



STANDARD FORM OF AGREEMENT BETWEEN DESIGN CONSULTANT AND DESIGN SUB-CONSULTANT

Document No. 575

First Edition, 2012

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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. 575 Standard Form of Agreement Between Design Consultant and Design Sub-Consultant (2012 Edition)

Checklist

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

_____	Page 1	Enter date of the Agreement
_____	Page 1	Design Consultant's name, address and form of business
_____	Page 1	Design Sub-Consultant'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 1.1.1	Attach Exhibit outlining Scope of Services
_____	Section 2.4.1	Attach list of primary personnel
_____	Section 2.5.1	Attach permit list (optional)
_____	Section 2.7.6	Attach requirements for frequency of site visits (optional)
_____	Section 2.8.1	Attach Additional Services list (optional)
_____	Section 4.4.1.2	Insert additional compensation the Design Sub-Consultant is due for the use of its Work Product under the circumstances described in this section.
_____	Section 6.1.2	Attach basis for compensation for Design Phase Services, Construction Phase Services, Additional Services, if any, and list of Reimbursable Costs
_____	Section 6.2.1	Complete blanks for day of month
_____	Section 6.7.1	Complete blanks for interest rate
_____	Section 8.1.1	Insert Design Consultant's Senior Representative's name, etc.
_____	Section 8.1.2	Insert Design Consultant's Representative's name, etc.
_____	Section 8.2.1	Insert Design Sub-Consultant's Senior Representative's name, etc.
_____	Section 8.2.2	Insert Design Sub-Consultant's Representative's name, etc.
_____	Section 9.1.1	Attach Insurance Exhibit
_____	Section 15.1	Insert any other provisions (optional)
_____	Last Page	Design Consultant's and Design Sub-Consultant'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	DBIA Document No. 575, <i>Standard Form of Agreement Between Design Consultant and Design Sub-Consultant</i> (2012 Edition) (“Agreement”) sets forth the terms and conditions under which the design for the Project and other design services during the construction phase of the Project will be performed. This Agreement envisions that Design Sub-Consultant and Design Consultant have reviewed the requirements of the Design Consultant Agreement between the Design-Builder and the Design Consultant and the Design-Build Agreement between Design-Builder and Owner (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), and requires Design Sub-Consultant to design the portion of the Project within the Design Sub-Consultant’s Scope of Services consistent with the Contract Documents.
General	Purpose of These Instructions	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.
General	Date	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 Section 5.1.1.
General	Parties: Design-Builder and Design Consultant	On Page 1 enter the legal name and full address of Design Consultant, Design Sub-Consultant, Design-Builder and Owner, as well as the legal form of each entity, e.g., corporation, partnership, limited partnership, limited liability company, or other.
1.1.1	Pass Through	The section recognizes that the Design Sub-Consultant has the same rights, responsibilities and obligations as to Design Consultant as Design Consultant by the Design Consultant Agreement has against and to Design-Builder. However, because the Design Consultant Agreement also affords the Design Consultant and Design-Builder 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 Sub-Consultant. Accordingly, if the Design Consultant and Design Sub-Consultant believe it is appropriate to afford the Design Sub-Consultant 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 15 of this Agreement. This section requires that the parties identify in an Exhibit the Design Subconsultant’s Scope of Services, defined as that portion of the professional services for the Project to be performed by the Design Subconsultant.
1.2	Definitions	Terms, words and phrases used in the Agreement shall have the same meanings used in the Design Consultant Agreement between Design-Builder and Design Consultant except to the extent set forth in Section 1.2.
1.3.1	Contract Documents	This section identifies the Contract Documents, which include the Basis of Design Documents defined in Section 1.2.1.3.
1.4.2	Order of Precedence	The Contract Documents are listed in Section 1.3 in the order of their precedence.
1.4.3	Design Specifications	If the Design-Builder has provided design specifications to the Design Consultant, the Design Sub-Consultant is entitled to rely on the information provided to the same extent as Design Consultant. If said information is not accurate, the Design Sub-Consultant may be entitled to an adjustment of costs and/or time to the extent the Design Consultant recovers from the Design-Builder.

Section	Title	Instruction
1.5.2	Mutual Obligations and Acknowledgments	This Agreement contemplates that the Design Consultant and Design Sub-Consultant have either cooperated in the procurement of the Design-Build Agreement and/or Design Consultant Agreement or met to review, discuss and familiarize themselves with the Design-Build Agreement and the Design Consultant Agreement and that the Design Sub-Consultant has familiarized itself with the Design Consultant Agreement and the Design-Build Agreement, including the Basis of Design Documents.
2.1.1	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.
2.2.1	Standard of Care for Design Professional Services	Design Sub-Consultant's obligation is to deliver a design that meets prevailing industry standards.
2.4.1	Primary Personnel	Attach a list of Design Sub-Consultant's primary personnel for the Project.
2.5.1	Government Approvals and Permits	Design Sub-Consultant is responsible for obtaining the specific permits, approvals, and licenses set forth in an exhibit to the Agreement.
2.6.1	Design Development Services	In accordance with the Design Schedule, the parties will hold design monitoring meetings during the development of the Project design so that the final design shall be consistent with the requirements of the Contract Documents, including the Basis of Design Documents, as the Basis of Design Documents may have been modified.
2.6.1	Deviations from the Basis of Design Documents	With respect to those documents that are within the Design Sub-Consultant's Scope of Services, if the Design Sub-Consultant fails to identify changes that it made to the Contract Documents, including the Basis of Design Documents, or fails to produce Construction Documents consistent with approved changes, Design Sub-Consultant is responsible for any additional costs incurred by Design Consultant as a result of the undisclosed changes.
2.7.6	Site Visits	If the parties agree to a specific frequency of Design Sub-Consultant site visits, attach an exhibit setting forth such requirements.
2.8	Additional Services	If the parties agree that Design Sub-Consultant shall provide any services beyond those contained in the Agreement, such Additional Services shall be set forth in an exhibit attached to the Agreement.
3.3.1	Furnishing of Information	Design-Consultant shall furnish Design Sub-Consultant with the listed Design-Builder-provided information. Design Sub-Consultant is entitled to rely on the Design-Builder-provided information to the same extent Design Consultant is entitled to pursuant to the Design Consultant Agreement.
4.1	Work Product	This Agreement provides that Design Sub-Consultant shall retain ownership of the Work Product. However, if the Design Consultant Agreement conflicts with the above, then Design Sub-Consultant grants the Design Consultant the same rights that Design Consultant has provided the Design-Builder and the Owner.
4.2	Agreement to Grant Rights to Owner	Design Sub-Consultant has reviewed the Design Consultant Agreement and Design-Build Agreement and understands that it is required to grant Design-Builder and/or Owner the rights to the Work Product according to the terms and circumstances described in the Design Consultant Agreement and the Design-Build Agreement.
4.3	Indemnification for Use of Work Product	If either Design Consultant or Design Sub-Consultant uses the Work Product on any other project, that party shall defend, indemnify and hold harmless the other party, Design-Builder and Owner.

Section	Title	Instruction
4.4.1	Use of Work Product Upon Termination for Convenience or Design Consultant's Default	If Design Consultant terminates this Agreement for convenience or if the Design Sub-Consultant terminates this Agreement due to Design Consultant's default, Design Sub-Consultant grants the Design Consultant, 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 Sub-Consultant all amounts due under the Agreement, including paying Design Sub-Consultant an additional sum (to be negotiated) under Section 4.4.1.2 for the use of the Work Product; and (ii) Design Consultant, Design-Builder and/or Owner using the Work Product at their risk.
4.4.2	Use of Work Product Upon Design Sub-Consultant's Default	If Design Sub-Consultant is properly terminated for default, Design Consultant shall have the same rights to use the Work Product as set forth in Section 4.1.1.
5.1	Date of Commencement	Design Sub-Consultant's obligation to commence work is triggered by its receipt of a Notice to Proceed unless the parties mutually agree otherwise.
6.1.2	Design Sub-Consultant's Fee	Attach an exhibit setting forth the basis for compensating Design Sub-Consultant for its Design Phase Services, Construction Phase Services, Additional Services, if any, and Reimbursable Costs.
6.2.1	Applications for Payment	Enter the day of the month when Design Sub-Consultant shall submit its Application for Payment.
6.7	Interest	The parties should enter the rate at which interest will accrue on Design Sub-Consultant's payments if unpaid five (5) days after due. Late payment creates a hardship for Design Sub-Consultant and its Lower Tier Design Sub-Consultants.
6.9	Record Keeping	The Design Consultant is provided access to, and the right to audit Design Sub-Consultant's records. However, if the parties have agreed to fees (that are either a lump sum or percentage of construction costs), 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 Consultant 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.
7.1	Design Consultant's Right to Terminate for Convenience	Design Consultant shall only have the right to terminate Design Sub-Consultant without cause if Design-Builder elects to terminate Design Consultant for any reason.
Article 8	Representatives of the Parties	Enter the name, title, address and telephone number of Design Consultant's Senior Representative and Design Consultant's Representative at Sections 8.1.1 and 8.1.2, respectively. Enter the name, title, address and telephone number of Design Sub-Consultant's Senior Representative and Design Sub-Consultant's Representative at Sections 8.2.1 and 8.2.2, respectively.
9.1.1	Design Sub-Consultant's Insurance Requirements	Attach an Insurance Exhibit setting forth in detail the insurance coverages Design Sub-Consultant is required to provide for the Project. Parties are advised to consult their insurance advisors.
9.1.2	Design Sub-Consultant's Insurance Requirements	Design Sub-Consultant is obligated to require its Lower Tier Design Sub-Consultants to provide the insurance coverage set forth in the Insurance Exhibit to the Agreement. Parties are advised to consult their insurance advisors.

Section	Title	Instruction
9.1.3	Exclusions to Design-Build	Parties are advised that standard liability insurance policies may contain exclusions for the design-build delivery method. This Section 9.1.3 requires that any such exclusions be deleted from the policy.
9.1.4	Errors and Omissions Insurance	Should Design Consultant, after its analysis of the risk factors involved, require this insurance, the coverage required shall be as set forth in the Insurance Exhibit.
11.3	Disputes Involving Owner or Design-Builder	Disputes for which Owner or Design-Builder is responsible will be resolved in accordance with the dispute resolution clause in the Design-Build Agreement or Design Consultant Agreement.
11.4	Disputes Not Involving Owner or Design-Builder	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 11.5 unless the parties elect the option in Section 15.1 of the Agreement to submit their dispute to a court of competent jurisdiction.
11.5.4	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.
11.6	Duty to Continue Performance	Pending the resolution of any dispute or disagreement, both Design Consultant and Design Sub-Consultant shall continue to perform their respective duties under the Contract Documents, unless the parties provide otherwise in the Contract Documents.
11.7	Consequential Damages	If the Design Consultant Agreement waives Consequential Damages, DBIA believes that it is inappropriate for either Design Consultant or Design Sub-Consultant to be responsible to the other for consequential damages arising from the Project. This limitation on consequential damages in no way restricts, however, Design Consultant's entitlement to recover against Design Sub-Consultant liquidated damages assessed by Design-Builder against Design Consultant which are attributable to Design Sub-Consultant, and which may include damages that might otherwise be deemed consequential.
Article 13	Electronic Data	Design-Builder will determine, after consultation with Design Consultant, 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 Consultant Agreement contains a conflicting provision governing Electronic Data, the provision in the Design Consultant Agreement takes precedence.
Article 15	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 Consultant Agreement in which case those provisions should be expressly incorporated in Article 15.

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Standard Form of Agreement Between Design Consultant and Design Sub-Consultant

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

This **AGREEMENT** is made as of the _____ day of _____
in the year of 20_____, by and between the following parties:

DESIGN CONSULTANT:

(Name and address)

DESIGN SUB-CONSULTANT

(Name and address)

for services in connection with the Project identified below:

DESIGN-BUILDER:

(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 Consultant and Design Sub-Consultant 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 of a licensed design professional to perform all necessary design services for the Project as set forth in the Design-Build Agreement between Owner and Design-Builder. Design Consultant, through itself and its design sub-consultants, has agreed in the Design Consultant Agreement to provide such architectural, engineering, and other services required by this Agreement and the other Contract Documents. Design Consultant and Design Sub-Consultant hereby agree to provide the professional services outlined in Exhibit _____ (“Scope of Services”) in accordance with the Design-Build Agreement and the Design Consultant Agreement. Design Consultant and Design Sub-Consultant further agree that to the extent applicable to the performance of the Services hereunder, Design Sub-Consultant shall have the same rights, responsibilities, and obligations as to Design Consultant as Design Consultant by the Design Consultant Agreement has against and to Design-Builder, 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 and the Design-Builder and Design Consultant have passed through those provisions in the Design Consultant Agreement, those optional provisions are only passed through to the Design Sub-Consultant to the extent those provisions have been expressly set forth in Article 15.

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 and in the Design Consultant Agreement unless otherwise provided herein, with the following specific terms defined as follows:

1.2.1.1 *Additional Services* are those services identified in Section 2.8 hereof.

1.2.1.2 *Agreement* refers to this executed contract between Design Consultant and Design Sub-Consultant under DBIA Document 575, *Standard Form of Agreement Between Design Consultant and Design Sub-Consultant* (2012 Edition).

1.2.1.3 *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.

1.2.1.4 *Construction Documents* are the documents, consisting of Drawings and Specifications, to be prepared or assembled by Design Consultant and Design Sub-Consultants consistent with the Basis of Design Documents, unless a deviation from the Basis of Design Documents is specifically set forth in a Change Order.

1.2.1.5 *Construction Phase Services* refers to those services identified in Section 2.7 hereof.

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

1.2.1.7 *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.

1.2.1.8 *Design Consultant Agreement* refers to the contract between the Design-Builder and the Design Consultant for the design of the Project under DBIA Document No. 540, *Standard Form of Agreement Between Design-Builder and Design Consultant*, and all exhibits, attachments, and other Contract Documents enumerated and incorporated therein.

1.2.1.9 *Design Phase Services* refers to those services set forth in Sections 2.5 and 2.6 hereof.

1.2.1.10 *Design Schedule* refers to the schedule setting forth the dates by which Design Consultant and Design Sub-Consultant must perform the various Services required herein, consistent with the Project Schedule.

1.2.1.11 *Design Sub-Consultant's Fee* shall refer to the compensation due Design Sub-Consultant for the performance of the Services as set forth herein.

1.2.1.12 *Final Completion* is the date on which all Work is complete in accordance with the Contract Documents, including but not limited to any items identified in the punch list prepared under Section 6.6.1 of the General Conditions of the Design-Build Agreement and the submission of all documents set forth in Section 6.7.2 of the General Conditions of the Design-Build Agreement.

1.2.1.13 *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.

1.2.1.14 *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 Services.

1.2.1.15 *Lower Tier Design Sub-Consultant* is a qualified, licensed design professional who is not an employee of Design Sub-Consultant, but is retained by Design Sub-Consultant or employed or retained by anyone under contract with Design Sub-Consultant, to furnish design services required under the Contract Documents.

1.2.1.16 *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.

1.2.1.17 *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.

1.2.1.18 *Scope of Services* shall include all Design Phase Services, Construction Phase Services and Additional Services required by Exhibit _____ or as may be authorized in writing by Design Consultant except for those design services provided by others under Section 1.5.3 or by Owner's design consultants.

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

1.2.1.20 *Subcontractor* is any person or entity retained by Design-Builder as an independent contractor to perform a portion of the construction work for the Project and shall include materialmen and suppliers.

1.2.1.21 *Sub-Subcontractor* is any person or entity retained by a Subcontractor as an independent contractor to perform any portion of the Subcontractor's work and shall include materialmen and suppliers.

1.2.1.22 *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.

1.3 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 Consultant and Design Sub-Consultant;

1.3.1.4 The Design Consultant Agreement, (excluding the Basis of Design Documents), but only to the extent the Design Consultant Agreement relates to the Services and the terms and conditions under which the Services in this Agreement shall be performed;

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 Services and the terms and conditions under which the Services in this Agreement shall be performed; and

1.3.1.6 Construction Documents prepared and approved in accordance with Section 2.4 of the General Conditions of the Design-Build Agreement.

1.4 Interpretation and Intent

1.4.1 Design Consultant and Design Sub-Consultant, prior to execution of the Agreement, shall carefully review all the Contract Documents, including the various documents comprising the Basis of Design Documents relating to the Scope of Services, for any conflicts or ambiguities. Design Consultant and Design Sub-Consultant 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 discovered after execution of the Agreement, the parties 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 Sub-Consultant shall be entitled to reasonably rely on the accuracy of the information represented in such design specifications and their compatibility with other information set forth in Owner's Project Criteria, including any performance specifications, to the same extent as Design-Builder and Design Consultant are entitled to so rely in the Design-Build Agreement and the Design Consultant Agreement. If Design Sub-Consultant 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 Section 11.3.

1.5 Mutual Obligations and Acknowledgments

1.5.1 Design Consultant and Design Sub-Consultant 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 Consultant and Design Sub-Consultant 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 Consultant and Design Sub-Consultant acknowledge the following:
[Check appropriate box]

- They have cooperated with each other in the procurement of the Design-Build Agreement and that Design Consultant and Design Sub-Consultant have met to review, discuss, and familiarize themselves with the Design-Build Agreement and the Design Consultant Agreement, including the Basis of Design Documents that relate to the Scope of Services.
- Design-Builder and Design Consultant have met to review, discuss, and familiarize themselves with the Design-Build Agreement and the Design Consultant Agreement, including the Basis of Design Documents that relate to the Scope of Services.

1.5.3 Design-Builder or Design Consultant may choose to have portions of the overall design (e.g., structural and MEP) undertaken by design professionals directly employed by or contracting with Design-Builder or Design Consultant. Design Consultant and Design Sub-Consultant acknowledge the importance of integrating all of the designs into the Project's overall design concept. The parties commit to working with each other and with any other design professionals working on the Project with Design-Builder and Design Consultant to facilitate the coordination

and integration of other Design Consultants and Design Sub-Consultant's Services with the Project's overall design concept. Design-Builder is responsible for the services performed by design professionals under contract with Design-Builder. Design Consultant is responsible for the services performed by design professionals under contract with Design Consultant, but nothing herein is intended to relieve Design Sub-Consultant of its obligation to coordinate its Services with the services performed by other design professionals and Lower Tier Design Sub-Consultants.

1.5.4 Design Consultant and Design Sub-Consultant mutually agree that time is of the essence with respect to the dates and times set forth in the Design Schedule, Project Schedule and Contract Documents. Each party agrees to provide the other party with information in a timely fashion and in the form and manner as reasonably required.

1.6 Entire Agreement

1.6.1 Subject to the limitations in Section 1.3.1, the Contract Documents, all of which are incorporated by reference into this Agreement, form the entire agreement between Design Consultant and Design Sub-Consultant 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 Sub-Consultant's Services and Responsibilities**

2.1 General

2.1.1 Design Sub-Consultant shall, consistent with applicable state licensing laws, provide the Services, including architectural, engineering and other professional services, required by the Scope of Services. Design Sub-Consultant agrees that such Services shall be provided through qualified, licensed professionals who are either (i) employed by Design Sub-Consultant or (ii) procured by Design Sub-Consultant from qualified, licensed Lower Tier Design Sub-Consultants.

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

2.1.3 If Design Consultant, Design-Builder or Owner performs other work on the Project with separate design professionals under Design Consultant's, Design-Builder's or Owner's control, Design Sub-Consultant agrees to reasonably cooperate and coordinate its activities with those of such separate design professionals so that the Project can be completed in an orderly and coordinated manner and without disruption.

2.1.4 Design Sub-Consultant shall only communicate with Design-Builder, Owner, Subcontractor(s), or Sub-Subcontractors through Design Consultant unless the parties agree otherwise. Notwithstanding the preceding sentence, Design Sub-Consultant may communicate directly with the Owner and Design-Builder (with written copy to Design Consultant) on matters of public health, safety, and welfare when required by applicable Legal Requirements or professional codes of ethics.

2.1.5 Within seven (7) days after execution of this Agreement, Design Consultant and Design Sub-Consultant will meet to discuss issues affecting the administration of the Services and to implement the necessary procedures, including but not limited to those relating to the schedule for the Services, schedule updates, review of submittals, and payment, to facilitate the ability of the parties to perform their obligations under the Contract Documents and allow Design Consultant to meet its obligations to design the Project consistent with the Contract Documents, without compromising any professional obligations of Design Sub-Consultant. This meeting may take place in connection with the meeting described in Section 2.1.5 of the Design Consultant Agreement or in Section 2.1.4 of the General Conditions of the Design-Build Agreement.

2.2 Standard of Care

2.2.1 The standard of care for all design professional services performed by Design Sub-Consultant and its Lower Tier Design Sub-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 Legal Requirement

2.3.1 Design Sub-Consultant agrees to perform the Services in accordance with all applicable Legal Requirements.

2.3.2 Design Sub-Consultant's Fee and/or the Design Schedule shall be adjusted to compensate Design Sub-Consultant for the effects, if any, of any changes in the Legal Requirements enacted after the date of the Agreement affecting the performance of the Services. Such effects may include, without limitation, revisions Design Sub-Consultant is required to make to the Construction Documents because of changes in Legal Requirements.

2.4 Design Sub-Consultant's Personnel

2.4.1 Design Sub-Consultant agrees that the primary personnel assigned to perform the Services shall be as listed in Exhibit _____. Design Sub-Consultant shall not change such personnel without Design Consultant's prior approval.

2.4.2 Design Sub-Consultant's Representative shall be reasonably available to Design Consultant and Design-Builder and shall have the necessary expertise and experience required to supervise the Services. Design Sub-Consultant's Representative shall communicate regularly with Design Consultant and shall be vested with the authority to act on behalf of Design Sub-Consultant. Design Sub-Consultant shall replace its Representative upon the reasonable request of Design Consultant.

2.5 Government Approvals and Permits

2.5.1 Design Sub-Consultant shall obtain and pay for the permits, approvals, and licenses, if any, set forth in Exhibit _____.

2.5.2 Design Sub-Consultant shall provide reasonable assistance to Design Consultant, Design-Builder and Owner in obtaining any permits, approvals, and licenses which are not Design Sub-Consultant's obligation to obtain, but which are required for the construction of the Project.

2.5.3 Design Sub-Consultant 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 Sub-Consultant or its Lower Tier Design Sub-Consultants, Design Sub-Consultant shall be compensated for such revisions as a change to this Agreement.

2.6 Design Development Services

2.6.1 In accordance with the times set forth in the Design Schedule, Design Sub-Consultant shall submit to Design Consultant all interim design submissions and revisions 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. Design Consultant and Design Sub-Consultant agree that prior to the scheduled date for submitting all interim design submissions to Design-Builder, Design Consultant and Design Sub-Consultant will hold meetings for the purpose of discussing and monitoring the design for consistency with the requirements of the Contract Documents. To the extent relevant to Design Sub-Consultant's Scope of Services, Design Sub-Consultant shall identify to Design Consultant 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 Sub-Consultant fails to identify such changes or fails to produce Construction Documents consistent with the Basis of Design Documents and identified and approved changes and Design Consultant incurs additional uncompensated costs as a result, Design Sub-Consultant shall be responsible for such costs.

2.6.2 In accordance with the Contract Documents and with the times set forth in the Design Schedule, Design Sub-Consultant shall submit to Design Consultant Construction Documents setting forth in detail drawings and specifications describing the requirements for construction of the Work. The Construction Documents shall be consistent with the latest set of interim design submissions, as such submissions may have been modified in a design review meeting and recorded in the meeting minutes. Design Sub-Consultant shall provide the Construction Documents in the form and quantity required by the Design Consultant. Design Sub-Consultant shall perform agreed upon revisions and submit revised Construction Documents to Design Consultant for approval by the Design Consultant, Design-Builder and Owner.

2.6.3 Design Sub-Consultant shall attend and participate in such meetings as are held between Design Consultant, Owner and Design-Builder to discuss interim design submissions and the Construction Documents as requested by Design Consultant. Minutes of these meetings, including a full listing of all changes, will be maintained by Design-Builder and provided to all attendees for review. Design Sub-Consultant shall review such minutes and provide notice to Design Consultant and Design-Builder of any objections thereto. 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 and recorded in the meetings minutes.

2.6.4 In addition to the interim design submissions and Construction Documents, Design Sub-Consultant shall, if requested by Design Consultant, prepare (i) those design documents necessary for the establishment of a GMP Exhibit or GMP Proposal and (ii) interim design submissions and Construction Documents required to permit commencement of construction on a portion of the Project before the entire Construction Documents for the Project are completed.

2.6.5 Design Consultant's, 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 compatible with the requirements of the Contract Documents. The review and/or approval by Design Consultant, Design-Builder or Owner of any interim design submission or the Construction Documents shall not be deemed to transfer any design liability from Design Sub-Consultant to Design Consultant, Design-Builder or Owner.

2.6.6 Design Sub-Consultant will, at its own cost, revise any interim design submission or the Construction Documents drafted by Design Sub-Consultant to correct any of its errors, mistakes or omissions. Such revisions shall be performed timely and so as not to jeopardize the Design Schedule and/or the Project Schedule.

2.6.7 Design Sub-Consultant shall be responsible for paying all royalties and licensing fees for patented or copyrighted materials, methods or systems specified by Design Sub-Consultant and incorporated into the Project.

2.7 Construction Phase Services

2.7.1 Design Sub-Consultant shall assist Design Consultant and Design-Builder in preparing bidding documents for specified portions of the Project's construction and clarifying and responding to questions involving the bidding documents.

2.7.2 Design Sub-Consultant shall timely provide requested clarifications and interpretations of the Construction Documents, which shall be consistent with the intent of, and reasonably inferable from, the Contract Documents. Design Sub-Consultant shall make all revisions to the Construction Documents necessary for the proper construction of the Project.

2.7.3 Design Sub-Consultant shall review and recommend approval or rejection of such submittals, including shop drawings, product data and samples, as they relate to Design Sub-Consultant's Scope of Services and as may be required by the Design Consultant. Design Sub-Consultant shall expeditiously inform Design Consultant of any revisions that are necessary as a condition to Design Sub-Consultant's approval of submittals. The time within which Design Sub-Consultant shall review and respond to submittals will be as established at the meeting required by Section 2.1.5 hereof. Design Sub-Consultant's review and approval shall not relieve Design-Builder or Subcontractors of responsibility for construction means and methods or safety precautions.

2.7.4 If requested, Design Sub-Consultant shall review, and if acceptable approve, any substitutions for materials or equipment proposed by Design-Builder.

2.7.5 Design Sub-Consultant shall, if requested by Design Consultant, review any inspection reports or tests involving the construction of the Project and provide its comments to Design Consultant and Design-Builder. Design Sub-Consultant is not responsible for the accuracy or completeness of the tests or inspections performed by others.

2.7.6 Unless otherwise provided, Design Sub-Consultant is not providing full-time resident services. Nevertheless, Design Sub-Consultant shall at appropriate intervals visit the Site to determine if the construction is proceeding in accordance with the Construction Documents. If

Design Consultant and Design Sub-Consultant have agreed to a specific frequency of Design Sub-Consultant's Site visits, such frequency shall be set forth as an exhibit to this Agreement. Design Sub-Consultant shall promptly notify Design-Builder and Design Consultant of any defects, deficiencies, deviations, omissions, or violations observed by Design Sub-Consultant in the construction of the Project and make recommendations to Design Consultant and Design-Builder on how to proceed.

2.7.7 At the request of Design Consultant or Design-Builder, Design Sub-Consultant shall attend meetings with Design Consultant, Design-Builder and/or Owner and/or Subcontractor(s) and Sub-Subcontractors to discuss design issues which may arise during construction.

2.7.8 Design Sub-Consultant shall, if requested by Design-Builder or Design Consultant, provide such certifications as may be necessary relative to Substantial Completion, and if required by the Design-Build Agreement, Final Completion.

2.7.9 Design Sub-Consultant's provision of the Construction Phase Services shall not be construed to make Design Sub-Consultant responsible for (i) the acts or omissions of Design Consultant, Design-Builder, any Sub-Consultants, Subcontractors, or any Sub-Subcontractors, (ii) the means, methods, sequences, and techniques of construction of the Project or (iii) safety precautions and programs in connection with the construction of the Project. Nothing in this Agreement shall create any legal or contractual relationship between Design Sub-Consultant and any other Design Sub-Consultant, Subcontractor or Sub-Subcontractor.

2.8 Additional Services

2.8.1 Additional Services, if any, agreed upon by the parties shall be set forth in Exhibit _____ and may include by way of example only, site visits in excess of those agreed upon by the parties, evaluating changes, including the preparation or revision of the Construction Documents, providing record drawings, and providing consultation concerning replacement of Work damaged by fire or other causes during construction.

Article 3

Design Consultant's Services and Responsibilities

3.1 Timely Reviews, Approvals and Submittals

3.1.1 Design Consultant shall provide timely reviews and approvals of all interim design submissions and Construction Documents consistent with the turnaround times set forth in the Design Schedule, or as agreed to by the parties at the meeting required under Section 2.1.5 hereof.

3.1.2 Design Consultant shall timely submit to Design Sub-Consultant all submittals, including shop drawings, product data and samples, for Design Sub-Consultant's review and approval consistent with the Project Schedule, or as agreed to by the parties at the meeting required under Section 2.1.5 hereof.

3.1.3 Design Consultant shall provide timely notice to Design Sub-Consultant of any delays to the Project caused by Design Sub-Consultant.

3.2 Design Consultant's Representative

3.2.1 Design Consultant's Representative shall be responsible for providing Design Consultant-supplied information and approvals in a timely manner to permit Design Sub-Consultant 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 Consultant has received such items from Design-Builder, Design Consultant shall provide for Design Sub-Consultant's information the items listed below, to the extent that such items relate to Design Sub-Consultant's Scope of Services. Design Consultant does not warrant the accuracy or completeness of such items, provided, however, that Design Sub-Consultant is entitled to rely upon such items to the same extent Design Consultant is entitled to rely upon such items in the Design Consultant 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 design and construction of the Project and enable Design Sub-Consultant to perform the Services;

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

3.3.3 Design Consultant shall provide to Design Sub-Consultant information regarding any cost estimating and scheduling services provided by Design-Builder and related to the construction of the Project; however, Design Consultant shall not be responsible for mistakes or miscalculations of market conditions that result in construction costs that are contrary to Design-Builder's or Design Consultant's budget and pricing assumptions. Nothing herein shall relieve Design Sub-Consultant from its obligation to prepare a design for the Project that is consistent with the Contract Documents.

3.3.4 Upon Design Sub-Consultant's reasonable request, Design Consultant shall provide Design Sub-Consultant with information it receives from Design-Builder regarding Owner's financial ability to pay for the Services set forth in this Agreement.

3.3.5 Design Consultant shall provide Design Sub-Consultant with the Project Schedule and appropriate updates thereto that it receives from Design-Builder.

3.3.6 Design Consultant shall use reasonable efforts to grant Design Sub-Consultant reasonable access to the Project and the Site, upon written request.

3.4 Notification of Errors

3.4.1 Design-Builder or Design Consultant shall notify Design Sub-Consultant of any errors, inconsistencies, or omissions Design-Builder or Design Consultant discover in the Services, including any interim design submissions, Construction Documents or other Services. Notwithstanding anything to the contrary in this Agreement, nothing in this Agreement shall relieve Design Sub-Consultant of responsibility for errors, inconsistencies, or omissions in the Services.

3.5 Attendance at Design Meetings

3.5.1 Design Consultant shall afford Design Sub-Consultant and its Lower Tier Design Sub-Consultants the opportunity to attend all necessary design meetings with Owner, Subcontractor(s) and/or Sub-Subcontractors.

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 Sub-Consultant to Design Consultant or Design-Builder under this Agreement ("Work Product") are deemed to be instruments of service and Design Sub-Consultant shall retain ownership and property interests therein provided, however, that Design Sub-Consultant hereby grants Design Consultant and Design-Builder, (for the purpose of allowing Design-Builder to grant to Owner) upon Design Consultant's payment to Design Sub-Consultant 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 or the Design Consultant Agreement grants ownership and/or property rights to Owner and/or Design-Builder that conflict with the above, then Design Sub-Consultant hereby grants such rights to Design Consultant and Design-Builder (for the purpose of allowing Design-Builder to grant to Owner) under the same terms and conditions that Design Consultant and Design-Builder grant such rights to Owner.

4.2 Agreement to Grant Rights to Owner

4.2.1 Design Sub-Consultant has reviewed the Design Consultant and Design-Build Agreements and is fully aware of the ownership and property rights to use the Work Product which may be granted to Design-Builder and/or Owner therein. Design Sub-Consultant accepts and agrees to Design-Builder's and/or Owner's ownership and property rights with respect to the Work Product contained in the Design Consultant and Design-Build Agreements.

4.3 Indemnification for Use of Work Product

4.3.1 If either Design Consultant or Design Sub-Consultant 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, Design-Builder, Owner, or anyone working through them. Such party further agrees that it shall defend, indemnify and hold harmless the other party, Design-Builder 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 Consultant terminates this Agreement for its convenience as set forth in Section 7.1 hereof, or if Design Sub-Consultant elects to terminate this Agreement in accordance with Section 7.4 of this Agreement, Design Sub-Consultant, upon Design Consultant's payment in full of the amounts due Design Sub-Consultant under the Contract Documents, grants Design Consultant, 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 and Design Consultant's sole risk and without liability or legal exposure to Design Sub-Consultant or anyone working by or through Design Sub-Consultant, and on the indemnity set forth in Section 4.3 herein, and

4.4.1.2 Design Consultant agrees to pay Design Sub-Consultant 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 or Design Consultant resumes the Project through its employees, agents, or third parties.

4.4.2 If this Agreement is terminated due to Design Sub-Consultant's default pursuant to Section 7.2 of this Agreement, then Design-Builder and Design Consultant 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 Consultant, 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 Sub-Consultant was not in default, Design Consultant shall be deemed to have terminated the Agreement for convenience, and Design Sub-Consultant 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 Services shall commence five (5) days after Design Sub-Consultant's receipt of Design Consultant's Notice to Proceed ("Date of Commencement") unless the parties mutually agree otherwise in writing.

5.2 Design Schedule

5.2.1 Unless a schedule for the execution of the Work has been attached to the Agreement as an exhibit at the time this Agreement is executed, Design Sub-Consultant shall coordinate with Design Consultant to prepare a schedule for the Design Phase Services. If requested by Design Consultant, Design Sub-Consultant shall prepare a schedule for Design Sub-Consultant's Scope of Services that meet Design-Builder's requirements and the requirements in the Design Consultant Agreement. Design Consultant will review Design Sub-Consultant's schedule to determine whether it permits Design Consultant to satisfy its obligations under the Project Schedule and the Design Consultant Agreement. The accepted schedule (the "Design Schedule") shall be revised as required by conditions and progress of the Project, but such revisions shall not relieve Design Sub-Consultant of its obligations to perform the Services in accordance with the Contract Documents, subject to its rights under this Agreement.

5.3 Status Reports

5.3.1 Design Sub-Consultant shall provide Design Consultant on a regular basis a status report detailing the progress of the Design Sub-Consultant's Scope of Services, including whether (i) the Services are proceeding according to the Design Schedule, and (ii) items exist which require resolution so as not to jeopardize Design Sub-Consultant's ability to meet the dates set forth in the Design Schedule and Design-Builder's and Design Consultant's ability to meet the Project Schedule. The frequency of the status reports shall be established at the meeting required by Section 2.1.5 hereof.

5.4 Delays

5.4.1 If Design Sub-Consultant's performance of the Services are delayed for any reason so as to impact the Design Schedule or the Project Schedule, Design Sub-Consultant shall promptly notify Design Consultant in writing of the cause(s) of such delay within sufficient time to permit Design Consultant to provide timely notice to Design-Builder in accordance with the Design Consultant Agreement. If the delay is due to any act, neglect, or omission on the part of Design Sub-Consultant, its Lower Tier Design Sub-Consultants, or anyone for whom they are responsible, Design Sub-Consultant shall, subject to any limitations contained herein, compensate and indemnify Design Consultant and Design-Builder for all costs, damages, and expenses arising from such delay. If the delay is caused by Design Consultant, the Design Sub-Consultant's Fee and the Design Schedule shall be adjusted to compensate Design Sub-Consultant for the effects, if any, of the delay, subject to any limitations contained herein.

5.4.2 Notwithstanding any other provision to the contrary, any delay and resulting damages that arise out of, or relate to, problems caused by Design-Builder or Owner or for which Design-Builder or Owner is responsible shall be resolved pursuant to Section 11.3 hereof.

Article 6 **Design Sub-Consultant's Compensation**

6.1 Design Sub-Consultant's Fee

6.1.1 Design Sub-Consultant's Fee shall be the compensation due Design Sub-Consultant for the performance of the Scope of Services, including all Design Phase Services, Construction Phase Services, and Additional Services, and for Reimbursable Costs, all as set forth in this Agreement. Unless otherwise provided in the Contract Documents, the Design Sub-Consultant's

Fee is deemed to include all sales, use, consumer and other taxes mandated by applicable Legal Requirements.

6.1.2 Design Sub-Consultant will be compensated for the Design Phase Services, Construction Phase Services, Additional Services, if any, and Reimbursable Costs as set forth in Exhibit _____. *(Provide for a fixed lump sum amount, hourly rates, percentage fees, or some other basis of compensation for the Services.)*

6.2 Applications for Payment

6.2.1 Beginning with the first month after the Date of Commencement, Design Sub-Consultant shall submit on the _____ (_____) day of each month for Design Consultant's review and approval, Design Sub-Consultant's certified Application for Payment requesting payment for all Services 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 2.1.5 hereof. Once approved, Design Consultant will submit Design Sub-Consultant's Application for Payment to Design-BUILDER with Design Consultant's application.

6.2.2 The Application for Payment shall constitute Design Sub-Consultant's representation that (i) the Services have been performed consistent with the Contract Documents, (ii) the Services have progressed to the point indicated in the Application for Payment, (iii) Lower Tier Design Sub-Consultants have been paid all amounts previously received by Design Sub-Consultant on account of their services, and (iv) there are no claims, obligations or liens outstanding or unsatisfied for labor, services, taxes, or other items performed, furnished, or incurred for or in connection with the Scope of Services.

6.2.3 Design Consultant shall make payment on Design Sub-Consultant's properly submitted and accurate Application for Payment within three (3) days after Design Consultant's receipt of payment from Design-BUILDER on account of Design Sub-Consultant's monthly Application for Payment, but in each case less the total of payments previously made, and less amounts properly withheld hereunder.

6.3 Retainage on Applications for Payment

6.3.1 Design Consultant will not retain any funds from Design Sub-Consultant's Applications for Payment unless Design-BUILDER is retaining funds from Design Consultant's progress payments for the Services, and then only in the same amount or percentage retained from Design Consultant's progress payments as set forth in the Design Consultant Agreement. Unless mutually agreed otherwise between the parties, retainage (if applicable) will be released to Design Sub-Consultant within three (3) days after Design Consultant's receipt of such retained amounts from Design-BUILDER.

6.4 Withholding of Payment

6.4.1 If Design Consultant determines that Design Sub-Consultant is not entitled to all or part of an Application for Payment, it will notify Design Sub-Consultant in writing at least five (5) days prior to the date payment is due. The notice shall indicate the specific amounts Design Consultant intends to withhold, the reasons and contractual basis for the withholding, and the specific measures Design Sub-Consultant must take to rectify Design Consultant's concerns. Design Consultant and Design Sub-Consultant will attempt to resolve Design Consultant's concerns prior to the date payment is due. If the parties cannot resolve such concerns, Design Consultant shall pay Design Sub-Consultant the uncontested amount of the Application for Payment, and Design

Sub-Consultant may pursue its rights under this Agreement, including those under Article 11 hereof.

6.5 Final Payment

6.5.1 At the time Design Sub-Consultant submits its final Application for Payment to Design Consultant, Design Sub-Consultant shall provide (i) all deliverables required by the Contract Documents; (ii) an affidavit that there are no claims, obligations or liens outstanding or unsatisfied for or in connection with the Services which will in any way affect Design Consultant's, Design-Builder's, or Owner's interests; (iii) a general release executed by Design Sub-Consultant waiving, upon receipt of final payment by Design Sub-Consultant, all claims, except those claims previously made in writing to Design Consultant and remaining unsettled at the time of final payment; and (iv) certificates of insurance confirming that required coverages will remain in effect consistent with the requirements of the Contract Documents. Design Consultant shall make payment on Design Sub-Consultant's properly submitted and accurate final Application for Payment within ten (10) days after Design Consultant's receipt of final payment from Design-Builder on account of Design Sub-Consultant's final Application for Payment, provided also that Design Sub-Consultant has satisfied the requirements for final payment set forth herein.

6.6 Pay When Paid

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

6.7 Interest

6.7.1 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.

6.8 Design Sub-Consultant's Payment Obligations

6.8.1 Design Sub-Consultant will pay Lower Tier Design Sub-Consultants, in accordance with its contractual obligations to such parties, all the amounts Design Sub-Consultant has received from Design Consultant on account of their services. Design Sub-Consultant will impose similar requirements on Lower Tier Design Sub-Consultants to pay those parties with whom they have contracted. Design Sub-Consultant will indemnify and defend Design Consultant, Owner, and Design-Builder against any claims for payment and mechanic's liens, provided Design Consultant is not in breach of its contractual obligations to make payments to Design Sub-Consultant for its Services.

6.9 Record Keeping and Finance Controls

6.9.1 Design Sub-Consultant 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 Services and for a period of three (3) years after final payment of the Services or such longer period as set forth in the Design Consultant Agreement for the review of Design Consultant's records, Design-Builder, Design Consultant, and their accountants shall be afforded access to and the right to audit from time-to-time, upon

reasonable notice, Design Sub-Consultant's records, books, correspondence, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to the cost of performing the Services, including changes in the Services, and reimbursable expenses all of which Design Sub-Consultant shall preserve for a period of three (3) years after final payment. Such inspection shall take place at Design Sub-Consultant's offices during normal business hours unless another location and time is agreed by the parties. Any fee (that is either a lump sum or percentage of construction cost), multipliers or markups agreed to by the Design Consultant and Design Sub-Consultant as part of this Agreement are only subject to audit to confirm that such fee, multiplier or markup has been charged in accordance with this Agreement, with the composition of such fee, multiplier or markup not being subject to audit.

Article 7

Termination and Design Sub-Consultant's Right to Stop Services

7.1 Design Consultant's Right to Terminate for Convenience

7.1.1 If Design-Builder terminates Design Consultant for any reason, then Design Consultant may terminate this Agreement. In such event, Design Consultant shall pay Design Sub-Consultant only those amounts Design Consultant actually receives from Design-Builder on behalf of Design Sub-Consultant. Notwithstanding the preceding sentence, in the event the Design Consultant does not receive any compensation from the Design-Builder because the Design Consultant was terminated for default, the Design Consultant is obligated to pay the Design Sub-Consultant for all services performed by the Design Sub-Consultant prior to receiving notice of the termination, providing that the Design Consultant's default was not caused by the Design Sub-Consultant's failure to perform in accordance with its obligations.

7.2 Design Consultant's Right to Terminate for Cause

7.2.1 If Design Sub-Consultant persistently fails to (i) comply with applicable Legal Requirements, (ii) timely pay, without cause, its Lower Tier Design Sub-Consultants, (iii) prosecute the Services with promptness and diligence so that the Scope of Services is completed by the times set forth in the Design Schedule or the Project Schedule, (iv) provide qualified, licensed design professionals, or (v) perform material obligations under the Contract Documents, then Design Consultant shall have the rights, in addition to any other rights and remedies provided in the Contract Documents or by law, set forth in Sections 7.2.2 and 7.2.3 below.

7.2.2 Upon the occurrence of an event set forth in Section 7.2.1 above, Design Consultant may provide written notice to Design Sub-Consultant that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be cured, within seven (7) days of Design Sub-Consultant's receipt of such notice. If Design Sub-Consultant fails to cure, or reasonably commence to cure, such problem, then Design Consultant may give a second written notice to Design Sub-Consultant of its intent to terminate within an additional seven (7) day period. If Design Sub-Consultant, within such second seven (7) day period, fails to cure, or reasonably commence to cure, such problem, then Design Consultant may declare the Agreement terminated for default by providing written notice to Design Sub-Consultant of such declaration.

7.2.3 Upon declaring the Agreement terminated pursuant to Section 7.2.2 above, Design Consultant may complete the Services in whatever fashion it deems most efficient, and shall have the right to use the existing Work Product for purposes of completing the Project, subject to Section 4.4 above. To the extent Design Consultant has been adversely impacted by Design Sub-Consultant's default and termination, Design Consultant shall be entitled to recover against Design Sub-Consultant all of Design Consultant's costs. Such costs and expense shall include

not only the cost of completing the Services, but also losses, damages, costs and expense, including attorneys' fees and expenses, incurred by Design Consultant in connection with the procurement and defense of claims arising from Design Sub-Consultant's default, subject to the waiver of consequential damages set forth in Section 11.7 hereof.

7.3 Design Sub-Consultant's Right To Stop Services

7.3.1 If (i) Design-Builder fails to pay amounts due Design Consultant under the Design Consultant Agreement for Services performed by Design Sub-Consultant, and such failure is not due to the fault of Design Sub-Consultant, and Design Sub-Consultant has not been paid such amounts due, or (ii) Design Consultant fails to pay any amounts due Design Sub-Consultant under this Agreement, Design Sub-Consultant may, in addition to any other rights afforded under the Contract Documents or at law, stop work in accordance with Section 7.3.2 below.

7.3.2 Should either of the events set forth in Section 7.3.1 above occur, Design Sub-Consultant has the right to provide Design Consultant with written notice that Design Sub-Consultant will stop work unless said failure to pay is cured within seven (7) days from Design Consultant's receipt of Design Sub-Consultant's notice. If Design Consultant does not cure the problem within such seven (7) day period, Design Sub-Consultant may stop work. In such case, Design Sub-Consultant shall be entitled to make a claim for adjustment to the Design Sub-Consultant's Fee and the Design Schedule to the extent it has been adversely impacted by such stoppage. To the extent Design Consultant's failure to pay is related to a dispute between the parties, the dispute will be resolved in accordance with Article 11, and the parties will continue performance in accordance with Section 11.6.

7.4 Design Sub-Consultant's Right to Terminate for Cause

7.4.1 Design Sub-Consultant 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 7.4.2 if Design Consultant has failed to cure the problems set forth in Section 7.3.2 within thirty (30) days after Design Sub-Consultant has stopped work.

7.4.2 Upon the occurrence of the event set forth in Section 7.4.1 above, Design Sub-Consultant may provide written notice to Design Consultant that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be cured, within seven (7) days of Design Consultant's receipt of such notice. If Design Consultant fails to cure, or reasonably commence to cure, such problem, then Design Sub-Consultant may give a second written notice to Design Consultant of its intent to terminate within an additional seven (7) day period. If Design Consultant, within such second seven (7) day period, fails to cure, or reasonably commence to cure, such problem, then Design Sub-Consultant may declare the Agreement terminated for default by providing written notice to Design Consultant of such declaration.

7.5 Bankruptcy of Design Consultant or Design Sub-Consultant

7.5.1 If either Design Consultant or Design Sub-Consultant 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:

7.5.1.1 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

7.5.1.2 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 7.

7.5.2 The rights and remedies under Section 7.5.1 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 8 **Representatives of the Parties**

8.1 Design Consultant's Representatives.

8.1.1 Design Consultant designates the individual listed below as its Senior Representative ("Design-Consultant's Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under Section 11.4 hereof: **(Identify individual's name, title, address and telephone numbers)**

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

8.2 Design Sub-Consultant's Representatives.

8.2.1 Design Sub-Consultant designates the individual listed below as its Senior Representative ("Design Sub-Consultant's Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under Section 11.4 hereof: **(Identify individual's name, title, address and telephone numbers)**

8.2.2 Design Sub-Consultant designates the individual listed below as its Design Sub-Consultant's Representative, which individual has the authority and responsibility set forth in Section 2.4.2 hereof: **(Identify individual's name, title, address and telephone numbers)**

Article 9 **Insurance**

9.1 Design Sub-Consultant's Insurance Requirements

9.1.1 Design Sub-Consultant 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, 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 the obligations under the Contract Documents.

9.1.2 Design Sub-Consultant shall require its Lower Tier Design Sub-Consultants 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.

9.1.3 Design Sub-Consultant's and its Lower Tier Design Sub-Consultants' 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.

9.1.4 To the extent Design Consultant requires Design Sub-Consultant to provide professional liability insurance for claims arising from the negligent performance of design services by Design Sub-Consultant or Lower Tier Design Sub-Consultants, the coverage limits, duration and other specifics of such insurance shall be set forth in the Insurance Exhibit. Such policies shall be provided prior to the commencement of any design services hereunder.

9.1.5 Prior to commencing any services hereunder, Design Sub-Consultant shall provide Design Consultant 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 Consultant.

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

9.1.7 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.

9.2 Waiver of Subrogation

9.2.1 Design Consultant and Design Sub-Consultant waive against each other and Owner, Owner's separate contractors, Subcontractors, Sub-Subcontractors, Design-Builder and Design Consultant's separate Sub-Consultants, agents and employees of each and all of them, all damages covered by property insurance provided the Contract Documents, except such rights as they may have to the proceeds of such insurance. Design Consultant and Design Sub-Consultant shall, where appropriate, require similar waivers of subrogation from Lower Tier Design Sub-Consultants and Subcontractors 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.

Article 10

Indemnification

10.1 Patent and Copyright Infringement

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

10.1.2 If Owner is enjoined from the operation or use of the Project, or any part thereof, as the result of any patent or copyright suit, claim, or proceeding that arises from Design Sub-Consultant's Scope of Services, Design Sub-Consultant shall at its sole expense take reasonable steps to procure the right to operate or use the Project, or applicable part thereof. If Design Sub-Consultant cannot so procure such right within a reasonable time, Design Sub-Consultant shall promptly, at Design Sub-Consultant's option and at Design Sub-Consultant's expense, (i) modify the Project, or applicable part thereof, 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, and is consistent with the Contract Documents.

10.1.3 Sections 10.1.1 and 10.1.2 above shall not be applicable to any suit, claim or proceeding based on infringement or violation of a patent or copyright (i) relating solely to a particular process or product of a particular manufacturer specified by Design Consultant, Owner, or Design-Builder and not offered or recommended by Design Sub-Consultant to Design Consultant, Owner, or Design-Builder; or (ii) arising from modifications to the Project by Design Consultant, Owner, or Design-Builder after acceptance of the Project.

10.1.4 The obligations set forth in this Section 10.1 shall constitute the sole agreement between the parties relating to liability for infringement or violation of any patent or copyright.

10.2 Design Sub-Consultant's General Indemnification

10.2.1 Design Sub-Consultant, to the fullest extent permitted by law, shall indemnify and hold harmless Design Consultant, Owner, Design-Builder and their officers, directors, employees and agents from and against losses, and damages, 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 Sub-Consultant, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable.

10.2.2 If an employee of Design Sub-Consultant, anyone employed directly or indirectly by Design Sub-Consultant or anyone for whose acts any of them may be liable has a claim against

any party indemnified pursuant to Section 10.2.1 above, Design Sub-Consultant's indemnity obligation set forth in Section 10.2.1 above shall not be limited by any limitation on the amount of damages, compensation or benefits payable by or for Design Sub-Consultant, or other entity under any employee benefit acts, including workers' compensation or disability acts.

10.3 Design Consultant's General Indemnification

10.3.1 Design Consultant, to the fullest extent permitted by law, shall indemnify and hold harmless Design Sub-Consultant and its officers, directors, employees, and agents from and against losses and damages, 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 Consultant, anyone employed directly or indirectly by Design Consultant, or anyone for whose acts Design Consultant may be liable.

10.3.2 If an employee of Design Consultant, anyone employed directly or indirectly by Design Consultant or anyone for whose acts Design Consultant may be liable has a claim against any party indemnified pursuant to Section 10.3.1 above, Design Consultant's indemnity obligation set forth in Section 10.3.1 above shall not be limited by any limitation on the amount of damages, compensation or benefits payable by or for Design Consultant or other entity under any employee benefit acts, including workers' compensation or disability acts.

Article 11 **Contract Adjustments and Disputes**

11.1 Requests for Contract Adjustments and Relief

11.1.1 If either Design Sub-Consultant or Design Consultant believes that it is entitled to relief against the other for any event arising out of or related to the Services 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 Sub-Consultant shall provide Design Consultant written notice of claims for which Owner or Design-Builder may be responsible, including but not limited to changes in the Basis of Design Documents, in sufficient time for Design Consultant to meet its notice requirements to Design-Builder 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 Sub-Consultant shall comply with all documentation requirements set forth in the Design Consultant Agreement when submitting its claim to Design Consultant.

11.2 Dispute Avoidance and Resolution

11.2.1 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 Sub-Consultant and Design Consultant 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 Services.

11.3 Disputes Involving Owner or Design-Builder

11.3.1 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") or by Design-Builder or for which Design-Builder is responsible ("Design-Builder Disputes"), such Owner and/or Design-Builder Disputes shall be resolved pursuant to the dispute resolution clause set forth in the Design-Build Agreement with respect to Owner Disputes and the Design Consultant Agreement with respect to Design-Builder Disputes. Both Design Consultant and Design Sub-Consultant agree to cooperate in the presentation and prosecution or defense of Owner or Design-Builder Disputes. If, after a request for an extension of time or additional compensation from Design Sub-Consultant, Design Consultant believes that the event causing the delay or additional compensation is the responsibility of Design-Builder or Owner, then Design Consultant will cooperate with and assist Design Sub-Consultant in presenting a request for an extension of time or additional compensation to Owner. Notwithstanding the above, Design Consultant reserves the right not to submit a claim to Owner or Design-Builder. In such cases, the claim shall be resolved pursuant to Section 11.4.

11.3.2 Notwithstanding any other provisions herein to the contrary, Design Consultant and Design Sub-Consultant each agree to accept the relief as to a time extension or additional compensation obtained from Design-Builder and/or 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 Design-Builder and/or Owner Dispute.

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

11.3.4 If Owner or Design-Builder contends that the Contract Documents have been breached, or otherwise asserts a claim or set-off against Design Consultant, 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 Consultant and Design Sub-Consultant in connection with any claim by Design-Builder or Owner, then Design Consultant and Design Sub-Consultant agree that the allocation of fault shall be determined pursuant to Section 11.4.

11.4 Disputes Not Involving Owner or Design-Builder

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

11.4.2 If a claim, dispute or controversy cannot be resolved through Section 11.4.1, Design Consultant's Senior Representative and Design Sub-Consultant'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.

11.4.3 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 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 Consultant and Design Sub-Consultant 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.

11.5 Arbitration

11.5.1 Any claims, disputes, or controversies between the parties arising out of or relating to the Agreement, or the breach thereof, which has not been resolved in accordance with the procedures set forth in Section 11.4 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.

11.5.2 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.

11.5.3 Design Sub-Consultant and Design Consultant expressly agree that any arbitration pursuant to this Section 11.5 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 Consultant and Design Sub-Consultant will include appropriate provisions in all contracts they execute with other parties in connection with the Project to require such joinder or consolidation.

11.5.4 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.

11.6 Duty to Continue Performance

11.6.1 Unless provided to the contrary in the Contract Documents, Design Sub-Consultant shall continue to perform the Services and Design Consultant shall continue to satisfy its payment obligations to Design Sub-Consultant, pending the final resolution of any dispute or disagreement between Design Consultant and Design Sub-Consultant.

11.7 CONSEQUENTIAL DAMAGES

11.7.1 NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY (EXCEPT AS SET FORTH IN SECTION 11.7.2 BELOW) AND TO THE EXTENT THAT SUCH DAMAGES ARE WAIVED IN THE DESIGN CONSULTANT AGREEMENT, NEITHER DESIGN CONSULTANT NOR DESIGN SUB-CONSULTANT 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.

11.7.2 Notwithstanding Section 11.7.1 above, Design Consultant shall be entitled to recover against Design Sub-Consultant (i) any liquidated damages that Design-BUILDER may assess against Design Consultant which are attributable to Design Sub-Consultant, even though both parties recognize that such liquidated damages may include some damages that might otherwise be deemed to be consequential and (ii) consequential damages that may be imposed upon Design Consultant by the Design Consultant Agreement.

Article 12 **Miscellaneous**

12.1 Assignment

12.1.1 Neither Design Sub-Consultant nor Design Consultant shall, without the written consent of the other, assign, transfer, or sublet any portion or part of the Services or the obligations required by the Contract Documents.

12.2 Successorship

12.2.1 Design Consultant and Design Sub-Consultant intend that the provisions of the Contract Documents are binding upon the parties, their employees, agents, heirs, successors, and assigns.

12.3 Governing Law

12.3.1 The Agreement and all Contract Documents shall be governed by the laws that govern the Design Consultant Agreement, without giving effect to its conflict of law principles.

12.4 Severability

12.4.1 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.

12.5 No Waiver

12.5.1 The failure of either Design Consultant or Design Sub-Consultant 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.

12.6 Headings

12.6.1 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.

12.7 Notice

12.7.1 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 or electronic mail, by the time stated in a machine generated confirmation that notice was received at the number of the intended recipient.

12.8 Amendments

12.8.1 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.

12.9 Survival

12.9.1 Design Sub-Consultant's obligations under this Agreement shall not be released, and shall specifically survive, the completion of all Services hereunder, final payment to Design Sub-Consultant, and the termination of this Agreement for any reason.

Article 13 **Electronic Data**

13.1 Electronic Data

13.1.1 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 Consultant, Design Sub-Consultant and others in electronic media as an alternative to paper hard copies (collectively "Electronic Data").

13.2 Transmission of Electronic Data

13.2.1 Design-Builder shall determine, after consultation with Design Consultant, 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.

13.2.2 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.

13.2.3 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.

13.3 Electronic Data Protocol

13.3.1 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 Lower Tier Design Sub-Consultants to agree, to the following protocols, terms, and conditions set forth in this Section 13.3.

13.3.2 Electronic Data will be transmitted in the format determined in Section 13.2.1 above, including file conventions and document properties, unless prior arrangements are made in advance in writing.

13.3.3 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.

13.3.4 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.

13.4 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 13, the provision in the Design-Build Agreement takes precedence notwithstanding the order of precedence set forth in Section 1.4.2.

Article 14 **Confidential Information**

14.1 Confidential and/or Proprietary Information

14.1.1 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.

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

14.1.3 In the event the Design-Build Agreement or the Design Consultant Agreement contains a provision governing Confidential Information, and there is a conflict between either of those agreements and this Article 14, the provision in the Design-Build Agreement takes precedence notwithstanding the order of precedence set forth in Section 1.4.2.

Article 15 **Other Provisions**

15.1 Other provisions, if any, are as follows:

(Insert any additional provisions such as incentives or other provisions from the Design-Build Agreement that the parties believe are appropriate to be passed through to the Design Consultant).

[Section 2.2.1 sets forth a traditional negligence standard as it relates to Design Sub-Consultant's performance of its Services. If the Design Sub-Consultant Agreement identifies specific performance standards that can be objectively measured, the parties, by including the following language, agree that the Design Sub-Consultant is obligated to achieve such standards.]

Notwithstanding Section 2.2.1 above, to the extent that the Design Consultant Agreement, contains specifically identified performance standards for aspects of the Design Sub-Consultant's Scope of Services, Design Sub-Consultant agrees that all Services shall be performed to achieve such standards.

[In lieu of Sections 11.5.1 through 11.5.3 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 11.4 herein shall be resolved in a court of competent jurisdiction in the state in which the Project is located.

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

DESIGN CONSULTANT

(Name of Design Consultant)

(Signature)

(Printed Name)

(Title)

Date: _____

DESIGN SUB-CONSULTANT

(Name of Design Sub-Consultant)

(Signature)

(Printed Name)

(Title)

Date: _____

Caution: You should sign an original DBIA document which has this caution printed in blue. An original assures that changes will not be obscured as may occur when documents are reproduced.