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**STANDARD FORM OF AGREEMENT  
BETWEEN DESIGN-BUILDER AND  
DESIGN-BUILD SUBCONTRACTOR -  
LUMP SUM**

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**Document No. 565**

Second Edition, 2010

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Washington, DC



## Design-Build Institute of America - Contract Documents LICENSE AGREEMENT

By using the DBIA Contract Documents, you agree to and are bound by the terms of this License Agreement.

- 1. License.** The Design-Build Institute of America ("DBIA") provides DBIA Contract Documents and licenses their use worldwide. You acknowledge that DBIA Contract Documents are protected by the copyright laws of the United States. You have a limited nonexclusive license to: (a) Use DBIA Contract Documents on any number of machines owned, leased or rented by your company or organization; (b) Use DBIA Contract Documents in printed form for bona fide contract purposes; and (c) Copy DBIA Contract Documents into any machine-readable or printed form for backup or modification purposes in support of your permitted use.
- 2. User Responsibility.** You assume sole responsibility for the selection of specific documents or portions thereof to achieve your intended results, and for the installation, use, and results obtained from the DBIA Contract Documents. You acknowledge that you understand that the text of the DBIA Contract Documents has important legal consequences and that consultation with an attorney is recommended with respect to use or modification of the text. You will not represent that any of the contract documents you generate from DBIA Contract Documents are DBIA documents unless (a) the document text is used without alteration or (b) all additions and changes to, and deletions from, the text are clearly shown.
- 3. Copies.** You may not use, copy, modify, or transfer DBIA Contract Documents, or any copy, modification or merged portion, in whole or in part, except as expressly provided for in this license. Reproduction of DBIA Contract Documents in printed or machine-readable format for resale or educational purposes is expressly prohibited. You will reproduce and include DBIA's copyright notice on any printed or machine-readable copy, modification, or portion merged into another document or program.
- 4. Transfers.** You may not transfer possession of any copy, modification or merged portion of DBIA Contract Documents to another party, except that a party with whom you are contracting may receive and use such transferred material solely for purposes of its contract with you. You may not sublicense, assign, or transfer this license except as expressly provided in this Agreement, and any attempt to do so is void.
- 5. Term.** The license is effective for one year from the date of purchase. DBIA may elect to terminate it earlier, by written notice to you, if you fail to comply with any term or condition of this Agreement.
- 6. Limited Warranty.** DBIA warrants the electronic files or other media by which DBIA Contract Documents are furnished to be free from defects in materials and workmanship under normal use during the Term. There is no other warranty of any kind, expressed or implied, including, but not limited to the implied warranties of merchantability and fitness for a particular purpose. Some states do not allow the exclusion of implied warranties, so the above exclusion may not apply to you. This warranty gives you specific legal rights and you may also have other rights which vary from state to state. DBIA does not warrant that the DBIA Contract Documents will meet your requirements or that the operation of DBIA Contract Documents will be uninterrupted or error free.
- 7. Limitations of Remedies.** DBIA's entire liability and your exclusive remedy shall be: the replacement of any document not meeting DBIA's "Limited Warranty" which is returned to DBIA with a copy of your receipt, or at DBIA's election, your money will be refunded. In no event will DBIA be liable to you for any damages, including any lost profits, lost savings or other incidental or consequential damages arising out of the use or inability to use DBIA Contract Documents even if DBIA has been advised of the possibility of such damages, or for any claim by any other party. Some states do not allow the limitation or exclusion of liability for incidental or consequential damages, so the above limitation or exclusion may not apply to you.
- 8. Acknowledgement.** You acknowledge that you have read this agreement, understand it and agree to be bound by its terms and conditions and that it will be governed by the laws of the District of Columbia. You further agree that it is the complete and exclusive statement of your agreement with DBIA which supersedes any proposal or prior agreement, oral or written, and any other communications between the parties relating to the subject matter of this agreement.

# INSTRUCTIONS

For DBIA Document No. 565, Standard Form of Agreement Between Design-Builder and Design-Build Subcontractor - Lump Sum (2010 Edition)

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## Checklist

Use this Checklist to ensure that the Agreement is fully completed and all exhibits are attached.

_____ Page 1	Enter date of Agreement
_____ Page 1	Design-Builder's name, address and form of business
_____ Page 1	Design-Build Subcontractor's name, address and form of business
_____ Page 1	Project name, location and general description
_____ Page 1	Owner's name, address and form of business
_____ Section 1.2.1.15	Identify portion of the Project which comprises the Work in an Exhibit to this Agreement
_____ Section 2.12.1	Attach permit list
_____ Section 4.4.1.2	Insert additional compensation the Design-Build Subcontractor is due for the use of its Work Product under the circumstances described in this section.
_____ Section 6.1.1	Insert Contract Price
_____ Section 6.2.1	Insert markups and note optional provisions
_____ Section 7.2.1	Complete blanks for day of month
_____ Section 7.3.1	Complete blanks for retainage
_____ Section 7.7.1	Complete blanks for interest rate
_____ Section 8.2.1.3	Choose overhead/profit method for termination for convenience and note optional provision
_____ Section 9.1.1	Insert Design-Builder's Senior Representative's name, etc.
_____ Section 9.1.2	Insert Design-Builder's Representatives name, etc.
_____ Section 9.2.1	Insert Design-Build Subcontractor's Senior Representative's name, etc.
_____ Section 9.2.2	Insert Design-Build Subcontractor's Representative's name, etc.
_____ Section 10.1.1	Attach Insurance Exhibit
_____ Section 10.4.1	Insert amount and conditions of bonds or other security
_____ Article 17	Insert any other provisions (optional)
_____ Last Page	Design-Builder's and Design-Build Subcontractor's execution of the Agreement

## General Instructions

No.	Subject	Instruction
1.	Standard Forms	Standard form contracts have long served an important function in the United States and international construction markets. The common purpose of these forms is to provide an economical and convenient way for parties to contract for design and construction services. As standard forms gain acceptance and are used with increased frequency, parties are able to enter into contracts with greater certainty as to their rights and responsibilities.
2.	DBIA Standard Form Contract Documents	Since its formation in 1993, the Design-Build Institute of America ("DBIA") has regularly evaluated the needs of owners, design-builders, and other parties to the design-build process in preparation for developing its own contract forms. Consistent with DBIA's mission of promulgating best design-build practices, DBIA believes that the design-build contract should reflect a balanced approach to risk that considers the legitimate interests of all parties to the design-build process. DBIA's Standard Form Contract Documents reflect a modern risk allocation approach, allocating each risk to the party best equipped to manage and minimize that risk, with the goal of promoting best design-build practices.
3.	Use of Non-DBIA Documents	To avoid inconsistencies among documents used for the same project, DBIA's Standard Form Contract Documents should not be used in conjunction with non-DBIA documents unless the non-DBIA documents are appropriately modified on the advice of legal counsel. Moreover, care should also be taken when using different editions of the DBIA Standard Form Documents on the same project to ensure consistency.
4.	Legal Consequences	DBIA Standard Form Contract Documents are legally binding contracts with important legal consequences. Contracting parties are advised and encouraged to seek legal counsel in completing or modifying these Documents.
5.	Reproduction	DBIA hereby grants to purchasers a limited license to reproduce its Documents consistent with the License Agreement accompanying these Documents. At least two original versions of the Agreement should be signed by the parties. Any other reproduction of DBIA Documents is strictly prohibited.
6.	Modifications	<p>Effective contracting is accomplished when the parties give specific thought to their contracting goals and then tailor the contract to meet the unique needs of the project and the design-build team. For that reason, these Documents may require modification for various purposes including, for example, to comply with local codes and laws, or to add special terms. DBIA's latest revisions to its Documents provide the parties an opportunity to customize their contractual relationship by selecting various optional contract clauses that may better reflect the unique needs and risks associated with the project.</p> <p>Any modifications to these Documents should be initialed by the parties. At no time should a document be re-typed in its entirety. Re-creating the document violates copyright laws and destroys one of the advantages of standard forms – familiarity with the terms.</p>
7.	Execution	It is good practice to execute two original copies of the Agreement. Only persons authorized to sign for the contracting parties may execute the Agreement.

## Specific Instructions

Section	Title	Instruction
General	Purpose of This Agreement	<p>DBIA Document No. 565, <i>Standard Form of Agreement Between Design-Builder and Design-Build Subcontractor – Lump Sum</i>, 2010 Edition (“Agreement”) sets forth the terms and conditions under which the design and construction of a specified portion of the Project will be performed, and should be used only when the parties intend that Design-Builder pay Design-Build Subcontractor a lump sum fixed price for the completion of the Work.</p> <p>Document 565 is appropriate where there is certainty as to Owner’s Project Criteria, or if the Construction Documents are final. If there is uncertainty about Owner’s Project Criteria, or it remains to be developed jointly, a cost plus fee/guaranteed maximum price (“GMP”) contracting approach may be more suitable. In such case, the parties should use DBIA Document No. 560, <i>Standard Form of Agreement Between Design-Builder and Design-Build Subcontractor – Cost Plus Fee with an Option for a Guaranteed Maximum Price</i>, 2010 Edition.</p>
General	Purpose of These Instructions	<p>These Instructions are not part of this Agreement, but are provided to aid the parties in their understanding of the Agreement and in completing the Agreement.</p>
General	Date	<p>On Page 1, enter the date when both parties reach a final understanding. It is possible, due to logistical reasons, that the dates when the parties execute the Agreement may be different. Once both parties execute the Agreement, the effective date of the Agreement will be the date recorded on Page 1. This date does not, however, determine the Date of Commencement, which is measured according to the terms of Article 5.</p>
General	Parties: Design-Builder and Design-Build Subcontractor	<p>On Page 1, enter the legal name and full address of Design-Builder, Design-Build Subcontractor and Owner, as well as the legal form of each entity, e.g., corporation, partnership, limited partnership, limited liability company, or other.</p>
1.1.1	Pass Through	<p>The section recognizes that the Design-Build Subcontractor has the same rights, responsibilities and obligations as to Design-Builder as Design-Builder by the Design-Build Agreement has against and to Owner. However, because the Design-Build Agreement also affords the Design-Builder and Owner many opportunities to customize their contractual relationship by the selection of optional provisions, DBIA does not believe that these optional provisions should automatically pass through to the Design-Build Subcontractor. Accordingly, if the Design-Builder and Design-Build Subcontractor believe it is appropriate to afford the Design-Build Subcontractor the same rights, responsibilities and obligations as it relates to these optional provisions, the parties should make that clear by adding the necessary and appropriate provisions at Article 17 of this Agreement.</p>
1.2	Definitions	<p>Except to the extent set forth in Section 1.2 of this Agreement, terms, words and phrases used in the Agreement shall have the same meanings used in the Design-Build Agreement between Owner and Design-Builder (either DBIA Document No. 525, <i>Standard Form of Agreement Between Owner and Design-Builder - Lump Sum</i> (2010 Edition), or DBIA Document No. 530, <i>Standard Form of Agreement Between Owner and Design-Builder - Cost Plus Fee with an Option for a Guaranteed Maximum Price</i> (2010 Edition), and including DBIA Document No. 535, <i>Standard Form of General Conditions of Contract Between Owner and Design-Builder</i> (2010 Edition).</p>
1.2.1.15	Definition of the Work	<p>The parties must identify the specific portion of the Project which Design-Build Subcontractor is responsible for designing and constructing.</p>
1.3.1	Contract Documents	<p>This section identifies the Contract Documents.</p>

1.4.2	Order of Precedence	The Contract Documents are listed in Section 1.3.1 in the order of their precedence.
1.4.3	Design Specifications	If the Owner has provided design specifications to the Design-Builder, the Design-Build Subcontractor is entitled to rely on the information provided to the same extent as Design-Builder. If said information is not accurate, the Design-Build Subcontractor may be entitled to an adjustment of costs and/or time to the extent the Design-Builder recovers from the Owner.
1.5.2	Mutual Obligations and Acknowledgments	This Agreement contemplates that the Design-Builder and Design-Build Subcontractor have cooperated in the procurement of the Design-Build Agreement and that the Design-Build Subcontractor has familiarized itself with the Design-Build Agreement, including the Basis of Design Documents.
2.3.1	Design Professional Services	The parties should be aware that in addition to requiring compliance with state licensing laws for design professionals, some states also require that the design professional have a corporate professional license.
2.3.3	Standard of Care for Design Professional Services	Design-Build Subcontractor's obligation is to deliver a design that meets prevailing industry standards. However, DBIA has provided the parties at Article 17 an optional provision whereby the Owner can identify specific performance standards that can be objectively measured. If this optional provision is selected, Design-Build Subcontractor is obligated to design the Work to satisfy these standards. To avoid any confusion and to ensure that the parties fully understand what their obligations are, the specific performance standards should be clearly identified and should be able to be objectively measured. The Design-Build Subcontractor should recognize that this is a heightened standard of care that has insurance ramifications that should be discussed with the Design-Build Subcontractor's insurance advisor.
2.3.5	Design Development Services	In accordance with the Project Schedule, the parties will hold design monitoring meetings during the development of the Construction Documents for the work so that the final design shall be consistent with the requirements of the Contract Documents.
2.3.7	Deviations from the Basis of Design Documents	If the Design-Build Subcontractor fails to identify changes to the Contract Documents, including the Basis of Design Documents, or fails to produce Construction Documents consistent with approved changes, Design-Build Subcontractor is responsible for any additional costs incurred by Design-Builder.
2.10	Patents and Copyrights	Design-Build Subcontractor shall pay all license fees and royalties for items or processes it selects which are subject to copyrights or patent rights.
2.12.1	Government Approvals and Permits	Design-Build Subcontractor is responsible for obtaining the specific permits, approvals, and licenses set forth in an exhibit to the Agreement.
3.3.1	Furnishing of Information	Design-Builder shall furnish Design-Build Subcontractor with the listed Owner-provided information. Design-Build Subcontractor is entitled to rely on the Owner-provided information to the same extent Design-Builder is entitled to pursuant to the Design-Build Agreement.
4.1.1	Work Product	This Agreement provides that Design-Build Subcontractor shall retain ownership of the Work Product Design-Build Subcontractor produces, but obligates Design-Build Subcontractor to grant a limited license to Design-Builder to use the Work Product in connection with completing the Project. However, if the Design-Build Agreement conflicts with the above, then Design-Build Subcontractor grants the Design-Builder the same rights that Design-Builder has provided the Owner.
4.2.1	Agreement to Grant Rights to Owner	Design-Build Subcontractor has reviewed the Design-Build Agreement and understands that it is required to grant Owner the rights to the Work Product according to the terms and circumstances described in the Design-Build Agreement.

4.3.1	Indemnification for Use of Work Product	If either Design-Builder or Design-Build Subcontractor uses the Work Product on any other project that party shall defend, indemnify and hold harmless the other party and Owner.
4.4.1	Design-Builder's Use of Work Product Upon Termination for Convenience or Design-Builder's Default	If Design-Builder terminates this Agreement for convenience or if the Design-Build Subcontractor terminates this Agreement due to Design-Builder's default, Design-Build Subcontractor grants the Design-Builder and Owner the right to use the Work Product as set forth in Section 4.1.1. The granting of these rights is conditioned on (i) paying Design-Build Subcontractor all amounts due under the Agreement, including paying Design-Build Subcontractor an additional sum (to be negotiated) under Section 4.4.1.2 for the use of the Work Product; and (ii) Design-Builder using the Work Product at its sole risk.
4.4.2	Design-Builder's Use of Work Product Upon Design-Build Subcontractor's Default	If Design-Build Subcontractor is properly terminated for default, Design-Builder shall have the same rights to use the Work Product as set forth in Section 4.1.1.
5.1	Date of Commencement	Design-Build Subcontractor's obligation to commence work is triggered by its receipt of a Notice to Proceed unless the parties mutually agree otherwise.
5.4.2	Compensation for Delay Events	Design-Build Subcontractor is entitled to a time extension and compensation for those events set forth in Section 5.4.1 except the Design-Build Subcontractor is not entitled to compensation for Force Majeure events unless compensation for Force Majeure is expressly provided in Article 17 of this Agreement.
6.2.1	Markups for Changes	For additive Change Orders, the parties have to negotiate the Fee the Design-Build Subcontractor will receive. For deductive Change Orders, the parties have the option by checking the appropriate box of whether there will be no additional reduction or whether there will be an additional reduction based on a negotiated percentage.
7.2.1	Progress Payments	Enter the day of the month when Design-Build Subcontractor shall submit its Application for Payment.
7.3.1	Retainage on Progress Payments	Insert percent Design-Builder will retain from Progress Payments to Design-Build Subcontractor.
7.7.1	Interest	The parties should enter the rate at which interest will accrue on Design-Build Subcontractor's payments if unpaid five (5) days after due. Late payment creates a hardship for Design-Build Subcontractor and its Design Consultants and Subcontractors.
7.11.1	Record Keeping	The Design-Builder is provided access to, and the right to audit Design-Build Subcontractor's records with respect to changes in the Work. However, if the parties have agreed to multipliers or markups, the time to challenge and negotiate those percentages is at the time the parties execute the Agreement and not during the Project or after it has been completed. Accordingly, the Design-Builder can at any time audit these percentages only to confirm that such percentage has been properly charged and not to challenge the composition of such percentage.
8.2.1.3	Termination for Convenience: Overhead and Profit	The parties should choose prior to execution of the Agreement the method that will be used to determine overhead and profit paid to Design-Build Subcontractor in the event Design-Builder terminates Design-Build Subcontractor for its convenience. The parties may choose to set percentage rates for overhead and profit prior to execution of the Agreement, or may choose to determine reasonable sums to be paid for overhead and profit at the time of the termination. If the parties choose to set overhead and profit rates prior to execution of the Agreement, the percentages should be entered in Section 8.2.1.3.

8.2.2	Termination for Convenience	If Design-Builder terminates Design-Build Subcontractor for convenience because Owner has terminated Design-Builder for its convenience, Design-Build Subcontractor is only entitled to receive such amount as Design-Builder receives from Owner on behalf of Design-Build Subcontractor.
8.5	Design-Build Subcontractor's Right to Terminate for Cause	If Design-Build Subcontractor properly terminates the Agreement for cause, it shall recover from Design-Builder in the same way as if Design-Builder had terminated the Agreement for convenience under Section 8.2 of the Agreement.
Article 9	Representatives of the Parties	Enter the name, title, address and telephone number of Design-Builder's Senior Representative and Design-Builder's Representative at Sections 9.1.1 and 9.1.2, respectively.  Enter the name, title, address and telephone number of Design-Build Subcontractor's Senior Representative and Design-Build Subcontractor's Representative at Sections 9.2.1 and 9.2.2, respectively.
10.1.1	Design-Build Subcontractor's Insurance Requirements	Attach an Insurance Exhibit setting forth in detail the insurance coverages Design-Build Subcontractor is required to provide for the Project. Parties are advised to consult their insurance advisors.
10.1.2	Design Consultant's and Subcontractor's Insurance Requirements	Design-Build Subcontractor is obligated to require its Design Consultants and Sub-Subcontractors to provide the insurance coverage set forth in the Insurance Exhibit to the Agreement. Parties are advised to consult their insurance advisors.
10.1.3	Exclusions to Design-Build	Parties are advised that standard liability insurance policies may contain exclusions for the design-build delivery method. This Section 10.1.3 requires that any such exclusions be deleted from the policy.
10.1.4	Errors and Omissions Insurance	Should Design-Builder, after its analysis of the risk factors involved, require this insurance, the coverage required shall be as set forth in the Insurance Exhibit attached at Section 10.1.1 of the Agreement.
10.4.1	Bonds and Other Performance Security	Enter the type and amount of bonds or other performance security required for the Project. Where bonding is not required by statute, Design-Builder may want to evaluate the project risk versus the bonding costs in deciding what type of performance security to require.
13.3	Disputes Involving Owner	Disputes for which Owner is responsible will be resolved in accordance with the dispute resolution clause in the Design-Build Agreement.
13.4	Disputes Not Involving Owner	DBIA endorses the use of partnering, negotiation, mediation and arbitration for the prevention and resolution of disputes. The Agreement provides for the parties' Representatives and Senior Representatives to attempt to negotiate the dispute or disagreement. If this attempt fails, the dispute shall be submitted to mandatory, non-binding mediation. Any dispute that cannot be resolved by mediation shall then be submitted to binding arbitration pursuant to Section 13.5 unless the parties elect the option in Article 17 of the Agreement to submit their dispute to a court of competent jurisdiction.
13.5	Arbitration	The prevailing party in any arbitration shall receive reasonable attorneys' fees from the other party. DBIA supports this "loser pays" provision to encourage parties to negotiate or mediate their differences and to minimize the number of frivolous disputes.
13.6	Duty to Continue Performance	Pending the resolution of any dispute or disagreement, both Design-Builder and Design-Build Subcontractor shall continue to perform their respective duties under the Contract Documents, unless the parties provide otherwise in the Contract Documents.



13.7	Consequential Damages	DBIA believes that it is inappropriate for either Design-Builder or Design-Build Subcontractor to be responsible to the other for consequential damages arising from the Project. This limitation on consequential damages in no way restricts, however, Design-Builder's entitlement to recover against Design-Build Subcontractor liquidated damages assessed by Owner against Design-Builder which are attributable to Design-Build Subcontractor and which may include damages that might otherwise be deemed consequential.
Article 15	Electronic Data	Design-Builder will determine, after consultation with Design-Build Subcontractor, the software and format for the transmission of Electronic Data. Ownership of Work Product in electronic form is governed by Article 4 of the Agreement. The transmitting party disclaims all warranties with respect to the media transmitting the Electronic Data, but nothing in this Article is intended to negate duties with respect to the standard of care in creating the Electronic Data. In the event the Design-Build Agreement contains a conflicting provision governing Electronic Data, the provision in the Design-Build Agreement takes precedence.
Article 17	Other Provisions	Insert any other provisions. For example, the parties may elect to have disputes resolved through litigation rather than arbitration in which case the optional language in this Section should be included. Also, the parties may want to incorporate specific optional provisions from the Design-Build Agreement in which case those provisions should be expressly incorporated in Article 17.

SAMPLE

# Table of Contents

<b>Article</b>	<b>Name</b>	<b>Page</b>
Article 1	General.....	2
Article 2	Design-Build Subcontractor's Services and Responsibilities.....	5
Article 3	Design-Builder's Services and Responsibilities.....	10
Article 4	Ownership of Work Product.....	11
Article 5	Time of Performance.....	12
Article 6	Contract Price.....	14
Article 7	Procedure for Payment.....	14
Article 8	Stop Work and Termination.....	17
Article 9	Representatives of the Parties.....	20
Article 10	Insurance and Bonds.....	20
Article 11	Indemnification.....	21
Article 12	Changes to the Contract Price and Time.....	23
Article 13	Contract Adjustments and Disputes.....	25
Article 14	Miscellaneous.....	27
Article 15	Electronic Data.....	28
Article 16	Confidential Information.....	29
Article 17	Other Provisions.....	30



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

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

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This **AGREEMENT** is made as of the \_\_\_\_\_ day of \_\_\_\_\_  
in the year of 20\_\_\_\_\_, by and between the following parties, for services in connection with the Project  
identified below:

**DESIGN-BUILDER:**

*(Name and address)*

**DESIGN-BUILD SUBCONTRACTOR:**

*(Name and address)*

**PROJECT:**

*(Include Project name and location as it will appear in the Contract Documents)*

**OWNER:**

*(Name and address)*

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

# Article 1

## General

### 1.1 Basic Purpose.

1.1.1 Design-Builder has contracted with Owner to provide the services necessary for the design and construction of the Project as set forth in the Design-Build Agreement. Design-Build Subcontractor, through itself, Design Consultants and Sub-Subcontractors, agrees to provide all design, construction and other aspects of the Work consistent with the Contract Documents. Design-Builder and Design-Build Subcontractor agree that to the extent applicable to the performance of the Work hereunder, Design-Build Subcontractor shall have the same rights, responsibilities, and obligations as to Design-Builder as Design-Builder by the Design-Build Agreement has against and to Owner, except as may be modified herein. Notwithstanding the foregoing, if the Design-Builder and Owner have checked boxes indicating the selection of optional provisions from the Design-Build Agreement, those optional provisions are only passed through to the Design-Build Subcontractor to the extent these provisions have been expressly set forth in Article 17.

### 1.2 Basic Definitions.

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

1.2.1.1 *Agreement* refers to this executed contract between Design-Builder and Design-Build Subcontractor under DBIA Document 565, *Standard Form of Agreement Between Design-Builder and Design-Build Subcontractor - Lump Sum* (2010 Edition).

1.2.1.2 *Basis of Design Documents* are as follows: For DBIA Document No. 530, *Standard Form of Agreement Between Owner and Design-Builder - Cost Plus Fee With an Option for a Guaranteed Maximum Price*, the Basis of Design Documents are those documents specifically listed in, as applicable, the GMP Exhibit or GMP Proposal as being the "Basis of Design Documents." For DBIA Document No. 525, *Standard Form of Agreement Between Owner and Design-Builder - Lump Sum*, the Basis of Design Documents are the Owner's Project Criteria, Design-Builder's Proposal and the Deviation List, if any.

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

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

1.2.1.5 *Design-Build Agreement* refers to the contract between Design-Builder and Owner for the design and construction of the Project under either DBIA Document No. 525, *Standard Form of Agreement Between Owner and Design-Builder - Lump Sum* (2010 Edition), or DBIA Document No. 530, *Standard Form of Agreement Between Owner and Design-Builder - Cost Plus Fee with an Option for a Guaranteed Maximum Price* (2010 Edition), including the DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (2010 Edition), and all exhibits, attachments, and other Contract Documents enumerated and incorporated therein.

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

anyone under contract to Design Consultant, to furnish design services required under the Contract Documents.

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

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

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

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

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

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

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

**1.2.1.14** *Substantial Completion* or *Substantially Complete* is the date on which the Project, or an agreed upon portion of the Project, is sufficiently complete so that Owner can occupy and use the Project or a portion thereof for its intended purposes.

**1.2.1.15** *Work* is comprised of all Design-Build Subcontractor's design, construction and other services required by the Contract Documents, including procuring and furnishing all supervision, labor, inspection, testing, start-up, materials, tools, equipment, machinery, transportation, temporary utilities, temporary facilities and all other items and services reasonably inferable from this Agreement and the other Contract Documents necessary to complete the portion of the Project described in Exhibit \_\_\_\_\_. (Identify with specificity that portion of the Project which Design-Build Subcontractor is responsible for designing and constructing.)

### **1.3 Contract Documents.**

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

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

**1.3.1.2** The Basis of Design Documents;

**1.3.1.3** This Agreement, including all exhibits and attachments, executed by Design-Builder and Design-Build Subcontractor;

**1.3.1.4** The Construction Documents, and

**1.3.1.5** The Design-Build Agreement; (excluding the Basis of Design Documents), but only to the extent the Design-Build Agreement relates to the Work and the terms and conditions under which the Work shall be performed.

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

**1.4.1** Design-Builder and Design-Build Subcontractor, prior to execution of the Agreement, shall carefully review all the Contract Documents, including the various documents comprising the Basis of Design Documents, for any conflicts or ambiguities. Design-Builder and Design-Build Subcontractor will discuss and resolve any identified conflicts or ambiguities prior to execution of the Agreement.

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

**1.4.3** If Owner's Project Criteria contain design specifications, Design-Build Subcontractor shall be entitled to reasonably rely on the accuracy of the information represented in the design specifications and its compatibility with other information set forth in Owner's Project Criteria, including any performance specifications, to the same extent as Design-Builder is entitled to so rely in the Design-Build Agreement. If Design-Build Subcontractor contends that its costs and/or time of performance have been adversely impacted by such inaccurate design specifications, then it shall proceed in accordance with Article 13.3.

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

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

**1.5.2** Design-Builder and Design-Build Subcontractor acknowledge that they have cooperated with each other in the procurement of the Design-Build Agreement and that Design-Builder and Design-Build Subcontractor have met to review, discuss, and familiarize themselves with the Design-Build Agreement, including the Basis of Design Documents.

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

#### **1.6 Entire Agreement.**

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

## Article 2

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

#### **2.1 General.**

**2.1.1** Within seven (7) days after execution of this Agreement, Design-Builder and Design-Build Subcontractor will meet to discuss issues affecting the administration and schedule of the Work, and implement the necessary procedures, including but not limited to those relating to design submissions, schedule updates, submittals, and payment, to facilitate the ability of the parties to perform their obligations under this Agreement.

**2.1.2** Design-Build Subcontractor's Representative shall be reasonably available to Design-Builder and shall have the necessary expertise and experience required to supervise the Work. Design-Build Subcontractor's Representative shall communicate regularly with Design-Builder and shall be vested with the authority to act on behalf of Design-Build Subcontractor. Design-Build Subcontractor shall replace its Representative upon the reasonable request of Design-Builder.

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

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

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

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

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

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

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

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

**2.3.4** Design-Build Subcontractor shall assist Design-Builder regarding the selection of building systems, materials, and equipment, as well as cost, schedule, and construction feasibility assistance for the Work. Such assistance shall include providing advice relative to, among other

things, labor availability, construction costs, procurement strategies (including scheduling the procurement of items with long-lead times) related to the requirements set forth in the Contract Documents for the Work.

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

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

**2.3.7** Design-Build Subcontractor shall attend and participate in such meetings as are held between and among Owner, Design-Builder and Design-Builder's Design Consultant to discuss interim design submissions and the Construction Documents for the Work. Design-Build Subcontractor shall identify during each such meeting, among other things, the evolution of the design and any changes or deviations from the Contract Documents, including the Basis of Design Documents, or, if applicable, previously submitted design submissions. To the extent that Design-Build Subcontractor fails to identify such changes or fails to produce Construction Documents for the Work consistent with the Basis of Design Documents and identified and approved changes and Design-Builder incurs additional uncompensated costs as a result, Design-Build Subcontractor shall be responsible for such costs. Minutes of the meetings, including a full listing of all changes, will be maintained by Design-Builder and provided to all attendees for review. Design-Build Subcontractor shall review such minutes and provide notice of any objections thereto. The Construction Documents for the Work shall be consistent with the latest set of interim design submissions as such submissions may have been modified in a design review meeting and recorded in the meeting minutes.

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

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

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



## **2.4 Construction Services Generally.**

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

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

## **2.5 Submittals and Substitutions.**

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

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

## **2.6 Sub-Subcontractors.**

**2.6.1** Design-Build Subcontractor shall employ only Sub-Subcontractors who are duly licensed and qualified to perform the Work consistent with the Contract Documents. Design-Build Subcontractor agrees that each Sub-Subcontractor shall be fully bound to Design-Build Subcontractor in the same manner as Design-Build Subcontractor is bound to Design-Builder for all the requirements of the Contract Documents to the extent applicable to the Sub-Subcontractor's scope of work.

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

## **2.7 Work of Others.**

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

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

## **2.8 Site Cleanup.**

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

## **2.9 Inspection.**

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

## **2.10 Patents and Copyrights.**

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

## **2.11 Legal Requirements.**

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

**2.11.2** The Contract Price and/or the times for completion of the Work shall be adjusted to compensate Design-Build Subcontractor for the effects, if any, of any changes in the Legal Requirements enacted after the date of the Agreement affecting the performance of the Work.

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

**2.12.1** Design-Build Subcontractor shall obtain and pay for the necessary permits, approvals, licenses, government charges and inspection fees required for the prosecution of the Work as set forth in Exhibit \_\_\_\_\_.

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

**2.12.3** Design-Build Subcontractor shall make any revisions to the Construction Documents necessary to secure permits, approvals, and licenses, including those which have been denied for failure of the Construction Documents to meet Legal Requirements. If such revisions are necessary for reasons beyond the control of Design-Build Subcontractor or its Design Consultants, Design-Build Subcontractor shall be compensated for such revisions as a change to this Agreement.

## **2.13 Project Safety.**

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

**2.13.2** Design-Build Subcontractor and Sub-Subcontractors shall comply with all Legal Requirements relating to safety, as well as any Owner-specific and/or Design-Builder-specific safety requirements set forth in the Contract Documents or established for the Project, provided that such Owner-specific and/or Design-Builder-specific requirements do not violate any

applicable Legal Requirement. Design-Build Subcontractor will immediately report in writing any safety-related injury, loss, damage or accident arising from the Work to Design-Builder's Representative and, to the extent mandated by Legal Requirements, to all government or quasi-government authorities having jurisdiction over safety-related matters involving the Project or the Work.

## **2.14 Warranty.**

**2.14.1** Design-Build Subcontractor warrants to Design-Builder that the construction, including all materials and equipment furnished as part of the construction, shall be new unless otherwise specified in the Contract Documents, of good quality, in conformance with the Contract Documents and free of defects in materials and workmanship. Design-Build Subcontractor's warranty obligation excludes defects caused by abuse, alterations, or failure to maintain the Work in a commercially reasonable manner. Nothing in this warranty is intended to limit any manufacturer's warranty which provides Owner and/or Design-Builder with greater warranty rights than set forth in this Section 2.14 or the Contract Documents. Design-Build Subcontractor will provide and, if requested, assign to Design-Builder all manufacturers' warranties upon Substantial Completion.

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

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

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

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

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

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

## **2.17 Hazardous Conditions.**

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

## Article 3

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

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

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

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

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

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

**3.3.1** Unless expressly stated to the contrary in the Contract Documents, and to the extent Design-Builder has received such items from Owner, Design-Builder shall provide for Design-Build Subcontractor's information the items listed below. Design-Builder does not warrant the accuracy or completeness of such items provided, however, that Design-Build Subcontractor is entitled to rely on these items to the same extent Design-Builder is entitled to rely upon such items in the Design-Build Agreement:

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

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

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

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

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

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

**3.3.1.7** Owner's Project Criteria;

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

**3.3.1.9** Test and inspection reports.

**3.3.2** Design-Builder shall provide Design-Build Subcontractor with a copy of the Design-Build Agreement, including all exhibits, attachments, and other Contract Documents enumerated and incorporated therein.

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

**3.3.4** Design-Builder shall provide Design-Build Subcontractor with the Project Schedule and appropriate updates thereto.

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

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

**3.4 Notification of Errors.**

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

**3.5 Attendance at Design Meetings.**

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

**3.6 Review and Approval of Submittals.**

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

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

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

## **Article 4**

### **Ownership of Work Product**

**4.1 Work Product.**

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

grants such rights to Design-Builder (for the purpose of allowing Design-Builder to grant to Owner) under the same terms and conditions that Design-Builder grants such rights to Owner.

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

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

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

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

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

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

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

**4.4.1.2** Design-Builder agrees to pay Design-Build Subcontractor the additional sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) as compensation for the right to use the Work Product to complete the Project and subsequently use the Work Product in accordance with Section 4.1.1 if Design-Builder resumes the Project through its employees, agents, or third parties.

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

## **Article 5**

### **Time of Performance**

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

**5.1.1** The Work shall commence five (5) days after Design-Build Subcontractor's receipt of Design-Builder's Notice to Proceed ("Date of Commencement") unless the parties mutually agree otherwise in writing.

## **5.2 Time of Completion.**

**5.2.1** Design-Build Subcontractor shall diligently and continuously prosecute and complete the Work in accordance with the Project Schedule as it may be revised and issued from time to time during the performance of the Work, and any other scheduling requirements listed in the Contract Documents.

**5.2.2** Design-Build Subcontractor shall participate and cooperate in the development of schedules and other efforts to achieve timely completion of the Work. Design-Build Subcontractor shall provide Design-Builder information for the scheduling of the times and sequence of operations required for the Work to meet Design-Builder's overall schedule requirements, shall continuously monitor the Project Schedule, including any revisions thereto, so as to be fully familiar with the timing, phasing and sequence of operation of the Work and of other work on the Project, and shall execute the Work in accordance with the requirements of the Project Schedule including any revisions thereto.

**5.2.3** Design-Build Subcontractor shall timely perform the various stages of the Work so that Design-Builder can achieve the dates set forth in the Project Schedule, including any revisions thereto.

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

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

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

**5.4.1** If Design-Build Subcontractor is delayed in the performance of the Work due to acts, omissions, conditions, events, or circumstances beyond its control and due to no fault of its own or those for whom Design-Build Subcontractor is responsible, the time for performance shall be reasonably extended by Change Order. By way of example, events that may entitle Design-Build Subcontractor to an extension of the time for completion of the work include acts or omissions of Design-Builder, Owner or anyone under Design-Builder's or Owner's control (including separate contractors), changes in the Work, Differing Site Conditions, Hazardous Conditions, and Force Majeure Events.

**5.4.2** In addition to Design-Build Subcontractor's right to a time extension for those events set forth in Section 5.4.1 above, Design-Build Subcontractor shall also be entitled to an appropriate adjustment of the Contract Price provided, however, that the Contract Price shall not be adjusted for Force Majeure Events unless otherwise expressly provided in Article 17 of this Agreement.

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

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

## Article 6

### Contract Price

#### 6.1 Contract Price.

**6.1.1** Design-Builder shall pay Design-Build Subcontractor in accordance with Article 7 hereof the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) ("Contract Price"), subject to adjustments made in accordance with the Contract Documents. Unless otherwise provided in the Contract Documents, the Contract Price is deemed to include all sales, use, consumer and other taxes mandated by applicable Legal Requirements. The parties acknowledge that the Contract Price herein is based upon Design-Build Subcontractor's List of Assumptions and Qualifications. To the extent Design-Build Subcontractor is required to perform work which is not consistent with its List of Assumptions and Qualifications, Design-Build Subcontractor shall be entitled to an adjustment in the Contract Price pursuant to Article 12 of this Agreement. Notwithstanding the above, Design-Builder is not responsible for Design-Build Subcontractor's bidding or estimating mistakes or miscalculation of market conditions.

#### 6.2 Markups for Changes.

**6.2.1** If the Contract Price requires an adjustment due to changes in the Work, and the cost of such changes is determined under Sections 12.6.1.3 or 12.6.1.4 hereof, the following markups shall be allowed on such changes:

**6.2.1.1** For additive Change Orders, including additive Change Orders arising from both additive and deductive items, it is agreed that Design-Build Subcontractor shall receive a Fee of \_\_\_\_\_ percent (\_\_\_\_\_% ) of the additional Costs of the Work incurred for that Change Order, plus any other markups set forth at Exhibit \_\_\_\_\_ hereto.

**6.2.1.2** For deductive Change Orders, including deductive Change Orders arising from both additive and deductive items, the deductive amounts shall include:

***[Check one box only]***

No additional reduction to account for Design-Build Subcontractor's Fee or any other markup.

**or**

An amount equal to the sum of: (a) \_\_\_\_\_ percent (\_\_\_\_\_% ) applied to the direct costs of the net reduction (which amount will account for a reduction associated with Design-Build Subcontractor's Fee); plus (b) any other markups set forth at Exhibit \_\_\_\_\_ hereto applied to the direct costs of the net reduction.

## Article 7

### Procedure for Payment

#### 7.1 Schedule of Values.

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



## **7.2 Progress Payments.**

**7.2.1** Beginning with the first month after the Date of Commencement, Design-Build Subcontractor shall submit on the \_\_\_\_\_ (\_\_\_\_\_) day of each month for Design-Builder's review and approval, Design-Build Subcontractor's Application for Payment requesting payment for all Work performed as of the date of the Application for Payment. The Application for Payment shall be accompanied by all supporting documentation required by the Contract Documents and/or established at the meeting required by Section 2.1.1 hereof. Design-Builder will submit Design-Build Subcontractor's proper Application for Payment to Owner with Design-Builder's application.

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

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

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

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

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

## **7.4 Withholding of Payments.**

**7.4.1** If Design-Builder determines that Design-Build Subcontractor is not entitled to all or part of an Application for Payment, it will notify Design-Build Subcontractor in writing at least five (5) days prior to the date payment is due. The notice shall indicate the specific amounts Design-Builder intends to withhold, the reasons and contractual basis for the withholding, and the specific measures Design-Build Subcontractor must take to rectify Design-Builder's concerns. Design-Builder and Design-Build Subcontractor will attempt to resolve Design-Builder's concerns prior to the date payment is due. If the parties cannot resolve such concerns, Design-Builder shall pay Design-Build Subcontractor the uncontested amount of the Application for Payment, and Design-Build Subcontractor may pursue its rights under the Contract Documents, including those under Article 13 hereof.

## **7.5 Final Payment.**

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

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

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

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

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

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

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

**7.5.3** Upon making final payment, Design-Builder waives all claims against Design-Build Subcontractor except claims relating to (i) Design-Build Subcontractor's failure to satisfy its payment obligations, if such failure affects Design-Builder's or Owner's interests; (ii) Design-Build Subcontractor's failure to complete the Work consistent with the Contract Documents, including defects appearing after final completion of the Work; and (iii) the terms of any special warranties required by the Contract Documents.

## **7.6 Pay When Paid.**

**7.6.1** Design-Build Subcontractor agrees that all payments to Design-Build Subcontractor hereunder, whether progress or final payment, or for changes or delays to the Work, shall not be due until after Design-Builder actually receives payment on account of same from Owner. Notwithstanding the preceding sentence, Design-Builder shall pay Design-Build Subcontractor within a reasonable time if it has not been paid by the Owner unless the Owner's failure to pay the Design-Builder is caused by the Design-Build Subcontractor's failure to perform in accordance with this Agreement.

## **7.7 Interest.**

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

## **7.8 Advance Payments.**

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

## **7.9 Payment Not Acceptance.**

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

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

**7.10.1** Design-Build Subcontractor will pay its Design Consultants and Sub-Subcontractors, in accordance with its contractual obligations to such parties, all the amounts Design-Build Subcontractor has received from Design-Builder on account of their work. Design-Build Subcontractor will impose similar requirements on its Design Consultants and Sub-Subcontractors to pay those parties with whom they have contracted. Design-Build Subcontractor will indemnify and defend Owner and Design-Builder against any claims for payment and

mechanic's liens as set forth in Section 11.3 hereof, providing Design-Builder is not in breach of its contractual obligations to make payment to Design-Build Subcontractor for its Work.

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

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

## **Article 8**

### **Stop Work and Termination**

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

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

**8.1.2** Design-Build Subcontractor is entitled to seek an adjustment of the Contract Price and/or times for completion of the Work if its cost or time to perform the Work has been adversely impacted by any suspension or stoppage of work by Design-Builder. Notwithstanding anything to the contrary herein, if Design-Builder's suspension of the Work is the result of Owners suspension of the Design-Builder's work under the Design-Build Agreement, then Design-Builder shall pay Design-Build Subcontractor only those amounts Design-Builder actually receives from Owner on account of the Work.

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

**8.2.1** Upon ten (10) days' written notice to Design-Build Subcontractor, Design-Builder may, for its convenience and without cause, elect to terminate this Agreement. In such event, Design-Builder's right to use the existing Work Product shall be as set forth in Section 4.4.1, and Design-Builder shall pay Design-Build Subcontractor for the following:

**8.2.1.1** All Work executed and for proven loss, cost or expense in connection with the Work;

**8.2.1.2** The reasonable costs and expenses attributable to such termination, including amounts due in settlement of terminated contracts with its Design Consultants and Sub-Subcontractors; and

**8.2.1.3** *[choose one of the following]*

The fair and reasonable sums for overhead and profit on the sum of items 8.2.1.1 and 8.2.1.2 above.

or

Overhead and profit in the amount of \_\_\_\_\_ percent  
(\_\_\_\_\_%) on the sum of items 8.2.1.1 and 8.2.1.2 above.

**8.2.2** If Design-Builder's termination of Design-Build Subcontractor for convenience is the result of Owner's termination of Design-Builder for convenience under the Design-Build Agreement, then Design-Builder shall pay Design-Build Subcontractor only those amounts Design-Builder actually receives from Owner on behalf of Design-Build Subcontractor.

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

**8.3.1** If Design-Build Subcontractor persistently fails to (i) provide a sufficient number of skilled workers, (ii) supply the materials required by the Contract Documents, (iii) comply with applicable Legal Requirements, (iv) timely pay, without cause, its Sub-Subcontractors or Design Consultants, (v) prosecute the Work with promptness and diligence to ensure that the Work is completed in accordance with the Project Schedule, as such schedule may be adjusted, or (vi) perform material obligations under the Contract Documents, then Design-Builder shall have the rights, in addition to any other rights and remedies provided in the Contract Documents or by law, set forth in Sections 8.3.2 and 8.3.3 below.

**8.3.2** Upon the occurrence of an event set forth in Section 8.3.1 above, Design-Builder may provide written notice to Design-Build Subcontractor that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be cured, within seven (7) days of Design-Build Subcontractor's receipt of such notice. If Design-Build Subcontractor fails to cure, or reasonably commence to cure, such problem, then Design-Builder may give a second written notice to Design-Build Subcontractor of its intent to terminate within an additional seven (7) day period. If Design-Build Subcontractor, within such second seven (7) day period, fails to cure, or reasonably commence to cure, such problem, then Design-Builder may declare the Agreement terminated for default by providing written notice to Design-Build Subcontractor of such declaration.

**8.3.3** Upon declaring the Agreement terminated pursuant to Section 8.3.2 above, Design-Builder may enter upon the premises and take possession, for the purpose of completing the Work, of all materials, equipment, scaffolds, tools, appliances and other items thereon, which have been purchased or provided for the performance of the Work, all of which Design-Build Subcontractor hereby transfers, assigns and sets over to Design-Builder for such purpose, and to employ any person or persons to complete the Work and provide all of the required labor, services, materials, equipment and other items. Design-Builder shall have the right to use the existing Work Product for purposes of completing the Project as set forth in Section 4.4.2. In the event of such termination, Design-Build Subcontractor shall not be entitled to receive any further payments under the Contract Documents until the Work shall be finally completed in accordance with the Contract Documents. At such time, if the unpaid balance of the Contract Price exceeds the cost and expense incurred by Design-Builder in completing the Work, such excess shall be paid by Design-Builder to Design-Build Subcontractor. If Design-Builder's cost and expense of completing the Work exceeds the unpaid balance of the Contract Price, then Design-Build Subcontractor shall be obligated to pay the difference to Design-Builder. Such costs and expense shall include not only the cost of completing the Work, but also losses, damages, costs and expenses, including attorneys' fees and expenses, incurred by Design-Builder in connection with the procurement and defense of claims arising from Design-Build Subcontractor's default, subject to the waiver of consequential damages set forth in Section 13.7 hereof.

**8.3.4** If Design-Builder improperly terminates the Agreement for cause, the termination for cause will be converted to a termination for convenience in accordance with the provisions of Section 8.2 of the Agreement.

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

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

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

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

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

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

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

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

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

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

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

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

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

## **Article 9**

### **Representatives of the Parties**

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

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

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

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

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

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

## **Article 10**

### **Insurance and Bonds**

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

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

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

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

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

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

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

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

## **10.2 Property Insurance.**

**10.2.1** In accordance with the Contract Documents, Owner or Design-Builder shall procure and maintain property insurance upon the entire Project.

## **10.3 Waiver of Subrogation.**

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

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

**10.4.1** Design-Build Subcontractor shall provide the following performance bond and labor and material payment bond or other performance security: *(Indicate the amount of bonds and any other conditions of the bonds or other security.)*

# **Article 11**

## **Indemnification**

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

**11.1.1** Design-Build Subcontractor shall defend any action or proceeding brought against Owner or Design-Builder based on any claim that the Work, or any part thereof, or the operation or use of the Work or any part thereof, constitutes infringement of any United States patent or copyright, now or hereafter issued. Design-Builder shall give prompt written notice to Design-Build Subcontractor of any such action or proceeding and will reasonably provide authority, information

and assistance in the defense of same. Design-Build Subcontractor shall indemnify and hold harmless Owner and Design-Builder from and against all damages and costs, including but not limited to attorneys' fees and expenses awarded against Owner or Design-Builder in any such action or proceeding. Design-Build Subcontractor agrees to keep Design-Builder informed of all developments in the defense of such actions.

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

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

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

## **11.2 Tax Claim Indemnification.**

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

## **11.3 Payment Claim Indemnification.**

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

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

**11.4.1** Design-Build Subcontractor, to the fullest extent permitted by law, shall indemnify, hold harmless and defend Owner, Design-Builder, their officers, directors, employees and agents from and against claims, losses, damages, liabilities, including attorneys' fees and expenses, for bodily injury, sickness or death, and property damage or destruction (other than to the Work itself) to the extent resulting from the negligent acts or omissions of Design-Build Subcontractor, its Design Consultants, its Sub-Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable.



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

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

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

**11.5.2** If an employee of Design-Builder, anyone employed directly or indirectly by Design-Builder or anyone for whose acts any of them may be liable has a claim against any party indemnified pursuant to Section 11.5.1 above, Design-Builder's indemnity obligation set forth in Section 11.5.1 above shall not be limited by any limitation on the amount of damages, compensation or benefits payable by or for Design-Builder, Design-Builder's Design Consultant, Design-Builder's other contractors, or other entity under any employee benefit acts, including workers compensation or disability acts.

## **Article 12**

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

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

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

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

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

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

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

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

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

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

**12.3.2** All changes in the Work authorized by applicable Change Order shall be performed under the applicable conditions of the Contract Documents. Design-Builder and Design-Build

Subcontractor shall negotiate in good faith and as expeditiously as possible the appropriate adjustments for such changes.

**12.3.3** If Design-Builder requests a proposal for a change in the Work from Design-Build Subcontractor and subsequently elects not to proceed with the change, a Change Order shall be issued to reimburse Design-Build Subcontractor for reasonable costs incurred for preparing the proposal.

#### **12.4 Work Change Directives.**

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

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

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

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

#### **12.6 Contract Price Adjustment.**

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

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

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

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

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

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

**12.6.3** If Design-Builder and Design-Build Subcontractor disagree upon whether Design-Build Subcontractor is entitled to be paid for any services required by Design-Builder, or if there are any other disagreements over the scope of Work or proposed changes to the Work, Design-Builder and Design-Build Subcontractor shall resolve the disagreement pursuant to Article 13 hereof. As part of the negotiation process, Design-Build Subcontractor shall furnish Design-Builder with a good faith estimate of the costs to perform the disputed services in accordance with Design-

Builder's interpretations. If the parties are unable to agree and Design-Builder expects Design-Build Subcontractor to perform the services in accordance with Design-Builder's interpretations, Design-Build Subcontractor shall proceed to perform the disputed services, conditioned upon Design-Builder issuing a written order to Design-Build Subcontractor (i) directing Design-Build Subcontractor to proceed and (ii) specifying Design-Builder's interpretation of the services that are to be performed.

## **12.7 Emergencies.**

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

# **Article 13**

## **Contract Adjustments and Disputes**

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **13.5 Arbitration.**

**13.5.1** Any claims, disputes or controversies between the parties arising out of or relating to the Agreement, or the breach thereof, which have not been resolved in accordance with the procedures set forth in Section 13.4 above, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the AAA then in effect, unless the parties mutually agree otherwise.

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

**13.5.3** Design-Build Subcontractor and Design-Builder expressly agree that any arbitration pursuant to this Section 13.5 may be joined or consolidated with any arbitration involving any

other person or entity (i) necessary to resolve the claim, dispute or controversy, or (ii) substantially involved in or affected by such claim, dispute or controversy. Both Design-Builder and Design-Build Subcontractor will include appropriate provisions in all contracts they execute with other parties in connection with the Project to require such joinder or consolidation.

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

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

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

### **13.7 CONSEQUENTIAL DAMAGES.**

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

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

## **Article 14**

### **Miscellaneous**

#### **14.1 Assignment.**

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

#### **14.2 Successorship.**

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

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

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

#### **14.4 Severability.**

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

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

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

#### **14.6 Headings.**

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

#### **14.7 Notice.**

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

#### **14.8 Amendments.**

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

#### **14.9 Survival.**

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

## **Article 15**

### **Electronic Data**

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

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

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

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

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

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

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

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

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

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

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

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

## **Article 16**

### **Confidential Information**

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

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

**16.1.2** Design-Build Subcontractor may receive information from Design-Builder that is either confidential or proprietary to either Design-Builder or to Owner. Such information shall be labeled as confidential and/or proprietary. Design-Build Subcontractor agrees to maintain the confidential

nature of such information and to execute any such additional agreements as may be required by Owner or Design-Builder with respect to such information.

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

## **Article 17**

### **Other Provisions**

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

*(Insert any additional provisions, including those that relate to options that might have been selected by Design-Builder and Owner in the Design-Build Agreement related to Warranty Reserves, alternatives to Liquidated Damages, etc. as the parties may deem commercially appropriate.)*

**[Section 2.3.3 sets forth a traditional negligence standard as it relates to Design-Build Subcontractor's performance of its design professional services. If the Basis of Design Documents identify specific performance standards that can be objectively measured, the parties, by including the following language, agree that the Design-Build Subcontractor is obligated to achieve such standards.]**

Notwithstanding Section 2.3.3 above, if the Design-Build Agreement, including but not limited to the Basis of Design Documents, contain specifically identified performance standards for aspects of Work, the Design-Build Subcontractor agrees that its design services shall be performed to achieve such standards.

**[In lieu of Sections 13.5.1 through 13.5.3 of the Agreement, the parties may want to delete such sections and include the following alternative dispute resolution clause.]**

Any claims, disputes, or controversies between the parties arising out of or related to the Agreement, or the breach thereof which have not been resolved in accordance with the procedures set forth in Section 13.4 herein shall be resolved in a court of competent jurisdiction in the state in which the Project is located.



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

**DESIGN-BUILDER:**

**SUBCONTRACTOR:**

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

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

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

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

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

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

Title: \_\_\_\_\_

Title: \_\_\_\_\_

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

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

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