[The Owner may determine or the parties may agree (1) that the Extended Performance Warranty provided below in subsections 2.11.2 through 2.11.4 is not appropriate or required for the project and therefore such sections should be labeled "Not Used" or (2) that an extended commissioning period with active participation by Design-Builder in Owner's operation subsequent to Substantial Completion should be required for the project.]*

- 2.11.2** Design-Builder also warrants, subject to GC 2.11.3 and 2.11.4, that the completed Facility shall be capable of meeting the Performance Standards in Attachment F throughout the Performance Warranty Period ("Extended Performance Warranty").

- 2.11.3** Design-Builder shall have no responsibility under the Extended Performance Warranty to the extent that any failure of the Work is due to: (1) Owner action or non-action, such as (i) provision of inadequate staffing, (ii) failure to operate or maintain the Project in accordance with methods, standards and procedures generally recognized and accepted as good industry practices and with the Operation and Maintenance Information Systems prepared by Design-Builder, (iii) abuse, negligence or willful misconduct, or (iv) alteration of the Work; (2) Uncontrollable Circumstances; (3) Change in Law; (4) noncompliant operating conditions, such as raw [water or wastewater] influent not conforming to the parameters in Attachment F or other conditions exceeding the Project's design criteria in Attachment F; (5) unavailability of supplies, spare parts, chemicals, power or other consumables or items necessary for operation and maintenance; or (6) impossibility or frustration of purpose.
- 2.11.4** If the Work fails to satisfy the Extended Performance Warranty, Design-Builder shall, upon written notice from Owner delivered not later than five (5) days after any such failure, promptly begin and continue to take necessary actions (including training or support of Owner's operation and maintenance staff; revision of operating or maintenance procedures; or modification or correction of equipment or facilities) to satisfy the Extended Performance Warranty. The costs of any such training or support of Owner's operations staff or revision of operating procedures that are effective in achieving satisfaction of the Extended Performance Warranty shall be paid by Owner. The costs of any such modification or correction of equipment or facilities required to achieve satisfaction of the Extended Performance Warranty shall be paid by the Design-Builder without reimbursement from Owner, subject to any applicable limitation of liability set forth in this Agreement. Before any necessary correction or modification of equipment or facilities is initiated by the Design-Builder, all reasonable efforts to satisfy the Performance Warranty through operational training, support and revision shall be completed and a plan indicating the scope and schedule for such work shall be prepared by the Design-Builder and approved by Owner.

### **GC 3.0 Owner's Services and Responsibilities**

#### **3.1 Duty to Cooperate**

- 3.1.1** Owner shall, throughout the performance of the Work, cooperate with Design-Builder and perform its responsibilities, obligations and services in a timely manner to facilitate Design-Builder's timely and efficient performance of the Work and so as not to delay or interfere with Design-Builder's performance of its obligations under the Contract Documents.
- 3.1.2** Owner shall provide reviews and approvals of interim design submissions and Construction Documents consistent with the turn-around times set forth in the Schedule. Owner's review does not constitute acceptance of design errors or omissions, or transfer of any design liability to Owner.

#### **3.2 Furnishing of Services and Information**

- 3.2.1** Unless expressly stated to the contrary in the Contract Documents, Owner shall provide, at its own cost and expense, for Design-Builder's information and use the following, all of which Design-Builder is entitled to rely upon in performing the Work:
- .1** Surveys describing the property boundaries, topography and reference points for use during construction, including existing service and utility lines;
  - .2** Geotechnical studies describing subsurface conditions, and other surveys describing other latent or concealed physical conditions at the Site;
  - .3** Temporary and permanent easements, zoning and other requirements and encumbrances affecting land use, or necessary to permit the proper design and construction of the Project,

access to the Site and any off-site storage or lay-down areas, and to enable Design-Builder to perform the Work;

.4 A legal description of the Site;

.5 To the extent available, as-built and record drawings of any existing structures and utilities at the Site; and

.6 To the extent available, environmental studies, reports and impact statements describing the environmental conditions, including Hazardous Conditions, in existence at the Site.

3.2.2 Owner is responsible for securing and executing all necessary agreements with adjacent land or property owners that are necessary to enable Design-Builder to perform the Work. Owner is further responsible for all costs, including attorneys' fees, incurred in securing these necessary agreements.

### 3.3 Financial Information

3.3.1 Design-Builder shall cooperate with the reasonable requirements of Owner's lenders or other financial sources.

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

### 3.4 Owner's Representative (NOT USED)

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

3.4.2 [*Optional language:* If Owner retains a third party as Owner's Engineer or Owner's Program Manager, separately from Owner's Representative, then Owner shall designate such third party in writing to Design-Builder, together with a statement of the respective roles, responsibility, and authority of each such party with respect to the administration of the contract, the approval of drawings and specifications, the issuance of instructions and change orders, the resolution of disputes, and the relative priority of the authority of such parties.]

### 3.5 Government Approvals and Permits

3.5.1 Owner shall obtain and pay for all necessary permits, approvals, licenses, government charges and inspection fees set forth in the Owner's Permit List attached as part of Attachment F, *Owner's Project Criteria*.

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

### 3.6 Owner's Separate Contractors

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

- 3.6.2 Owner recognizes the importance that all work performed on the Project or at the Site by separate contractors under separate agreements with Owner is performed in a safe manner so as to prevent damage, injury or loss to (i) all individuals at the Site, whether working or visiting, (ii) the Work, including materials and equipment incorporated into the Work or stored on-Site or off-Site, and (iii) all other property at the Site or adjacent thereto. Owner shall require such separate contractors to assume responsibility for implementing and monitoring all safety precautions and programs related to the performance of their work.

#### **GC 4.0 Hazardous Conditions and Differing Site Conditions**

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

- 4.1.1 Unless otherwise expressly provided in the Contract Documents to be part of the Work, Design-Builder is not responsible for any Hazardous Conditions encountered at the Site. Upon encountering any Hazardous Conditions, Design-Builder will stop Work immediately in the affected area and duly notify Owner and, if required by Legal Requirements, all government or quasi-government entities with jurisdiction over the Project or Site.
- 4.1.2 Upon receiving notice of the presence of suspected Hazardous Conditions, Owner shall take the necessary measures required to ensure that the Hazardous Conditions are remediated or rendered harmless. Such necessary measures shall include Owner retaining qualified independent experts to (i) ascertain whether Hazardous Conditions have actually been encountered, and, if they have been encountered, (ii) prescribe the remedial measures that Owner must take either to remove the Hazardous Conditions or render the Hazardous Conditions harmless.
- 4.1.3 Design-Builder shall be obligated to resume Work at the affected area of the Project only after Owner's expert provides it with written certification that (i) the Hazardous Conditions have been removed or rendered harmless and (ii) all necessary approvals have been obtained from all government and quasi-government entities having jurisdiction over the Project or Site.
- 4.1.4 Design-Builder will be entitled, in accordance with these General Conditions, to an equitable adjustment in its Contract Price and/or Contract Time(s) to the extent Design-Builder's cost and/or time of performance have been adversely impacted by the presence of Hazardous Conditions.
- 4.1.5 To the fullest extent permitted by law, Owner shall defend, indemnify and hold harmless Design-Builder, Design Consultants, Subcontractors and Subsubcontractors, and the agents, officers, directors and employees of each of them, from and against any and all claims, damages, losses, costs and expenses, whether direct, indirect or consequential, including but not limited to attorney's fees, costs and expenses incurred in connection with litigation or arbitration, arising out of or relating to the performance of the Work in any area affected by Hazardous Material. To the fullest extent permitted by law, such indemnification shall apply regardless of the fault, negligence, breach of warranty or contract, or strict liability of the indemnitee.
- 4.1.6 Notwithstanding the preceding provisions of this GC 4.1, Owner is not responsible for Hazardous Conditions introduced to the Site by Design-Builder, Design Consultants, Subcontractors or anyone for whose acts they may be liable. Design-Builder shall indemnify, defend and hold harmless Owner and Owner's officers, directors, employees and agents from and against all claims, losses, damages, liabilities and expenses, including attorneys' fees and expenses, arising out of or resulting from those Hazardous Conditions introduced to the Site by the parties identified in the first sentence of this GC 4.1.6.
- 4.1.7 The terms of this GC 4.1 shall survive the completion of the Work under this Agreement and/or any termination of this Agreement.

##### **4.2 Differing Site Conditions**

- 4.2.1 Concealed or latent physical conditions or subsurface conditions at the Site that (i) materially differ from the conditions indicated in the Contract Documents or (ii) are of an unusual ~~nature,~~ ~~differing nature,~~ ~~differing~~ materially from the conditions ordinarily encountered and generally recognized as inherent in the Work, are collectively referred to herein as “Differing Site Conditions.” If Design-Builder encounters a Differing Site Condition, Design-Builder will be entitled to an equitable adjustment in the Contract Price and/or Contract Time(s) to the extent Design-Builder’s cost and/or time of performance are adversely impacted by the Differing Site Condition.
- 4.2.2 Upon encountering a Differing Site condition, Design-Builder shall provide prompt written notice to Owner of such condition, which notice shall not be later than seven (7) days after such condition has been encountered. Design-Builder shall, to the extent reasonably possible, provide such notice before the Differing Site Condition has been substantially disturbed or altered.

## **GC 5.0 Payment**

### **5.1 Payment for Phase 1 Services**

- 5.1.1 Design-Builder will submit an Application for Payment to Owner each month covering Phase 1 services performed to date. Each Application for Payment will be prepared in the standard form agreed to by the parties and supported by required documentation.

### **5.2 Schedule of Values for Phase 2 Services**

- 5.2.1 Within ten (10) days of the Commencement Date, Design-Builder shall submit for Owner’s review and approval a schedule of values for Phase 2 of the Work. The Schedule of Values will (i) subdivide the Work into its respective parts, (ii) include values for all items comprising the Work and (iii) serve as the basis for monthly progress payments made to Design-Builder throughout the Work.

### **5.3 Monthly Progress Payments**

- 5.3.1 On or before the date established in the Agreement, Design-Builder shall submit for Owner’s review and approval its Application for Payment requesting payment for all Work performed as of the date of the Application for Payment. The Application for Payment shall be accompanied by all supporting documentation required by the Contract Documents and/or established at the meeting required by GC 2.1.4.
- 5.3.2 The Application for Payment may request payment for equipment and materials not yet incorporated into the Project, provided that (i) Owner is satisfied that the equipment and materials are suitably stored at either the Site or another acceptable location, (ii) the equipment and materials are protected by suitable insurance and (iii) upon payment, Owner will receive the equipment and materials free and clear of all liens and encumbrances.
- 5.3.3 The Application for Payment shall constitute Design-Builder’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-Builder’s receipt of payment, whichever occurs earlier.



## **5.4 Withholding of Payments; Payment of Undisputed Amounts**

- 5.4.1** On or before the date established in the Agreement, Owner shall pay Design-Builder all amounts properly due, including the release of retention under Section 7.3.1 of the Agreement. If Owner determines that Design-Builder is not entitled to all or part of an Application for Payment, it will notify Design-Builder in writing at least five (5) days prior to the date payment is due. The notice shall indicate the specific amounts Owner intends to withhold, the reasons and contractual basis for the withholding, and the specific measures Design-Builder must take to rectify Owner's concerns. Design-Builder and Owner will attempt to resolve Owner's concerns prior to the date payment is due. If the parties cannot resolve such concerns, Design-Builder may pursue its rights under the Contract Documents, including those under GC 8.0.
- 5.4.2** Notwithstanding anything to the contrary in the Contract Documents, Owner shall pay Design-Builder all undisputed amounts in an Application for Payment within the times required by the Agreement.

## **5.5 Right to Stop Work and Interest**

- 5.5.1** If Owner fails to pay Design-Builder any amount that becomes due, Design-Builder, in addition to all other remedies provided in the Contract Documents, may stop Work pursuant to GC 9.4. All payments due and unpaid shall bear interest at the rate set forth in Section 7.5 of the Agreement.

## **5.6 Design-Builder's Payment Obligations**

- 5.6.1** Design-Builder will pay any Subcontractors and Design Consultants, in accordance with applicable law and its contractual obligations to such parties, all the amounts Design-Builder has received from Owner on account of their work. Design-Builder will impose similar requirements on Subcontractors and Design Consultants to pay those parties with whom they have contracted.
- 5.6.2** Providing that Owner is not in breach of its contractual obligation to make payments to Design-Builder for the Work, Design-Builder shall indemnify, defend and hold harmless Owner from any claims or mechanic's liens brought against Owner or against the Project as a result of the failure of Design-Builder, or those for whose acts it is responsible, to pay for any services, materials, labor, equipment, taxes or other items or obligations furnished or incurred for or in connection with the Work. Within ten (10) days of receiving written notice from Owner that such a claim or mechanic's lien has been filed, Design-Builder shall commence to take the steps necessary to discharge said claim or lien, including, if necessary, the furnishing of a mechanic's lien bond. If Design-Builder fails to do so, Owner will have the right to discharge the claim or lien and charge Design-Builder with any costs and expenses incurred, including attorneys' fees.

## **5.7 Substantial Completion**

- 5.7.1** Design-Builder shall notify Owner when it believes the Work, or to the extent permitted in the Contract Documents, a portion of the Work, is substantially complete (including the completion of performance testing). Within five (5) days of Owner's receipt of Design-Builder's notice, Owner and Design-Builder will jointly inspect such Work to verify that it is substantially complete in accordance with the requirements of the Contract Documents. If such Work is substantially complete, Owner shall prepare and issue a Certificate of Substantial Completion that will set forth (i) the date of Substantial Completion of the Work or portion thereof, (ii) the remaining items of Work that have to be completed before final payment, (iii) provisions (to the extent not already provided in the Contract Documents) establishing Owner's and Design-Builder's responsibility for the Project's security, maintenance, utilities and insurance pending final payment, and (iv) an acknowledgment that warranties commence to run on the date of

Substantial Completion, except as may otherwise be noted in the Certificate of Substantial Completion.

- 5.7.2 Upon Substantial Completion of the entire Work or, if applicable, any portion of the Work, Owner shall release to Design-Builder all retained amounts relating, as applicable, to the entire Work or completed portion of the Work, less an amount equal to the reasonable value of all remaining or incomplete items of Work as noted in the Certificate of Substantial Completion.
- 5.7.3 Owner, at its option, may use a portion to the Work which has been determined to be substantially complete, provided that (i) a Certificate of Substantial Completion has been issued for the portion of Work addressing the items set forth in GC 5.7.1, (ii) Design-Builder and Owner have obtained the consent of their sureties and insurers, and (iii) Owner and Design-Builder, agree that Owner's use or occupancy will not interfere with Design-Builder's completion of the remaining Work.
- 5.7.4 Upon Substantial Completion, Design-Builder shall conduct performance testing of the Facility using Owner's operations and maintenance staff to demonstrate that the Performance Criteria set forth in Attachment F, *Owner's Project Criteria*, have been satisfied and that the Performance Guarantees have been met.

## 5.8 Final Payment

- 5.8.1 After receipt of a Final Application for Payment from Design-Builder, Owner shall make final payment by the time required in the Agreement, *provided* that Design-Builder has completed all of the Work in conformance with the Contract Documents.
- 5.8.2 At the time of submission of its Final Application for Payment, Design-Builder shall provide the following information:
- 1) an affidavit that there are no claims, obligations or liens outstanding or unsatisfied for labor, services, material, equipment, taxes or other items performed, furnished or incurred for or in connection with the Work which will in any way affect Owner's interests;
  - 2) a general release executed by Design-Builder waiving, upon receipt of final payment by Design-Builder, all claims, except those claims previously made in writing to Owner and remaining unsettled at the time of final payment;
  - 3) consent of Design-Builder's surety, if any, to final payment;
  - 4) a certificate demonstrating that performance testing is complete and that the Performance Guarantees set forth in Attachment F, *Owner's Project Criteria*, have been met;
  - 5) all operating manuals, warranties and other deliverables required by the Contract Documents; and
  - 6) certificates of insurance confirming that required coverages will remain in effect consistent with the requirements of the Contract Documents.
- 5.8.3 Upon making final payment, Owner waives all claims against Design-Builder except claims relating to (i) Design-Builder's failure to satisfy its payment obligations, if such failure affects Owner's interests, (ii) Design-Builder's failure to complete the Work consistent with the Contract Documents, including defects appearing after Substantial Completion, (iii) the terms of any special warranties required by the Contract Documents, and (iv) claims which are identified as unsettled at the time of making final payment.
- 5.8.4 Final payment by Owner shall constitute Final Acceptance of the Project for all purposes hereunder, subject to Design-Builder's remaining warranty obligations and any remaining indemnity obligations hereunder.

- 5.8.5 Acceptance of final payment by the Design-Builder, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

## **GC 6.0 Time**

### **6.1 Obligation to Achieve the Contract Times**

- 6.1.1 Design-Builder agrees that it will commence performance of the Work and achieve the Contract Time(s) in accordance with Article 5.0 of the Agreement.

### **6.2 Delays to the Work**

- 6.2.1 If Design-Builder is delayed in the performance of the Work due to Uncontrollable Circumstances, the Contract Time(s) for performance shall be reasonably extended by Change Order, and the Schedule adjusted accordingly.
- 6.2.2 In addition to Design-Builder's right to a time extension for delays in the Work under GC 6.2.1, Design-Builder shall also be entitled to an equitable adjustment of the Contract Price and equitable commutation of any Liquidated Damages under Section 5.4 of the Agreement.

## **GC 7.0 Changes to the Contract Price and Time**

### **7.1 Change Orders**

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

- .1 The scope of the change in the Work;
- .2 The amount of the adjustment to the Contract Price; and
- .3 The extent of the adjustment to the Contract Time(s) and Schedule.

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

- 7.1.3 If Owner requests a proposal for a change in the Work from Design-Builder and subsequently elects not to proceed with the change, a Change Order shall be issued to reimburse Design-Builder for reasonable costs incurred for estimating services, design services and services involved in the preparation of proposed revisions to the Contract Documents.

### **7.2 Work Change Directives**

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

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

- 7.2.3 [*Optional language:* If Owner has requested a proposal for a change in the Work from Design-Builder, Owner shall notify Design-Builder as expeditiously as possible whether such proposal is accepted. Design-Builder shall not commence changed work until a written Work Change Directive or Change Order has been delivered by Owner. The parties recognize that delay in response to such proposals may increase the impact or cost of the Change.]

### **7.3 Minor Changes in the Work**

- 7.3.1 Minor changes in the Work do not involve an adjustment in the Contract Price and/or Contract Time(s) and do not materially and adversely affect the Work, including the design, quality, performance and workmanship required by the Contract Documents. Design-Builder may make minor changes in the Work consistent with the intent of the Contract Documents, *provided*,

*however*, that Design-Builder shall promptly inform Owner, in writing, of any such changes and record such changes on the documents maintained by Design-Builder.

#### **7.4 Contract Price Adjustments**

- 7.4.1** The increase or decrease in Contract Price resulting from a change in the Work shall be determined by one or more of the following methods:
- .1** unit prices set forth in the Agreement or as subsequently agreed between the parties (which may include daily or monthly overhead rates for the extension of services);
  - .2** a mutually-accepted lump sum, properly itemized and supported by sufficient substantiating data to permit evaluation by Owner;
  - .3** costs, fees and any other markups set forth in the Agreement; and
  - .4** if an increase or decrease cannot be agreed to as set forth in items .1 through .3 above and Owner issues a Work Change Directive, the cost of the change of the Work shall be determined by the reasonable expense and savings in the performance of the Work resulting from the change, including a reasonable overhead and profit, as may be set forth in the Agreement. If the net result of both additions and deletions to the Work is an increase or a decrease in the Contract Price, overhead and profit shall be calculated on the basis of the net increase or decrease to the Contract Price. Design-Builder shall maintain a documented, itemized accounting evidencing the expenses and savings associated with such changes.
- 7.4.2** If unit prices are set forth in the Contract Documents or are subsequently agreed to by the parties, but application of such unit prices will cause substantial inequity to Owner or Design-Builder because of differences in the character or quantity of such unit items as originally contemplated, such unit prices shall be equitably adjusted.
- 7.4.3** If Owner and Design Builder disagree upon whether Design-Builder is entitled to be paid for any services required by Owner, or if there are any other disagreements over the scope of Work or proposed changes to the Work, Owner and Design-Builder shall resolve the disagreement pursuant to GC 8.0. As part of the negotiation process, Design-Builder shall furnish Owner with a good faith estimate of the costs to perform the disputed services in accordance with Owner's interpretations. If the parties are unable to agree and Owner expects Design-Builder to perform the services in accordance with Owner's interpretations, Design-Builder shall proceed to perform the disputed services, conditioned upon Owner issuing a written order to Design-Builder (i) directing Design-Builder to proceed and (ii) specifying Owner's interpretation of the services that are to be performed. If this occurs, Design-Builder shall be entitled to submit in its Applications for Payment an amount equal to \_\_\_\_ percent (\_\_\_%) of its reasonable estimated direct cost to perform the services, and Owner agrees to pay such amounts, with the express understanding that (i) such payment by Owner does not prejudice Owner's right to argue that it has no responsibility to pay for such services and (ii) receipt of such payment by Design-Builder does not prejudice Design-Builder's right to seek full payment of the disputed services if Owner's order is deemed to be a change to the Work.
- 7.4.4** Unless otherwise agreed by the parties, the Design-Builder's markup for indirect costs and profit on additional costs included in an adjustment to the Contract Price under this section 7.4 shall be equal to \_\_\_\_ percent (\_\_\_%) of such additional costs.
- #### **7.5 Emergencies**
- 7.5.1** In any emergency affecting the safety of persons and/or property, Design-Builder shall act, at its discretion, to prevent threatened damage, injury or loss. Any change in the Contract Price and/or Contract Time(s) on account of emergency work shall be determined as provided in this GC 7.0.

## **GC 8.0 Contract Adjustments and Disputes**

### **8.1 Requests for Contract Adjustments and Relief**

- 8.1.1** If either Design-Builder or Owner believes that it is entitled to relief against the other for any Changed Condition arising out of or related to the Work or Project, such party shall provide written notice to the other party of the basis for its claim for relief.
- 8.1.2** A Changed Condition may include a Change in Law following the date of Design-Builder's proposal to Owner which has a material impact on the cost of the Work, the Schedule, the Performance Criteria, or other aspects of Design-Builder's performance hereunder.
- 8.1.3** Changed Conditions may include Uncontrollable Circumstances having an impact on Design-Builder's cost of the Work, the Schedule, the Performance Criteria, or other aspects of Design-Builder's performance hereunder.
- 8.1.4** Such notice shall, if possible, be made prior to incurring any cost or expense and in accordance with any specific notice requirements contained in applicable sections of these General Conditions. In the absence of any specific notice requirement, written notice shall be given within a reasonable time, not to exceed twenty-one (21) 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.
- 8.1.5** Such notice shall include sufficient information to advise the other party of the circumstances giving rise to the claim for relief, and, if then available, the specific contractual adjustment or relief requested and the basis of such request.

### **8.2 Dispute Avoidance and Resolution**

- 8.2.1** 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-Builder and Owner each agree to resolve such disputes or disagreements in an amicable, professional and expeditious manner so as to avoid unnecessary losses, delays and disruptions to the Work.
- 8.2.2** Design-Builder and Owner will first attempt to resolve disputes or disagreements at the Project level through discussions between Design-Builder's Representative and Owner's Representative.
- 8.2.3** If a dispute or disagreement cannot be resolved through Design-Builder's Representative and Owner's Representative, upon the request of either party, then the matter shall be referred to the Senior Representatives of each party for resolution. Design-Builder's Senior Representative and Owner's Senior Representative 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 dispute or disagreement. Prior to any meetings between the Senior Representatives, the parties will exchange relevant information that will assist the parties in resolving their dispute or disagreement.
- 8.2.4** If, after meeting, the Senior Representatives determine that the dispute or disagreement cannot be resolved on terms satisfactory to both parties, then the parties shall submit the dispute or disagreement 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.

### **8.3 Arbitration**

- 8.3.1** 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 GC 8.2, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the AAA then in effect, unless the parties mutually agree otherwise.
- 8.3.2** 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.
- 8.3.3** Design-Builder and Owner expressly agree that any arbitration pursuant to this GC 8.3 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 Owner will include appropriate provisions in all contracts they execute with other parties in connection with the Project to require such joinder or consolidation.
- 8.3.4** In any arbitration, or any other final, binding dispute proceeding upon which the parties may agree, each party shall be responsible for its own legal costs, including attorneys' fees.
- 8.3.5** The arbitration shall be held at the location of the Project, unless the parties mutually agree to another acceptable site for the arbitration. The law applicable to the arbitration shall be the law of the jurisdiction in which the Project is located.

### **8.4 Duty to Continue Performance**

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

## **GC 9.0 Suspension and Termination**

### **9.1 Owner's Right to Stop Work**

- 9.1.1** Owner may, without cause and for its convenience, order Design-Builder 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.
- 9.1.2** Design-Builder is entitled to an equitable adjustment of the Contract Price and/or Contract Time(s) if its cost or time to perform the Work has been adversely impacted by any suspension of stoppage of work by Owner.

### **9.2 Termination for Convenience**

- 9.2.1** Upon ten (10) days' written notice to Design-Builder, Owner may, for its convenience and without cause, elect to terminate this Agreement. In such event, Owner shall pay Design-Builder for the following:
- .1** All Work executed and for proven loss, cost or expense in connection with such Work;
  - .2** The reasonable costs and expenses attributable to such termination, including demobilization costs and amounts due in settlement of terminated contracts with Subcontractors and Design Consultants; and
  - .3** The fair and reasonable sums for overhead and profit on the sum of items **.1** and **.2** above.
- 9.2.2** If Owner terminates this Agreement pursuant to GC 9.2.1 and proceeds to design and construct the Project through its employees, agents or third parties, Owner's rights to use the Work product

shall be as set forth in Section 4.3 (“Owner’s Limited License upon Owner’s Termination for Convenience or Design-Builder’s Election to Terminate”).

### **9.3 Owner’s Right to Perform and Terminate for Cause**

- 9.3.1** *If* Design-Builder persistently falls to (i) provide a sufficient number of skilled workers, (ii) supply the materials required by the Contract Documents, (iii) comply with applicable Legal Requirements, (iv) timely pay, without cause, Subcontractors, (v) prosecute the Work with promptness and diligence to ensure that the Work is completed by the Contract Time(s), as such times may be adjusted, or (vi) perform material obligations under the Contract Documents, *then* Owner, in addition to any other rights and remedies provided in the Contract Documents or by law, shall have the rights set forth in GC 9.3.2, 9.3.3, and 9.3.4.
- 9.3.2** Upon the occurrence of an event set forth in GC 9.3.1, Owner may provide written notice to Design-Builder that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be cured, within seven (7) days of Design-Builder’s receipt of such notice. If Design-Builder fails to cure, or reasonably commence to cure, such problem, then Owner may give a second written notice to Design-Builder of its intent to terminate within an additional seven (7) day period. If Design-Builder, within such second seven (7) day period, fails to cure, or reasonably commence to cure, such problem, then Owner may declare the Agreement terminated for default by providing written notice to Design-Builder of such declaration.
- 9.3.3** Upon declaring the Agreement terminated pursuant to GC 9.3.2, Owner may enter upon the premises and take possession, for the purpose of completing the Work, of all materials, equipment, scaffolds, tools, appliances and other items thereon, which have been purchased or provided for the performance of the Work, all of which Design-Builder hereby transfers, assigns and sets over to Owner for such purpose, and to employ any person or persons to complete the Work and provide all of the required labor, services, materials, equipment and other items.
- 9.3.4** In the event of such termination, Design-Builder shall not be entitled to receive any further payments under the Contract Documents until the Work shall be finally completed in accordance with the Contract Documents. At such time, if the unpaid balance of the Contract Price exceeds the cost and expense incurred by Owner in completing the Work, such excess shall be paid by Owner to Design-Builder. Notwithstanding the preceding sentence, if the Agreement establishes a Guaranteed Maximum Price, Design-Builder will only be entitled to be paid for Work performed prior to its default. If Owner’s cost and expense of completing the Work exceeds the unpaid balance of the Contract Price, then Design-Builder shall be obligated to pay the difference to Owner. Such costs and expense shall include not only the cost of completing the Work, but also losses, damages, costs and expense, including attorneys’ fees and expenses, incurred by Owner in connection with the procurement and defense of claims arising from Design-Builder’s default, subject to the waiver of consequential damages set forth in GC 2.12.2.
- 9.3.5** If Owner improperly terminates the Agreement for cause, the termination for cause will be converted to a termination for convenience in accordance with the provisions of GC 9.2.

### **9.4 Design-Builder’s Right to Stop Work**

- 9.4.1** Design-Builder may, in addition to any other rights afforded under the Contract Documents or at law, stop work for the following reasons:
- .1** Owner’s failure to pay amounts properly due under Design-Builder’s Application for Payment.
- 9.4.2** Should an event set forth in GC 9.4.1 occur, Design-Builder may provide Owner with written notice that Design-Builder will stop work unless such event is cured within seven (7) days from Owner’s receipt of Design-Builder’s notice. If Owner does not cure the problem within such

seven (7) day period, Design-Builder may stop work. In such case, Design-Builder may make a claim for adjustment to the Contract Price and Contract Time(s) to the extent it has been adversely impacted by such stoppage.

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

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

- .1** The Work has been stopped for sixty (60) consecutive days, or more than ninety (90) days during the duration of the Project, because of a court order, any government authority having jurisdiction over the Work, or orders by Owner under GC 9.1.1, *provided* that such stoppages are not due to the acts or omissions of Design-Builder or anyone for whose acts Design-Builder may be responsible; or
- .2** Owner's failure to provide Design-Builder with any information, permits or approvals that are Owner's responsibility under the Contract Documents which result in the Work being stopped for sixty (60) consecutive days, or more than ninety (90) days during the duration of the Project, even though Owner has not ordered Design-Builder in writing to stop and suspend the Work pursuant to GC 9.1.1; or
- .3** Owner's failure to cure the problems set forth in GC 9.4.1 after Design-Builder has stopped the Work.

**9.5.2** Upon the occurrence of an event set forth in GC 9.5.1, Design-Builder may provide written notice to Owner that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be cured, within seven (7) days of Owner's receipt of such notice. If Owner fails to cure, or reasonably commence to cure, such problem, then Design-Builder may give a second written notice to Owner of its intent to terminate within an additional seven (7) day period. If Owner, within such second seven (7) day period, fails to cure, or reasonably commence to cure, such problem, then Design-Builder may declare the Agreement terminated for default by providing written notice to Owner of such declaration. In such case, Design-Builder shall be entitled to recover in the same manner as if Owner had terminated the Agreement for its convenience under GC 9.2.

## **9.6 Bankruptcy of Owner or Design-Builder**

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

- .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
- .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 GC 9.0.

**9.6.2** The rights and remedies under GC 9.6.1 shall not be deemed to limit the ability of the non-Bankrupt Party to seek any other rights and remedies provided by the Contract Documents or by



law, including its ability to seek relief from any automatic stays under the United States Bankruptcy Code or the right of Design-Builder to stop Work under any applicable provision of these General Conditions.

## **GC 10.0        Miscellaneous**

### **10.1    Assignment**

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

### **10.2    Successorship**

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

### **10.3    Governing Law**

**10.3.1** 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.

### **10.4    Severability**

**10.4.1** 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, 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.

### **10.5    No Waiver**

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

### **10.6    Headings**

**10.6.1** The headings used in these General Conditions 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.

### **10.7    Notice**

**10.7.1** 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, (iii) if transmitted by facsimile, by the time stated in a machine-generated confirmation that notice was received at the number of the intended recipient, or (iv) if transmitted by e-mail to the individual to whom such notice is required to be given, by the time stated in a machine-generated confirmation that notice was received at the e-mail address of the intended recipient.

### **10.8    Amendments**

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

## **10.9 Third Parties**

**10.9.1** The services to be performed by Design-Builder are intended solely for the benefit of the Owner. No person or entity not a signatory to this Agreement shall be entitled to rely on the Design-Builder's performance of its services hereunder, and no right to assert a claim against the Design-Builder by assignment of indemnity rights or otherwise shall accrue to a third part.

## **GC 11.0 Electronic Data**

### **11.1 Electronic Data.**

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

### **11.2 Transmission of Electronic Data**

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

**11.2.2** 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.

**11.2.3** 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 4.0 of the Agreement ("Ownership of Work Product"). Under no circumstances shall the transfer of ownership of Electronic Data be deemed to be a sale by the transmitting party of tangible goods.

### **11.3 Electronic Data Protocol**

**11.3.1** 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 GC 11.3.

**11.3.2** Electronic Data will be transmitted in the format agreed upon in GC 11.2.1, including file conventions and document properties, unless prior arrangements are made in advance in writing.

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

**11.3.4** 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 by 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.

**ATTACHMENT E**  
**INDEMNITY, INSURANCE & BONDING**

**1.0 Indemnity**

- 1.1** To the fullest extent permitted by law, Design-Builder shall defend, indemnify and hold Owner harmless from all claims by third parties for bodily injury and property damage (other than to the Work itself and other property insured hereunder) that may arise from the performance of the Work, except that Design-Builder shall have no duty to defend Owner from claims based exclusively on professional services. Design-Builder shall not be required to defend, indemnify or hold harmless Owner for any acts, omissions or negligence of Owner, Owner's employees, agents or separate contractors.
- 1.2** Owner shall cause any other contractor who may have a contract with Owner to perform work in the areas where Work will be performed under this Agreement, to agree to indemnify and defend Design-Builder, Subcontractors or anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable and hold them harmless from all claims for bodily injury and property damage, other than property insured under Section 5.0, that may arise from that contractor's operations. Such provisions shall be in a form satisfactory to Design-Builder.
- 1.3** If an employee of Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them, or anyone for whose acts any of them may be liable has a claim against Owner, its officers, directors, employees, or agents, then Design-Builder's indemnity obligation set forth in Section 1.1 above shall not be limited by any limitation on the amount of damages, compensation, or benefits payable by or for Design-Builder, Design Consultants, Subcontractors, or other entity under any employee benefit acts, including workers' compensation or disability acts.

**2.0 Design-Builder's Liability Insurance**

- 2.1** Design-Builder shall obtain and maintain insurance coverage for the following claims which may arise out of the performance of this Agreement, whether resulting from Design-Builder's operations or by the operations of any Subcontractor, anyone in the employ of any of them, or by an individual or entity for whose acts they may be liable:  
[The claims and limits described below are illustrative. Owner should revise as appropriate to the needs of its project.]
- 2.1.1** workers' compensation, disability and other employee benefit claims under acts applicable to the Work;
- 2.1.2** under applicable employers' liability law, bodily injury, occupational sickness, disease or death claims of Design-Builder's employees with limits of \$1,000,000 per accident or employee disease;
- 2.1.3** bodily injury, sickness, disease or death claims for damages to persons not employed by Design-Builder;
- 2.1.4** usual personal injury liability claims for damages directly or indirectly related to the person's employment by Design-Builder or for damages to any other person;
- 2.1.5** damage to or destruction of tangible property, including resulting loss of use, claims for property other than the Work itself and other property of third parties;
- 2.1.6** bodily injury, death or property damage claims resulting from motor vehicle liability in the use, maintenance or ownership of any motor vehicle; and
- 2.1.7** contractual liability claims involving Design-Builder's obligations under Paragraph 1.1.

2.2 Design-Builder's Commercial General and Automobile Liability Insurance as required by Paragraph 2.1 shall be written for the following limits of liability:

[Owner should consult with its insurance or risk management personnel or advisor is setting limits of liability for the insurance coverages required for its project.]

1. Commercial General Liability Insurance
  - a. Each Occurrence Limit \$ [insert value]
  - b. General Aggregate \$ [insert value]
  - c. Products/Completed Operations Aggregate \$ [insert value]
  - d. Personal and Advertising Injury Limit \$ [insert value]
  - e. Contractual Liability \$ [insert value]
  
2. Commercial Automobile Liability Insurance
  - a. Combined Single Limit Bodily Injury and Property Damage \$ [insert value]  
Each Occurrence
  
  - or*
  - b. Bodily Injury \$ [insert value]  
Each Person  
\$ [insert value]  
Each Occurrence
  - c. Property Damage \$ [insert value]  
Each Occurrence

Owner shall be an Additional Insured on Commercial General Liability insurance and the Commercial Automobile Liability insurance obtained by Design-Builder pursuant to this clause.

Excess Liability Insurance above the required Commercial General, Commercial Automobile, and Employer's Liability insurance in the additional amount of [insert value] annual aggregate limit. [Owner should consult with its insurance or risk management personnel or advisor is setting limits of liability for the insurance coverages required for its project.]

Contractor's Pollution Liability Errors and Omissions Insurance in the amount of [insert value] per loss and annual aggregate limit of [insert value]. [Owner should consult with its insurance or risk management personnel or advisor is setting limits of liability for the insurance coverages required for its project.]

- 2.3 The policies shall contain a provision that coverage will not be canceled or not renewed until at least thirty (30) days' prior written notice has been given to Owner. Certificates of insurance showing required coverage to be in force shall be filed with Owner prior to commencement of the Work.
- 2.4 Products and Completed Operations insurance shall be maintained for a minimum period of at least two year(s) after either ninety (90) days following the date of Substantial Completion or final payment, whichever is earlier.
- 2.5 The insurance limits stated in this Attachment E may be satisfied through a combination of underlying and excess or umbrella coverage.
- 2.6 **Subcontractors.** Design-Builder shall require that all Subcontractors working on the Project secure and maintain the same insurance coverages required for Design-Builder for workers' compensation insurance, employer's liability insurance, commercial automotive liability insurance and commercial general liability insurance and other financial sureties required by

applicable law in connection with their presence and the performance of their duties pursuant to this Agreement; provided that Owner may approve lower limits for specific subcontractors pursuant to a request submitted by Design-Builder to Owner prior to any work being performed by the subcontractor. Design-Builder shall require that all subcontractors performing engineering services and all subcontractors performing work with potential pollution liability risk secure and maintain Professional Liability or Pollution Liability insurance coverage, respectively, with such coverage limits commensurate with the scope of the subcontract work performed. Owner, Design-Builder and all other parties required of Design-Builder shall be named as additional insured on subcontractor's required commercial general liability insurance policy. Alternatively, Design-Builder may obtain and maintain said policies and sureties on the subcontractor's behalf.

### **3.0 Professional Liability Insurance**

Professional liability insurance for claims arising from the negligent performance of professional services under this Agreement shall be written for \$\_\_\_\_\_ per claim and in the annual aggregate with a deductible not to exceed \$\_\_\_\_\_. These requirements shall be continued in effect for two year(s) after the date of Substantial Completion. If the Design-Builder retains consultants for a portion of the design, Owner may approve lower limits for specific Design Consultants pursuant to a request submitted by Design-Builder to Owner prior to any work being performed by such Design Consultants. [Owner should consult with its insurance or risk management personnel or advisor is setting limits of liability for the insurance coverages required for its project.]

### **4.0 Owner's Liability Insurance**

- 4.1** Owner shall be responsible for obtaining and maintaining its own liability insurance. Insurance for claims arising out of the performance of this Agreement may be purchased and maintained at Owner's discretion.
- 4.2** If Owner hires separate contractors for with respect to the Project or for any portion of the Work, then Owner shall require that such separate contractors waive any insurers' rights of subrogation against the Design-Builder and its Subcontractors, Design Consultants, and their officers, directors, and employees.

### **5.0 Insurance to Protect Project**

- 5.1** Design-Builder shall obtain and maintain Builder's Risk Property Insurance including work and materials, upon the entire project for the full replacement cost at the time of loss. This insurance shall include as named insureds Owner, Design-Builder, Subcontractors and Subsubcontractors. The policy shall insure against direct risk of physical loss or damage including flood or other water damage, earthquake, transit, off-premises storage, boiler and machinery, delay in opening, testing (both hot and cold) [*and damage resulting from defective design, faulty workmanship or materials*]. Minimum deductible for all risks perils is [insert value] except flood and earthquake which shall be [insert value] and [insert value] respectively. Subcontractors shall be responsible for up to a [insert value] deductible per the Subcontract Terms and Conditions.

*[Note 1: The deductibles available for flood and earthquake may vary by year and by location of project. Consult with your insurance or risk management personnel or advisor.]*

*[Note 2: It may not be feasible to obtain Builder's Risk Property Insurance coverage which includes "damage resulting from defective design, faulty workmanship or materials." Consult with your insurance or risk management personnel or advisor.]*

The Builder's Risk Property Insurance shall contain provisions to the effect that in the event of payment of any loss or damage, the insurers will have no rights of recovery against any of the insureds or additional insureds. Owner, Design-Builder, Subcontractors and Subsubcontractors and Suppliers of any tier waive all rights and claims against each other and their respective officers, directors, employees and agents for all loss or damages including loss due to business interruption, loss of use or other consequential damage extending beyond direct physical loss or damage to Owner's property or the work whether or not insured by Owner, caused by, arising out of or resulting from any of the perils covered by such insurance and any other property insurance applicable to the Work during construction and after. None of the waivers will extend to the rights of any party making such waiver may have to the proceeds of insurance held by Owner as trustee or otherwise payable under any policy issued.

Owner and Subcontractor(s) shall maintain at their option, separate all risk commercial property insurance to cover their property, tools and equipment not covered by the Builder's Risk Insurance Policy.

- 5.2 If Owner occupies or uses a portion of the Project prior to its Substantial Completion, such occupancy or use shall not commence prior to a time mutually agreed to by Owner and Design-Builder and to which the insurance company or companies providing the property insurance have consented by endorsing the policy or policies. This insurance shall not be canceled or lapsed on account of partial occupancy. Consent of Design-Builder to such early occupancy or use shall not be unreasonably withheld.
- 5.3 Owner shall obtain and maintain boiler and machinery insurance as necessary. The interests of Owner, Design-Builder, Subcontractors and Subsubcontractors shall be protected under this coverage.
- 5.4 Upon Substantial Completion and during any period of startup, testing, commissioning, or initial operation of the Project, Owner shall obtain and maintain insurance with respect thereto consistent with that insurance which Owner obtains and maintains with respect to any damage or loss to its permanent plant during commercial operation. Design-Builder, Subcontractors and Subsubcontractors shall be named as additional insured on such insurance, and Owner hereby waives any rights of subrogation with respect thereto.

## **6.0 Property Insurance Loss Adjustment**

- 6.1 Any insured loss shall be adjusted with Owner and Design-Builder and made payable to Owner and Design-Builder as trustees for the insureds, as their interests may appear, subject to any applicable mortgagee clause.
- 6.2 Upon the occurrence of an insured loss, monies received will be deposited in a separate account and the trustees shall make distribution in accordance with the agreement of the parties in interest, or in the absence of such agreement, in accordance with a mediation agreement, or, if not resolved through mediation, then by an arbitration award pursuant to arbitration. If the trustees are unable to agree between themselves on the settlement of the loss, such dispute shall also be submitted for resolution by mediation or arbitration.

## **7.0 Waiver of Subrogation**

- 7.1 Owner and Design-Builder waive all rights against each other, and any of their respective employees, agents, consultants, subcontractors and subsubcontractors for damages caused by risks covered by insurance provided in Section 5.0 to the extent they are covered by that insurance, except such rights as they may have to the proceeds of such insurance held by Owner and Design-Builder as trustees. Design-Builder shall require similar waivers from all

Subcontractors, and shall require each of them to include similar waivers in their subsubcontracts and consulting agreements.

- 7.2 Owner waives subrogation against Design-Builder, Subcontractors and Subsubcontractors on all property and consequential loss policies carried by Owner on adjacent properties and under property and consequential loss policies purchased for the Project after its completion.
- 7.3 If the policies of insurance referred to in this Section require an endorsement to provide for continued coverage where there is a waiver of subrogation, the owners of such policies will cause them to be so endorsed.

*[NOTE: With respect to Bonding, the Owner and Design-Builder may agree that bonds are not required for a particular project, or that the amount of the bonds can be less than 100% of Contract Price.*

*If the parties agree that bonds are required, in section 8.2 below, select Option 1 for conventional construction-type Performance and Payment Bonds, or select Option 2 for Design-Build Performance and Payment Bonds, which may require a higher bond premium.]*

## **8.0 Bonding**

- 8.1 Design-Builder will provide Performance and Payment Bonds for the Phase 2 Services. The costs of such bonds shall be in addition to the Contract Price.
- 8.2 ***[Option 1]*** Design-Builder shall furnish Performance and Payment Bonds, each in an amount equal to the Contract Price, as security for the faithful performance and payment of all Design-Builder's obligations to furnish, provide and pay for Construction and related materials, design, and other services under the Contract Documents.
- [Option 2]*** Design-Builder shall furnish Performance and Payment Bonds, each in an amount equal to the Contract Price, as security for the faithful performance of all Design-Builder's contractual obligations hereunder with respect to both design and construction of the Project, and as security for payment of all Design-Builder's obligations to furnish, provide and pay for Construction and related materials under the Contract Documents.
- 8.3 These Bonds shall remain in effect after the date of Substantial Completion at least until expiration of the warranty period, except as provided otherwise by Laws or Regulations or by the Contract Documents.
- 8.4 All Bonds shall be in the form prescribed by the Contract Documents except as provided otherwise by Laws or Regulations, and shall be executed by such sureties as are named in the current list of "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies" as published in Circular 570 (amended) by the Audit Staff, Bureau of Government Financial Operations, U.S. Treasury Department. All Bonds signed by an agent must be accompanied by a certified copy of such agent's authority to act.
- 8.5 **Licensed Sureties** All Bonds required by the Contract Documents to be purchased and maintained by Design-Builder shall be obtained from surety companies that are duly licensed or authorized to issue bonds in the jurisdiction in which the Project is located to issue Bonds for the limits and coverages so required.



**ATTACHMENT F**  
**OWNER'S PROJECT SCOPE AND CRITERIA**

**1.0 Project Scope**

*[Owner should insert a description of the scope of its project.]*

**2.0 Design Criteria**

*[Owner should insert required or preferred preliminary design criteria for its project that may be available at the time the Agreement is signed and such preliminary criteria should be refined by agreement of Owner and Design-Builder during the Phase 1 Services. Alternatively, these criteria can be developed during the Phase 1 Services.]*

**3.0 Facility Performance Criteria**

*[Owner should insert required or preferred preliminary facility performance criteria for its project that may be available at the time the Agreement is signed and such preliminary criteria should be refined by agreement of Owner and Design-Builder during the Phase 1 Services. Alternatively, these criteria can be developed during the Phase 1 Services.]*

**4.0 Performance Tests**

*[Owner should insert required or preferred preliminary requirements for performance tests for its project that may be available at the time the Agreement is signed and such preliminary requirements should be refined by agreement of Owner and Design-Builder during the Phase 1 Services. Alternatively, these requirements can be developed during the Phase 1 Services.]*

**ATTACHMENT G  
OWNER'S PERMIT LIST**

[Owner should add a list of the permits and other governmental approvals that it will bear responsibility to obtain.]