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**FRESNO COUNTY RURAL TRANSIT AGENCY (FCRTA)
MEETING AGENDA**

DATE: Thursday, March 24, 2022
TIME: 5:30pm, **AFTER** the *Fresno Council of Governments (FCOG) Meeting*
PLACE: FCOG / FCRTA Offices
Sequoia Conference Room
2035 Tulare Street, Suite 201
Fresno, CA 93721
*(Corner of Tulare and Van Ness Ave. - above Club One
Park in Underground Garage - Entrance off Tulare & Van Ness Ave.
Exit Elevator on Tulare St., Turn Left, Enter Lobby Door,
Up Elevator to Second Floor, Left to Sequoia Conference Room)*

Americans with Disabilities Act (ADA) Accommodation

The Fresno COG / FCRTA offices and restrooms are ADA accessible. Individuals with disabilities may call (559-233-4148) / FCRTA (559-233-6789) at least 3 days in advance, to request auxiliary aids and/or translation services necessary to participate in the public meeting / public hearing. If Fresno COG / FCRTA are unable to accommodate an auxiliary aid or translation request for a public hearing after receiving proper notice, the hearing will be continued on a specified date when accommodations are available.

AB 23 Requirement: In accordance with the Brown Act and AB23 the amount of stipend paid to members of the Board of Directors for attending this meeting of the Fresno County Rural Transit Agency, is \$50.00.

THE FRESNO COUNCIL OF GOVERNMENTS AND FRESNO COUNTY RURAL TRANSIT AGENCY BOARD MEETINGS WILL TAKE PLACE IN PERSON AT THE FRESNO COG SEQUOIA ROOM AND VIA ZOOM.

Join Zoom Meeting

<https://us06web.zoom.us/j/82575190204?pwd=b29nemhhS1MybGZRRRTBBcmxwM3Z3Zz09>

Meeting ID: 825 7519 0204 Passcode: 540533

Dial In: +1 669 900 6833

If you wish to address the Board during the public comment portion of the agenda, click on the "Reactions" at the bottom center of your PC or Mac screen. Select the Hand icon, click the icon to "RaiseHand". Your digital hand will now be raised.

When on the phone, if you wish to address the Board during the public comment portion of the agenda, Press *9 to "RaiseHand" and we will select you from the meeting cue.

**If joining by phone use *6 to unmute and mute yourself. When joining the meeting all participants are automatically muted. Do NOT use the mute function on your land line phone or cell phone.

Those addressing the Board are asked to state their first and last name and agency for the record.

To facilitate electronic access, no person shall speak until recognized by the Chair.

1. ROLL CALL

Public Presentations - This portion of the meeting is reserved for persons wishing to address the FCRTA Board on items within its jurisdiction but not on this Agenda.

NOTE: The public may also comment on any Agenda item, as they are presented, prior to action by the FCRTA Board.

2. ACTION ITEMS

A. Board Officer Appointments

Summary: Previously when the Board Chair position has been vacated suddenly, the FCRTA Board will fill the chair position via an interim appointment until the term expires. The next regular officer election is scheduled for July 28, 2022. In the event the vice chair is elevated to Board chair, the Board will need to also appoint an interim vice chair.

Current:

Mayor David Cardenas (Fowler) Chair

Councilmember Michelle Roman (Kingsburg) Vice Chair

Action: Appoint/install new Board chair and potentially, vice chair, to complete 2021-22 term through July 28, 2022.

3. CONSENT ITEMS

A. Approve Minutes of February 24, 2022 Meeting [ATTACHMENT]

B. Consultant Selection for the FCRTA Microgrid Study Project [APPROVE]

Summary: In June of 2021, FCRTA was awarded \$455,500 from the Caltrans Sustainable Communities Planning Grant Program to conduct a Microgrid Feasibility Study in rural Fresno County. As indicated in the grant application, FCRTA will be utilizing a qualified consultant to perform this study and complete a Request for Proposal (RFP) process for selection of a consultant. The intent of this RFP is to retain a consultant to; evaluate the feasibility of distributed energy resources such as microgrids and other affordable charging model technologies for use in Fresno County, evaluate how microgrids would make the FCRTA transit system more efficient, provide more transit service as well as multi-modal options such as electric car share and bike share, and assess space/land requirements for generation and storage technologies. The RFP was released on January 3, 2022 and proposals were due on February 3, 2022. Staff received three (3) proposals for this project. On February 22, 2022, a scoring committee representing FCRTA, Fresno COG and FAX interviewed the consultants and unanimously recommended Walker Consultants for this project. The proposed agreement is attached for your review (**ATTACHMENT**).

Action: Staff recommends Board approval of Walker Consultants as the consultant for the FCRTA Microgrid Study Project and authorize the General Manager to enter into an agreement with Walker in an amount not to exceed \$454,919.

C. 2022 Annual CHP-Motor Carrier Division Terminal, Vehicle and Driver Inspection Report [INFORMATION]

Summary: The CHP has completed the FCRTA Annual Inspection for the Terminal, Maintenance, Vehicles and Driver's Records. This included Drug & Alcohol testing requirements under the Federal

Transit Administration and Caltrans. The satisfactory ratings meet Local, State and Federal requirements to continue operations and remain eligible for funding allocations in FY 2022-23 as a Public Transit Agency. The Transit Operator Compliance Certificate, Controlled Substance and Alcohol Testing Program and Motor Carrier Certification are available on FCRTA's website www.ruraltransit.org.

Action: Information only. The Board may provide additional direction at its discretion.

D. Transit and Intercity Rail Capital Program Grant Application [INFORMATION]

Summary: FCRTA has submitted an application to the Transit and Intercity Rail Capital Program (TIRCP) on March 3, 2022. FCRTA is planning to construct a resiliency hub, which will include electric vehicle charging infrastructure. The resiliency hub will include four (4) inductive charging stations to allow FCRTA to quickly charge their electric bus fleet during layovers to advance the agencies transition to an EV/ZEV fleet. The resiliency hub will also include a solar carport and EV Charging System for FCRTA's small electric vehicle (EV) fleet (comprised of Chevy Bolts) with sixteen (16) EV charging stations to permit new transit service. The resiliency hub will be constructed at a currently vacant property located in West Fresno at 1535 Kern Street, Fresno, CA, owned by a local business (Central Fish Company). The property is located in a disadvantaged community across the street from the future high speed rail Station in Fresno. FCRTA is applying for the TIRCP grant to fund the purchase of the property, construction of the resiliency hub, and conversion of FCRTA's electric bus fleet to be compatible with the inductive charging units. The total project cost is \$6,862,025, and FCRTA is requesting \$6,175,822 in TIRCP funds and a match of \$686,202 in local Measure C funds.

Action: Information only. The Board may provide additional direction at its discretion.

E. FCRTA Selma Maintenance Facility Project Agreement [APPROVE]

Summary: On February 24, 2022 the Board approved the award of the Selma Maintenance Facility Construction project to Zumwalt Construction Inc. following the Request for Qualification (RFQ) and Request for Proposal (RFP) process. This will be for Phase 1 of the operations and maintenance facility on approximately 7.5 acres in Selma. This project is being funded by an FTA 5339 grant (\$5,145,281) and local Measure C funding (\$5,145,281) for a total funding amount of \$10,290,562. The proposed agreement is attached for your review and has been reviewed by FCRTA legal counsel (ATTACHMENT).

Action: Staff recommends Board approval and authorize the General Manager to enter into an agreement with Zumwalt Construction Inc. in an amount not to exceed \$10,290,562.

F. Affordable Housing and Sustainable Communities (AHSC) Project [APPROVE]

Summary: The Affordable Housing and Sustainable Communities program is administered by the Strategic Growth Council and implemented by the Department of Housing and Community Development. The Board approved in January 2020, the grant submission of FCRTA in partnership with the City of Coalinga, Affordable Housing and Sustainable Communities Grant Application. This grant application has been awarded and includes affordable housing, bikeways, transit amenities, transit passes, and an electric bus. Staff has updated the previously approved Resolution per the request of the funding source (ATTACHMENT).

Action: Staff recommends Board approval and adoption of Resolution No. 2022-04.

G. Special Meeting April 11, 2022 – AB 361 Findings for April Board Meeting [ACTION]

Summary: Due to the Cesar Chavez holiday on Thursday March 31, the FCRTA Board Meeting was moved to March 24th. The March and April Board Meetings are more than 30 days apart exceeding what is allowed under AB 361 requirements for issuing findings necessary to continue the Board's video conferencing practice during COVID-19 emergency conditions. As a result, FCRTA will require a special

meeting, proposed for 5:30 p.m. Mon., April 11 following the FCOG Special Meeting, to issue findings necessary to hold the regular April 28 Policy Board meeting via video conferencing.

Action: Approve a special FCRTA Board meeting for **5:30 p.m. Mon. April 11** following the FCOG special meeting to consider COVID-related findings necessary to allow for video conferencing during the April 28 Policy Board meeting under AB 361.

4. OTHER BUSINESS

A. Items from staff.

B. Items from members.

5. ADJOURNMENT

Executive Minutes

Thursday, February 24, 2022 at 5:30 P.M after COG Policy Board Meeting
COG Sequoia Conference Room
2035 Tulare St., Suite 201, Fresno, CA

Members Attending:

Mayor Ron Ramsey, City of Coalinga
Mayor David Cardenas, City of Fowler
Mayor Gary Yep, City of Kerman
Mayor Rey Leon, City of Huron
Councilmember, Michelle Roman, City of Kingsburg
Mayor Victor Lopez, City of Orange Cove
Mayor Mary Fast, City of Reedley
Mayor Scott Robertson, City of Selma
Mayor Eli Ontiveros, City of Sanger
Mayor Julia Hernandez, City of San Joaquin
Supervisor Steve Brandau, Fresno County

Moses Stites, General Manager
Janelle Del Campo, Operations Manager
Alison Samarin, County Counsel
Jeaneen Cervantes, FCOG

Absent:

Mayor Brady Jenkins, City of Firebaugh
Mayor Rolando Castro, City of Mendota
Mayor Alma Beltran, City of Parlier

1. **ROLL CALL** — Meeting called to order 8:01 p.m.
Public Presentations - This portion of the meeting is reserved for persons wishing to address the
FCRTA Board on items within its jurisdiction but not on this Agenda.
NOTE: The public may also comment on any Agenda item, as they are presented, prior to action by the FCRTA Board.
2. **CONSENT ITEMS**
 - A. **Approve Executive Minutes of January 27, 2022 [ATTACHMENT]**
 - B. **Amendment I to the Contractor Services Agreement with Fresno Economic Opportunities Commission [APPROVE]**
 - C. **Electrical Grid Analysis Study Final Report [INFORMATION]**
 - D. **Annual Productivity Evaluation FY 2020-21 [APPROVE]**
 - E. **Future Board Meeting Format [ACTION]**

A motion was made by Mayor Orange Cove (Lopez) and second by Supervisor Brandau (County). A vote was called, and motion carried.

3. **ACTION ITEMS**

A. **Return to In Person Meetings [DISCUSSION/ACTION]**

Moses informed the Board that the format of the meetings is at the Board's discretion.

Mayor Yep said that some Board members prefer in person and some Board members prefer Zoom and recommended rolling over what was decided for the Fresno COG Board meetings; the next three (3) FCRTA Board meetings remain hybrid.

A motion was made by Mayor Yep (Kerman) and second by Mayor Ontiveros (Sanger). A vote was called, and motion carried.

B. **DBE Selection for the FCRTA Selma Maintenance Facility Project [APPROVE]**

Moses informed the Board that this was a design-build project which had (2) parts for the prospective bidder: 1) The RFQ- 5 firms submitted their qualifications 2) The RFP- 2 local firms were selected for interviews. FCRTA provided basic background and parameters for the RFP to the short-listed bidders based on a similar transit maintenance facility project in King City by MST.

Moses informed the Board of the review of the RFQ and RFP and said a select group of panelists were chosen to review the RFQ and RFP proposals based on their experience in transit and maintenance. The same group of experts reviewed the RFQ and RFP as there was consistency and integrity throughout the process. The panel narrowed down the (5) RFQ submittals to (2) RFP finalists, Staff shared this information with the Board on November 18, 2021 and the information is also detailed in the agenda summary before you. Staff met with both DBE firms at the site in Selma to do a walk through and provide an extensive overview of the project so they could both prepare their design build proposals. The panel was unanimous in the recommendation for award after the interview. The panel's recommendation was for Zumwalt. FCRTA staff is recommending Zumwalt as they provided the "best value" with key items in their proposal including almost \$1 million dollars in contingency within the stipulated sum. The key item for making the recommendation by both the panel and staff was the proposed 5,500 sq foot office building in addition to the 15,000 sq foot maintenance building along with other amenities.

Moses informed the Board of the bid protest that was received by Harris and it is addressed in the agenda in detail as per consultation with FCRTA legal counsel. A typographical error in a referenced code section which was an oversight. The entire document had this code cited correctly for best value. The board was provided an update on November 18, 2021 and in the update, staff made specific reference to the selection of the DBE and that it would be based on "best value" among other criteria. The scoring and evaluation was consistent however it should be noted that one of the panelists did not score the interview portion of the evaluation for either bidder due to illness and was not present at the interviews. It is staff's recommendation that the bid protest be rejected as it is without merit and not warranted. Staff believes the evaluations of the proposals was a fair and consistent process and staff further recommends the selection of Zumwalt for Phase 1 of the project based on "best value".

Mayor Yep (Kerman) asked legal counsel why this is not in a closed session? legal counsel stated that it is not a closed session because there is no litigation pending. Mayor Yep (Kerman) stated that Harris donated to his campaign in 2014 and he sits on the LAFCO Board and they are the same law firm but they are separate entities so he does not believe it is a conflict of interest and legal counsel agreed. Supervisor Brandau (County) asked if FCRTA anticipates more phases for the project and Moses responded that they anticipates 1 or 2 additional phases for this project. Selma asked if we re-bid the project how much additional time would it take? Moses responded

we would be starting the process over and it would take a lot of additional time and work and we risk losing the funding for this project from FTA.

Angie Dow, the Executive Director from Kings Area Rural Transit (KART) made a public comment. Angie stated she was one of the panelists on the scoring committee. She has more than 15 years experience and currently is in charge of a \$35 million dollar construction project. She is very familiar with the procurement process and how things are awarded through FTA guidelines. The two (2) issues stated in the bid protest letter by Harris are irrelevant. The scoring panel was more than qualified to make this recommendation to this board. A delay in this project will jeopardize the funding and it is a waste in taxpayer funds, there will also be an increase in costs. Angie stated that she supports and recommends the actions recommended in the agenda.

Bob McKnight, the President from Zumwalt Construction made a public comment. Bob stated that the design-build is entirely different from a regular construction project and all the documents for this RFP were identical that were provided to both DBE's. Bob stated that they had a good understanding of the project based on what FCRTA provided and they put together the best team. Zumwalt receives about 2 bid protests a year and this bid protest is extremely weak and is just to slow down the process. When we went through this process with FCRTA it was extremely transparent.

Mayor Yep (Kerman) stated that there was no fundamental or material error in the process and the items listed in the protest letter would have not changed the way the bid came out and that is why he supports the recommended actions.

Staff recommended the following actions;

1. Reject the bid protest from Harris Construction regarding the proposed award of the RFP for the FCRTA Selma Maintenance Facility Project

A motion was made by Mayor Ontiveros (Sanger) and second by Mayor Robertson (Selma). A vote was called, and motion carried.

2. Find that the process utilized by FCRTA staff in the evaluation of bid proposals was fair and consistent with the provisions of the RFP and substantially complied with the requirements of the Public Contract Code.
3. Find that Zumwalt Construction is the best value bidder of the RFP for the FCRTA Selma Maintenance Facility Project, and award Zumwalt Construction Inc. as the selected Contractor for the Selma Maintenance Facility Project in the amount not to exceed \$10,290,562 for Phase 1.
4. Issuance of the following statement: The award of the Fleet Maintenance Facility project is based on the scoring panel's evaluation of those price and non-price factors identified in the RFP, including but not limited to: technical design and construction expertise, life cycle costs, design-build team organization and personnel, and skilled workforce commitment, together with the interviews conducted by the scoring panel with the short-listed DB Entities, with all of those evaluation factors weighted and accorded a maximum point total as specified in Exhibit B to the RFP.

A motion was made by Mayor Robertson (Selma) and second by Mayor Ontiveros (Sanger). A vote was called, and motion carried.

4. **OTHER ITEMS**

A. Items from Staff

None Reported.

B. Items from Members

None Reported.

5. **ADJOURNMENT @ 8:49p.m.**

Respectfully submitted,



Moses Stites
General Manager

FRESNO COUNTY RURAL TRANSIT AGENCY
AGREEMENT FOR CONTRACTOR SERVICES

This AGREEMENT, made and entered into this ____ day of _____, 2022 by and between the FRESNO COUNTY RURAL TRANSIT AGENCY, 2035 Tulare St., Suite 201, Fresno, California 93721, a joint powers Public Agency (hereafter referred to as "FCRTA"), and Walker Consultants, a Michigan Corporation (hereafter referred to as "CONTRACTOR"). FCRTA and CONTRACTOR are each a "Party" to this Agreement and collectively are the "Parties" to this Agreement.

WITNESSETH:

WHEREAS, it is necessary and desirable that FCRTA retain a firm to perform a feasibility study for microgrid systems in rural Fresno County (hereafter referred to as "PROJECT"); and

WHEREAS, CONTRACTOR represents it is qualified to perform the services required for the PROJECT and is willing to perform such services pursuant to the terms and conditions stated in this Agreement; and

NOW, THEREFORE, it is agreed by FCRTA and CONTRACTOR as follows:

I. CONTRACTOR'S OBLIGATIONS

A. The CONTRACTOR shall perform all work necessary to complete the PROJECT. CONTRACTOR shall perform those services as described in: FCRTA's Request for Proposals, released January 3, 2022 (Exhibit A) attached hereto and incorporated herein by this reference as though set forth in full, and CONTRACTOR's Proposal dated February 3, 2022 titled Proposal for Fresno County Rural Transit Agency Distributed Energy Resource/ Microgrid Feasibility Study, attached hereto as (Exhibit B), and incorporated herein by this reference as if set out in full. CONTRACTOR shall perform those tasks and services in accordance with the instructions set forth in Exhibit A. In the event of any inconsistency between this Agreement the FCRTA's RFP and the CONTRACTOR's Proposal, such inconsistency shall be resolved by giving precedence in the following order of priority: (1) to the text of this Agreement; (2) to the FCRTA's RFP; (3) the CONTRACTOR's Proposal.

B. CONTRACTOR shall perform the tasks and services contemplated by this Agreement according to the proposed work schedule as set forth in Exhibit B (CONTRACTOR's Proposal), and according to the requirements of this Agreement.

C. CONTRACTOR shall perform all services required pursuant to this Agreement in the manner and according to the standards observed by a competent practitioner of the profession in which CONTRACTOR is engaged in the geographical area in which CONTRACTOR practices his profession. All products of whatsoever nature which

D. CONTRACTOR delivers to FCRTA pursuant to this Agreement shall be prepared in a substantial, first class manner and conform to the standards of CONTRACTOR's profession.

II. FCRTA's OBLIGATIONS

A. FCRTA shall compensate CONTRACTOR as provided in section III of this Agreement.

B. FCRTA will make available to the CONTRACTOR any document, studies, or other information in its possession related to the PROJECT.

III. COMPENSATION

A. Total Compensation.

Notwithstanding any other provision in this Agreement, the basic fee for the services rendered shall be computed at the hourly and cost rates as set forth in Exhibit B (CONTRACTOR's Proposal), and shall be limited by an amount not to exceed the sum of \$454,919.

B. Progress Payments.

FCRTA shall make progress payments to CONTRACTOR upon receipt and approval by FCRTA of CONTRACTOR's monthly invoices, based upon completion of the task and services as set forth in Exhibit B. Payment of said progress payments to CONTRACTOR shall be based upon FCRTA's evaluation of the completion of each respective component.

Ten percent (10%) of each progress payment shall be retained by FCRTA as performance retention. Upon CONTRACTOR's full performance of its obligations under this agreement, including, without limitation, submission of its Final Report, and FCRTA's approval of CONTRACTOR's performance hereunder, the accrued performance retention shall be paid to CONTRACTOR by FCRTA. The CONTRACTOR may request FCRTA to make payment of retention funds withheld from progress payments as provided under Section 10263 of the California Public Contracts Code.

C. Invoices.

CONTRACTOR shall submit two copies of each invoice with adequate supporting documentation of work billed and costs charged by Task as set forth in Exhibit B, to FCRTA, specifying those services which CONTRACTOR believes have been completed. The invoice shall specify: (1) hours worked multiplied times the billing rates authorized in Exhibit B, (2) an itemization of other direct cost and/or subcontractor fees as set forth in Exhibit A; (B) the total amount billed for the current period, (4) the total amount billed to-date for the project. (5) the retention amount withheld. The invoice shall include a written progress report adequately describing the services billed and provided, and summarizing the status of the PROJECT in regards to task completion, timelines, and budget.

D. Payment.

Within 30 days of receipt of a proper invoice, FCRTA shall determine whether CONTRACTOR has adequately performed to the satisfaction of FCRTA the item(s) for which CONTRACTOR seeks payment, and shall remit payment thereof to CONTRACTOR.

E. Disputes.

If FCRTA determines that CONTRACTOR has not adequately performed any such task or services, FCRTA shall inform CONTRACTOR of those acts in writing which are necessary for satisfactory completion of the item(s). CONTRACTOR shall undertake any and all work to satisfactorily complete the item(s) at no additional charge to FCRTA.

In the event there is a dispute over an alleged error or omission by CONTRACTOR, FCRTA shall have the right to withhold payment of CONTRACTOR's fees in the disputed amount.

FCRTA and CONTRACTOR shall endeavor to resolve any dispute informally between them. In the event the dispute cannot be thus resolved, either Party may request the Parties engage in arbitration or mediation (hereafter referred to as "arbitration") of the dispute before an independent arbitrator. In the case the Parties mutually agree to arbitrate the dispute, they shall mutually select an independent arbitrator or panel of arbitrators from Judicial Arbitration and Mediation Services, Inc. ("JAMS"), or another entity mutually agreed to. In the event a panel of arbitrators is selected, each Party shall select one member, and shall mutually agree on a third member of the panel. Any arbitration shall occur in Fresno County, California.

IV. TERMINATION

A. Termination Without Cause.

This Agreement may be terminated without cause at any time by FCRTA or the CONTRACTOR upon thirty (30) calendar days written notice. If FCRTA terminates this Agreement, CONTRACTOR shall be compensated for services satisfactorily completed to the date of termination based upon the compensation rates and subject to the maximum amounts payable agreed to in Section III.

B. Breach of Contract.

FCRTA may immediately suspend or terminate this Agreement in whole or in part, where in the determination of FCRTA there is:

1. an illegal or improper use of funds;
2. a failure to comply with any term of this Agreement;
3. a substantially incorrect or incomplete report, study, or other documents or documentation submitted to FCRTA;
4. improperly performed services under this Agreement.

In no event shall any payment by FCRTA constitute a waiver by FCRTA of any breach of this Agreement or any default which may then exist on the part of the CONTRACTOR. Neither shall such payment impair or prejudice any remedy available to FCOG with respect to the breach or default.

C. Non-Allocation of Funds.

The terms of this Agreement, and the services to be provided hereunder, are contingent on the approval of funds by the appropriating government agency. CONTRACTOR services and reimbursements beyond March 30, 2024, are subject to the inclusion of this project in the FCRTA FY23-24 Budget. Should sufficient funds not be allocated, the services to be provided hereunder may be modified, or this Agreement terminated at any time by FCRTA's giving the CONTRACTOR thirty (30) days advance written notice.

D. In the event of any termination of this Agreement, all finished and unfinished work materials, including, without limitation, notes, minutes, research, documents, maps, graphs, and studies, shall be FCRTA's property, and at FCRTA's sole option, shall be delivered by CONTRACTOR to FCRTA.

V. RIGHT TO PUBLISH/OWNERSHIP OF MATERIALS

FCRTA shall be the owner of all materials produced pursuant to this Agreement upon completion and full performance of this Agreement by CONTRACTOR and shall have the right to publish, disclose, distribute, and otherwise use, in whole or in part, any reports, data, or other materials prepared by CONTRACTOR under this Agreement. CONTRACTOR shall not be liable for misuse or modification beyond their control by FCRTA of materials produced pursuant to this agreement.

VI. INDEPENDENT CONTRACTOR

In performance of the work, duties, and obligations assumed by CONTRACTOR to be provided under this Agreement, it is mutually expressly understood and agreed that CONTRACTOR, including any and all of CONTRACTOR's officers, agents, and employees will at all times be acting and performing as an independent contractor, and shall act in an independent capacity and not as an officer, agent, servant, employee, joint venture, partner, or associate of FCRTA. Furthermore, FCRTA shall have no right to control or supervise or direct the manner or method by which CONTRACTOR shall perform its work and function. However, FCRTA shall retain the right to administer this Agreement so as to verify that CONTRACTOR is performing its obligations in accordance with the terms and conditions thereof. CONTRACTOR and FCRTA shall comply with all applicable provisions of law and the rules and regulations, if any, of governmental authorities having jurisdiction over matters the subject thereof.

Because of its status as an independent contractor, CONTRACTOR shall have absolutely no right to employment rights and benefits available to FCRTA employees. CONTRACTOR shall be solely liable and responsible for providing to, or on behalf of, its employees all legally-required employee benefits. In addition, CONTRACTOR shall be solely responsible and save FCRTA harmless from all matters relating to payment of CONTRACTOR's

employees, including compliance with Social Security, withholding, and all other regulations governing such matters. It is acknowledged that during the term of this Agreement, CONTRACTOR may be providing services to others unrelated to FCRTA or to this Agreement.

VII. ASSIGNMENT

CONTRACTOR shall not assign or subcontract its duties under this Agreement without the prior express written consent of the FCRTA. No such consent shall be construed as making the FCRTA a party to such subcontract, or subjecting the FCRTA to liability of any kind to any subcontractor.

No subcontract whether existing or later entered into as set forth herein, under any circumstances shall relieve the CONTRACTOR of his liability and obligation under this contract, and all transactions with the FCRTA must be through the CONTRACTOR. Subcontractors may not be changed by CONTRACTOR without the prior express written approval of FCRTA.

CONTRACTOR has submitted a Proposal (Exhibit B) which names Energeia-USA, Provost and Pritchard Consulting Group and Scholardev Apps (“Approved Subcontractors”) as subcontractor(s) for the purposes of this Agreement. CONTRACTOR represents and covenants by entering into this Agreement that it is the prime contractor in this Agreement, and that it is responsible for all acts or omissions of its said subcontractors, if any. CONTRACTOR shall also be responsible for submitting invoices, in accordance with the requirements of Section III of this Agreement, to FCRTA for work performed by the Approved Subcontractors, and shall remit payment to the Approved Subcontractors in accordance with the agreements between CONTRACTOR and the Approved Subcontractors. FCRTA shall have no responsibility to provide compensation directly to the approved Subcontractors, if any.

VIII. BINDING NATURE OF AGREEMENT; MODIFICATION

The parties agree that all of the terms of this Agreement and its Exhibits shall be binding upon them and that together these terms constitute the entire Agreement of the parties with respect to the subject matter hereof. No variation or modification of this Agreement and no waiver of any of its provisions or conditions shall be valid unless in writing and signed by duly authorized representatives of the parties. This Agreement shall be binding upon FCRTA, the CONTRACTOR, and their successors in interest, legal representatives, executors, administrators, and assigns with respect to all covenants as set forth herein.

IX. INDEMNITY

CONTRACTOR agrees to indemnify, save, hold harmless, and at FCRTA’s request, defend the FCRTA, its boards, committees, representatives, officers, agents, and employees from and against any and all costs and expenses (including reasonable attorneys fees and litigation costs), damages, liabilities, claims, and losses (whether in contract, tort, or strict liability, including, but not limited to, personal injury, death, and property damage) occurring or resulting to FCRTA to the extent they are caused from any negligent, recklessness or willful misconduct of CONTRACTOR, its officers, agents, subcontractors, or employees in their performance of this Agreement, and from any and all costs and expenses (including reasonable attorneys fees and litigation costs), damages, liabilities, claims, and losses (whether in contract,

tort, or strict liability, including, but not limited to, personal injury, death and property damage), occurring or resulting to any person, firm, corporation, or entity who may be injured or damaged to the extent such injury or damage arises from any negligent acts, errors or omissions of CONTRACTOR, its officers, agents, subcontractors, or employees in their performance of this Agreement.

X. NON DISCRIMINATION AND DBE

CONTRACTOR shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. CONTRACTOR shall carry out all applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract and such other remedy as FCRTA deems appropriate.

XI. INSURANCE

Without limiting FCRTA's right to obtain indemnification from CONTRACTOR or any third parties, CONTRACTOR, at its sole expense, shall maintain in full force and affect the following insurance policies throughout the term of this Agreement:

A. Comprehensive general liability insurance with coverage of not less than \$2,000,000 combined single limit per occurrence for bodily injury, personal injury and property damage.

Comprehensive general liability insurance policies shall name the FCRTA, its officers, agents, and employees, individually and collectively, as additional insured, but only insofar as the operations under this Agreement are concerned.

Such coverage for additional insured shall apply as primary insurance and any other insurance, or self-insurance, maintained by FCRTA, its officers, agents, and employees, shall be excess only and not contributing with insurance provided under the CONTRACTOR'S policies herein.

B. Comprehensive automobile liability insurance with limits for bodily injury of not less than \$25,000 per person, \$250,000 per accident and for property damages of not less than \$50,000, or such coverage with a combined single limit of \$250,000.

C. Professional liability insurance in the minimum amount of at least \$1,000,000 coverage per occurrence.

D. Workers compensation insurance as required by law.

No insurance policy required by this Section XI insurance may be canceled or changed without a minimum of thirty (30) days advance, written notice given to FCRTA.

CONTRACTOR shall provide certification of each insurance policy required by this Section XI to FCRTA within twenty-one (21) days of the date of the execution of this Agreement.

Such certification shall show to FCRTA's sole satisfaction that such insurance coverages have been obtained and are in full force; that FCRTA, its officers, agents, and employees will not be responsible for any premiums on the policies; that as and if required such insurance names FCRTA, its officers, agents, and employees, individually and collectively, as additional insured (comprehensive general liability only), but only insofar as the operations under this Agreement are concerned; that such coverage for additional insured shall apply as primary insurance and any other insurance, or self-insurance, maintained by FCRTA, its officers, agents, and employees, shall be excess only and not contributing with insurance provided under the CONTRACTOR's policies herein; and that this insurance shall not be canceled or changed without a minimum of thirty (30) days advance, written notice given to FCRTA.

In the event CONTRACTOR fails to keep in effect at all times insurance coverage as herein provided, FCRTA may, in addition to other remedies it may have, suspend or terminate this Agreement upon the occurrence of such event.

XII. CONFLICT OF INTEREST

CONTRACTOR covenants that it has no interest, and will not have any interest, direct or indirect, which would conflict in any manner with the performances of the services required hereunder.

XIII. EFFECTIVE DATE, TERM

This Agreement shall become effective as of the date of its execution by the parties hereto and shall remain in full force and effect through March 30, 2024 unless sooner terminated or unless its term is extended. Upon the mutual written Agreement of the parties hereto, this Agreement may be extended beyond that date.

XIV. NOTICES

Any and all notices between FCRTA and the CONTRACTOR provided for or permitted under this Agreement or by law shall be in writing and shall be deemed duly served when personally delivered to one of the parties, or in lieu of such personal service, when deposited in the United States Mail, postage prepaid, addressed to such Party, at such addresses set forth below:

FCRTA

Fresno County Rural Transit Agency
2035 Tulare St., Suite 201
Fresno, CA 93721

CONTRACTOR

WALKER CONSULTANTS

601 California St, Suite 820
San Francisco, CA 94108

XV. PROJECT MANAGER

The CONTRACTOR's project manager shall be Chrissy Mancini Nichols. CONTRACTOR may not change its project manager without obtaining prior express written approval by FCRTA. It is understood by the parties hereto that in entering into an agreement of this type with CONTRACTOR, FCRTA has evaluated CONTRACTOR's Proposal (Exhibit B) and taken into consideration the project team designated therein for this PROJECT, including but not limited to CONTRACTOR's designation of Chrissy Mancini Nichols as the project manager for said PROJECT.

XVI. VENUE; GOVERNING LAW

Venue for any claim or action arising under this Agreement shall only be in Fresno County, California. This Agreement shall be governed in all respects by the laws of the State of California.

XVII. COMPLIANCE WITH LAWS

CONTRACTOR shall comply with all current Federal, State, and local laws, ordinances, and regulations applicable in carrying out its obligations under this Agreement.

CONTRACTOR agrees that Contract Cost Principles and Procedures, 48 CFR, Federal Acquisition Regulations System, Chapter 1, Part 31 et. seq., shall be used to determine the eligibility of individual items of cost.

CONTRACTOR also agrees to comply with applicable federal procedures in accordance with 49 CFR, Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

For the purpose of determining compliance with Public Contract Code 10115, et seq. and Title 21, California Code of Regulations, Chapter 21, Section 2500 et seq., when applicable, and other matters connected with the performance of the contract pursuant to Government Code 8546.7, the CONTRACTOR, contractor's subcontractors, and the FCRTA shall maintain all books, documents, papers, accounting records, and other evidence pertaining to the performance of the contract, including but not limited to, the cost of administering the contract. All parties shall make such material available at their respective offices at all reasonable times during the contract period and for three years from the date of final payment under the contract. Any duly authorized representative of the FCRTA, the state, or federal government shall have access to any books, records, and documents that are pertinent to the contract for audits examinations, excerpts, and transactions, and copies thereof shall be furnished if requested.

Any costs for which payment has been made to CONTRACTOR that are determined by subsequent audit to be unallowable under Title 2, CFR part 200 Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards or 2 CFR, Part 1201, Uniform Administrative Requirements Costs Principles, and Audit Requirements for Federal Awards, are subject to repayment by Contractor to FCRTA.

XVIII. CONTRACTOR'S LEGAL AUTHORITY

Each individual executing or attesting this Agreement on behalf of CONTRACTOR hereby covenants, warrants, and represents: (1) that he or she is duly authorized to execute or attest and deliver this Agreement on behalf of such corporation in accordance with a duly adopted resolution of the corporation's board of directors and in accordance with such corporation's article of incorporation or charter and bylaws; (2) that this Agreement is binding upon such corporation; and (3) that CONTRACTOR is a duly organized and legally existing corporation in good standing in the State of California.

XIX. NO THIRD PARTY BENEFICIARIES

Notwithstanding anything else to the contrary herein, the Parties acknowledge and agree that no other person, firm, corporation, or entity shall be deemed an intended third-party beneficiary of this Agreement.

XX. SEVERABILITY

In the event any provisions of this Agreement are held by a court of competent jurisdiction to be invalid, void, or unenforceable, the Parties will use their best efforts to meet and confer to determine how to mutually amend such provisions with valid and enforceable provisions, and the remaining provisions of this Agreement will nevertheless continue in full force and effect without being impaired or invalidated in any way.

XXI. HEADINGS; CONSTRUCTION; STATUTORY REFERENCES

The headings of the sections and paragraphs of this Agreement are for convenience only and shall not be used to interpret this Agreement. This Agreement is the product of negotiation between the Parties. The language of this Agreement shall be construed as a whole according to its fair meaning and not strictly for or against any Party. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in interpreting this Agreement. All references in this Agreement to particular statutes, regulations, ordinances or resolutions of the United States, the State of California, or the County of Fresno shall be deemed to include the same statute, regulation, ordinance or resolution as hereafter amended or renumbered, or if repealed, to such other provisions as may thereafter govern the same subject.

XXII. DRUG FREE WORK PLACE

CONTRACTOR shall certify compliance with Government Code Section 8355 pertaining to providing a drug-free workplace per Exhibit C - "Drug Free Workplace Certification", attached hereto and incorporated herein by this reference as though set forth in full.

XXIV. INTEGRATED AGREEMENT

This Agreement, and Exhibit A and B, attached hereto and incorporated herein by this reference, represents the full and complete understanding of the parties with respect to the subject matter hereof, and all preliminary negotiations and oral or written agreements with respect thereto are merged herein. No verbal agreement or implied covenant shall be held to vary the provisions hereof.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date and year first above written.

FRESNO COUNTY RURAL TRANSIT AGENCY

By _____

MOSES STITES, General Manager

CONTRACTOR,

By _____

CHRISSY MANCINI NICHOLS, Project Manager

APPROVED AS TO LEGAL FORM ON BEHALF OF THE FCRTA:

DANIEL C. CEDERBORG, County Counsel

By  _____

ALISON SAMARIN, Deputy County Counsel

Agreement Between Owner and Design-Builder

AGREEMENT made as of the _____ day of _____ in the year two thousand and twenty-two.

BETWEEN the Owner (Agency):

Fresno County Rural Transit Agency
2035 Tulare Street, Suite 201
Fresno, CA 93721

and the Design-Builder:

Zumwalt Construction, Inc
5520 E. Lamona Ave
Fresno, CA 93727

for the following Project:

The Fresno County Rural Transit Agency (FCRTA) Maintenance Facility Project located at 1821 Pacific Ave, Selma, California.

The Project consists of developing an approximately 7.5-acre, vacant parcel in Selma, California, to construct an operations/dispatch office and maintenance facility for public transit buses/vehicles. The project will accommodate current and future transit needs in the surrounding rural communities of rural Fresno County.

The Owner and Design-Builder agree as follows.

Owner desires to utilize the services of Design-Builder as an independent contractor to provide design-build services for the Project.

Design-Builder represents that it is fully qualified to perform such services by virtue of its experience and the training, educations, and expertise of its principals and employees.

Owner desires to retain Design-Builder, and Design-Builder desires to serve Owner to perform these design-build services in accordance with the terms and conditions of this Agreement.

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- 4 WORK PRIOR TO EXECUTION OF THE DESIGN-BUILD AMENDMENT**
- 5 WORK FOLLOWING EXECUTION OF THE DESIGN-BUILD AMENDMENT**
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- A DESIGN-BUILD AMENDMENT**
- B INSURANCE AND BONDS**
- C SUSTAINABLE PROJECTS**

ARTICLE 1 GENERAL PROVISIONS

§ 1.1 Owner's Criteria

This Agreement is based on the Owner's Criteria set forth in this Section 1.1.

§ 1.1.1 The Owner's Criteria for the Project:

It is the intent of FCRTA that the Work to be performed by the Design Builder as part of the Project shall be designed and constructed in accordance with the Project Criteria included in Exhibit H of the RFP. The Design Builder will be required to perform an independent evaluation of all information provided by the Owner to validate the information provided by the Owner. Further, regardless of the inclusion of design or prescriptive specifications, the selected Design Builder shall remain responsible for meeting the performance requirements of the Project, including, but not limited to, the requirements described in the Project Criteria as well as all applicable Legal Requirements.

The Project includes all site development, site utilities, structural, mechanical, plumbing, electrical, landscaping, as well as other tasks described in the Bridging Documents. The Project must be designed and constructed in conformance with the Bridging Documents, and in accordance with all applicable state and local building requirements ("code requirements").

§ 1.1.2 The Owner's design requirements for the Project and related documentation:

RFP for FCRTA Selma Maintenance Facility Project
Addendums 2,3 and 4

§ 1.1.3 The Project's physical characteristics:

Project characteristics are described in the Phase 1 and Phase 2 and NEPA Report.

§ 1.1.4 The Owner's anticipated Sustainable Objective for the Project:

The Project shall comply with the California Energy and Green Building standards codes.

§ 1.1.5 [Blank]

§ 1.1.6 The Owner's budget for the Work to be provided by the Design-Builder is \$10,290,562.

§ 1.1.7 The Owner's design and construction milestone dates:

.1 Substantial Completion date:

The Parties agree that time is of the essence and that in case all the Work is not completed before or upon the expiration of the time limit as set forth, damage will be sustained by the Owner, and that it is and shall be impracticable to determine the actual amount of damage by reason of such delay. If the Work is not substantially complete on or before five hundred twenty-five (525) calendar days after the date of the notice to proceed, or extension thereof granted by the Owner, the Design-Builder shall pay to the Owner liquidated damages in the sum of \$2,000 for each and every calendar day of delay beyond the time prescribed. Any sums that may be due the Owner as liquidated damages may be deducted from any monies due or owing to the Design-Builder under the Agreement or may be collected from the Design-Builder's surety.

§ 1.1.8 [Blank]

§ 1.1.9 [Blank]

§ 1.1.10 The Design-Builder confirms that the information included in the Owner's Criteria complies with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities.

§ 1.1.10.1 If the Owner's Criteria conflicts with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Design-Builder shall immediately notify the Owner of the conflict.

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

§ 1.1.12 If the Owner and Design-Builder intend to transmit Instruments of Service or any other information or documentation in digital form, they shall endeavor to establish necessary protocols governing such transmissions.

Unless otherwise agreed, the Parties will use AIA Document E203TM_2013 to establish the protocols for the development, use, transmission, and exchange of digital data and building information modeling.

§ 1.2 Project Team

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

Moses Stites, General Manager
Fresno County Rural Transit Agency
2035 Tulare Street, Suite 201
Fresno CA 93721

Kurt Zumwalt
Zumwalt Construction, Inc.
5520 E. Lamona Ave
Fresno, CA 93727

§ 1.2.2 [Blank]

§ 1.2.3 [Blank]

§ 1.2.4 (Blank)

§ 1.2.5 Neither the Owner's nor the Design-Builder's representative shall be changed without ten days' prior written notice to the other party.

§ 1.3 Binding Dispute Resolution

For any Claim subject to, but not resolved by, mediation pursuant to Section 14.3, Claims will be resolved by litigation in a court of competent jurisdiction in Fresno County.

§ 1.4 Definitions

§ 1.4.1 **Design-Build Documents.** The Design-Build Documents consist of this Agreement between Owner and Design-Builder and its attached Exhibits (hereinafter, the "Agreement"); other documents listed in this Agreement; and Modifications issued after execution of this Agreement. A Modification is (1) a written amendment to the Agreement signed by both parties, including the Design-Build Amendment, (2) a Change Order, or (3) a Change Directive.

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

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

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

§ 1.4.5 **Instruments of Service.** Instruments of Service are representations, in any medium of expression now known or later developed, of the tangible and intangible creative work performed by the Design-Builder, Contractor(s),

Architect, and Consultant(s) under their respective agreements. Instruments of Service may include, without limitation, studies, surveys, models, sketches, drawings, specifications, digital models and other similar materials.

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

§ 1.4.7 Owner. The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Design-Build Documents as if singular in number. The term "Owner" means the Owner or the Owner's authorized representative.

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

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

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

§ 1.4.11 Contractor. A Contractor is a person or entity performing all or a portion of the construction, required in connection with the Work, for the Design-Builder. The Contractor shall be lawfully licensed, if required in the jurisdiction where the Project is located. The Contractor is referred to throughout the Design-Build Documents as if singular in number and means a Contractor or an authorized representative of the Contractor.

§ 1.4.12 Confidential Information. Confidential Information is information containing confidential or business proprietary information that is clearly marked as "confidential."

§ 1.4.13 Contract Time. Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, as set forth in the Design-Build Amendment for Substantial Completion of the Work.

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

§ 1.4.15 Contract Sum. The Contract Sum is the amount to be paid to the Design-Builder for performance of the Work after execution of the Design-Build Amendment, as identified in Article A.1 of the Design-Build Amendment.

§ 1.4.16 Independent Inspector

The term "Independent Inspector," as used in this Agreement, shall mean the Inspector who is independent from the Design-Builder hired by the Owner to represent the Owner's interests. The Owner requires a construction inspector independent of and not subject to the control or direction of the Design-Builder.

§1.4.16.1 The Independent Inspector shall be a representative of and shall advise and consult with the Owner during construction until final payment is due to the Design-Builder, and at the Owner's sole direction during the period of correction of the Work described in the Design-Build Documents. The Independent Inspector shall furnish consultations necessary to identify construction defects and correct unforeseen conditions encountered during this period. The Independent Inspector shall assist the Owner in performing a review of the Project during the **11th** month after the date of Substantial Completion.

§1.4.16.2 The Independent Inspector shall conduct an inspection prior to the issuance of the Acknowledgement of Substantial Completion and shall submit a written report to the Owner and the Design-Builder about Work to be completed prior to final acceptance.

Prior to submitting the final Application for Payment, the Independent Inspector shall conduct an inspection, submit a Statement of Completion, and receive and forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Design-Build Documents and assembled by the Design-Builder.

§1.4.16.3 Visits to the Project site shall be documented in writing on standard inspection report forms with copies furnished to the Owner and Design-Builder. Visits to the Project site shall be in accordance with Owner requirements and procedures.

ARTICLE 2 COMPENSATION AND PROGRESS PAYMENTS

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

§ 2.1.1 Unless otherwise agreed, payments for Work performed prior to Execution of the Design-Build Amendment shall be made monthly. For the Design-Builder's performance of Work prior to the execution of the Design-Build Amendment, the Owner shall compensate the Design-Builder as follows:

Payment for Design-Build Services, FCRTA will compensate Design-Builder on a monthly basis pursuant to the Contract and to costs established in the RFP Cost Proposal submitted by Zumwalt Construction on December 10, 2021, on a percentage of completion basis. The billings will be based off of a percent complete for the following milestone: Preconstruction Price of \$702,365 which includes Schematic Design, Design Development, and Construction Drawings. FCRTA will retain ten percent of the amount due on each payment, as retention to ensure full and satisfactory performance of the Design-Build Services.

§ 2.1.2 The total costs for services of the Design-Builder and the Design-Builder's Architect, Consultants and Contractors are set forth above and Preconstruction costs are not to exceed \$702,365. If the total amount of Preconstruction costs is not spent, any remaining funds will be moved to Construction costs and materials.

§ 2.1.3 Compensation for Reimbursable Expenses Prior To Execution of Design-Build Amendment

§ 2.1.3.1 Reimbursable Expenses are in addition to compensation set forth in Section 2.1.1 and 2.1.2 and include expenses, reasonable and necessary that are directly related to the Project, incurred by the Design-Builder and the Design-Builder's Architect, Consultants, and Contractors, as follows:

- .1** Transportation and authorized out-of-town travel and subsistence;
- .2** Dedicated data and communication services, teleconference costs, Project websites, and extranets;
- .3** Fees paid for securing approval of authorities having jurisdiction over the Project;
- .4** Printing, reproductions, plots, standard form documents;
- .5** Postage and delivery;
- .6** Expense of overtime work requiring higher than regular rates, if authorized in writing in advance by the Owner;
- .7** Renderings, physical models, mock-ups, professional photography, and presentation materials requested by the Owner;
- .8** Other Project-related expenditures, if authorized in writing in advance by the Owner.

§ 2.1.3.2 For Reimbursable Expenses, the compensation shall be the expenses the Design-Builder and the Design-Builder's Architect, Consultants and Contractors incurred.

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

§ 2.1.4.1 Payments are due and payable upon presentation of the Design-Builder's invoice. Undisputed amounts unpaid 60 days after the invoice date shall bear interest at the rate entered below, or in the absence thereof at the legal rate prevailing from time to time at the principal place of business of the Design-Builder.

(Interest at 1% per month or 12% per year for payment of undisputed amounts outstanding for 60 days will be paid to the Design-Builder.

§ 2.1.4.2 Records of Reimbursable Expenses and services performed on the basis of hourly rates shall be available to the Owner at mutually convenient times for a period of two years following execution of the Design-Build Amendment or termination of this Agreement, whichever occurs first.

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

For the Design-Builder's performance of the Work after execution of the Design-Build Amendment, the Owner shall pay to the Design-Builder the Contract Sum in current funds as agreed in the Design-Build Amendment.

ARTICLE 3 GENERAL REQUIREMENTS OF THE WORK OF THE DESIGN-BUILD AGREEMENT

§ 3.1 General

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

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

§ 3.1.3 The Design-Builder shall perform the Work in accordance with the Design-Build Documents. The Design-Builder shall not be relieved of the obligation to perform the Work in accordance with the Design-Build Documents by the activities, tests, inspections or approvals of the Owner.

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

§ 3.1.3.2 Neither the Design-Builder nor any Contractor, Consultant, or Architect shall be obligated to perform any act that will violate any applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities. If the Design-Builder determines that implementation of any instruction received from the Owner, including those in the Owner's Criteria, would cause a violation of any applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Design-Builder shall immediately notify the Owner in writing. If the Owner verifies that a change to the Owner's Criteria is required to remedy the violation, the Owner and the Design-Builder shall execute a Modification in accordance with Article 6.

§ 3.1.3.3 The Design-Builder shall advise the Owner of required tests, inspections and reports, shall furnish coordination of such tests and inspections, and shall advise the Owner if the results of same. Copies of test results shall be furnished to the Owner and Owner's Independent Inspector as appropriate.

§ 3.1.4 The Design-Builder shall be responsible to the Owner for acts and omissions of the Design-Builder's employees, Architect, Consultants, Contractors, and their agents and employees, and other persons or entities performing portions of the Work. Any cost or expense that may result from any such acts and omissions shall be the responsibility of the Design-Builder.

§ 3.1.5 **General Consultation.** The Design-Builder shall schedule and conduct periodic meetings as needed, and as requested by Owner, with the Owner to review matters such as procedures, progress, coordination, and scheduling of the Work. The Design-Builder shall conduct a Preconstruction Conference prior to beginning construction to familiarize all parties involved with the necessary Work. This meeting shall be held with the Design-Build representative, Owner, Owner's Independent Inspector, representative(s) and other interested parties as appropriate. The Owner 'Record of Preconstruction Conference' may be used to document the meeting.

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

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

§3.1.7.1 The Design-Builder shall consult with the Owner Architect or Engineer about the Owner's requirements and procedures.

§ 3.1.8 Progress Reports

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

- .1 Work completed for the period;
- .2 Project schedule status;
- .3 Submittal schedule and status report, including a summary of outstanding Submittals;
- .4 Responses to requests for information to be provided by the Owner;
- .5 Approved Change Orders and Change Directives;
- .6 Pending Change Order and Change Directive status reports;
- .7 Tests and inspection reports;
- .8 Status report of Work rejected by the Owner;
- .9 Status of Claims previously submitted in accordance with Article 14;
- .10 Cumulative total of the Cost of the Work to date including the Design-Builder's compensation and Reimbursable Expenses, if any;
- .11 Current Project cash-flow and forecast reports;
- .12 Additional information as agreed to by the Owner and Design-Builder; and
- .13 The Design-Builder shall conduct on-site pay/progress meetings no less than once a month during all periods of active construction. These meetings shall be held with the Design-Build representative, Owner, Owner's Independent Inspector, and other interested parties as appropriate, to review and discuss the application for payment, work progress schedule, construction problems or disputes and other appropriate matters.

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

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

§ 3.1.9 Design-Builder's Schedules

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

§ 3.1.9.2 The Design-Builder shall perform the Work in general accordance with the most recent schedules submitted to the Owner.

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

§ 3.1.11 Design-Builder's Submittals

§ 3.1.11.1 Two sets of Design-Builder submittals are required to be provided to the Owner. Prior to submission of any Submittals, the Design-Builder shall prepare a Submittal schedule, and shall submit the schedule for the Owner's approval. The Owner's approval shall not unreasonably be delayed or withheld. The Submittal schedule shall (1) be coordinated with the Design-Builder's schedule provided in Section 3.1.9.1, (2) allow the Owner reasonable time to review Submittals, and (3) be periodically updated to reflect the progress of the Work.

If the Design-Builder fails to submit a Submittal schedule, the Design-Builder shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of Submittals.

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

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

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

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

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

§ 3.1.13 **Royalties, Patents and Copyrights**

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

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

§ 3.1.14 **Indemnification**

§ 3.1.14.1 To the fullest extent permitted by law, the Design-Builder shall indemnify and hold harmless the Owner, including the Owner's officers, agents and employees, from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, but only to the extent caused by the negligent acts or omissions or willful misconduct of the Design-Builder, Architect, a Consultant, a Contractor, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.1.14.

§ 3.1.14.2 The indemnification obligation under this Section 3.1.14 shall not be limited by a limitation on amount or type of damages, compensation, or benefits payable by or for Design-Builder, Architect, a Consultant, a Contractor, or anyone directly or indirectly employed by them, under workers' compensation acts, disability benefit acts or other employee benefit acts.

§ 3.1.14.3 Indemnification obligations under this Section 3.1.14 shall include expert witnesses (whether or not called to testify), expenses for accountants or appraisers (whether or not called to testify), and other related expenses. Recovery of these expenses shall be as additional costs awarded to the prevailing party and shall not require initiation of a separate legal proceeding.

§ 3.1.15 Contingent Assignment of Agreements

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

- .1 assignment is effective only after termination of the Agreement by the Owner for cause, pursuant to Sections 13.1.4 or 13.2.2, and only for those agreements that the Owner accepts by prior written notification to the Design-Builder and the Architect, Consultants, and Contractors whose agreements are accepted for assignment; and
- .2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Agreement.

When the Owner accepts the assignment of an agreement, the Owner assumes the Design-Builder's rights and obligations under the agreement.

§ 3.1.15.2 Upon such assignment, if the Work has been suspended for more than 30 days, the compensation under the assigned agreement shall be equitably adjusted for increases in cost resulting from the suspension.

§ 3.1.15.3 Upon such assignment to the Owner under this Section 3.1.15, the Owner may further assign the agreement to a successor design-builder or other entity. If the Owner assigns the agreement to a successor design-builder or other entity, the Owner shall nevertheless remain legally responsible for all of the successor design-builder's or other entity's obligations under the agreement.

§ 3.1.16 **Design-Builder's Insurance and Bonds.** The Design-Builder shall purchase and maintain insurance and provide bonds as set forth in Exhibit B.

ARTICLE 4 WORK PRIOR TO EXECUTION OF THE DESIGN-BUILD AMENDMENT

§ 4.1 General

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

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

§ 4.2 Evaluation of the Owner's Criteria

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

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

- .1 allocations of program functions, detailing each function and their square foot areas;
- .2 a preliminary estimate of the Cost of the Work, and, if necessary, recommendations to adjust the Owner's Criteria to conform to the Owner's budget;
- .3 a preliminary schedule, which shall include proposed design milestones; dates for receiving additional information from, or for work to be completed by, the Owner; anticipated date for the Design-Builder's Proposal; and dates of periodic design review sessions with the Owner.

§ 4.2.3 The Owner shall review the Design-Builder's written report and, if acceptable, provide the Design-Builder with written consent to proceed to the development of the Preliminary Design as described in Section 4.3. The consent to proceed shall not be understood to modify the Owner's Criteria unless the Owner and Design-Builder execute a Modification.

§ 4.3 Preliminary Design

§ 4.3.1 Upon the Owner's issuance of a written consent to proceed under Section 4.2.3, the Design-Builder shall prepare and submit a Preliminary Design to the Owner. The Preliminary Design shall include a report identifying any deviations from the Owner's Criteria, and shall include the following:

- .1 Confirmation of the allocations of program functions;
- .2 Site plan;
- .3 Building plans, sections and elevations;
- .4 Structural system;
- .5 Selections of major building systems, including but not limited to mechanical, electrical and plumbing systems; and
- .6 Outline specifications or sufficient drawing notes describing construction materials.

The Preliminary Design may include some combination of physical study models, perspective sketches, or digital modeling.

§ 4.3.2 The Owner shall review the Preliminary Design and, if acceptable, provide the Design-Builder with written consent to proceed to development of the Design-Builder's Proposal. The Preliminary Design shall not modify the Owner's Criteria unless the Owner and Design-Builder execute a Modification.

§ 4.4 Design-Builder's Proposal

§ 4.4.1 Upon the Owner's issuance of a written consent to proceed under Section 4.3.2, the Design-Builder shall prepare and submit the Design-Builder's Proposal to the Owner. The Design-Builder's Proposal shall include the following:

- .1 A list of the Preliminary Design documents and other information, including the Design-Builder's clarifications, assumptions and deviations from the Owner's Criteria, upon which the Design-Builder's Proposal is based;
- .2 The proposed Contract Sum, including the compensation method;
- .3 The proposed date the Design-Builder shall achieve Substantial Completion;
- .4 An enumeration of any qualifications and exclusions, if applicable;
- .5 A list of the Design-Builder's key personnel, Contractors and suppliers; and
- .6 The date on which the Design-Builder's Proposal expires.

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

§ 4.4.3 If the Owner and Design-Builder agree on a proposal, the Owner and Design-Builder shall execute the Design-Build Amendment setting forth the terms of their agreement.

ARTICLE 5 WORK FOLLOWING EXECUTION OF THE DESIGN-BUILD AMENDMENT

§ 5.1 Construction Documents

§ 5.1.1 Upon the execution of the Design-Build Amendment, the Design-Builder shall prepare Construction Documents. The Construction Documents shall establish the quality levels of materials and systems required. The Construction Documents shall be consistent with the Design-Build Documents.

§ 5.1.2 The Design-Builder shall provide the Construction Documents to the Owner for the Owner's information. If the Owner discovers any deviations between the Construction Documents and the Design-Build Documents, the Owner shall promptly notify the Design-Builder of such deviations in writing. The Construction Documents shall not modify the Design-Build Documents unless the Owner and Design-Builder execute a Modification. The failure of the Owner to discover any such deviations shall not relieve the Design-Builder of the obligation to perform the Work in accordance with the Design-Build Documents.

§ 5.2 Construction

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

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

§ 5.2.3 The Design-Builder shall supervise and direct the Work, using the Design-Builder's best skill and attention. The Design-Builder shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work under the Agreement, unless the Design-Build Documents give other specific instructions concerning these matters.

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

§ 5.3 Labor and Materials

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

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

§ 5.3.3 The Design-Builder shall enforce strict discipline and good order among the Design-Builder's employees and other persons carrying out and performing the Work. The Design-Builder shall not permit employment of unfit persons or persons not properly skilled in tasks assigned to them.

§ 5.3.4 The Design-Builder shall not contract with any person or entity declared ineligible under Federal laws or regulations from participating in federally-assisted construction projects with whom the Owner has made reasonable and timely objection. If additional costs are incurred due to Owner's rejection, such costs will be charged as a change order.

§ 5.4 Taxes

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

§ 5.5 Permits, Fees, Notices and Compliance with Laws

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

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

§ 5.5.3 **Concealed or Unknown Conditions.** If the Design-Builder encounters conditions at the Project site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Design-Build Documents or (2) unknown physical conditions of an unusual nature that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Design-Build Documents, the Design-Builder shall promptly provide notice to the Owner before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Owner shall promptly investigate such conditions and, if the Owner determines that they differ materially and cause an increase or decrease in the Design-Builder's cost of, or time required for, performance of any part of the Work, shall recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Owner determines that the conditions at the Project site are not materially different from those indicated in the Design-Build Documents and that no change in the terms of the Agreement is justified, the Owner shall promptly notify the Design-Builder in writing, stating the reasons for the determination. If the Design-Builder disputes the Owner's determination or recommendation, the Design-Builder may proceed as provided in Article 14.

§ 5.5.4 If, in the course of the performance of the Work, the Design-Builder encounters human remains, or recognizes the existence of burial markers, archaeological sites, or wetlands, not indicated in the Design-Build Documents, the Design-Builder shall immediately suspend any operations that would affect them and shall immediately notify the Owner. Upon receipt of such notice, the Owner shall promptly take any action necessary to obtain governmental authorization required to resume the operations. The Design-Builder shall continue to suspend such operations until otherwise instructed by the Owner but shall continue with all other operations that do not affect those remains or features. Requests for adjustments in the Contract Sum and Contract Time arising from the existence of such remains or features may be made as provided in Article 14.

§ 5.6 Allowances

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

§ 5.6.2 Unless otherwise provided in the Design-Build Documents,

- .1 allowances shall cover the cost to the Design-Builder of materials and equipment delivered at the Project site and all required taxes, less applicable trade discounts;
- .2 the Design-Builder's costs for unloading and handling at the Project site, labor, installation costs, overhead, profit, and other expenses contemplated for stated allowance amounts, shall be included in the Contract Sum but not in the allowances; and
- .3 whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Section 5.6.2.1 and (2) changes in Design-Builder's costs under Section 5.6.2.2.

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

§ 5.7 Key Personnel, Contractors and Suppliers

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

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

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

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

§ 5.8 Documents and Submittals at the Project Site

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

§ 5.9 Use of Project Site

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

§ 5.10 Cutting and Patching

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

§ 5.11 Cleaning Up

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

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

§ 5.12 Access to Work

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

§ 5.13 Construction by Owner or by Separate Contractors

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

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

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

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

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

§ 5.14 Mutual Responsibility

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

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

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

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

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

§ 5.15 Owner's Right to Clean Up

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

ARTICLE 6 CHANGES IN THE WORK

§ 6.1 General

§ 6.1.1 Changes in the Work may be accomplished after execution of the Agreement, and without invalidating the Agreement, by Change Order or Change Directive, subject to the limitations stated in this Article 6 and elsewhere in the Design-Build Documents.

§ 6.1.2 A Change Order shall be based upon agreement between the Owner and Design-Builder. The Owner may issue a Change Directive without agreement by the Design-Builder.

§ 6.1.3 Changes in the Work shall be performed under applicable provisions of the Design-Build Documents, and the Design-Builder shall proceed promptly, unless otherwise provided in the Change Order or Change Directive.

§ 6.2 Change Orders

§ 6.2.1 A Change Order is a written order to the Design-Builder utilizing Form RD 1924-7, "Contract Change Order," or comparable form as pre-approved by Owner, signed by the Owner, Independent Inspector, Design-Builder, and the Owner representative. It is issued after the execution of the Agreement, authorizing a change in the Work or an adjustment in the Contract Sum or the Contract Time. The Contract Sum and the Contract Time may be changed only by written Change Order. The Design-Builder's signing of the Change Order indicates complete agreement therein.

§ 6.3 Change Directives

§ 6.3.1 A Change Directive is a written order signed by the Owner directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or, if prior to execution of the Design-Build Amendment, the adjustment in the Design-Builder's compensation, or Contract Time. The Owner may by Change Directive, without invalidating the Agreement, order changes in the Work within the general scope of the Agreement consisting of additions, deletions or other revisions, the Contract Sum or, if prior to execution of the Design-Build Amendment, the adjustment in the Design-Builder's compensation, and Contract Time being adjusted accordingly. A Change Directive may be used only for a change in response to an emergency, as described in Paragraph 10.4.

§ 6.3.2 A Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

§ 6.3.4 If unit prices are stated in the Design-Build Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order or Change Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Design-Builder, the applicable unit prices shall be equitably adjusted.

§ 6.3.5 A Change Directive signed by the Design-Builder indicates the Design-Builder's agreement therewith, including adjustment in Contract Sum or, if prior to execution of the Design-Build Amendment, the adjustment in the Design-Builder's compensation, and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

§ 6.3.6 The amount of credit to be allowed by the Design-Builder to the Owner for a deletion or change that results in a net decrease in the Contract Sum or, if prior to execution of the Design-Build Amendment, in the Design-Builder's compensation, shall be actual net cost. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

§ 6.3.7 Pending final determination of the total cost of a Change Directive to the Owner, the Design-Builder may request payment for Work completed under the Change Directive in Applications for Payment. The Owner will make an interim determination for purposes of certification for payment for those costs deemed to be reasonably justified. The Owner's interim determination of cost shall adjust the Contract Sum or, if prior to execution of the Design-Build Amendment, the Design-Builder's compensation, on the same basis as a Change Order, subject to the right of Design-Builder to disagree and assert a Claim in accordance with Article 14.

§ 6.3.8 When the Owner and Design-Builder agree with a determination concerning the adjustments in the Contract Sum or, if prior to execution of the Design-Build Amendment, the adjustment in the Design-Builder's compensation and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and the Owner and Design-Builder shall execute a Change Order. Change Orders may be issued for all or any part of a Change Directive.

ARTICLE 7 OWNER'S RESPONSIBILITIES

§ 7.1 General

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

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

§ 7.2 Information and Services Required of the Owner

§ 7.2.1 The Owner shall furnish information or services required of the Owner by the Design-Build Documents with reasonable promptness.

§ 7.2.2 The Owner shall provide, to the extent under the Owner's control and if not required by the Design-Build Documents to be provided by the Design-Builder, the results and reports of prior tests, inspections or investigations conducted for the Project involving structural or mechanical systems; chemical, air and water pollution; hazardous materials; or environmental and subsurface conditions and information regarding the presence of pollutants at the Project site. Upon receipt of a written request from the Design-Builder, the Owner shall also provide surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site under the Owner's control.

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

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

§ 7.2.5 The services, information, surveys and reports required to be provided by the Owner under this Agreement, shall be furnished at the Owner's expense, and except as otherwise specifically provided in this Agreement or elsewhere in the Design-Build Documents or to the extent the Owner advises the Design-Builder to the contrary in writing, the Design-Builder shall be entitled to rely upon the accuracy and completeness thereof. In no event shall the Design-Builder be relieved of its responsibility to exercise proper precautions relating to the safe performance of the Work.

§ 7.2.6 If the Owner observes or otherwise becomes aware of a fault or defect in the Work or non-conformity with the Design-Build Documents, the Owner shall give prompt written notice thereof to the Design-Builder.

§ 7.2.7 Prior to the execution of the Design-Build Amendment, the Design-Builder may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Design-Build Documents and the Design-Builder's Proposal. Thereafter, the Design-Builder may only request such evidence if (1) the Owner fails to make payments to the Design-Builder as the Design-Build Documents require; (2) a change in the Work materially changes the Contract Sum; or (3) the Design-Builder identifies in writing a reasonable concern regarding the Owner's ability to make payment when due. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Design-Builder.

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

§ 7.3 Submittals

§ 7.3.1 The Owner shall review and approve or take other appropriate action on Submittals. Review of Submittals is not conducted for the purpose of determining the accuracy and completeness of other details, such as dimensions and quantities; or for substantiating instructions for installation or performance of equipment or systems; or for determining that the Submittals are in conformance with the Design-Build Documents, all of which remain the responsibility of the Design-Builder as required by the Design-Build Documents. The Owner's action will be taken in accordance with the submittal schedule approved by the Owner or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time in the Owner's judgment to permit adequate review. The Owner's review of Submittals shall not relieve the Design-Builder of the obligations under Sections 3.1.11, 3.1.12, and 5.2.3. The Owner's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Owner, of any construction means, methods, techniques, sequences or procedures. The Owner's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

§ 7.3.2 Upon review of the Submittals required by the Design-Build Documents, the Owner shall notify the Design-Builder of any non-conformance with the Design-Build Documents the Owner discovers.

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

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

§ 7.6 The Owner has the authority to reject Work that does not conform to the Design-Build Documents. The Owner shall have authority to require inspection or testing of the Work in accordance with Section 15.5.2, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Owner nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Owner to the Design-Builder, the Architect, Consultants, Contractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.

§ 7.7 The Owner shall determine the date or dates of Substantial Completion in accordance with Section 9.8 and the date of final completion in accordance with Section 9.10.

§ 7.8 Owner's Right to Stop Work

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

§ 7.9 Owner's Right to Carry Out the Work

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

ARTICLE 8 TIME

§ 8.1 Progress and Completion

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

§ 8.1.2 The Design-Builder shall not, except by agreement of the Owner in writing, commence the Work prior to the effective date of insurance, other than property insurance, required by this Agreement. The Contract Time shall not be adjusted as a result of the Design-Builder's failure to obtain insurance required under this Agreement.

§ 8.1.3 The Design-Builder shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

§ 8.2 Delays and Extensions of Time

§ 8.2.1 If the Design-Builder is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or of a consultant or separate contractor employed by the Owner; or by changes ordered in the Work by the Owner; or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Design-Builder's control; or by delay authorized by the Owner pending mediation or by other causes that the Owner determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Owner may determine.

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

§ 8.2.3 This Section 8.2 does not preclude recovery of damages for delay by either party under other provisions of the Design-Build Documents.

ARTICLE 9 PAYMENT APPLICATIONS AND PROJECT COMPLETION

§ 9.1 Contract Sum

The Contract Sum is TEN MILLION TWO HUNDRED NINETY THOUSAND FIVE HUNDRED SIXTY TWO dollars (\$10,290,562).

§ 9.2 Schedule of Values

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

§ 9.3 Applications for Payment

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

§ 9.3.1.1 As provided in Section 6.3.9, Applications for Payment may include requests for payment on account of changes in the Work that have been properly authorized by Change Directives, or by interim determinations of the Owner, but not yet included in Change Orders.

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

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

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

§ 9.4 Certificates for Payment

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

§ 9.5 Decisions to Withhold Certification

§ 9.5.1 The Owner may withhold a Certificate for Payment in whole or in part to the extent reasonably necessary to protect the Owner due to the Owner's determination that the Work has not progressed to the point indicated in the Design-Builder's Application for Payment, or the quality of the Work is not in accordance with the Design-Build

Documents. If the Owner is unable to certify payment in the amount of the Application, the Owner will notify the Design-Builder as provided in Section 9.4. If the Design-Builder and Owner cannot agree on a revised amount, the Owner will promptly issue a Certificate for Payment for the amount that the Owner deems to be due and owing. The Owner may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued to such extent as may be necessary to protect the Owner from loss for which the Design-Builder is responsible because of

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

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

§ 9.5.3 If the Owner withholds certification for payment under Section 9.5.1.3, the Owner may, at its sole option, issue joint checks to the Design-Builder and to the Architect or any Consultants, Contractor, material or equipment suppliers, or other persons or entities providing services or work for the Design-Builder to whom the Design-Builder failed to make payment for Work properly performed or material or equipment suitably delivered.

§ 9.6 Progress Payments

§ 9.6.1 After the Owner has issued a Certificate for Payment, the Owner shall make payment in the manner and within the time provided in the Design-Build Documents.

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

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

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

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

§ 9.6.6 A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Design-Build Documents.

§ 9.6.7 Unless the Design-Builder provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Design-Builder for Work properly performed by the Architect, Consultants, Contractors and other person or entity providing services or work for the Design-Builder, shall be held by the Design-Builder for the Architect and those Consultants, Contractors, or other person or entity providing services or work for the Design-Builder, for which payment was made by the Owner. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Design-Builder, shall create any fiduciary liability or tort liability on the part of the Design-Builder for breach of trust or shall entitle any person or entity to an award of punitive damages against the Design-Builder for breach of the requirements of this provision.

§9.6.8 No progress payments shall be made that deplete the retainage, place in escrow any funds required for retainage, or invest the retainage for the benefit of the Design-Builder.

§ 9.7 Failure of Payment

If the Owner does not issue a Certificate for Payment, through no fault of the Design-Builder, within the time required by the Design-Build Documents, then the Design-Builder may, upon ten additional days' written notice to the Owner, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Design-Builder's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Design-Build Documents.

§ 9.8 Substantial Completion

§ 9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Design-Build Documents so that the Owner can occupy or utilize the Work for its intended use. The date of Substantial Completion is the date certified by the Owner in accordance with this Section 9.8.

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

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

§ 9.8.4 Prior to issuance of the Certificate of Substantial Completion under Section 9.8.5, the Owner and Design-Builder shall discuss and then determine the parties' obligations to obtain and maintain property insurance following issuance of the Certificate of Substantial Completion.

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

§ 9.8.6 The Certificate of Substantial Completion shall be submitted by the Design-Builder to the Owner for written acceptance of responsibilities assigned to it in the Certificate. When the Work has been substantially completed, except for the Work that cannot be completed because of weather conditions, lack of materials or other reasons, which, in the judgment of the Owner, are valid reasons for non-completion, the Owner may make additional payments, retaining at all times an amount sufficient to cover the estimated cost of the Work still to be completed.

§ 9.9 Partial Occupancy or Use

§ 9.9.1 The Design-Builder agrees to the use and occupancy of a portion or unit of the Project before formal acceptance by the Owner under the following conditions:

§ 9.9.1.1 A Certificate of Substantial Completion shall be prepared and executed as provided in subparagraph 9.8.4, except that when, in the opinion of the Inspecting Architect, the Design-Builder is chargeable with unwarranted delay in completing the Work or the Agreement requirements, the signature of the Design-Builder will not be required. The Certificate of Substantial Completion shall be accompanied by copies of Design-Builder's insurance policies, written endorsements of the Design-Builder's insurance carrier, and the surety permitting occupancy by the Owner during the remaining period of the Project Work. Occupancy and use by the Owner shall not commence until authorized by public authorities having jurisdiction over the Work.

§ 9.9.1.3 The Design-Builder shall not be held responsible for any damage to the occupied part of the Project solely resulting from the Owner's occupancy.

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§ 9.9.1.5 If the Project consists of more than one building, and one of the buildings is to be used or occupied, the Owner, prior to occupancy of that building, shall confirm permanent property insurance coverage exists on the building to be occupied and necessary permits which may be required for use and occupancy.

§ 9.9.2 With the exception of clause 9.9.1.5, use and occupancy by the Owner prior to Project acceptance does not relieve the Design-Builder of the responsibility to maintain all insurance and bonds required of the Design-Builder under the Design-Build Documents until the Project is completed and accepted by the Owner. Immediately prior to such partial occupancy or use, the Owner and Design-Builder shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

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

§ 9.10 Final Completion and Final Payment

§ 9.10.1 Upon receipt of written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Owner, Owner's Independent Inspector shall promptly make such inspection and, and when the Owner finds the Work acceptable under the Design-Build documents and fully performed, the Owner shall subject to Section A.9.10.2, promptly make final payment to the Design-Builder.

§ 9.10.2 Neither final payment nor any remaining retained percentage shall become due until the Design-Builder submits to the Owner (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work, for which the Owner or the Owner's property might be responsible or encumbered, (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Design-Build Documents to remain in force after final payment is currently in effect, (3) a written statement that the Design-Builder knows of no substantial reason that the insurance will not be renewable to cover the period required by the Design-Build Documents, (4) consent of surety, if any, to final payment, (5) as-constructed record copy of the Construction Documents marked to indicate field changes and selections made during construction, (6) manufacturer's warranties, product data, and maintenance and operations manuals, and (7) if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, or releases and waivers of liens, claims, security interests, or encumbrances, arising out of the Agreement, to the extent and in such form as may be designated by the Owner.

§ 9.10.3 If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Design-Builder or by issuance of Change Orders affecting final completion, the Owner shall, upon application by the Design-Builder, and without terminating the Agreement, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Design-Build Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Design-Builder to the Owner prior to issuance of payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

§ 9.10.4 The making of final payment shall constitute a waiver of Claims by the Owner except those arising from

- .1 liens, Claims, security interests or encumbrances arising out of the Agreement and unsettled;
- .2 failure of the Work to comply with the requirements of the Design-Build Documents; or
- .3 terms of special warranties required by the Design-Build Documents.

§ 9.10.5 Acceptance of final payment by the Design-Builder shall constitute a waiver of claims by the Design-Builder except those previously made in writing and identified by the Design-Builder as unsettled at the time of final Application for Payment.

ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

§ 10.1 Safety Precautions and Programs

The Design-Builder shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Agreement.

§ 10.2 Safety of Persons and Property

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

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

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

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

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

§ 10.2.5 The Design-Builder shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Design-Build Documents) to property referred to in Sections 10.2.1.2 and 10.2.1.3, caused in whole or in part by the Design-Builder, the Architect, a Consultant, a Contractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Design-Builder is responsible under Sections 10.2.1.2 and 10.2.1.3; except damage or loss solely attributable to acts or omissions of the Owner, or anyone directly or indirectly employed by the Owner, or by anyone for whose acts the Owner may be liable, and not attributable to the fault or negligence of the Design-Builder. The foregoing obligations of the Design-Builder are in addition to the Design-Builder's obligations under Section 3.1.14.

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

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

§ 10.2.8 **Injury or Damage to Person or Property.** If the Owner or Design-Builder suffers injury or damage to person or property because of an act or omission of the other, or of others for whose acts such party is legally responsible, prompt written notice of the injury or damage, whether or not insured, shall be given to the other party

within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

§ 10.3 Hazardous Materials

§ 10.3.1 The Design-Builder is responsible for compliance with any requirements included in the Design-Build Documents regarding hazardous materials. If the Design-Builder encounters a hazardous material or substance not addressed in the Design-Build Documents and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Design-Builder, the Design-Builder shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner in writing.

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

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

§ 10.3.4 The Owner shall not be responsible under this Section 10.3 for materials or substances the Design-Builder brings to the Project site unless such materials or substances are required by the Owner's Criteria. The Owner shall be responsible for materials or substances required by the Owner's Criteria, except to the extent of the Design-Builder's fault or negligence in the use and handling of such materials or substances.

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

§ 10.3.6 If, without negligence on the part of the Design-Builder, the Design-Builder is held liable by a government agency for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Design-Build Documents, the Owner shall indemnify the Design-Builder for all cost and expense thereby incurred.

§ 10.4 Emergencies

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

ARTICLE 11 UNCOVERING AND CORRECTION OF WORK

§ 11.1 Uncovering of Work

The Owner may request to examine a portion of the Work that the Design-Builder has covered to determine if the Work has been performed in accordance with the Design-Build Documents. If such Work is in accordance with the Design-Build Documents, the Owner and Design-Builder shall execute a Change Order to adjust the Contract Time

and Contract Sum, as appropriate. If such Work is not in accordance with the Design-Build Documents, the costs of uncovering and correcting the Work shall be at the Design-Builder's expense and the Design-Builder shall not be entitled to a change in the Contract Time unless the condition was caused by the Owner or a separate contractor in which event the Owner shall be responsible for payment of such costs and the Contract Time will be adjusted as appropriate.

§ 11.2 Correction of Work

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

§ 11.2.2 After Substantial Completion

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

§ 11.2.2.2 The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual completion of that portion of the Work.

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

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

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

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

§ 11.3 Acceptance of Nonconforming Work

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

ARTICLE 12 COPYRIGHTS AND LICENSES

§ **12.1** Drawings, specifications, and other documents furnished by the Design-Builder, including those in electronic form, are Instruments of Service. The Design-Builder, and the Architect, Consultants, Contractors, and any other person or entity providing services or work for any of them, shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and shall retain all common law, statutory and other reserved rights, including copyrights. Submission or distribution of Instruments of Service to meet official regulatory requirements, or for similar purposes in connection with the Project, is not to be construed as publication in derogation of the reserved rights of the Design-Builder and the Architect, Consultants, and Contractors, and any other person or entity providing services or work for any of them.

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

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

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

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

§ **12.3.3** Under this Section 12, recovery of costs or recovery of expenses for expert witnesses (whether or not called to testify), or expenses for accountants or appraisers (whether or not called to testify), and other related expenses shall be as additional costs awarded to the prevailing party, and shall not require initiation of a separate legal proceeding.

ARTICLE 13 TERMINATION OR SUSPENSION

§ 13.1 Termination or Suspension Before to Execution of the Design-Build Amendment

§ **13.1.1** If the Owner fails to make payments to the Design-Builder for Work prior to execution of the Design-Build Amendment in accordance with this Agreement, such failure shall be considered substantial nonperformance and cause for termination or, at the Design-Builder's option, cause for suspension of performance of services under this Agreement. If the Design-Builder elects to suspend the Work, the Design-Builder shall give seven days' written notice to the Owner before suspending the Work. In the event of a suspension of the Work, the Design-Builder shall have no liability to the Owner for delay or damage caused by the suspension of the Work. Before resuming the Work, the Design-Builder shall be paid all sums due prior to suspension and any expenses incurred in the interruption and

resumption of the Design-Builder's Work. The Design-Builder's compensation for, and time to complete, the remaining Work shall be equitably adjusted.

§ 13.1.2 If the Owner suspends the Project, the Design-Builder prior to execution of the Design-Build Amendment shall be compensated for the Work performed prior to notice of such suspension. When the Project is resumed, the Design-Builder shall be compensated for actual expenses incurred in the interruption of the Design-Builder's Work. The Design-Builder's compensation for, and time to complete, the remaining Work shall be equitably adjusted.

§ 13.1.3 If the Owner suspends the Project for more than 90 cumulative days prior to execution of the Design-Build Amendment for reasons other than the fault of the Design-Builder, the Design-Builder may terminate this Agreement by giving not less than seven days' written notice.

§ 13.1.4 Either party may terminate this Agreement upon not less than seven days' written notice should the other party fail substantially to perform in accordance with the terms of this Agreement through no fault of the party initiating the termination.

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

§ 13.1.6 In the event of termination prior to execution of the Design-Build Amendment through no act or fault of the Design-Builder, the Design-Builder shall be compensated for Work performed prior to termination, together with Reimbursable Expenses then due and any other expenses directly attributable to termination for which the Design-Builder is not otherwise compensated. In no event shall the Design-Builder's compensation under this Section 13.1.6 be greater than the compensation set forth in Section 2.1.

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

§ 13.2.1 Termination by the Design-Builder

§ 13.2.1.1 The Design-Builder may terminate the Agreement if the Work is stopped for a period of 30 consecutive days through no act or fault of the Design-Builder, the Architect, a Consultant, or a Contractor, or their agents or employees, or any other persons or entities performing portions of the Work under direct or indirect contract with the Design-Builder, for any of the following reasons:

- .1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;
- .2 An act of government, such as a declaration of national emergency that requires all Work to be stopped;
- .3 Because the Owner has not issued a Certificate for Payment and has not notified the Design-Builder of the reason for withholding certification as provided in Section 9.5.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Design-Build Documents; or
- .4 The Owner has failed to furnish to the Design-Builder promptly, upon the Design-Builder's request, reasonable evidence as required by Section 7.2.7.

§ 13.2.1.2 The Design-Builder may terminate the Agreement if, through no act or fault of the Design-Builder, the Architect, a Consultant, a Contractor, or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Design-Builder, repeated suspensions, delays or interruptions of the entire Work by the Owner as described in Section 13.2.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

§ 13.2.1.3 If one of the reasons described in Section 13.2.1.1 or 13.2.1.2 exists, the Design-Builder may, upon seven days' prior written notice to the Owner, terminate the Agreement and recover from the Owner payment for Work executed, including reasonable overhead and profit, costs incurred by reason of such termination, and damages.

§ 13.2.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Design-Builder or any other persons or entities performing portions of the Work under contract with the Design-Builder because the Owner has repeatedly failed to fulfill the Owner's obligations under the Design-Build Documents with respect to matters important to the progress of the Work, the Design-Builder may, upon seven additional days' written notice to the Owner, terminate the Agreement and recover from the Owner as provided in Section 13.2.1.3.

§ 13.2.2 Termination by the Owner For Cause

§ 13.2.2.1 The Owner may terminate the Agreement if the Design-Builder

- .1 fails to submit the Proposal by the date required by this Agreement, or if no date is indicated, within a reasonable time consistent with the date of Substantial Completion;
- .2 refuses or fails to supply an Architect, or enough properly skilled Consultants, Contractors, or workers or proper materials;
- .3 fails to make payment to the Architect, Consultants, or Contractors for services, materials or labor in accordance with their respective agreements with the Design-Builder;
- .4 disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or
- .5 is otherwise guilty of substantial breach of a provision of the Design-Build Documents.

§ 13.2.2.2 When any of the above reasons exist, the Owner may without prejudice to any other rights or remedies of the Owner and after giving the Design-Builder and the Design-Builder's surety, if any, seven days' written notice, terminate services of the Design-Builder and may, subject to any prior rights of the surety:

- .1 Exclude the Design-Builder from the site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Design-Builder;
- .2 Accept assignment of the Architect, Consultant and Contractor agreements pursuant to Section 3.1.15; and
- .3 Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Design-Builder, the Owner shall furnish to the Design-Builder a detailed accounting of the costs incurred by the Owner in finishing the Work.

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

§ 13.2.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Design-Builder. If such costs and damages exceed the unpaid balance, the Design-Builder shall pay the difference to the Owner. The obligation for such payments shall survive termination of the Agreement.

§ 13.2.3 Suspension by the Owner for Convenience

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

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

- .1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Design-Builder is responsible; or
- .2 that an equitable adjustment is made or denied under another provision of the Agreement.

§ 13.2.4 Termination by the Owner for Convenience

§ 13.2.4.1 The Owner may, at any time, terminate the Agreement for the Owner's convenience and without cause.

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

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

§ 13.2.4.3 In case of such termination for the Owner's convenience, the Design-Builder shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.

ARTICLE 14 CLAIMS AND DISPUTE RESOLUTION

§ 14.1 Claims

§ 14.1.1 Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Agreement. The term "Claim" also includes other disputes and matters in question between the Owner and Design-Builder arising out of or relating to the Agreement. The responsibility to substantiate Claims shall rest with the party making the Claim.

§ 14.1.2 Time Limits on Claims. The Owner and Design-Builder shall commence all claims and causes of action, whether in contract, tort, breach of warranty or otherwise, against the other, arising out of or related to the Agreement in accordance with the requirements of the dispute resolution method selected in Section 1.3, within the time period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Design-Builder waive all claims and causes of action not commenced in accordance with this Section 14.1.2.

§ 14.1.3 Notice of Claims

§ 14.1.3.1.1 Prior To Final Payment by Design-Builder. Prior to Final Payment, Claims by Design-Builder must be initiated by written notice to the other party within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

§ 14.1.3.1.2 Prior To Final Payment by Owner. Prior to Final Payment, Claims by the Owner must be initiated by written notice to the other party within 61 days after occurrence of the event giving rise to such Claim or within 61 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

§ 14.1.3.2 Claims Arising After Final Payment. After Final Payment, Claims by either the Owner or Design-Builder that have not otherwise been waived pursuant to Sections 9.10.4 or 9.10.5, must be initiated by prompt written notice to the other party. The notice requirement in Section 14.1.3.1 and the Initial Decision requirement as a condition precedent to mediation in Section 14.2.1 shall not apply.

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

§ 14.1.5 Claims for Additional Cost. If the Design-Builder intends to make a Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the portion of the Work that relates to the Claim. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

§ 14.1.6 Claims for Additional Time

§ 14.1.6.1 If the Design-Builder intends to make a Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Design-Builder's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.

§ 14.1.6.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated, and had an adverse effect on the scheduled construction.

§ 14.1.7 Claims for Consequential Damages

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

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

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 13. Nothing contained in this Section 14.1.7 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Design-Build Documents.

§ 14.2 Initial Decision

§ 14.2.1 An initial decision shall be required as a condition precedent to mediation of all Claims between the Owner and Design-Builder initiated prior to the date final payment is due, excluding those arising under Sections 10.3 and 10.4 of the Agreement and Sections B.3.2.9 and B.3.2.10 of Exhibit B to this Agreement, unless 30 days have passed after the Claim has been initiated with no decision having been rendered. Unless otherwise mutually agreed in writing, the Owner shall render the initial decision on Claims.

§ 14.2.2 Procedure

§ 14.2.2.1 **Claims Initiated by the Owner.** If the Owner initiates a Claim, the Design-Builder shall provide a written response to Owner within ten days after receipt of the notice required under Section 14.1.3.1. Thereafter, the Owner shall render an initial decision within ten days of receiving the Design-Builder's response: (1) withdrawing the Claim in whole or in part, (2) approving the Claim in whole or in part, or (3) suggesting a compromise.

§ 14.2.2.2 **Claims Initiated by the Design-Builder.** If the Design-Builder initiates a Claim, the Owner will take one or more of the following actions within ten days after receipt of the notice required under Section 14.1.3.1: (1) request additional supporting data, (2) render an initial decision rejecting the Claim in whole or in part, (3) render an initial decision approving the Claim, (4) suggest a compromise or (5) indicate that it is unable to render an initial decision because the Owner lacks sufficient information to evaluate the merits of the Claim.

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

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

§ 14.2.5 The Owner's initial decision shall (1) be in writing; (2) state the reasons therefor; and (3) identify any change in the Contract Sum or Contract Time or both. The initial decision shall be final and binding on the parties but subject to mediation and, if the parties fail to resolve their dispute through mediation, to litigation.

§ 14.2.6 Either party may file for mediation of an initial decision at any time, subject to the terms of Section 14.2.6.1.

§ 14.2.6.1 Either party may, within 30 days from the date of an initial decision, demand in writing that the other party file for mediation within 60 days of the initial decision. If such a demand is made and the party receiving the demand fails to file for mediation within the time required, then both parties waive their rights to mediate with respect to the initial decision.

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

§ 14.2.8 If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines.

§ 14.3 Mediation

§ 14.3.1 Claims, disputes, or other matters in controversy arising out of or related to the Agreement, except those waived as provided for in Sections 9.10.4, 9.10.5, and 14.1.7, shall be subject to mediation as a condition precedent to binding dispute resolution.

§ 14.3.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to the Agreement, and filed with the person or entity administering the mediation.

§ 14.3.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction.

§ 14.4 [Blank]

ARTICLE 15 MISCELLANEOUS PROVISIONS

§ 15.1 Governing Law

The Agreement shall be governed by California Law.

§ 15.2 Successors and Assigns

§ 15.2.1 The Owner and Design-Builder, respectively, bind themselves, their partners, successors, assigns and legal representatives to the covenants, agreements and obligations contained in the Design-Build Documents. Except as provided in Section 15.2.2, neither party to the Agreement shall assign the Agreement as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Agreement.

§ 15.2.2 The Owner may, without consent of the Design-Builder, assign the Agreement to a lender providing construction financing for the Project, if the lender assumes the Owner's rights and obligations under the Design-Build Documents. The Design-Builder shall execute all consents reasonably required to facilitate such assignment.

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

§ 15.3 Written Notice

Written notice shall be deemed to have been duly served if delivered in person to the individual, to a member of the firm or entity, or to an officer of the corporation for which it was intended; or if delivered at, or sent by registered or certified mail or by courier service providing proof of delivery to, the last business address known to the party giving notice.

§ 15.4 Rights and Remedies

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

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

§ 15.5 Tests and Inspections

§ 15.5.1 Tests, inspections and approvals of portions of the Work shall be made as required by the Design-Build Documents and by applicable laws, statutes, ordinances, codes, rules and regulations or lawful orders of public authorities. Unless otherwise provided, the Design-Builder shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals. The Design-Builder shall give the Owner timely notice of when and where tests and inspections are to be made so that the Owner may be present for such procedures. The Owner shall bear costs of (1) tests, inspections or approvals that do not become requirements until after bids are received or negotiations concluded, and (2) tests, inspections or approvals where building codes or applicable laws or regulations prohibit the Owner from delegating their cost to the Design-Builder.

§ 15.5.2 If the Owner determines that portions of the Work require additional testing, inspection or approval not included under Section 15.5.1, the Owner will instruct the Design-Builder to make arrangements for such additional

testing, inspection or approval by an entity acceptable to the Owner, and the Design-Builder shall give timely notice to the Owner of when and where tests and inspections are to be made so that the Owner may be present for such procedures. Such costs, except as provided in Section 15.5.3, shall be at the Owner's expense.

§ 15.5.3 If such procedures for testing, inspection or approval under Sections 15.5.1 and 15.5.2 reveal failure of the portions of the Work to comply with requirements established by the Design-Build Documents, all costs made necessary by such failure shall be at the Design-Builder's expense.

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

§ 15.5.5 If the Owner is to observe tests, inspections or approvals required by the Design-Build Documents, the Owner will do so promptly and, where practicable, at the normal place of testing.

§ 15.5.6 Tests or inspections conducted pursuant to the Design-Build Documents shall be made promptly to avoid unreasonable delay in the Work.

§ 15.6 Confidential Information

If the Owner or Design-Builder transmits Confidential Information, the transmission of such Confidential Information constitutes a warranty to the party receiving such Confidential Information that the transmitting party is authorized to transmit the Confidential Information. If a party receives Confidential Information, the receiving party shall keep the Confidential Information strictly confidential and shall not disclose it to any other person or entity except as set forth in Section 15.6.1.

§ 15.6.1 A party receiving Confidential Information may disclose the Confidential Information as required by law or court order, including a subpoena or other form of compulsory legal process issued by a court or governmental entity. A party receiving Confidential Information may also disclose the Confidential Information to its employees, consultants or contractors in order to perform services or work solely and exclusively for the Project, provided those employees, consultants and contractors are subject to the restrictions on the disclosure and use of Confidential Information as set forth in this Agreement.

§ 15.7 Capitalization

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

§ 15.8 Interpretation

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

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

§ 15.9 EQUAL OPPORTUNITY REQUIREMENTS - Non-discrimination in Employment is required by Federally Assisted Construction Contractors, by Executive Order 11246.

§ 15.9.1 This section summarizes Executive Order 11246, as amended, which prohibits employment discrimination and requires employers holding non-exempt Federal contracts and subcontracts and federally-assisted construction contracts and subcontracts in excess of \$10,000 to take affirmative action to ensure equal employment opportunity without regard to race, color, religion, sex, or national origin. The Executive Order requires, as a condition for the approval of any federally assisted construction contract, that the applicant incorporate nondiscrimination and affirmative action clauses into its non-exempt federally assisted construction contracts.

§ 15.9.2 Executive Order 11246, as amended, is administered and enforced by the Office of Federal Contract Compliance Programs (OFCCP), an agency in the U.S. Department of Labor's Employment Standards Administration. OFCCP has issued regulations at 41 CFR chapter 60

implementing the Executive Order. The regulations at 41 CFR part 60-4 establish the procedures which the Owner, as an administering agency, must follow when making grants, contracts, loans, insurance or guarantees involving federally assisted construction which is not exempt from the requirements of Executive Order 11246. The regulations which apply to Federal or federally assisted construction contractors also are published at 41 CFR part 60-4.

§ 15.9.3 OFCCP has established numerical goals for minority and female utilization in construction work. The goals are expressed in percentage terms for the contractor's aggregate workforce in each trade. OFCCP has set goals for minority utilization based on the percentage of minorities in the civilian labor force in the relevant area. There is a single nationwide goal of 6.9 percent for utilization for women. The goals to all construction work in the covered geographic area, whether or not it is federal, federally assisted or non-federal. A notice advises bidders of the applicable goals for the area where the project is to be located.

§ 15.9.4 Application. This section applies to all Design-Builder and all construction contractor's or subcontractor's employees who are engaged in on-site construction including those construction employees who work on a non-Federal or non-Federally assisted construction site.

§ 15.9.4.1 The Design-Builder and prospective contractor or subcontractor must comply with the Immigration Reform and Control Act of 1986 by completing and retaining Form I-9, "Employment Eligibility Verification," for employees hired. This form is available from the Immigration and Naturalization Service, and Department of Justice.

§ 15.9.4.2 The Design-Builder and prospective contractor or subcontractor must submit Form RD 400-6, "Compliance Statement," to the applicant and an Owner official as part of the bid package, prior to any contract bid negotiations and comply with the Executive Order 11246 as stated in the contract documents.

§ 15.10 STATUTES

§ 15.10.1 The Design-Builder and each subcontractor shall comply with the following statutes (and the regulations issued pursuant thereto, which are incorporated herein by reference):

§ 15.10.2 2 CFR part 417 and Executive Order 12549, which pertain to the debarment or suspension of a person from participating in a Federal program or activity. If the total compensation exceeds \$25,000, the Design-Builder shall complete the relevant certification form provided by the Owner.

§ 15.10.3 Section 319 of Public Law 101-121, as supplemented by the Department of Agriculture regulations (29 CFR part 418 and DR 2400-5). This Law pertains to restrictions on lobbying and applies to the recipients of Contracts and Subcontracts that exceed \$100,000 at any tier under a Federal loan that exceeds \$150,000 or a Federal grant that exceeds \$100,000. If applicable, the Design-Builder must complete a certification form on lobbying activities related to a specific Federal loan or grant that is a funding for this Agreement. The certification and disclosure forms shall be provided by the Owner.

§ 15.10.4 Copeland Anti-Kickback Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR part 3). This Act provides that the Design-Builder and each Contractor shall be prohibited from inducing, by any means, any person in connection with the construction to give up any part of the compensation to which the person is otherwise entitled.

§ 15.10.5 Clean Air Act (42 U.S.C. 7414), section 114, and the Water Pollution Control Act (33 U.S.C. 1813), section 308. Under Executive Order 11738 and Environmental Protection Agency (EPA) regulations 40 CFR part 15, all Contracts in excess of \$100,000 are required to comply with these Acts. The Acts require the Design-Builder and Contractor to:

§ 15.10.5.1 Notify the Owner of the receipt of any communication from EPA indicating that a facility to be utilized in the performance of the Agreement is under consideration to be listed on the EPA list of Violating Facilities,

§ 15.10.5.2 Certify that any facility to be utilized in the Work by any nonexempt contractor or subcontractor of Design-Builder is not listed on the EPA list of Violating Facilities as of the date of the Contract Award.

§ 15.10.5.3 Include or cause to be included the above criteria and requirements of clauses A.13.3.5.1 and A.13.3.5.2 in every nonexempt Subcontract, and that the Design-Builder and Contractor will take such actions as the Owner may direct as a means of enforcing such provisions.

§ 15.10.5.4 The Design-Builder/Contractor shall be required to comply with Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333) entitled "Safety and Health Regulations for Construction" (29 CFR Part 1926) to the extent that any resulting Contract involves construction.

§ 15.11 ENVIRONMENTAL REQUIREMENTS

§ 15.11.1 Mitigation Measures - The Design-Builder shall comply with all applicable mitigation measures established in the environmental assessment for the project. These may be obtained from the Owner representative.

§ 15.11.2 The Design-Builder, trenching, excavating, or other earth moving activity related to the Project, shall comply with the following environmental constraints:

§ 15.11.2.1 Endangered Species, Historic Preservation, Human Remains and Cultural Items, Hazardous Materials, and Paleontology - Any excavation or other earth moving activity by the Design-Builder that provides evidence of the presence of endangered or threatened species or their critical habitat, uncovers a historical or archaeological artifact, human remains or cultural items, hazardous materials, a fossil or other paleontological materials will require the Design-Builder to:

- .1 Temporarily stop work;
- .2 Provide immediate notice to the Architect and the Owner, and in the case of potentially hazardous materials, provide immediate notice to local first responders and take such measures as necessary to protect the public and workers;
- .3 Take reasonable measures as necessary to protect the discovered materials or protected resource;
- .4 Abide by such direction as provided by the Owner, or agencies responsible for resource protection or hazardous materials management; and
- .5 Resume work only upon notice from the Architect and the Owner.

§ 15.12 Compliance with all Federal, State, and local requirements effective on the Agreement execution date shall be the responsibility of the Design-Builder.

§ 15.13 RECORDS

§ 15.13.1 The Owner, the United States Department of Agriculture or other financing agency, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the Design-Builder which are directly pertinent to a specific Federal loan program for the purpose of making audit, examination, excerpts, and transcriptions. The Design-Builder shall maintain records for at least three years after the Owner makes final payment and all other pending matters are closed.

ARTICLE 16 SCOPE OF THE AGREEMENT

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

- .1 Agreement Between Owner and Design-Builder
- .2 Exhibit A, Design-Build Amendment, if executed
- .3 Exhibit B, Insurance and Bonds
- .4 Payment Bond
Performance Bond
Compliance Statement (Form RD 400-6)
Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion
- Lower Tier Covered Transactions (Form AD 1048)
Disclosure of Lobbying Activities (SF-LLL)

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

OWNER (*Signature*)

DESIGN-BUILDER (*Signature*)

Moses Stites, General Manager

Robert McKnight, President

(*Print name and title*)

(*Print name and title*)

APPROVED AS TO LEGAL FORM ON BEHALF OF FCRTA:
DANIEL C. CEDERBORG, County Counsel

By 

ALISON SAMARIN, Deputy County Counsel

BEFORE THE
FRESNO COUNTY RURAL TRANSIT AGENCY
RESOLUTION NO. 2022-04

ITEM 3F

In the matter of: RESOLUTION AUTHORIZING THE AFFORDABLE HOUSING AND SUSTAINABLE COMMUNITIES PROGRAM APPLICATION

WHEREAS, A majority of the directors of the Fresno County Rural Transit Agency, a California joint powers Public Agency, hereby consent to, adopt and ratify the following resolutions:

WHEREAS, The State of California, the Strategic Growth Council (SGC) and the Department of Housing and Community Development (Department) has issued a Notice of Funding Availability dated November 1, 2019 (NOFA), under the Affordable Housing and Sustainable Communities (AHSC) Program established under Division 44, Part 1 of the Public Resources Code commencing with Section 75200.

WHEREAS, Fresno County Rural Transit Agency (Applicant) desires to apply for AHSC Program funds and submit the Application Package released by the Department for the AHSC Program.

WHEREAS, The SGC is authorized to approve funding allocations for the AHSC Program, subject to the terms and conditions of the NOFA, Program Guidelines, Application Package, and Standard Agreement. The Department is authorized to administer the approved funding allocations of the AHSC Program.

NOW THEREFORE, IT IS RESOLVED THAT:

1. Applicant is hereby authorized and directed to apply for and submit to the Department the AHSC Program Application as detailed in the NOFA dated November 1, 2019, for Round 5 in a total amount not to exceed \$20,000,000.00 of which \$11,250,000.00 is requested as a loan for an Affordable Housing Development (AHD) ("AHSC Loan") and \$8,750,000.00 is requested for a grant for Housing-Related Infrastructure (HRI), Sustainable Transportation Infrastructure (STI), Transit-Related Amenities (TRA) or Program (PGM) activities ("AHSC Grant") as defined the AHSC Program Guidelines adopted by SGC on October 31, 2019. Applicant is authorized to do business in the State of California and is an Eligible Applicant/Sponsor under the AHSC Program. Applicant was awarded an AHSC Program loan in an amount not to exceed \$11,250,000 ("AHSC Loan") and an AHSC Program grant in an amount not to exceed \$8,750,000 ("AHSC Grant") for an aggregate amount not to exceed \$20,000,000 under the above-described NOFA. Applicant is authorized to act on its own behalf in connection with the AHSC Loan and AHSC Grant.
2. Applicant shall be subject to the terms and conditions as specified in the Standard Agreement(s). Funds are to be used for allowable capital asset project expenditures to be identified in Exhibit A of the Standard Agreement(s). The application in full is incorporated as part of the Standard Agreement(s). Any and all activities funded, information provided, and timelines represented in the application are enforceable through the Standard Agreement(s). Applicant hereby agrees to use the funds for eligible capital asset(s) in the manner presented in the application as approved by the Department and in accordance with the NOFA and Program Guidelines and Application Package.
3. The Applicant is hereby authorized and directed to act on its own behalf to cause itself to incur an obligation for the AHSC Loan. That in connection with the AHSC Loan, the Applicant is authorized and directed to enter into, execute, and deliver a State of California Standard Agreement in the amount not to exceed \$11,250,000 and any and all other documents required or deemed necessary or appropriate to carry into effect the full intent and purpose of the above resolution, in order to evidence the AHSC Loan, Applicant's obligations related thereto, and the Department's security therefore; including, but not limited to, a promissory note, a deed of trust and security agreement, a regulatory agreement, a development agreement and certain other documents required by the Department as security for, evidence of or pertaining to the AHSC Loan, and all amendments thereto (collectively, the "AHSC Loan Documents").
4. The Applicant is hereby authorized and directed to incur an obligation for the AHSC Grant. That in connection with the AHSC Grant, the Applicant is authorized and directed to enter into, execute, and deliver a State of California Standard Agreement in the amount not to exceed \$5,595,700 and any and all other documents required or deemed necessary or appropriate to carry into effect the full intent and purpose of the above resolution, in order

to evidence the AHSC Grant, the Applicant's obligations related thereto, and the Department's security therefore; including, but not limited to, a disbursement agreement, a covenant and certain other documents required by the Department as security for, evidence of or pertaining to the AHSC Grant, and all amendments thereto (collectively, the "AHSC Grant Documents").

5. That Moses Stites, General Manager, is hereby authorized to execute the AHSC Loan Documents and the AHSC Grant Documents, and any amendment or modifications thereto, on behalf of the Applicant.

THE FOREGOING RESOLUTION was passed and adopted by the Fresno County Rural Transit Agency this 24th day of March, 2022.

AYES:
NOES:
ABSTAIN:
ABSENT:

Signed: _____
David Cardenas, Chairman

I hereby certify that the foregoing is a true copy of a resolution of the Fresno County Rural Transit Agency Board of Directors duly adopted at a meeting thereof held on the 24th day of March, 2022.

Signed: _____
Moses Stites, General Manager