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**STANDARD FORM OF AGREEMENT  
BETWEEN OWNER AND DESIGN-  
BUILDER - COST PLUS FEE  
WITH AN OPTION FOR A  
GUARANTEED MAXIMUM PRICE**

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**Document No. 530**

Second Edition 2010  
© Design-Build Institute of America  
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. 530 Standard Form of Agreement Between Owner and Design-Builder - Cost Plus Fee with an Option for a Guaranteed Maximum Price (2010 Edition)

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## Checklist

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

_____	Page 1	Owner's name, address and form of business
_____	Page 1	Design-Builder's name, address and form of business
_____	Page 1	Project name and address
_____	Section 2.1.3	Identify other exhibits to the Agreement
_____	Section 4.2	Note the optional provisions that are provided
_____	Section 4.3.2	Complete blanks for additional sum for use of Work Product
_____	Section 5.2.1	Complete blanks for calendar days and note the optional language that is provided
_____	Section 5.2.2	Insert any interim milestones (optional)
_____	Section 5.4	Complete blanks for liquidated damages and note the optional provisions that are provided
_____	Section 5.5	If the parties select the option provided they have to insert an amount
_____	Section 5.6	Complete blanks for early completion bonus and note the optional provision that is provided
_____	Section 5.7	Note the optional provisions that are provided
_____	Section 6.1.2	Insert basis for pricing preliminary services (optional)
_____	Section 6.2.1	Choose basis for Fee and complete blanks
_____	Section 6.2.2	Insert financial arrangements for adjustments and note optional provisions
_____	Section 6.3.3	Complete blanks for markup; insert or attach personnel names, etc.
_____	Section 6.3.4	Note the optional provision that is provided
_____	Section 6.4.4	Note the optional provision that is provided
_____	Section 6.6.1.1	Complete blanks for GMP, and note the optional provision that is provided
_____	Section 6.6.1.2	Complete blanks for Design-Builder's Contingency
_____	Section 6.6.3.1	Choose method for sharing savings; complete blanks
_____	Section 6.7.1	Note optional provision
_____	Section 7.1.1	Complete blanks for day of month
_____	Section 7.2.1	Complete blanks for retention percentage and note optional provision
_____	Section 7.2.2	Note the optional provision that is provided
_____	Section 7.4	Complete blanks for interest rate
_____	Section 8.1.3	Choose overhead/profit method for termination for convenience
_____	Section 8.2.1	Complete blanks for percentages
_____	Section 8.2.2	Complete blanks for percentages
_____	Section 9.1.1	Insert Owner's Senior Representative's name, etc. (optional)
_____	Section 9.1.2	Insert Owner's Representative's name, etc. (optional)
_____	Section 9.2.1	Insert Design-Builder's Senior Representative's name, etc. (optional)
_____	Section 9.2.2	Insert Design-Builder's Representative's name, etc. (optional)
_____	Section 10.1	Attach Insurance Exhibit
_____	Section 10.2	Insert amount and conditions of bonds or other security and note the options that are provided
_____	Section 11.1	Insert any other provisions (optional)
_____	Last Page	Owner's and Design-Builder's execution of the Agreement

## General Instructions

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

## Specific Instructions

Section	Title	Instruction
General	Purpose of This Agreement	<p>DBIA Document No. 530 (“Agreement”) should be used when the parties intend that Owner pay Design-Builder the Cost of the Work plus a Fee, with or without a Guaranteed Maximum Price (“GMP”). If there is uncertainty about Owner’s Project Criteria, or the Project Criteria remain to be developed by Owner and Design-Builder together, a cost-plus/GMP contracting approach is desirable.</p> <p>If there is certainty as to Owner’s Project Criteria, a lump sum fixed price for the completion of all design and construction services may be suitable, especially when the Owner procures Design-Builder’s services by competitive means. In such case, DBIA Document No. 525 should be used.</p>
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	Related Documents	This Agreement shall be used in conjunction with the General Conditions of Contract. Other related Contract Documents are listed in Article 2 of this 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 Contract Time, which is measured according to the terms of Article 5.
General	Parties: Owner and Design-Builder	On Page 1, enter the legal name and full address of Owner and Design-Builder, as well as the legal form of each entity, e.g., corporation, partnership, limited partnership, limited liability company, or other.
2.1.2	GMP Exhibit, GMP Proposal	If a GMP is established upon execution of this Agreement, the GMP Exhibit must be attached pursuant to Section 6.6.1.1. If a GMP is established after execution of this Agreement, the GMP Proposal must be attached pursuant to Section 6.6.2. Both the GMP Exhibit and GMP Proposal will include those Basis of Design Documents Design-Builder uses as the basis for its GMP.
2.1.5	Construction Documents	After execution of the Agreement, and consistent with the requirements of Section 2.4 of the General Conditions of Contract, Design-Builder will prepare Construction Documents, subject to Owner’s review and approval.
3.2	Order of Precedence	The Contract Documents are listed in Section 2.1 in the order of their precedence. The GMP Exhibit and GMP Proposal are based on the Basis of Design Documents, which are comprised of various documents. The parties should strongly consider establishing the priority of the various documents comprising the GMP Exhibit or GMP Proposal to avoid disputes should discrepancies arise among the documents. Moreover, Section 2.1.3 recognizes that there may be other exhibits attached to this Agreement. If this is the case, the parties should discuss whether these exhibits should be part of the Basis of Design Documents. If these exhibits are not made part of the Basis of Design Documents, these exhibits will not take priority over the Basis of Design Documents in the event of a conflict.
3.3	Definitions	Terms, words and phrases used in the Agreement shall have the same meanings used in the General Conditions of Contract.
3.4	Design Specifications	The Owner is cautioned that if it includes design specifications in its Project Criteria there is case law holding that the Design-Builder is entitled to rely on such information, and to the extent such information is not accurate, the Design-Builder will be entitled to an adjustment in the Contract Price and/or Contract Time. Accordingly, the Owner to avoid such potential liability should consider using performance specifications.

<b>Section</b>	<b>Title</b>	<b>Instruction</b>
4.1	Work Product	This Agreement provides that the Design-Builder shall retain ownership of the Work Product it produces, but obligates Design-Builder to grant a limited license to Owner to use the Work Product according to the terms and circumstances described in Sections 4.2, 4.3, 4.4 and 4.5.
4.2	Owner's Limited License Upon Payment in Full	Design-Builder shall grant Owner, at Owner's sole risk, a limited license to use the Work Product at the completion of the Work in connection with Owner's occupation of the Project. This Section also provides the parties with the option of transferring ownership of some or all of the Work Product to the Owner upon payment in full for all Work performed. Generally, where the Owner desires ownership of Work Product, it is sufficient to transfer ownership of unique architectural and design elements.
4.3	Owner's Limited License Upon Owner's Termination for Convenience or Design-Builder's Election to Terminate	Owner should not use the Termination for Convenience Clause to obtain Design-Builder's valuable design concepts, and then seek lower bids from other design-builders. Therefore, where Owner terminates this Agreement for its convenience, and then decides to complete the Project with its own or thirdparty forces, Design-Builder shall grant Owner the rights set forth in Section 4.2, provided Owner pays Design-Builder all amounts due Design-Builder as required by the Contract Documents, including paying Design-Builder an additional sum per Section 4.3.2 for the use of the Work Product. In the event Design-Builder elects to terminate this Agreement for cause, for reasons set forth in Section 11.4 of the General Conditions of Contract, these same conditions apply to Owner's use of the Work Product.
4.3.2	Additional Compensation	To minimize disputes, the parties should negotiate prior to the execution of the Agreement the amount Owner shall pay Design-Builder for the use of Design-Builder's Work Product in the event Owner terminates this Agreement for its convenience or Design-Builder elects to terminate this Agreement for cause. Enter this amount.
4.4	Owner's Limited License Upon Design-Builder's Default	If Design-Builder is properly terminated for default, Owner is granted a limited license to use the Work Product, to complete the Project, and Owner shall thereafter have the same rights and obligations as set forth in Section 4.2.
4.5	Owner's Indemnification for Use of Work Product	Owner's use or alteration of the Work Product shall be at its sole risk, and Owner must agree to defend, indemnify and hold harmless Design-Builder and anyone working by or through Design-Builder, including Design Consultants of any tier.
5.1	Date of Commencement	Design-Builder's obligation to commence work is triggered by its receipt of a Notice to Proceed unless the parties mutually agree otherwise.
5.2.1	Substantial Completion of the Entire Work	Enter the calendar days duration by which Substantial Completion has to be achieved. The parties in this Section have the option of modifying the definition of Substantial Completion set forth in the General Conditions of Contract if they want to use a Temporary Certificate of Occupancy as the benchmark. If this option is selected, Substantial Completion will be deemed to be achieved no later than the date a Temporary Certificate of Occupancy is issued if applicable to the Project.

Section	Title	Instruction
5.2.2	Interim Milestones	<p>It may be that some portions of the Work must be completed in phases or within a prescribed period of time to accommodate Owner's needs. The parties may, at their option, identify these portions of the Work to be completed prior to Substantial Completion of the entire Work. Enter the calendar days, starting from the Date of Commencement, for achieving Substantial Completion of these identified portions of the Work. If these portions of the Work are required to be substantially completed by certain milestone dates, enter those dates. As presently drafted, no remedy is provided to the Owner if an interim milestone is not met. If the Owner has special requirements as it relates to interim milestones, the Owner may want to consider a remedy for the Design-Builder's failure to meet an interim milestone, as well as providing a bonus to the Design-Builder for satisfying such interim milestone.</p>
5.4	Liquidated Damages	<p>Owner should make a good faith evaluation of the amount that is reasonably necessary to compensate it for delay. Owner should not establish liquidated damages to penalize Design-Builder. Moreover, in the event a GMP is not established upon execution of the Agreement, it appears prudent for the parties to refrain from establishing liquidated damages until such time as the GMP is established.</p> <p>Section 5.4 establishes a grace period between the Scheduled Substantial Completion Date and the assessment of liquidated damages in order to prevent disputes as to which party bears responsibility for only a few days of delay. The parties should enter the calendar days that may pass following the Scheduled Substantial Completion Date before liquidated damages will be assessed.</p> <p>The parties are also provided the option of establishing liquidated damages if the Design-Builder fails to achieve Final Completion within a specified number of days after Substantial Completion. If this option is selected, the parties have to negotiate the number of days, as well as the liquidated damages amount. The parties in negotiating liquidated damages should keep in mind that the amount of liquidated damages for failing to achieve Final Completion should be a considerably scaled down amount and should reflect the financial harm to the Owner. In no case should the total amount of liquidated damages for the Project exceed an amount that is reasonably necessary to compensate Owner for Project delay.</p> <p>The parties also have the option here of eliminating liquidated damages altogether, in which case the Owner can recover actual damages for Project delay at an amount that is capped by the parties. The Owner is cautioned that it still cannot recover consequential damages, as they are waived under Section 10.5.1 of the General Conditions of Contract.</p>
5.5	Liquidated Damages Cap	<p>The parties can agree to cap liquidated damages for delay at a negotiated amount.</p>

Section	Title	Instruction
5.6	Early Completion Bonus	If the Project economics justify liquidated damages, then it is appropriate to couple these liquidated damages with an early completion bonus. The parties should enter the number of calendar days prior to the Scheduled Substantial Completion Date that will set the Bonus Date. Also, enter the amount of the bonus to be paid per day that will allow Owner to share with Design-Builder the economic benefits of early completion. Moreover, in the event a GMP is not established upon execution of the Agreement, it appears prudent for the parties to refrain from establishing an early completion bonus until such time as the GMP is established. The parties also have the option in Section 5.6 of capping the early completion bonus at a negotiated amount.
5.7	Compensation for Force Majeure Events	The parties are provided the opportunity of providing the Design-Builder the right to receive compensation for Force Majeure Events. By selecting this option, the parties agree to modify Section 8.2.2 of the General Conditions of Contract, in which case the parties have to negotiate how many cumulative days of Force Majeure delays must occur before the Design-Builder is entitled to either a negotiated amount per day for delay or the direct costs it has incurred as a result of such delay.
6.1.2	Optional Pricing	This Agreement allows the parties the flexibility to establish within the Contract Price a different payment basis for certain preliminary portions of the Work which may be necessary to permit Design-Builder to furnish Owner with a GMP. Alternatively, the parties may use DBIA Document No. 520 to perform certain preliminary design services prior to setting the GMP. Enter a description of any such services, the basis for determining the price, and the price to be paid.
6.2.1	Design-Builder's Fee	Enter the amount of Design-Builder's Fee as a sum certain or as a percentage of the Cost of the Work. Design-Builder's Fee shall be commensurate with the services it provides and the risk it assumes in providing single point responsibility to Owner.
6.2.2	Adjustments to Design-Builder's Fee	For additive Change Orders, the parties have to negotiate the Fee the Design-Builder will receive. For deductive Change Orders, the parties have the option by checking the appropriate box to signify whether there will be no additional reduction or whether there will be an additional reduction based on a negotiated percentage.
6.3.3	Wages for Design-Builder's Employees at Principal or Branch Offices	DBIA endorses reimbursing salaries and associated benefits of Design-Builder's Project personnel, such as accountants, stationed at offices other than the field office, when to do so is more efficient and cost effective. Enter the percentage markup to be applied for Project-related overhead associated with such personnel. Insert, or attach as an exhibit, a list of such personnel and their job functions.
6.3.4	Employee Benefits	It may be simpler for the parties to agree on a multiplier (rather than actual costs) to compensate the Design-Builder for employee benefits. Accordingly, the parties may want to insert the multiplier to be applied to the wages and salaries of such reimbursable employees.

Section	Title	Instruction
6.3.7	Costs for Defective/Non-Conforming Work	The Cost of the Work shall include the costs to repair or correct defective or non-conforming Work (including warranty or corrective work performed after Substantial Completion) unless caused by Design-Builder's negligence. DBIA believes that Design-Builder should not be penalized for inadvertent mistakes which are inevitable when designing and constructing a Project. To do so would encourage ultra-conservatism in every task, the ultimate cost of which would be greater than a proactive approach to performing the Work.
6.3.23	Warranty Escrow	At this section, the parties are provided the opportunity to establish prior to Final Completion an escrow account in a negotiated amount to be used to reimburse the Design-Builder for its costs incurred in performing warranty Work. If funds remain in the escrow account after the expiration of the warranty period, the funds are returned to the Owner subject to Design-Builder's share of any savings. Note that even if the escrow account is exhausted, if funds remain under the GMP, the Owner is still obligated to reimburse the Design-Builder for its warranty Work.
6.4.4	Allowance Value	This section recognizes that the parties may agree that certain items of Work should be treated as an Allowance Item and priced based on Allowance Values. The Allowance Value for which the Design-Builder will be entitled to receive compensation includes direct cost of labor, materials, equipment, transportation, taxes and insurance associated with the Allowance Item. All other costs associated with the Allowance Item, such as design fees, general conditions costs and fee, are deemed to be included in the Contract Price. However, by checking the box, the parties agree that in the event the actual cost of the Allowance Item is greater than or less than the Allowance Value by a negotiated percentage, then Design-Builder's right to Fee and markup shall be determined pursuant to Section 6.2.2.
6.6	The Guaranteed Maximum Price	<p>This Agreement provides the parties flexibility in establishing the Contract Price. Parties can establish a GMP before or after entering into this Agreement, or elect to proceed on the basis of costs plus a fee, without a GMP.</p> <p>If a GMP method is elected, the GMP should not be established until the Basis of Design Documents are sufficiently defined to make the GMP realistic and meaningful. Setting it too early does not permit reasonable opportunity for scope definition and evaluation of Project risk. On the other hand, setting it too late may not achieve Owner's objective of having an early price guarantee to enable it to make decisions relative to the Project.</p>

Section	Title	Instruction
6.6.1.1	GMP at Agreement Execution	<p>Enter the GMP, if appropriate. Attach as an exhibit to this Agreement the Basis of Design Documents used to establish the GMP. These documents comprise the GMP Exhibit which shall become a Contract Document pursuant to Section 2.1.1 of the Agreement. The Design-Builder does not guarantee any specific line item provided as part of the GMP.</p> <p>By selecting the alternate option, the Design-Builder agrees to guarantee the line item in its GMP for general conditions costs only. The Design-Builder agrees that it is responsible for paying general conditions costs in excess of this line item. The Design-Builder does not guarantee any other line items in the GMP.</p>
6.6.1.2	GMP Contingency	<p>Enter the amount of Design-Builder's Contingency. The Contingency is for the exclusive use of the Design-Builder and covers all unanticipated costs incurred that are not the basis of a Change Order. This section sets forth by way of example only the type of costs that would be funded out of the Contingency. Other costs, such as but not limited to any deductibles the Design-Builder is obligated to pay, would be subject to reimbursement. The Design-Builder is also required to provide the Owner with a monthly status report accounting for the Contingency, including all reasonably foreseen uses and potential uses of the Contingency for the upcoming three months.</p> <p>While not provided for in the Contingency provision, DBIA recognizes that there may be situations where the Owner will want to recapture the Contingency prior to Final Completion. For example, the Owner may want to use amounts in the Contingency to fund changes to the Project. The Owner's desire has to be balanced against the Design-Builder's need to use the Contingency to fund unanticipated costs for which it is liable. Accordingly, balancing these competing concerns is usually accomplished by releasing some of the Contingency to the Owner after the Design-Builder has bought out the Subcontractors, providing that the Design-Builder is not obligated to release Contingency amounts in excess of amounts identified for reasonably foreseen uses or potential uses of the Contingency.</p>

Section	Title	Instruction
6.6.2.1	GMP Proposal After Execution of This Agreement	<p>At the request of Owner, Design-Builder shall submit its GMP Proposal, which shall include the items listed in Sections 6.6.2.1.1 to 6.5.2.1.9. If the parties agree to additions or deletions from this list, modify this Section 6.6.2.1 appropriately.</p> <p>The Agreement provides the parties with flexibility as to when the GMP Proposal will be submitted after execution of the Agreement. Prior to execution of the Agreement the parties should discuss when Owner desires Design-Builder to submit its GMP Proposal.</p>
6.6.2.1.4	Schedule	<p>Given that expedited delivery is one of the primary factors driving many owners to select the design-build method, DBIA strongly believes that the parties should discuss and understand what each party must do to support the Project schedule. The entire Work, both design and construction, should be scheduled. The schedule should indicate the dates for the start and completion of the various stages of the Work, including the date when Owner information and approvals are required, and any Owner created constraints. The Agreement also provides flexibility to establish the Scheduled Substantial Completion Date prior to submission of the GMP Proposal.</p>
6.6.2.3	Acceptance of GMP Proposal	<p>If Owner accepts the GMP Proposal, the parties should amend this Agreement to add the final GMP Proposal as a Contract Document pursuant to Section 2.1.2.</p>
6.6.2.4	Failure to Accept the GMP Proposal	<p>This Agreement provides three options for Owner in the event it fails to accept the GMP Proposal and two choices for Design-Builder if Owner fails to exercise any of the three options. These options are specifically designed to prevent one party from receiving a windfall in the event the parties cannot agree on the GMP and the Agreement is terminated.</p> <p>The parties should take note that if Owner exercises its option to terminate for convenience, or Design-Builder suspends performance, Design-Builder will not be entitled to payment for uncompleted Work provided by Section 8.2. However, additional payment for Owner's use of Work Product will be due Design-Builder pursuant to Section 4.3, if Owner proceeds to complete the Project using Design-Builder's Work Product.</p>
6.6.3	Savings	<p>One of the benefits of a GMP approach is the possibility that with good management by Design-Builder and timely support from Owner the actual Cost of the Work and Fee may be less than the GMP. This creates a savings pool that should result in a benefit to both Design-Builder and Owner. Sharing these savings creates an incentive for Design-Builder to save costs. Some factors to consider in determining how the Savings are shared include the timing for the establishment of the GMP and the amount of Design-Builder's Fee established under Section 6.2.1.</p>
6.6.3.1	Savings Calculations	<p>This section provides that if the actual Cost of the Work and Design-Builder's Fee is less than the GMP, as such GMP may have been adjusted, the savings, if any, shall be shared. The Agreement offers two choices for distributing Savings. Choose a method and enter the appropriate figures.</p>

Section	Title	Instruction
6.7	Performance Incentives	In addition for the potential of the Design-Builder to share in Savings as set forth in Section 6.6.3, there may be other performance incentives that will influence Project success. Such incentives may include award fees tied to the Design-Builder achieving certain standards relative to client satisfaction, safety, and personnel retention. The parties are encouraged to discuss the use of such incentives during negotiation of this Agreement. Any agreement on the use of incentives should be set forth in an exhibit attached to this Agreement.
7.1.1	Progress Payments	Enter the day of the month when Design-Builder shall submit its Application for Payment.
7.2.1	Retainage	<p>Enter the percentage Owner will retain from Progress Payments to Design-Builder until fifty percent (50%) of the Work is completed. Owner should recognize that it creates undue hardship to hold retainage on Subcontractors that have completed their work early in the Project. Owner should accordingly consider releasing retainage on Subcontractors that complete work early in the Project, providing that these Subcontractors have satisfactorily performed their portion of the Work.</p> <p>The parties are provided the option of modifying the retainage provision by checking the box. This option excludes from retainage the Design-Builder's General Conditions costs and amounts paid to Design-Builder's Design Consultant. The rationale for selecting this option is that the Design-Builder is obligated to pay its General Conditions costs in full each month and that under the design-bid-build delivery method, the Owner typically does not retain sums from its Designer.</p>
7.2.2	Release of Retainage	This section requires the Owner to release retainage to the Design-Builder. If the Design-Builder and Owner have established a warranty reserve in accordance with Section 6.3.2.4, the parties shall establish an escrow account at this time.
7.4	Interest	The parties should enter the rate at which interest will accrue on Design-Builder's payments if unpaid five (5) days after due. Late payment creates a hardship for Design-Builder, its Design Consultants and Subcontractors.
7.5	Record Keeping	The Owner is provided access to Design-Builder's accounting information as it relates to Costs of the Work. However, if the parties have agreed to multipliers or markups, the time to challenge and negotiate those percentages is at the time the parties execute the Agreement and not during the Project or after it has been completed. Accordingly, the Owner 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.

Section	Title	Instruction
8.1.3	Termination for Convenience: Overhead and Profit	The parties should choose prior to execution of the Agreement the method that will be used to determine overhead and profit paid to Design-Builder in the event Owner terminates Design-Builder for its convenience. The parties may choose to set percentage rates for overhead and profit prior to execution of the Agreement, or may choose to determine reasonable sums to be paid for overhead and profit at the time of the termination. If the parties choose to set overhead and profit rates prior to execution of the Agreement, the percentages should be entered in Section 8.1.3.
8.2	Termination for Convenience: Additional Payments	Although it is important for Owner to have a process for terminating this Agreement for convenience, the process must consider the interests of Design-Builder. If Owner terminates this Agreement for its own convenience, compensating Design-Builder for its costs will not be adequate because Design-Builder will have committed its resources for a small amount of revenue. Therefore, in addition to the overhead and profit paid in Section 8.1, Owner shall pay Design-Builder an additional sum, calculated as a percentage of the remaining balance of the Contract Price or, if a GMP has not been established, the remaining balance of the most recent estimated Contract Price. Enter the percentages Owner shall pay Design-Builder if Owner terminates this Agreement for its own convenience prior to or after the start of construction.
8.3	Termination for Convenience: Owner's Use of Work Product	Owner should not use the Termination for Convenience clause to obtain Design-Builder's valuable design concepts and then seek lower bids from another design-builder. If Owner terminates this Agreement for its own convenience, and chooses to proceed with the Project using Design-Builder's Work Product, Owner should pay an additional sum for the use of Design-Builder's Work Product pursuant to Section 4.3.
Article 9	Representatives of the Parties	<p>Enter the name, title, address and telephone number of Owner's Senior Representative and Owner's Representative at Sections 9.1.1 and 9.1.2, respectively.</p> <p>Enter the name, title, address and telephone number of Design-Builder's Senior Representative and Design-Builder's Representative at Sections 9.2.1 and 9.2.2, respectively.</p> <p>The parties can elect to establish these Representatives during the performance of the Project rather than at the time of execution of this Agreement. If Representatives are identified after execution of the Agreement, an appropriate amendment should be made to the Agreement at the time these individuals are designated.</p>
10.1	Insurance	Attach an Insurance Exhibit setting forth in detail the insurance coverages required for the Project. Parties are advised to familiarize themselves with the terms of Article 5 of the General Conditions of Contract, Insurance and Bonds, and to consult their insurance advisor.
10.2	Bonds	Enter the type and amount of bonds or other performance security required for the Project. Where bonding is not required by statute, Owner may want to evaluate the project risks versus the bonding costs in deciding what type of performance security to require.

<b>Section</b>	<b>Title</b>	<b>Instruction</b>
11.1	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.

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**Standard Form of Agreement**  
**Between**  
**Owner and Design-Builder - Cost Plus Fee with**  
**an Option for a Guaranteed Maximum Price**

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

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This **AGREEMENT** is made as of the \_\_\_\_\_ day of September in the year of 2024, by and between the following parties, for services in connection with the Project identified below:

**OWNER:**

*(Name and address)*

**City of Olathe, Kansas**  
**100 E. Santa Fe**  
**P.O. Box 786**  
**Olathe, KS 66051-0768**

**DESIGN-BUILDER:**

*(Name and address)*

**Turner Construction**  
**1220 Washington Street Suite 100**  
**Kansas City, Missouri 64105**

**PROJECT:**

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

**Police Firing Range**  
**Project No. 6-C-017-23**  
**167<sup>th</sup> Street and Interstate Highway 36**  
**Olathe, KS 66061**

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

## **Article 1**

### **Scope of Work**

**1.1** Design-Builder shall perform all design and construction services, and provide all material, equipment, tools and labor, necessary to complete the Work described in and reasonably inferable from the Contract Documents.

## **Article 2**

### **Contract Documents**

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

**2.1.1** All written modifications, amendments, minor changes, and Change Orders to this Agreement issued in accordance with DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder (2010 Edition)*, as modified and attached hereto ("General Conditions of Contract");

**2.1.2** The GMP Exhibit referenced in Section 6.6.1.1 herein or, if applicable, the GMP Proposal(s) accepted by Owner in accordance with Section 6.6.2 herein;

**2.1.3** This Agreement, including all exhibits (List for example, performance standard requirements, performance incentive arrangements, markup exhibits, allowances, unit prices, or exhibit detailing offsite reimbursable personnel) but excluding, if applicable, the GMP Exhibit;

**2.1.4** The General Conditions of Contract; and

**2.1.5** Construction Documents prepared and approved in accordance with Section 2.4 of the General Conditions of Contract.

**2.1.6** Design-Builder's response to the Request for Qualifications.

**2.1.7** Request for Qualifications issued by the Owner on May 20, 2024.

## **Article 3**

### **Interpretation and Intent**

**3.1** Design-Builder and Owner, prior to execution of the Agreement (and again, if applicable, at the time of acceptance of the GMP Proposal(s) by Owner in accordance with Section 6.6.2 hereof), shall carefully review all the Contract Documents, including the various documents comprising the Basis of Design Documents, for any conflicts or ambiguities. Design-Builder and Owner will discuss and resolve any identified conflicts or ambiguities prior to execution of the Agreement or, if applicable, prior to Owner's acceptance of the GMP Proposal(s).

**3.2** The Contract Documents are intended to permit the parties to complete the Work and all obligations required by the Contract Documents within the Contract Time(s) for the Contract Price. The Contract Documents are intended to be complementary and interpreted in harmony so as to avoid conflict, with words and phrases interpreted in a manner consistent with construction and design industry standards. In the event inconsistencies, conflicts, or ambiguities between or among the Contract Documents are

discovered after execution of the Agreement, or if applicable, after Owner's acceptance of the GMP Proposal(s), Design-Builder and Owner shall attempt to resolve any ambiguity, conflict or inconsistency informally, recognizing that the Contract Documents shall take precedence in the order in which they are listed in Section 2.1 hereof. *(Note, the parties are strongly encouraged to establish in the GMP Exhibit or GMP Proposal (as applicable) the priority of the various documents comprising such exhibit or proposal.)*

**3.3** Terms, words and phrases used in the Contract Documents, including this Agreement, shall have the meanings given them in the General Conditions of Contract.

**3.4** If Owner's Project Criteria contain design specifications: (a) Design-Builder 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; and (b) Design-Builder shall be entitled to an adjustment in the Contract Price and/or Contract Time(s) to the extent Design-Builder's cost and/or time of performance have been adversely impacted by such inaccurate design specification.

**3.5** The Contract Documents form the entire agreement between Owner and Design-Builder and by incorporation herein are as fully binding on the parties as if repeated herein. No oral representations or other agreements have been made by the parties except as specifically stated in the Contract Documents.

## **Article 4**

### **Ownership of Work Product**

**4.1 Work Product.** ~~All drawings, specifications and other documents and electronic data, including such documents identified in the General Conditions of Contract, furnished by Design-Builder to Owner under this Agreement ("Work Product") are deemed to be instruments of service and Design-Builder shall retain the ownership and property interests therein, including but not limited to any intellectual property rights, copyrights and/or patents, subject to the provisions set forth in Sections 4.2 through 4.5 below.~~

**4.1.1** All drawings, specifications, test reports, and other materials and work products which are prepared or furnished by the Owner prior to this Agreement, or for the performance thereof, shall remain the Owner's sole property. The Owner shall make available to Design-Builder the copies of such materials as necessary for Design-Builder to perform the work.

**4.1.2** All drawings, specifications, test reports, and other materials and work products, including computer aided drawings, designs, and other data filed on electronic media that will be prepared or furnished by Design-Builder (and Design-Builder's independent professional associates and subcontractors) under this Agreement shall become the sole property of the Owner for use on the Project only. At the conclusion of the Project, or at any other time requested by Owner, Design-Builder shall give Owner all materials obtained or produced in the course of performing the work. Provided, however, that in the event the Project is terminated for convenience, such materials shall be returned to the Design-Builder.

**4.1.3** The reuse or modification of any document prepared or furnished by Design-Builder shall be at Owner's sole risk and without liability or legal exposure to Design-Builder.

**4.2** ~~**Owner's Limited License upon Project Completion and Payment in Full to Design-Builder.** Upon Owner's payment in full for all Work performed under the Contract Documents, Design-Builder shall grant Owner a limited license to use the Work Product in connection with Owner's occupancy of the Project, conditioned on Owner's express understanding that its alteration of the Work Product without the involvement of Design-Builder is at Owner's sole risk and without liability or legal exposure to Design-Builder or anyone working by or through Design-Builder, including Design Consultants of any tier (collectively the "Indemnified Parties"), and on the Owner's obligation to provide the indemnity set forth in Section 4.5 below.~~

***[At the parties' option, one of the following may be used in lieu of Section 4.2.]***

Upon Owner's payment in full for all Work performed under the Contract Documents, Design-Builder: (a) grants Owner a limited license to use the Work Product in connection with Owner's occupancy of the Project; and (b) transfers all ownership and property interests, including but not limited to any intellectual property rights, copyrights and/or patents, in that portion of the Work Product that consists of architectural and other design elements and specifications that are unique to the Project. The parties shall specifically designate those portions of the Work Product for which ownership in the Work Product shall be transferred. Such grant and transfer are conditioned on Owner's express understanding that its alteration of the Work Product without the involvement of Design-Builder is at Owner's sole risk and without liability or legal exposure to Design-Builder or anyone working by or through Design-Builder, including Design Consultants of any tier (collectively the "Indemnified Parties"), and on the Owner's obligation to provide the indemnity set forth in Section 4.5 below.

or

Upon Owner's payment in full for all Work performed under the Contract Documents, Design-Builder transfers to Owner all ownership and property interests, including but not limited to any intellectual property rights, copyrights and/or patents, in the Work Product. Such transfer is conditioned on Owner's express understanding that its alteration of the Work Product without the involvement of Design-Builder is at Owner's sole risk and without liability or legal exposure to Design-Builder or anyone working by or through Design-Builder, including Design Consultants of any tier (collectively the "Indemnified Parties"), and on the Owner's obligations to provide the indemnity set forth in Section 4.5 below.

**4.3 — Owner's Limited License upon Owner's Termination for Convenience or Design-Builder's Election to Terminate.** If Owner terminates this Agreement for its convenience as set forth in Article 8 hereof, or if Design-Builder elects to terminate this Agreement in accordance with Section 11.4 of the General Conditions of Contract, Design-Builder shall, upon Owner's payment in full of the amounts due Design-Builder under the Contract Documents, grant Owner a limited license to use the Work Product to complete the Project and subsequently occupy the Project, and Owner shall thereafter have the same rights as set forth in Section 4.2 above, conditioned on the following:

**4.3.1** Use of the Work Product is at Owner's sole risk without liability or legal exposure to any Indemnified Party, and on the Owner's obligation to provide the indemnity set forth in Section 4.5 below, and

**4.3.2** Owner agrees to pay Design-Builder 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 4.2 if Owner resumes the Project through its employees, agents, or third parties.

**4.4 — Owner's Limited License upon Design-Builder's Default.** If this Agreement is terminated due to Design-Builder's default pursuant to Section 11.2 of the General Conditions of Contract, then Design-Builder grants Owner a limited license to use the Work Product to complete the Project and subsequently occupy the Project, and Owner shall thereafter have the same rights and obligations as set forth in Section 4.2 above. Notwithstanding the preceding sentence, if it is ultimately determined that Design-Builder was not in default, Owner shall be deemed to have terminated the Agreement for convenience, and Design-Builder shall be entitled to the rights and remedies set forth in Section 4.3 above.

**4.5 — Owner's Indemnification for Use of Work Product.** If Owner is required to indemnify any Indemnified Parties based on the use or alteration of the Work Product under any of the circumstances identified in this Article 4, Owner shall defend, indemnify and hold harmless such Indemnified Parties from and against any and all claims, damages, liabilities, losses and expenses, including attorneys' fees, arising out of or resulting from the use or alteration of the Work Product.

## Article 5

### Contract Time

**5.1 Date of Commencement.** The Work shall commence ~~within five (5) days of Design-Builder's receipt~~ on the date of the Owner's issuance of Owner's Notice to Proceed ("Date of Commencement") unless the parties mutually agree otherwise in writing.

**5.2 Substantial Completion and Final Completion.**

**5.2.1** Substantial Completion of the entire Work shall be achieved no later than \_\_\_\_\_ (~~\_\_\_\_\_~~) calendar days ~~after the Date of Commencement~~ the date established with acceptance of the GMP Proposal(s) ("Scheduled Substantial Completion Date").

~~The parties agree that the definition for Substantial Completion set forth in Section 1.2.18 of the General Conditions of Contract is hereby modified to read as follows:~~

~~"Substantial Completion is the date on which the Work, or an agreed upon portion of the Work, is sufficiently complete in accordance with the Contract Documents so that Owner can occupy and use the Project or a portion thereof for its intended purposes, provided, however, that Substantial Completion shall be deemed to have been achieved no later than the date of issuance of a Temporary Certificate of Occupancy issued by the local building official."~~

**5.2.2** Interim milestones and/or Substantial Completion of identified portions of the Work ("Scheduled Interim Milestone Dates") shall be achieved as follows: *(Insert any interim milestones for portions of the Work with different scheduled dates for Substantial Completion)*

**5.2.2.1** Programming and Master Planning will be completed no later than forty-five (45) calendar days after date of approval of this agreement. This phase shall include a review with the Owner to understand the Owner's requirements and expectations for the completed project. This will include planning for the outdoor shooting range facilities as well as, at a minimum, the programming and concept development of the indoor shooting range facility. This phase shall include the development of conceptual site plan(s) of the entire 70 acre parcel reflecting short-term and long-term Owner goals as understood at the time of creation. This phase will also include any survey, geotechnical studies, evaluations, and other services necessary to generally define the scope of the project and the work required to meet the Owner's requirements and expectations for the completed project.

**5.2.2.2** 100% Design Drawings will be complete no later than one hundred fifty six (156) calendar days after completion of program and master planning. This phase shall consist of all final plans and project specifications setting forth in detail the requirements for all construction and the quality levels of all materials, systems and equipment required to provide for a complete and functional project. This includes the completion of documents necessary for submittal of the project to all authorities for required code and permit review and approval in advance of the authorities issuing the required building and construction permits, and includes the completion of all documents necessary to issue the project for competitive bidding. This will also include phased infrastructure drawings for the entire 70-acre parcel reflecting short-term and long-term Owner goals as understood at the time of creation.

**5.2.2.3** One or more GMP Proposals in accordance with Section 6.6.2.1 of this Agreement will be developed by the Design-Builder and issued to the Owner no later than five (5) work weeks after completion of the 100% Construction Documents.

**5.2.3** Final Completion of the Work or identified portions of the Work shall be achieved as expeditiously as reasonably practicable in accordance with the requirements of the Contract

Documents. Final Completion is the date when all Work is complete pursuant to the definition of Final Completion set forth in Section 1.2.7 of the General Conditions of Contract.

**5.2.4** All of the dates set forth in this Article 5 (collectively the "Contract Time(s)") shall be subject to adjustment in accordance with the General Conditions of Contract.

**5.3 Time is of the Essence.** Owner and Design-Builder mutually agree that time is of the essence with respect to the dates and times set forth in the Contract Documents.

**5.4 Liquidated Damages.** Design-Builder understands that, except in the case of a Force Majeure Event, if Substantial Completion is not attained by the Scheduled Substantial Completion Date, Owner will suffer damages which are difficult to determine and accurately specify. Design-Builder agrees that if Substantial Completion is not attained by within Ten (10) days after the Scheduled Substantial Completion Date (the "LD Date"), Design-Builder shall pay Owner Five Hundred Dollars (\$500.00) as liquidated damages for each day that Substantial Completion extends beyond the LD Date.

Design-Builder understands that, except in the case of a Force Majeure Event, if Final Completion is not achieved within Thirty (30) days of the Substantial Completion Date, Owner will suffer damages which are difficult to determine and accurately specify. Design-Builder agrees that if Final Completion is not achieved within Thirty (30) days of Substantial Completion, Design-Builder shall pay to Owner Two-Hundred Fifty Dollars (\$250.00), as liquidated damages for each calendar day that Final Completion is delayed beyond the above-referenced number of days.

~~**5.4** — Design-Builder and Owner have agreed not to provide for liquidated damages in this Agreement for failure of Design-Builder to achieve the Contract Time(s) set forth in this Article 5. Design-Builder understands, however, that Owner may suffer actual damages in the event the Contract Time(s) set forth herein are not timely achieved. Owner shall be able to recover such actual damages from Design-Builder to the extent it can demonstrate that actual damages have been incurred, are directly related and caused by Design-Builder's failure to meet the Contract Time(s) set forth herein, and are not waived by Section 10.5.1 of the General Conditions of Contract. Notwithstanding the foregoing, in no event shall Design-Builder's liability for actual damages for delays exceed \_\_\_\_\_ Dollars (\$ \_\_\_\_\_).~~

**5.5** Any liquidated damages assessed pursuant to this Agreement shall be in lieu of all liability for any and all extra costs, losses, expenses, claims, penalties and any other damages, whether special or consequential, and of whatsoever nature, incurred by Owner which are occasioned by any delay in achieving the Contract Time(s).

~~Owner and Design-Builder agree that the maximum aggregate liability Design-Builder has for any liquidated damages that may be assessed under this Agreement for failure to achieve the Contract Time(s) shall be \_\_\_\_\_ Dollars (\$ \_\_\_\_\_).~~

~~**5.6 — Early Completion Bonus.** If Substantial Completion is attained on or before \_\_\_\_\_ (\_\_\_\_\_) days before the Scheduled Substantial Completion Date (the "Bonus Date"), Owner shall pay Design-Builder at the time of Final Payment under Section 7.3 hereof an early completion bonus of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) for each day that Substantial Completion is attained earlier than the Bonus Date. (If a GMP is not established upon execution of this Agreement, the parties should consider setting the early completion bonus after GMP negotiations. If an early completion bonus is applicable to any dates set forth in Section 5.2.2 or 5.2.3 hereof, this Section 5.6 will need to be modified accordingly.)~~

~~Owner and Design-Builder agree that the maximum aggregate amount that Design-Builder shall receive as the early Completion Bonus is \_\_\_\_\_ Dollars (\$ \_\_\_\_\_).~~

~~In addition to Design-Builder's right to a time extension for those events set forth in Section 8.2.1 of the General Conditions of Contract, Design-Builder shall also be entitled to an appropriate adjustment of the Contract Price for those events set forth in Section 8.2.1 of the General Conditions of Contract, provided, however, for Force Majeure Events, Design-Builder shall only be entitled to an increase in the Contract~~

Price if said events exceed \_\_\_\_\_ (\_\_\_\_\_) cumulative days. Said additional compensation shall be limited to:

\$ \_\_\_\_\_ dollars a day for each day work is delayed beyond the Scheduled Substantial Completion Date.

or

the direct costs and expenses Design-Builder can demonstrate it has reasonably and actually incurred as a result of such event.

## **Article 6**

### **Contract Price**

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

**6.1.1** Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract a contract price ("Contract Price") equal to Design-Builder's Fee (as defined in Section 6.2 hereof) plus the Cost of the Work (as defined in Section 6.3 hereof), subject to any GMP established in Section 6.6 hereof and any adjustments made in accordance with the General Conditions of Contract.

**6.1.2** For the specific Work set forth below, Owner agrees to pay Design-Builder, as part of the Contract Price, on the following basis: *(This is an optional section intended to provide the parties with flexibility to identify and price limited preliminary services, such as a lump sum or cost-plus arrangement for preliminary design, programming, or services necessary to enable Design-Builder to furnish Owner with a GMP before execution of this Agreement.)*

**6.1.2.1** The Design-Builder shall be compensated in an amount not to exceed five hundred sixteen thousand eight hundred dollars (\$516,800.00) for all planning, design, permitting, bidding, and other services and reimbursable expenses necessary for the Design-Builder to establish the GMP Proposal(s). The maximum compensation stated above for design services is calculated by multiplying the Design-Builder's design phase fee of 6.3% Percent against the current anticipated maximum construction budget for the project of eight million, one hundred thousand dollars (\$8,100,00.00)

**6.1.2.2** Changes made by the Owner to the scope of the project and/or the maximum construction budget for the project prior to beginning design phase services shall be cause for an adjustment to the maximum design services fee to be paid to the design-builder, whether it be an increase or decrease in fee. The fee adjustment shall be calculated by multiplying the Design-Builder's design phase fee of \$516,800.00 (6.3%) against the amount of the increase or decrease in the construction budget.

**6.1.2.3** Changes made by the Owner to the scope of the project and/or the maximum construction budget for the project after design phase services have commenced by the Design-Builder shall be cause for the Owner and Design-Builder to review the status of the design work completed at the time of the contemplated project scope and/or construction budget change. If an adjustment to the maximum design services fee to be paid to the design-builder is determined to be warranted based upon a review of the design service work already completed and a review of the contemplated change to the project scope and/or construction budget, whether it be an increase or decrease in fee, the fee adjustment shall be calculated as such:

6.1.2.3.1 By multiplying the Design-Builder's design phase fee of \$516,800.00 (6.3%) against the amount of the increase or decrease in the construction budget;

or

6.1.2.3.2 If the method identified in 6.1.2.3.1 for calculating the fee adjustment is agreed upon by both the Owner and the Design-Builder to be unequitable based upon the work previously completed and the contemplated project scope and/or construction budget change, then the amount of the fee adjustment shall be determined by other methods equitable to both the Owner and Design-Builder.

6.1.2.4 Compensation for each phase of services shall be as follows:

<u>Programming and Master Planning</u>	<u>Twenty-Five Percent</u>	<u>(25%)</u>
<u>Design/Construction Documents/Bidding</u>	<u>Fifty Percent</u>	<u>(50%)</u>
<u>Construction Administration (in GMP)</u>	<u>Twenty-Five Percent</u>	<u>(25%)</u>

## 6.2 Design-Builder's Fee.

6.2.1 Design-Builder's Fee shall be:

\_\_\_\_\_ Dollars (\$ \_\_\_\_\_), as adjusted in accordance with Section 6.2.2 below.

or

Five percent (5%) of the Cost of the Work, as adjusted in accordance with Section 6.2.2 below.

6.2.2 Design-Builder's Fee will be adjusted as follows for any changes in the Work:

For changes in the Work that either increases or decreases the Guaranteed Maximum Price, the fee paid to the Design-Builder shall equitably adjust at the rate identified in Section 6.2.1.

~~6.2.2.1~~ ~~For additive Change Orders, including additive Change Orders arising from both additive and deductive items, it is agreed that Design-Builder shall receive a Fee of \_\_\_\_\_ percent (\_\_\_\_%) of the additional Costs of the Work incurred for that Change Order, plus any other markups set forth in Exhibit \_\_\_\_\_ hereto.~~

~~6.2.2.2~~ ~~For deductive Change Orders, including deductive Change Orders arising from both additive and deductive items, the deductive amounts shall include:~~

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

or

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

**6.3 Cost of the Work.** The term Cost of the Work shall mean costs reasonably and actually incurred by Design-Builder in the proper performance of the Work. The Cost of the Work shall include only the following:

**6.3.1** Wages of direct employees of Design-Builder performing the Work at the Site or, with Owner's agreement, at locations off the Site; provided, however, that the costs for those employees of Design-Builder performing design services shall be ~~calculated on the basis of prevailing market rates for design professionals performing such services or, if applicable, those rates set forth in an exhibit to this Agreement~~ charged at the hourly rate as indicated in the Design-Builder's Personnel Hourly Rate Schedule identified as **Exhibit A** to this Agreement.

**6.3.2** Wages or portions of salaries of Design-Builder's supervisory and administrative personnel engaged in the performance of the Work and who are located at the Site or working off-Site to assist in the production or transportation of material and equipment necessary for the Work, the cost for those services charged at the hourly rate as indicated in the Design-Builder's Personnel Hourly Rate Schedule identified as Exhibit A to this Agreement.

**6.3.3** Wages or portions of salaries of Design-Builder's personnel stationed at Design-Builder's principal or branch offices, but only to the extent said personnel are identified in **Exhibit A** and performing the function set forth in said Exhibit, and only for that portion of their time as is specifically devoted to the Work of this Agreement. ~~The reimbursable costs of personnel stationed at Design-Builder's principal or branch offices shall include a \_\_\_\_\_ percent ( \_\_\_\_\_ %) markup to compensate Design-Builder for the Project-related overhead associated with such personnel.~~

**6.3.4** Costs incurred by Design-Builder for employee benefits, premiums, taxes, insurance, contributions and assessments required by law, collective bargaining agreements, or which are customarily paid by Design-Builder, to the extent such costs are based on wages and salaries paid to employees of Design-Builder covered under Sections 6.3.1 through 6.3.3 hereof.

A multiplier of \_\_\_\_\_ percent ( \_\_\_\_\_ %) shall be applied to the wages and salaries of the employees of Design-Builder covered under Sections 6.3.1 through 6.3.3 hereof.

**6.3.5** The reasonable portion of the cost of travel, accommodations and meals for Design-Builder's personnel necessarily and directly incurred in connection with the performance of the Work.

**6.3.6** Payments properly made by Design-Builder to Subcontractors and Design Consultants for performance of portions of the Work, including any insurance and bond premiums incurred by Subcontractors and Design Consultants.

**6.3.7** Costs incurred by Design-Builder in repairing or correcting defective, damaged or nonconforming Work (including any warranty or corrective Work performed after Substantial Completion), provided that such Work was beyond the reasonable control of Design-Builder, or caused by the ordinary mistakes or inadvertence, and not the negligence, of Design-Builder or those working by or through Design-Builder. If the costs associated with such Work are recoverable from insurance, Subcontractors or Design Consultants, Design-Builder shall exercise its best efforts to obtain recovery from the appropriate source and provide a credit to Owner if recovery is obtained.

**6.3.8** Costs, including transportation, inspection, testing, storage and handling, of materials, equipment and supplies incorporated or reasonably used in completing the Work.

**6.3.9** Costs (less salvage value) of materials, supplies, temporary facilities, machinery, equipment and hand tools not customarily owned by the workers that are not fully consumed in the performance of the Work and which remain the property of Design-Builder, including the costs of transporting, inspecting, testing, handling, installing, maintaining, dismantling and removing such items.

**6.3.10** Costs of removal of debris and waste from the Site.

**6.3.11** The reasonable costs and expenses incurred in establishing, operating and demobilizing the Site office, including the cost of facsimile transmissions, long-distance telephone calls, postage and express delivery charges, telephone service, photocopying and reasonable petty cash expenses.

**6.3.12** Rental charges and the costs of transportation, installation, minor repairs and replacements, dismantling and removal of temporary facilities, machinery, equipment and hand tools not customarily owned by the workers, which are provided by Design-Builder at the Site, whether rented from Design-Builder or others, and incurred in the performance of the Work.

**6.3.13** Premiums for insurance and bonds required by this Agreement or the performance of the Work.

**6.3.14** All fuel and utility costs incurred in the performance of the Work.

**6.3.15** Sales, use or similar taxes, tariffs or duties incurred in the performance of the Work.

~~**6.3.16** Legal costs, court costs and costs of mediation and arbitration reasonably arising from Design-Builder's performance of the Work, provided such costs do not arise from disputes between Owner and Design-Builder.~~

**6.3.17** Costs for permits, royalties, licenses, tests and inspections incurred by Design-Builder as a requirement of the Contract Documents.

~~**6.3.18** The cost of defending suits or claims for infringement of patent rights arising from the use of a particular design, process, or product required by Owner, paying legal judgments against Design-Builder resulting from such suits or claims, and paying settlements made with Owner's consent.~~

~~**6.3.19** Deposits which are lost, except to the extent caused by Design-Builder's negligence due to the actions of the Owner.~~

**6.3.20** Costs incurred in preventing damage, injury or loss in case of an emergency affecting the safety of persons and property, except to the extent such emergency was caused in whole or in part by the Design-Builder.

**6.3.21** Accounting and data processing costs related to the Work.

**6.3.22** Other costs reasonably and properly incurred in the performance of the Work to the extent approved in writing by Owner.

~~**6.3.23** Owner and Design-Builder agree that an escrow account in the amount of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) shall be established prior to Final Completion, which escrow shall be used to reimburse Design-Builder for the Costs of the Work incurred after Final Completion to perform warranty Work. The escrow agreement will provide that any sums not used at the expiration of the warranty period shall be returned to Owner, subject to any savings Design-Builder may be entitled to under this Agreement. In the event the warranty escrow account is exhausted, but funds remain under the GMP, Owner shall be obligated to pay Design-Builder the Costs of the Work incurred after Final Completion to perform warranty Work up to the GMP.~~

## **6.4 Allowance Items and Allowance Values.**

**6.4.1** Any and all Allowance Items, as well as their corresponding Allowance Values, are set forth in the GMP Exhibit or GMP Proposal(s) and are included within each GMP.

**6.4.2** Design-Builder and Owner have worked together to review the Allowance Items and Allowance Values based on design information then available to determine that the Allowance Values constitute reasonable estimates for the Allowance Items. Design-Builder and Owner will continue working closely together during the preparation of the design to develop Construction Documents consistent with the Allowance Values. Nothing herein is intended in any way to constitute a guarantee by Design-Builder that the Allowance Item in question can be performed for the Allowance Value.

**6.4.3** No work shall be performed on any Allowance Item without Design-Builder first obtaining in writing advanced authorization to proceed from Owner. Owner agrees that if Design-Builder is not provided written authorization to proceed on an Allowance Item by the date set forth in the Project schedule, due to no fault of Design-Builder, Design-Builder may be entitled to an adjustment of the Contract Time(s) ~~and Contract Price.~~

**6.4.4** The Allowance Value for an Allowance Item includes the direct cost of labor, materials, equipment, transportation, taxes and insurance associated with the applicable Allowance Item. All other costs, including design fees, Design-Builder's overall project management and general conditions costs, overhead and fee, are deemed to be included in the original Contract Price, and are not subject to adjustment, regardless of the actual amount of the Allowance Item.

~~In the event the actual direct cost of labor, materials, equipment, transportation, taxes and insurance associated with an Allowance Item is \_\_\_\_\_ percent (\_\_\_\_\_% ) greater than or less than the Allowance Value for such Allowance Item, Design-Builder and Owner agree that Design-Builder's right to Fee and markup shall be adjusted in accordance with Section 6.2.2.~~

**6.4.5** Whenever the actual costs for an Allowance Item is more than or less than the stated Allowance Value, the Contract Price shall be adjusted accordingly by Change Order, subject to Section 6.4.4. The amount of the Change Order shall reflect the difference between actual costs incurred by Design-Builder for the particular Allowance Item and the Allowance Value.

## **6.5 Non-Reimbursable Costs.**

**6.5.1** The following shall not be deemed as costs of the Work:

**6.5.1.1** Compensation for Design-Builder's personnel stationed at Design-Builder's principal or branch offices, except as provided for in Sections 6.3.1, 6.3.2 and 6.3.3 hereof.

**6.5.1.2** Overhead and general expenses, except as provided for in Section 6.3 hereof, or which may be recoverable for changes to the Work.

**6.5.1.3** The cost of Design-Builder's capital used in the performance of the Work.

~~**6.5.1.4** If the parties have agreed on a GMP, costs~~ Costs that would cause the GMP(s), as adjusted in accordance with the Contract Documents, to be exceeded.

## **6.6 The Guaranteed Maximum Price ("GMP").**

### ~~**6.6.1 GMP Established Upon Execution of this Agreement.**~~

~~**6.6.1.1** Design-Builder guarantees that it shall not exceed the GMP of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_). Documents used as a basis for the GMP shall be identified in an exhibit to this Agreement ("GMP Exhibit"). Design-Builder does not guarantee any specific line item provided as part of the GMP, and has the sole discretion to apply payment due to overruns in one line item to savings due to underruns in any other line item. Design-Builder agrees, however, that it will be responsible for paying all costs of completing the~~

~~Work which exceed the GMP, as adjusted in accordance with the Contract Documents. (While the GMP Exhibit will be developed in advance or concurrently with the execution of this Agreement, it is recommended that such exhibit include the items set forth in Section 6.6.2.1 below, to ensure that the basis for the GMP is well understood).~~

~~Design Builder guarantees that it shall not exceed the GMP of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_). Documents used as basis for the GMP shall be identified as an exhibit to this Agreement ("GMP Exhibit"). Design Builder does not guarantee any specific line item provided as part of the GMP, provided, however, that it does guarantee the line item for its general project management and general conditions costs, in the amount of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_), and as set forth in the GMP Exhibit ("General Conditions Cap"). Design Builder agrees that it will be responsible for paying the applicable general conditions costs in excess of the General Conditions Cap, as well as be responsible for all costs of completing the Work which exceed the GMP, as said General Conditions Cap and the GMP may be adjusted in accordance with the Contract Documents.~~

~~**6.6.1.2** The GMP includes a Contingency in the amount of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) which is available for Design Builder's exclusive use for unanticipated costs it has incurred that are not the basis for a Change Order under the Contract Documents. By way of example, and not as a limitation, such costs may include: (a) trade buy-out differentials; (b) overtime or acceleration; (c) escalation of materials; (d) correction of defective, damaged or nonconforming Work, design errors or omissions, however caused; (e) Subcontractor defaults; or (f) those events under Section 8.2.2 of the General Conditions of Contract that result in an extension of the Contract Time but do not result in an increase in the Contract Price. The Contingency is not available to Owner for any reason, including, but not limited to changes in scope or any other item which would enable Design Builder to increase the GMP under the Contract Documents. Design Builder shall provide Owner notice of all anticipated charges against the Contingency, and shall provide Owner as part of the monthly status report required by Section 2.1.2 of the General Conditions of Contract an accounting of the Contingency, including all reasonably foreseen uses or potential uses of the Contingency in the upcoming three (3) months. Design Builder agrees that with respect to any expenditure from the Contingency relating to a Subcontractor default or an event for which insurance or bond may provide reimbursement, Design Builder will in good faith exercise reasonable steps to obtain performance from the Subcontractor and/or recovery from any surety or insurance company. Design Builder agrees that if Design Builder is subsequently reimbursed for said costs, then said recovery will be credited back to the Contingency.~~

## **6.6.2 GMP(s) Established after Execution of this Agreement.**

~~**6.6.2.1 GMP Proposal(s).** If requested by Owner, Design Builder shall submit a GMP Proposal to Owner which shall include the following, unless the parties mutually agree otherwise: Design Builder shall submit one or more GMP Proposal(s) to Owner in accordance with the schedule established in Section 5.2.2 hereof, which proposal shall be identified as Amendment No. 1 – GMP Proposal, Amendment No. 2 – GMP Proposal, and so forth. Documents used as a basis for the GMP(s) are those documents developed by the Design Builder and approved by the Owner, and those documents developed by the Owner and provided to the Design Builder, all of which shall be identified in an exhibit(s) to each Amendment. The GMP Proposal(s) shall include the following:~~

~~**6.6.2.1.1** A proposed GMP, which shall be the sum of:~~

~~i. Design Builder's Fee as defined in Section 6.2.1 hereof;~~

ii. The estimated Cost of the Work as defined in Section 6.3 hereof, inclusive of any Design-Builder's Contingency as defined in Section 6.6.1.2 hereof;

iii. If applicable, any prices established under Section 6.1.2 hereof; and

iv. If applicable, any Owner's contingency or allowance.

**6.6.2.1.2** The Basis of Design Documents, which may include, by way of example, Owner's Project Criteria, which are set forth in detail and are attached to each GMP Proposal;

**6.6.2.1.3** A list of the assumptions and clarifications made by Design-Builder in the preparation of each GMP Proposal, which list is intended to supplement the information contained in the drawings and specifications and is specifically included as part of the Basis of Design Documents;

**6.6.2.1.4** The Scheduled Substantial Completion Date upon which each proposed GMP is based, to the extent said date has not already been established under Section 5.2.1 hereof, and a schedule upon which the Scheduled Substantial Completion Date is based;

**6.6.2.1.5** If applicable, a list of Allowance Items, Allowance Values, and a statement of their basis;

**6.6.2.1.6** If applicable, a schedule of alternate prices;

**6.6.2.1.7** If applicable, a schedule of unit prices;

**6.6.2.1.8** If applicable, a statement of Additional Services which may be performed but which are not included in each GMP and which, if performed, shall be the basis for an increase in each GMP and/or Contract Time(s); and

**6.6.2.1.9** The time limit for acceptance of each GMP Proposal.

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

**6.6.2.3 Acceptance of GMP Proposal(s).** If Owner accepts each GMP Proposal, as may be amended by Design-Builder, each GMP and its basis shall be set forth in an amendment to this Agreement.

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

**6.6.2.4.1** Owner may suggest modifications to the GMP Proposal, whereupon, if such modifications are accepted in writing by Design-Builder, the GMP Proposal

shall be deemed accepted and the parties shall proceed in accordance with Section 6.6.2.3 above;

**6.6.2.4.2** Owner may authorize Design-Builder to continue to proceed with the Work on the basis of reimbursement as provided in Section 6.1 hereof without a GMP, in which case all references in this Agreement to that GMP shall not be applicable; or

**6.6.2.4.3** Owner may terminate this Agreement for convenience in accordance with Article 8 hereof; provided, however, in this event, Design-Builder shall not be entitled to the payment provided for in Section 8.2 hereof.

If Owner fails to exercise any of the above options, Design-Builder shall have the right to (i) continue with the Work as if Owner had elected to proceed in accordance with Item 6.6.2.4.2 above, and be paid by Owner accordingly, unless and until Owner notifies it in writing to stop the Work, or (ii) suspend performance of Work in accordance with Section 11.3.1 of the General Conditions of Contract, provided, however, that in such event Design-Builder shall not be entitled to the payment provided for in Section 8.2 hereof.

**6.6.3 Savings.**

~~6.6.3.1~~ If the sum of the actual Cost of the Work and Design-Builder's Fee (and, if applicable, any prices established under Section 6.1.2 hereof) is less than the GMP, as such GMP may have been adjusted over the course of the Project, the difference ("Savings") shall be shared as follows:

\_\_\_\_\_ percent ( \_\_\_\_\_ %) to Design-Builder and \_\_\_\_\_  
\_\_\_\_\_ percent ( \_\_\_\_\_ %) to Owner.  
or

The first \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) of Savings shall be provided to ~~(choose either Design-Builder or Owner)~~ \_\_\_\_\_, with the balance of Savings, if any, shared \_\_\_\_\_ percent ( \_\_\_\_\_ %) to Design-Builder and \_\_\_\_\_ percent ( \_\_\_\_\_ %) to Owner.

~~6.6.3.2~~ Savings shall be calculated and paid as part of Final Payment under Section 7.3 hereof, with the understanding that to the extent Design-Builder incurs costs after Final Completion which would have been payable to Design-Builder as a Cost of the Work, the parties shall recalculate the Savings in light of the costs so incurred, and Design-Builder shall be paid by Owner accordingly.

**6.7 Performance Incentives**

~~6.7.1~~ Owner and Design-Builder have agreed to the performance incentive arrangements set forth in Exhibit \_\_\_\_\_.

*[The parties are encouraged to discuss and agree upon performance incentives that will influence project success. These incentives may consist of Award Fees, incentives for safety, personnel retention, client satisfaction and similar items.]*

**Article 7**

**Procedure for Payment**

**7.1 Progress Payments.**

**7.1.1** Design-Builder shall submit to Owner ~~on or no later than the tenth (10th)~~ no later than the tenth (10th) day of each month, beginning with the first month after the Date of Commencement, Design-Builder's Application for Payment in accordance with Article 6 of the General Conditions of Contract.

**7.1.2** Owner shall make payment within ~~ten (10)~~ thirty (30) days after Owner's receipt of each properly submitted and accurate Application for Payment in accordance with Article 6 of the General Conditions of Contract, but in each case less the total of payments previously made, and less amounts properly withheld under Section 6.2 and Section 6.3 of the General Conditions of Contract.

**7.1.3** If Design-Builder's Fee under Section 6.2.1 hereof is a fixed amount, the amount of Design-Builder's Fee to be included in Design-Builder's monthly Application for Payment and paid by Owner shall be proportional to the percentage of the Work completed, less payments previously made on account of Design-Builder's Fee.

## **7.2 Retainage on Progress Payments.**

**7.2.1** Owner will retain ten percent (10%) of each Application for Payment, ~~except no retaining will be withheld on the Design-Builder's fee, provided, however, that when fifty percent (50%) of the Work has been satisfactorily completed by Design-Builder and Design-Builder is otherwise in compliance with its contractual obligations, Owner will not retain any additional retention amounts from Design-Builder's subsequent Applications for Payment. Owner will also reasonably consider reducing retainage for Subcontractors completing their work early in the Project.~~

~~Owner will retain \_\_\_\_\_ percent ( \_\_\_\_\_ %) of the cost of Work, exclusive of general conditions costs, and any amounts paid to Design-Builder's Design Consultant, from each Application for Payment provided, however, that when fifty percent (50%) of the Work has been satisfactorily completed by Design-Builder and Design-Builder is otherwise in compliance with its contractual obligations, Owner will not retain any additional amounts from Design-Builder's subsequent Applications for Payment. Owner will also reasonably consider reducing retainage for Subcontractors completing their work early in the Project.~~

**7.2.2** Within ~~fifteen (15)~~ thirty (30) days after Substantial Completion of the entire Work or, if applicable, any portion of the Work, pursuant to Section 6.6 of the General Conditions of Contract, Owner shall release to Design-Builder all retained amounts relating, as applicable, to the entire Work or completed portion of the Work, less an amount equal to: (a) the reasonable value of all remaining or incomplete items of Work as noted in the Certificate of Substantial Completion; and (b) all other amounts Owner is entitled to withhold pursuant to Section 6.3 of the General Conditions of Contract, and to the maximum extent allowed by law.

~~If a warranty reserve has been established pursuant to Section 6.3.23 above, Owner shall at the time of Substantial Completion retain the agreed-upon amounts and establish an escrow account as contemplated by Section 6.3.24 above.~~

**7.3 Final Payment.** Design-Builder shall submit its Final Application for Payment to Owner in accordance with Section 6.7 of the General Conditions of Contract, which shall include retainage amounts previously withheld by Owner. Owner shall make payment on Design-Builder's properly submitted and accurate Final Application for Payment (less any amount the parties may have agreed to set aside for warranty work) within ~~ten (10)~~ thirty (30) days after Owner's receipt of the Final Application for Payment, provided that Design-Builder has satisfied the requirements for final payment set forth in Section 6.7.2 of the General Conditions of Contract.

**7.4 Interest.** Payments due and unpaid by Owner to Design-Builder, whether progress payments or final payment, shall bear interest commencing fifteen (15) ~~five (5)~~ days after payment is due at the maximum

rate allowed by law at the place of the project. rate of \_\_\_\_\_ percent (\_\_\_\_\_  
) per month until paid.

**7.5 Record Keeping and Finance Controls.** Design-Builder acknowledges that this Agreement is to be administered on an "open book" arrangement relative to Costs of the Work. Design-Builder shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management, using accounting and control systems in accordance with generally accepted accounting principles and as may be provided in the Contract Documents. During the performance of the Work and for a period of three (3) years after Final Payment, Owner and Owner's accountants shall be afforded access to, and the right to audit ~~from time to time~~ at any time, upon reasonable notice, Design-Builder's records, books, correspondence, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to the Work, all of which Design-Builder shall preserve for a period of three (3) years after Final Payment. Such inspection shall take place at Design-Builder's offices during normal business hours unless another location and time is agreed to by the parties. Any multipliers or markups agreed to by the Owner and Design-Builder as part of this Agreement are only subject to audit to confirm that such multiplier or markup has been charged in accordance with this Agreement, with the composition of such multiplier or markup not being subject to audit.

## Article 8

### Termination for Convenience

**8.1** ~~Owner and Design-Builder's right to terminate this Agreement shall be in accordance with the General Conditions of this contract. Upon ten (10) days' written notice to Design-Builder, Owner may, for its convenience and without cause, elect to terminate this Agreement. In such event, Owner shall pay Design-Builder for the following:~~

~~**8.1.1** All Work executed and for proven loss, cost or expense in connection with the Work;~~

~~**8.1.2** The reasonable costs and expenses attributable to such termination, including demobilization costs and amounts due in settlement of terminated contracts with Subcontractors and Design Consultants; and~~

~~**8.1.3**~~

~~The fair and reasonable sums for overhead and profit on the sum of items 8.1.1 and 8.1.2 above.~~

~~or~~

~~Overhead and profit in the amount of \_\_\_\_\_ percent (\_\_\_\_\_%)  
on the sum of items 8.1.1 and 8.1.2 above.~~

~~**8.2** In addition to the amounts set forth in Section 8.1 above, Design-Builder shall be entitled to receive one of the following as applicable:~~

~~**8.2.1** If Owner terminates this Agreement prior to commencement of construction, Design-Builder shall be paid \_\_\_\_\_ percent (\_\_\_\_\_% ) of the remaining balance of the Contract Price, provided, however, that if a GMP has not been established, the above percentage shall be applied to the remaining balance of the most recent estimated Contract Price.~~

~~**8.2.2** If Owner terminates this Agreement after commencement of construction, Design-Builder shall be paid \_\_\_\_\_ percent (\_\_\_\_\_% ) of the remaining balance of~~

~~the Contract Price, provided, however, that if a GMP has not been established, the above percentage shall be applied to the remaining balance of the most recent estimated Contract Price.~~

~~**8.3** — If Owner terminates this Agreement pursuant to Section 8.1 above and proceeds to design and construct the Project through its employees, agents or third parties, Owner's rights to use the Work Product shall be as set forth in Section 4.3 hereof. Such rights may not be transferred or assigned to others without Design-Builder's express written consent and such third parties' agreement to the terms of Article 4.~~

## **Article 9**

### **Representatives of the Parties**

#### **9.1 Owner's Representatives.**

**9.1.1** Owner designates the individual listed below as its Senior Representative ("Owner Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under Section 10.2.3 of the General Conditions of Contract: *(Identify individual's name, title, address and telephone numbers)*

**Zach Hardy**

City of Olathe  
Deputy Public Works Director  
100 E Sante Fe Street  
Olathe, KS 66061  
913-971-9064

**Tristan Baird**

City of Olathe  
Facilities Division Manager  
100 E Sante Fe Street  
Olathe, KS 66061  
913-971-0900

**9.1.2** Owner designates the individual listed below as its Owner's Representative, which individual has the authority and responsibility set forth in Section 3.4 of the General Conditions of Contract: *(Identify individual's name, title, address and telephone numbers)*

**Michelle Kaiser**

Benson Method  
8675 W. 106<sup>th</sup> Street – Suite 100  
Overland Park, KS 66212

**Peter Ho**

Visor Consulting  
4300 Shawnee Mission Parkway  
Fairway, KS 66205

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

**9.2.1** Design-Builder designates the individual listed below as its Senior Representative ("Design-Builder's Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under Section 10.2.3 of the General Conditions of Contract: *(Identify individual's name, title, address and telephone numbers)*

Christy Turner  
Turner Construction  
1220 Washington Street -Suite 100  
Kansas City, MO 64105  
816-845-0419  
[Cnturner@tcco.com](mailto:Cnturner@tcco.com)

**9.2.2** Design-Builder designates the individual listed below as its Design-Builder's Representative, which individual has the authority and responsibility set forth in Section 2.1.1 of the General Conditions of Contract: *(Identify individual's name, title, address and telephone numbers)*

Christy Turner  
Turner Construction  
1220 Washington Street -Suite 100  
Kansas City, MO 64105  
816-845-0419  
[Cnturner@tcco.com](mailto:Cnturner@tcco.com)

## Article 10

### Bonds and Insurance

**10.1 Insurance.** Design-Builder and Owner shall procure the insurance coverages set forth in the Insurance Exhibit attached hereto and identified as **Exhibit B** and in accordance with Article 5 of the General Conditions of Contract.

**10.2 Bonds and Other Performance Security.** Design-Builder shall provide the following performance bond and labor and material payment bond or other performance security:

**Performance Bond.**

Required                       Not Required

Performance and Maintenance Bond attached hereto and identified as **Exhibit C** to this Agreement.

**Payment Bond.**

Required                       Not Required

Payment Bond (Statutory Bond) attached hereto and identified as **Exhibit D** to this Agreement.

**Other Performance Security.**

Required                       Not Required

## Article 11

### Other Provisions

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

**.1** Notwithstanding Section 2.3.1 of the General Conditions of Contract, if the parties agree upon specific performance standards in the Basis of Design Documents, the design professional services shall be performed to achieve such standards.

**.2** 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 10.2 of the General Conditions of Contract shall be resolved in a court of competent jurisdiction in the state in which the Project is located.

**.3 Licensing Requirements**

The Design-Builder must be authorized to do business in the State of Kansas. If the Design-Builder is a corporation organized outside the State of Kansas it shall review its authorization with the State of Kansas and if necessary file the required documentation with the State of Kansas in order to receive authorization to do business in the State of Kansas. The Design-Builder, if organized outside the State of Kansas, must furnish evidence to the Owner of their authority to do business in the State of Kansas. Such evidence must be furnished to the Owner prior to any Contract award.

The Design-Builder and all sub-contractors performing design and construction work on this project shall meet all licensing requirements of the City of Olathe for the work which they intend to perform.

**.4 Appointment of Process Agent**

The Design-Builder, if not a resident of the State of Kansas, shall appoint a Process Agent being a resident of the State of Kansas. The Design-Builder shall submit with the GMP Proposal(s) the Appointment of Process Agent form as provided in **Exhibit E** to this Agreement. The Process Agent form will be filed with the Clerk of the District Court of the County in which the work is to be performed, as provided by law.

**.5 Non-Collusive Affidavit**

The Design-Builder shall submit with the GMP Proposal(s) the Non-Collusive Affidavit as provide in **Exhibit F** to this Agreement.

**.6 Tax Exemption**

All applicable taxes, sales, consumer, use and other similar taxes, imposed by any taxing authority, on materials, equipment or supplies to be incorporated in the work, (except for water main work) shall be tax exempt.

The Design-Builder shall be required to furnish taxing authorities any necessary information or reports pertaining thereto, as required.

Pursuant to KSA 79-3606, both services and materials for this project are exempt from the Kansas Retailers' Sales Tax and the Kansas Compensating Tax. Within fifteen (15) days after the date of Contract approval, Owner will provide a Kansas Sales tax exemption certificate number to the Design-Builder. The Design-Builder and each Subcontractor or repairman must furnish the exemption certificate number to each supplier on Kansas Sales Tax Division Form STD 74. The exemption certificate number shall be placed on all invoices for material to be incorporated in the work. All invoices shall be held by Design-Builder for 5 years, and shall be subject to audit by the Director of Taxation. Upon completion of the work, Design-Builder shall file with the Owner on a form provided by the Director of Taxation, a sworn statement that all purchases made under the exemption certificate were entitled to be exempt from the Kansas Retailers' Sales Tax and the Kansas Compensating Tax. Design-Builder shall assume full responsibility for proper use of the exemption certificate number and shall pay all legally assessed penalties for improper use of the certificate number.

**.7 Affirmative Action / Other Laws**

During the performance of this Agreement, the Design-Builder agrees that:

- a. Design-Builder shall observe the provisions of the Kansas Act Against Discrimination (K.S.A. 44-1001 et seq.) and shall not discriminate against any person in the performance of work under the present contract because of race, religion, color, sex, disability, national origin, ancestry or age;
- b. in all solicitations or advertisements for employees, the Design-Builder shall include the phrase, "equal opportunity employer," or a similar phrase to be approved by the commission;
- c. if the Design-Builder fails to comply with the manner in which the Design-Builder reports to the commission in accordance with the provisions of K.S.A. 44-1031 and amendments thereto, the Design-Builder shall be deemed to have breached the present contract and it may be canceled, terminated or suspended, in whole or in part, by the City without penalty;
- d. if the Design-Builder is found guilty of a violation of the Kansas Act Against Discrimination under a decision or order of the commission which has become final,

the Design-Builder shall be deemed to have breached the present contract and it may be canceled, terminated or suspended, in whole or in part, by the contracting agency; and

- e. the Design-Builder shall include the provisions of subsections (a) through (d) in every subcontract or purchase order so that such provisions will be binding upon such subcontractor or vendor.

The provisions of this section shall not apply to a contract entered into by the City with Design-Builder if:

- a. Design-Builder employs fewer than four employees during the term of such contract;  
or  
b. Design-Builder's contract with the City total \$10,000 or less in aggregate.

The Design-Builder further agrees and acknowledges that it shall abide by the Kansas Age Discrimination In Employment Act (K.S.A. 44-1111 et seq.) and the applicable provision of the Americans With Disabilities Act (42 U.S.C. 1201 et seq.) as well as all other federal, state and local laws, ordinances and regulations applicable to this project and to furnish any certification required by any federal, state or local governmental agency in connection therewith.

**.8 No Third Party Beneficiaries**

Nothing contained herein shall create a contractual relationship with, or any rights in favor of, any third party.

**.9 Independent Contractor**

The Design-Builder is an independent contractor and as such is not an agent or employee of the City.

**.10 Covenant Against Contingent Fees**

Design-Builder warrants that he/she has not employed or retained any company or person, other than a bona fide employee working for Consultant, to solicit or secure this Agreement, and that he/she has not paid or agreed to pay any company or person, other than a bona fide employee, any fee, commission, percentage, brokerage fee, gifts, or any other consideration contingent upon or resulting from the award or making of this Agreement. For breach or violation of this warranty, City may terminate this Agreement without liability or may, in its discretion, deduct from the Contract Price or otherwise recover the full amount of such fee, commission, percentage, brokerage fee, gift or contingent fee.

**.11 Compliance with Laws**

Design-Builder shall abide by all applicable federal, state and local laws, ordinances and regulations applicable to the Work or the Project at the time Services are rendered, including but not limited to The Kansas Fairness in Public Construction Contract Act, K.S.A. 16-1901 et seq. Design-Builder shall secure all occupational and professional licenses and permits from public and private sources necessary for the fulfillment of his/her obligations under this Agreement.

**.12 Titles, Subheads, and Capitalization**

Title and subheadings as used herein are provided only as a matter of convenience and shall have no legal bearing on the interpretation of any provision of this Agreement. Some terms are capitalized throughout this Agreement but the use of or failure to use capitals shall have no legal bearing on the interpretation of such terms.

**.13 Severability Clause**

Should any provision of this Agreement be determined to be void, invalid, unenforceable or illegal for whatever reason, such provision(s) shall be null and void; provided, however, that

the remaining provisions of this Agreement shall be unaffected thereby and shall continue to be valid and enforceable.

#### **.14 Bidding Procedure, Subcontractor and Supplier Selection**

For the purposes of this section, the term "Related Party" shall mean a parent, subsidiary, affiliate, or other entity having common ownership or management with the Design-Builder; any entity in which a stockholder in, or management employee of, the Design-Builder owns any interest in excess of ten percent in the aggregate; or and person or entity which has the right to control the business or affairs of the Design-Builder. The term Related Party includes any member of the immediate family of any person identified above.

At a time agreed upon by both the Design-Builder and Owner, the Design-Builder shall furnish in writing to the Owner a list of the names of Subcontractors and/or material and equipment suppliers, organized by specific trade, which the Design-Builder proposes to solicit bids for the Work required of the project. The Design-Builder shall make all reasonable efforts to obtain no less than three (3) bids for each of the scopes of work and/or material and equipment required for the Work of the project. The Owner shall have the right to make suggested additions to or deletions from the list of bidders. The Design-Builder shall clearly identify in writing if any of the proposed Subcontractors and/or material and equipment suppliers which the Design-Builder proposes to obtain bids from is considered a Related Party. The Design-Builder shall not be prohibited from obtaining bids for work and/or material and equipment from a Related Party. However, the Design-Builder shall also obtain bids from no less than two other Subcontractors and suppliers for the same work, material, and/or equipment as is being proposed by a Related Party. Additionally, the Design-Builder shall identify in writing to the Owner all work which will be self-performed by the Design-Builder's personnel, and all material and equipment which will be provided directly by the Design-Builder. If Design-Builder has price agreements in place with preferred suppliers for materials and/or equipment required for this project, and if Design-Builder intends to utilize the preferred supplier for providing the materials and/or equipment required for this project, the Design-Builder shall identify such materials and/or equipment to the Owner. Additionally, the Design-Builder shall provide documentation to the satisfaction of the Owner demonstrating the pricing of the materials and/or equipment from the preferred supplier is competitive in price with the same or substantially the same product as may be provided by another supplier.

The Design-Builder shall obtain bids from Subcontractors and/or suppliers of material and equipment for the Work required of the project. The Design-Builder shall prepare a tabulation of all bids received, and shall identify the Subcontractors and/or material and equipment suppliers which the Design-Builder recommends be awarded the work. The Design-Builder shall deliver to the Owner, for the Owner's review, a copy of the tabulation of all bids received. If so requested by the Owner, the Design-Builder shall submit to the Owner a copy of any and/or all bids received. The Owner and Design-Builder shall then review the tabulation of bids and confirm which bids will be accepted.

The Design-Builder shall not contract with any Subcontractor or supplier which the Owner has made a reasonable objection, and the Design-Builder shall not be required to contract with any Subcontractor or supplier to whom the Design-Builder has made a reasonable objection.

#### **.15 Owner's Project Criteria**

All WORK completed by the Construction Manager under the terms of this Agreement shall be warranted by the Construction Manager for a period of one (1) year unless otherwise specifically stated in the Contract Documents to be warranted for a longer period of time, including any extended warranty or special warranty period if specified in the Contract Documents. The commencement of the warranty period is the date of Substantial Completion unless specifically stated otherwise.

*(The remainder of this page intentionally left blank)*

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

**OWNER:**

**DESIGN-BUILDER:**

City of Olathe, Kansas \_\_\_\_\_

Turner Construction \_\_\_\_\_

(Name of Owner)

(Name of Design-Builder)

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

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

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

Karen M. Hogan  
\_\_\_\_\_  
(Printed Name)

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

VP & General Manager  
\_\_\_\_\_  
(Title)

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

Date: 9/17/2024 \_\_\_\_\_

ATTEST:

\_\_\_\_\_  
City Clerk

(SEAL)

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney/Deputy City Attorney/  
Assistant City Attorney

**Caution: An original DBIA document has this caution printed in blue. This is a printable copy and an original assures that changes will not be obscured as may occur when documents are reproduced.**



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# **STANDARD FORM OF GENERAL CONDITIONS OF CONTRACT BETWEEN OWNER AND DESIGN-BUILDER**

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**Document No. 535**

Second Edition, 2010

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Washington, DC



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

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

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

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# Article 1

## General

### 1.1 Mutual Obligations

1.1.1 *Owner and Design-Builder* 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.

### 1.2 Basic Definitions

1.2.1 *Agreement* refers to the executed contract between Owner and Design-Builder 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) as modified.

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

1.2.3 *Construction Documents* are the documents, consisting of Drawings and Specifications, to be prepared or assembled by the Design-Builder consistent with the Basis of Design Documents unless a deviation from the Basis of Design Documents is specifically set forth in a Change Order executed by both the Owner and Design-Builder, as part of the design review process contemplated by Section 2.4 of these General Conditions of Contract.

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

1.2.5 *Design-Build Team* is comprised of the Design-Builder, the Design Consultant, and key Subcontractors identified by the Design-Builder.

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

1.2.7 *Final Completion* is the date upon which the construction of the Project is complete in accordance with the Contract Documents, the City has accepted the Project, and no further Work remains to be performed under the Contract Documents. 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 and the submission of all documents set forth in Section 6.7.2.

1.2.8 *Force Majeure Events* are events beyond the control of both the Design-Builder and Owner, including but not limited to aActs of Nature (including fire, flood, earthquake, storm, tornado, hurricane or other natural disaster), war, invasion, act of foreign enemies, hostilities (whether war is declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation, terrorist activities, nationalization, government sanction, blockage,

~~embargo, or lockout, are those events that are beyond the control of both Design-Builder and Owner, including the events of war, floods, labor disputes, earthquakes, epidemics, adverse weather conditions not reasonably anticipated, and other acts of God.~~

**1.2.9** *General Conditions of Contract* refer to this DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (2010 Edition), as herein modified.

**1.2.10** *GMP Exhibit* means that exhibit attached to DBIA Document No. 530, *Standard Form of Agreement Between Owner and Design-Builder - Cost Plus Fee With an Option for a Guaranteed Maximum Price*, which exhibit will have been agreed upon by Owner and Design-Builder prior to the execution of the Agreement.

**1.2.11** *GMP Proposal* means that proposal developed by Design-Builder in accordance with Section 6.6 of DBIA Document No. 530, *Standard Form of Agreement Between Owner and Design-Builder - Cost Plus Fee With an Option for a Guaranteed Maximum Price*.

**1.2.12** *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.

**1.2.13** *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 Project or Site, the practices involved in the Project or Site, or any Work.

**1.2.14** *Owner's Project Criteria, if provided,* 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.

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

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

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

**1.2.18** *Substantial Completion* or *Substantially Complete* means the point in time when the Work (or a specified part thereof) has progressed to the point where, in the opinion of the Owner, as evidenced by his definitive statement of Substantial Completion, the Work is sufficiently complete, in accordance with the Contract Documents, so that the Work (or specified part) can be utilized for the purposes for which it was intended; or if there be no such statement issued, when Final Payment is due. The terms "substantially complete" and "substantially completed" as applied to any Work refer to "Substantial Completion" thereof. ~~the date on which the Work, or an agreed upon portion of the Work, is sufficiently complete in accordance with the Contract Documents so that Owner can occupy and use the Project or a portion thereof for its intended purposes.~~

**1.2.19** *Work* is comprised of all Design-Builder's design, construction and other services required by the Contract Documents, including procuring and furnishing all materials, equipment, services and labor reasonably inferable from the Contract Documents.

**1.2.20** *Contract Documents* are the documents, consisting of the Agreement, General Conditions

of Contract, GMP Exhibit, Construction Documents, Owner's Project Criteria and all attachments and exhibits to each of the above described documents.

1.2.21 Defective Work is Work that is unsatisfactory, faulty or deficient, or does not conform to the Contract Documents, or does not meet the specified requirements, reference standards, tests or reviews referred to in the Contract Documents, or has been damaged prior to approval of final payment unless responsibility for the damage has been expressly assumed by Owner at Substantial Completion.

1.2.22 Engineer means the City Engineer or Public Works Director or his/her designee for City of Olathe

1.2.23 Owner means City of Olathe, Kansas. All references to "City" shall have the same definition as "Owner".

1.2.24 Project means the total design and construction of which the Work to be provided under the Contract Documents may be the whole, or a part as indicated elsewhere in the Contract Documents.

## **Article 2**

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

#### **2.1 General Services.**

**2.1.1** Design-Builder's Representative shall be reasonably available to Owner and shall have the necessary expertise and experience required to supervise the Work. Design-Builder's Representative shall communicate regularly with Owner and shall be vested with the authority to act on behalf of Design-Builder. Design-Builder's Representative may be replaced only with the mutual agreement of Owner and Design-Builder.

**2.1.2** Design-Builder shall provide Owner with a monthly status report detailing the progress of the Work, including (i) whether the Work is proceeding according to schedule, (ii) whether discrepancies, conflicts, or ambiguities exist in the Contract Documents that require resolution, (iii) whether health and safety issues exist in connection with the Work; (iv) status of the contingency account to the extent provided for in the Standard Form of Agreement Between Owner and Design-Builder - Cost Plus Fee with an Option for a Guaranteed Maximum Price; and (v) other items that require resolution so as not to jeopardize Design-Builder's ability to complete the Work for the Contract Price and within the Contract Time(s).

**2.1.3** Unless a schedule for the execution of the Work has been attached to the Agreement as an exhibit at the time the Agreement is executed, Design-Builder shall prepare and submit, at least three (3) days prior to the meeting contemplated by Section 2.1.4 hereof, a schedule for the execution of the Work for Owner's review and response. The schedule shall indicate the dates for the start and completion of the various stages of Work, including the dates when Owner information and approvals are required to enable Design-Builder to achieve the Contract Time(s). The schedule shall be revised as required by conditions and progress of the Work, but such revisions shall not relieve Design-Builder of its obligations to complete the Work within the Contract Time(s), as such dates may be adjusted in accordance with the Contract Documents. Owner's review of, and response to, the schedule shall not be construed as relieving Design-Builder of its complete and exclusive control over the means, methods, sequences and techniques for executing the Work.

**2.1.4** The parties will meet within seven (7) days after execution of the Agreement to discuss

issues affecting the administration of the Work and to implement the necessary procedures, including those relating to submittals and payment, to facilitate the ability of the parties to perform their obligations under the Contract Documents.

2.1.5 Design-Builder shall cause appropriate provisions to be inserted in all subcontracts relative the Work to bind Subcontractors to Design-Builder by the terms of the Contract Documents insofar as applicable to the Work of the Subcontractor and to give Design-Builder the same power to terminate any Subcontractor as Owner has to terminate Design-Builder under the provisions of the Contract Documents.

2.1.6 Design-Builder shall not make any substitution for any Subcontractor or supplier who has been accepted by Owner unless the Engineer determines that there is a good cause for doing so. City's disapproval of any Subcontractor shall not, under any circumstances, be the basis for an increase in the Contract Price or a claim for damages caused by such delay.

## **2.2 Design Professional Services.**

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

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

**2.3.1** The standard of care for all design professional services performed to execute the Work shall be the care and skill ordinarily used by members of the design profession practicing under similar conditions at the same time and locality of the Project.

## **2.4 Design Development Services.**

**2.4.1** Design-Builder and Owner shall, consistent with any applicable provision of the Contract Documents, agree upon any interim design submissions that Owner may wish to review, which interim design submissions may include design criteria, drawings, diagrams and specifications setting forth the Project requirements. Interim design submissions shall be consistent with the Basis of Design Documents, as the Basis of Design Documents may have been changed through the design process set forth in this Section 2.4.1. On or about the time of the scheduled submissions, Design-Builder and Owner shall meet and confer about the submissions, with Design-Builder identifying during such meetings, among other things, the evolution of the design and any changes to the Basis of Design Documents, or, if applicable, previously submitted design submissions. Changes to the Basis of Design Documents, including those that are deemed minor changes under Section 9.3.1, shall be processed in accordance with Article 9. Minutes of the meetings, including a full listing of all changes, will be maintained by Design-Builder and provided to all attendees for review. Following the design review meeting, Owner shall review and approve the interim design submissions and meeting minutes in a time that is consistent with the turnaround times set forth in Design-Builder's schedule.

**2.4.2** Design-Builder shall submit to Owner Construction Documents setting forth in detail drawings and specifications describing the requirements for construction of the Work. The Construction Documents shall be consistent with the latest set of ~~interim design~~ schematic design and design development submissions, as such submissions may have been modified in a design review meeting and recorded in the meetings minutes. The parties shall have a design review meeting to discuss, and Owner shall review and approve, the Construction Documents in accordance with the procedures set forth in Section 2.4.1 above. Design-Builder shall proceed

with construction in accordance with the approved Construction Documents and shall submit ~~one~~ three hardcopy sets and one electronic copy in a form mutually agreeable by the parties of approved Construction Documents to Owner prior to commencement of construction.

**2.4.3** Owner's review and approval of ~~interim design~~ schematic design and design development submissions, meeting minutes, and the Construction Documents is for the purpose of mutually establishing a conformed set of Contract Documents compatible with the requirements of the Work. Neither Owner's review nor approval of any ~~interim design schematic design and design development~~ submissions, meeting minutes, and Construction Documents shall be deemed to transfer any design liability from Design-Builder to Owner. Nothing herein shall be construed to limit or waive Design-Builder's obligation to design and construct Work in accordance with the approved Construction Documents and Specifications.

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

## **2.5 Legal Requirements.**

**2.5.1** Design-Builder shall perform the Work in accordance with all Legal Requirements and shall provide all notices applicable to the Work as required by the Legal Requirements.

**2.5.2** The Contract Price and/or Contract Time(s) ~~shall~~ may be adjusted to compensate Design-Builder for the effects of any changes in the Legal Requirements enacted after the date of the Agreement affecting the performance of the Work, or if a Guaranteed Maximum Price is established after the date of the Agreement, the date the parties agree upon the Guaranteed Maximum Price. Such effects may include, without limitation, revisions Design-Builder is required to make to the Construction Documents because of changes in Legal Requirements.

## **2.6 Government Approvals and Permits.**

**2.6.1** Design-Builder shall obtain and pay for all construction permits, certificates and licenses, including a certificate of good standing in the State of Kansas, and shall provide such certificate to the Owner as part of the Contract Documents. Design-Builder shall pay all governmental charges and inspection fees necessary for the prosecution of the Work, which are applicable on the Effective Date of this Agreement. Design-Builder shall pay all charges of utility service companies for connections to the Work.

~~Except as identified in an Owner's Permit List attached as an exhibit to the Agreement, Design-Builder shall obtain and pay for all necessary permits, approvals, licenses, government charges and inspection fees required for the prosecution of the Work by any government or quasi-government entity having jurisdiction over the Project.~~

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

## **2.7 Design-Builder's Construction Phase Services.**

**2.7.1** Unless otherwise provided in the Contract Documents to be the responsibility of Owner or a separate contractor, Design-Builder shall provide through itself or Subcontractors the necessary supervision, labor, inspection, testing, start-up, material, equipment, machinery, temporary utilities and other temporary facilities to permit Design-Builder to complete construction of the Project consistent with the Contract Documents.

**2.7.2** Design-Builder shall perform all construction activities efficiently and with the requisite expertise, skill and competence to satisfy the requirements of the Contract Documents. Design-

Builder shall at all times exercise complete and exclusive control over the means, methods, sequences and techniques of construction.

**2.7.3** Design-Builder shall employ only Subcontractors who are duly licensed and qualified to perform the Work consistent with the Contract Documents. Owner may reasonably object to Design-Builder's selection of any Subcontractor, provided that the Contract Price and/or Contract Time(s) shall be adjusted to the extent that Owner's decision impacts Design-Builder's cost and/or time of performance.

**2.7.4** Design-Builder assumes responsibility to Owner for the proper performance of the Work of Subcontractors and any acts and omissions in connection with such performance. Nothing in the Contract Documents is intended or deemed to create any legal or contractual relationship between Owner and any Subcontractor or Sub-Subcontractor, including but not limited to any third-party beneficiary rights.

**2.7.5** Design-Builder shall coordinate the activities of all Subcontractors. If Owner performs other work on the Project or at the Site with separate contractors under Owner's control, Design-Builder agrees to reasonably cooperate and coordinate its activities with those of such separate contractors so that the Project can be completed in an orderly and coordinated manner without unreasonable disruption.

**2.7.6** Design-Builder shall keep the Site reasonably free from debris, trash and construction wastes to permit Design-Builder to perform its construction services efficiently, safely and without interfering with the use of adjacent land areas. Upon Substantial Completion of the Work, or a portion of the Work, Design-Builder shall remove all debris, trash, construction wastes, materials, equipment, machinery and tools arising from the Work or applicable portions thereof to permit Owner to occupy the Project or a portion of the Project for its intended use.

**2.7.7** The Design-Builder shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Design-Builder, and communications given to the superintendent shall be as binding as if given to the Design-Builder. The superintendent must provide his or her email address and cell phone number to Owner and must be available to be contacted during all business hours, and outside of business hours in the event of an emergency.

**2.7.8** Whenever the Owner shall notify Design-Builder that any person on the Project is, in his opinion, incompetent, unfaithful, or disorderly or who uses threatening or abusive language to any person representing the Owner when on the Project site or to any citizen, such person shall be immediately discharged from the Work and shall not be re-employed on the Project except with consent of the Owner.

**2.7.9** Work days shall be limited to Monday thru Friday from 8:00 a.m. to 5:00 p.m. No work shall be done between the hours of 5:00 p.m. and 8:00 a.m. nor on Saturdays, Sundays or legal holidays, without the written approval or permission of the Engineer, except such work as may be necessary for the proper care, maintenance and protection of the Work already performed or of equipment, or in the case of an emergency. Work on Saturdays or legal holidays shall be as approved by the Owner. Requests for permission to work on Saturdays must be received no later than 3:00 p.m. on the preceding Thursday. Requests to work on legal holidays must be received at least (5) working days prior to the anticipated date of the work to be performed. Sunday work will not be allowed under any circumstance. Legal holidays observed by the city of Olathe are New Year's Day, Martin Luther King's Birthday, Federal Monday, Memorial Day, Independence Day, Labor Day, Veteran's Day, Thanksgiving Day (including the following Friday) and Christmas. The actual days off for these holidays may vary and in certain situations additional days may be part of the amount of time granted as an official holiday by the city of Olathe. It shall be the Design-Builder's responsibility to obtain these days prior to the actual request for inspection services. Requests submitted by the Design-Builder to work Saturdays or legal holidays in no way obligates the Owner to approve such requests. Owner will review each request and either

approve or deny such request as deemed appropriate by the Owner.

2.7.10 Design-Builder shall be responsible for any damage to the Work, regardless of the cause, prior to Final Acceptance. Design-Builder shall repair any damage to the Work prior to Final Acceptance.

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

**2.8.1** Design-Builder recognizes the importance of performing the Work in a safe manner so as to prevent damage, injury or loss to (i) all individuals at the Site, whether working or visiting, (ii) the Work, including materials and equipment incorporated into the Work or stored on-Site or off-Site, and (iii) all other property at the Site or adjacent thereto. Design-Builder assumes responsibility for implementing and monitoring all safety precautions and programs related to the performance of the Work. Design-Builder shall, prior to commencing construction, designate a Safety Representative with the necessary qualifications and experience to supervise the implementation and monitoring of all safety precautions and programs related to the Work. Unless otherwise required by the Contract Documents, Design-Builder's Safety Representative shall be an individual stationed at the Site who may have responsibilities on the Project in addition to safety. The Safety Representative shall make routine daily inspections of the Site and shall hold weekly safety meetings with Design-Builder's personnel, Subcontractors and others as applicable.

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

**2.8.3** Design-Builder's responsibility for safety under this Section 2.8 is not intended in any way to relieve Subcontractors and Sub-Subcontractors of their own contractual and legal obligations and responsibility for (i) complying with all Legal Requirements, including those related to health and safety matters, and (ii) taking all necessary measures to implement and monitor all safety precautions and programs to guard against injuries, losses, damages or accidents resulting from their performance of the Work.

2.8.4 The Design-Builder must implement and maintain, as required by the Contract Documents, applicable laws and regulations and orders of public authorities having jurisdiction, manufacturers' instructions or recommendations, existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including issuing appropriate notices, distributing material safety data sheets and other hazard communication information, providing protective clothing and equipment, posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

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

2.8.6 The Design-Builder must not load nor permit any part of any structure at the Site to be loaded or subjected to stresses or pressures so as to endanger its safety or that of adjacent structures or property.

2.8.7 When explosives or other hazardous materials or equipment are stored or used or unusual methods are employed in the performance of the Work, the Design-Builder must exercise utmost care and conduct such activities under supervision of properly qualified personnel.

2.8.8 If the Design-Builder suffers injury or damage to person or property because of an act or omission of the Owner, or of any of the Owner's employees or agents, or of others for whose acts it is contended that the Owner is liable, written notice of such injury or damage, whether or not insured, must be given to the Owner within a reasonable time not exceeding ten (10) days after the onset or occurrence of such damage or injury or such shorter time as may be required by the Occupational Safety Hazards Administration (OSHA). The notice must provide sufficient detail to enable the Owner to investigate the matter. If notice is not received by the Owner within the time specified, any claim arising from the occurrence will be deemed to be conclusively waived, except to the extent of any applicable insurance (excluding self-insurance) coverage covering such occurrence. The provisions of this Section may not be used by the Design-Builder in lieu of the requirements of Article 9 when the Design-Builder is seeking an adjustment in the Contract Sum and are in addition to the requirements of Article 9 when the Design-Builder is seeking an adjustment in the Contract Time.

2.8.9 The Design-Builder must promptly remedy, at its sole cost and expense, damage and loss to property referred to in Section 2.8.1 caused in whole or in part by the Design-Builder, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable, unless otherwise instructed in writing by the Owner. This obligation is in addition to, and not in limitation of, the Design-Builder's obligations for indemnification under Section 7.4.1 and the Design-Builder's responsibility to repair and or replace that portion of the Work and any materials and equipment to be incorporated therein which are damaged as a result of criminal mischief as specified in Section 2.8.10.

2.8.10 The Design-Builder is responsible for taking all reasonable and necessary precautions to secure and protect the Site, the Work, materials and equipment to be incorporated therein, and any tools or equipment of the Design-Builder necessary or beneficial to the performance of the Work from damage due to vandalism, theft, or other criminal mischief. The Design-Builder must repair and/or replace that portion of the work and any materials or equipment to be incorporated therein and any tools or equipment of the Design-Builder necessary or beneficial to performance of the Work which are damaged or stolen due to vandalism, theft or any other criminal mischief at its expense whether or not covered by insurance. No increase in the Contract Sum will be granted to the Design-Builder as a consequence of any delay, impacts or inefficiencies resulting from any act of vandalism, theft or other criminal mischief whether or not caused or contributed to by the Design-Builder's negligence.

## **2.9 Design-Builder's Warranty.**

2.9.1 The Design-Builder warrants to the Owner that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Design-Builder further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects in material and workmanship, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. Defective Work, whether the result of poor workmanship, from the use of used or defective materials, damaged through carelessness or any other cause, and found to exist within the two (2) year warranty period or such longer time as may be permitted by law, shall be removed immediately and replaced in an acceptable manner. This provision shall have full effect regardless of the fact that the Defective Work may have been done or the defective materials used with the full knowledge of Owner. No inspection by Owner of the Work nor Final Acceptance of the project by Owner shall relieve Design-Builder of its responsibility to perform pursuant to the Contract Documents and provide acceptable Work.

If Owner discovers Defective Work, then Owner shall provide written notice to Design-Builder indicating the nature of the Defective Work and setting forth a time period to correct the Work. If Design-Builder fails to remove Defective Work within the time period set forth in the written notice, the rejected material or Work may be removed and corrected by City pursuant to the provisions of the Contract Documents permitting Owner to correct the Defective Work.

~~Design-Builder warrants to Owner that the construction, including all materials and equipment furnished as part of the construction, shall be new unless otherwise specified in the Contract Documents, of good quality, in conformance with the Contract Documents and free of defects in materials and workmanship. Design-Builder's warranty obligation excludes defects caused by abuse, alterations, or failure to maintain the Work in a commercially reasonable manner. Nothing in this warranty is intended to limit any manufacturer's warranty which provides Owner with greater warranty rights than set forth in this Section 2.9 or the Contract Documents. Design-Builder will provide Owner with all manufacturers' warranties upon Substantial Completion.~~

## **2.10 Correction of Defective Work.**

2.10.1 If within two (2) years after the date of Final Acceptance or such longer period of time as may be prescribed by Laws or Regulations or by the term of any applicable special guarantee required by the Contract Documents or by any specific provision of the Contract Documents, any Work is found to be Defective, Owner will issue to Design-Builder a notice of Defective Work detailing the specific nature of the Defective Work. Design-Builder shall, without cost to Owner and in accordance with Owner's notice of Defective Work and written instructions therein, either correct such Defective Work, or, if it has been rejected by Owner, remove it from the site and replace it with acceptable Work. Design-Builder shall, within seven (7) days of receipt of written notice from Owner that the Work is not in conformance with the Contract Documents, take meaningful steps to commence correction of such nonconforming Work. If Design-Builder does not comply with the terms of such instructions within seven (7) days of receipt of written notice from Owner, or in an emergency where delay would cause serious risk of loss or damage, Owner may have the Defective Work corrected or the Defective Work removed and replaced, and all direct and indirect costs of such removal and replacement (including but not limited to fees and charges of engineers, architects, attorneys and other professionals) will be paid by Design-Builder. In special circumstances where a particular item of equipment is placed in continuous service before Final Acceptance of the Work, the correction period for that item may start to run from an earlier date if so provided in the specifications or by written agreement.

~~Design-Builder agrees to correct any Work that is found to not be in conformance with the Contract Documents, including that part of the Work subject to Section 2.9 hereof, within a period of one year from the date of Substantial Completion of the Work or any portion of the Work, or within such longer period to the extent required by any specific warranty included in the Contract Documents.~~

~~2.10.2 Design-Builder shall, within seven (7) days of receipt of written notice from Owner that the Work is not in conformance with the Contract Documents, take meaningful steps to commence correction of such nonconforming Work, including the correction, removal or replacement of the nonconforming Work and any damage caused to other parts of the Work affected by the nonconforming Work. If Design-Builder fails to commence the necessary steps within such seven (7) day period, Owner, in addition to any other remedies provided under the Contract Documents, may provide Design-Builder with written notice that Owner will commence correction of such nonconforming Work with its own forces. If Owner does perform such corrective Work, Design-Builder shall be responsible for all reasonable costs incurred by Owner in performing such correction. If the nonconforming Work creates an emergency requiring an immediate response, the seven (7) day period identified herein shall be deemed inapplicable.~~

~~2.10.3 The one two-year period referenced in Section 2.10.1 above applies only to Design-Builder's obligation to correct nonconforming Work and is not intended to constitute a period of limitations for any other rights or remedies Owner may have regarding Design-Builder's other obligations under the Contract Documents.~~

2.10.4 If, instead of requiring correction or removal and replacement of Defective Work, Owner prefers to accept the Defective Work, Owner may do so. Design-Builder shall bear all direct, indirect and consequential costs attributed to Owner's evaluation of and determination to accept such Defective Work (such costs to include but not be limited to fees and charges of engineers,

architects, attorneys and other professionals). If any such review occurs prior to Owner's approval of Final Payment, a Change Order will be issued incorporating the necessary revisions in the Contract Documents with respect to the Work and Owner shall be entitled to an appropriate decrease the Contract Price; and, if the parties are unable to agree as to the amount thereof, ~~the dispute resolution process set forth in Article 10 shall govern~~~~Owner may make a claim therefore.~~ If the review occurs after such recommendation, an appropriate amount will be paid by Design-Builder to Owner.

**2.10.5** If Design-Builder fails to correct Defective Work within the time period set forth in the notice of Defective Work or to remove and replace Defective Work as required by Owner or if Design-Builder fails to perform the Work in accordance with the Contract Documents, or if Design-Builder fails to comply with any other provision of the Contract Documents, Owner may, after seven (7) days written notice to Design-Builder, correct and remedy any such deficiency. In exercising its right under this paragraph Owner shall proceed expeditiously. To the extent necessary to complete corrective and remedial action, Owner may exclude Design-Builder from all or part of the Project site, take possession of all or part of the Work, and suspend Design-Builder's services related thereto, take possession of Design-Builder's tools, appliances, construction equipment and machinery at the Project site and incorporate in the Work all materials and equipment stored at the Project site or for which Owner has paid Design-Builder and which are stored elsewhere. Design-Builder shall allow Owner, Owner's representative, agents and employees such access to the Project site as may be necessary to enable Owner to exercise its rights under this paragraph. All direct, indirect and consequential costs of Owner in exercising such rights and remedies will be charged against Design-Builder and a Change Order will be issued incorporating the necessary revisions in the Contract Documents with respect to the Work and Owner shall be entitled to an appropriate decrease in the Contract Price, and if the parties are unable to agree as to the amount thereof, ~~the dispute resolution process set forth in Article 10 shall govern~~~~Owner may make a claim thereof.~~ Such direct, indirect and consequential costs will include but not be limited to fees and charges of engineers, architects, attorneys and all other professionals, all court and arbitration costs and all costs of repair and replacement of Work of others destroyed or damaged by correction, removal or replacement of Design-Builder's Defective Work. Design-Builder shall not be allowed an extension of the Contract Time because of any delay in performance of the Work attributable to the exercise by Owner's rights hereunder.

## **2.11 Tests and Observations**

**2.11.1** Design-Builder shall give Owner at least 48 hours prior notice of readiness of the Work for all required observations, tests or reviews requiring Owner's involvement.

**2.11.2** If Laws or Regulations of any public body having jurisdiction required any Work (or part thereof) to specifically be tested, or if the Specifications require any testing or if such testing is necessary to verify compliance with the Contract Documents, the Design-Builder shall assume full responsibility therefore, pay all costs in connection therewith and furnish Owner with the required certificates of inspection, testing or approval. Design-Builder shall also be responsible for and shall pay all costs in connection with any inspection or testing required in connection with Owner's review of fabrication material, or equipment proposed to be incorporated in the Work.

**2.11.3** Neither observations by Owner or inspections, tests or approvals by others shall relieve Design-Builder from his obligations to perform the Work in accordance with the Contract Documents.

**2.11.4** If any Work that is included in the Contract (including the work of others) that is to be observed or tested is covered without written concurrence of Owner, it must, if requested by Owner, be uncovered for observation. Such uncovering shall be at Design-Builder's expense unless Design-Builder has given Owner timely notice of Design-Builder's intention to cover such work and Owner has not acted with reasonable promptness in response to such notice.

**2.11.5** If Owner considers it necessary or advisable that covered Work that was previously

inspected by Owner be observed by Owner or inspected or tested by others, Design-Builder, at Owner's request, shall uncover, expose or otherwise make available for observation, inspection or testing as Owner may require, that portion of the work in question, furnishing all necessary labor, material and equipment. If it is found that Work is defective, Design-Builder shall bear all direct, indirect and consequential costs of such uncovering, exposure, observation, inspection and testing and of satisfactory reconstruction, (including but not be limited to fees and charges of engineers, architects, attorneys and all other professionals), and Owner shall be entitled to an appropriate decrease in the Contract Price, and, if the parties are unable to agree as to the amount thereof, ~~the dispute resolution process set forth in Article 10 shall govern. Owner shall determine amount thereof.~~ If, however, such Work is not found to be defective, Design-Builder shall be allowed an increase in Contract Price or an extension of the Contract Time, or both, directly attributable to such uncovering, exposure, observation, inspection, testing and reconstruction and, if the parties are unable to agree as to the amount or extent thereof, ~~the dispute resolution process set forth in Article 10 shall govern., Owner shall determine the amount thereof.~~ Nothing in this section shall impair either party's ability to make a claim for compensation as provided in the Contract Documents regarding the increase or decrease in Contract Price caused by uncovering the Work.

## **2.12 Documents and Samples at the Site.**

2.12.1 The Design-Builder shall maintain at the site for the Owner one copy of the Drawings, Specifications, Addenda, Current Construction Schedule, Change Orders and other Modifications, in good order and marked currently to indicate field changes and selections made during construction, and one copy of approved Shop Drawings, Product Data, Samples and similar required submittals. The Design-Builder shall display a Current Construction Schedule at the site for reference and reliance by the Owner. These shall be delivered to the Owner upon completion of the Work as a record of the Work as constructed.

## **2.13 Shop Drawings, Product Data, and Samples.**

2.13.1 Shop Drawings are drawings, diagrams, schedules and other data specially prepared for the Work by the Design-Builder or a Subcontractor, Sub-subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.

2.13.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Design-Builder to illustrate materials or equipment for some portion of the Work.

2.13.3 Samples are physical examples that illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

2.13.4 Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents. Their purpose is to demonstrate the way by which the Design-Builder proposes to conform to the information given and the design concept expressed in the Contract Documents for those portions of the Work for which the Contract Documents require submittals.

2.13.5 The Design-Builder shall review for compliance with the Contract Documents, approve and submit to the Owner Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of separate contractors. The Design-Builder must provide the Owner with copies of all submittals made to regulatory agencies.

2.13.6 By submitting Shop Drawings, Product Data, Samples and similar submittals, the Design-Builder represents to the Owner that the Design-Builder and the Design-Builder's subconsultants including architects and engineers have (1) reviewed and approved them, (2) determined and verified materials, field measurements and field construction criteria related thereto, or will do so

and (3) checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

2.13.7 The Design-Builder shall perform no portion of the Work for which the Contract Documents require submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal has been reviewed by the Owner. The Contractor must correct at its cost, and without any adjustment in Contract Time, any Work the correction of which is required due to the Design-Builder's failure to obtain approval of a submittal required to have been obtained prior to proceeding with the Work, including, but not limited to, correction of any conflicts in the Work resulting from such failure.

2.13.8 The Work shall be in accordance with approved submittals except that the Design-Builder shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the Owner's review of Shop Drawings, Product Data, Samples or similar submittals unless the Contractor has specifically informed the Owner in writing of such deviation at the time of submittal and (1) the Owner has given written approval to the specific deviation as a minor change in the Work, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Design-Builder shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the Owner's review thereof.

2.13.9 The Design-Builder shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples or similar submittals, to revisions other than those requested by the Owner on previous submittals.

## **Article 3**

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

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

**3.1.1** Owner shall, throughout the performance of the Work, cooperate with Design-Builder and perform its responsibilities, obligations and services in a timely manner to facilitate Design-Builder's timely and efficient performance of the Work and so as not to delay or interfere with Design-Builder's performance of its obligations under the Contract Documents.

**3.1.2** Owner shall provide timely reviews and approvals of interim design submissions and Construction Documents consistent with the turnaround times set forth in Design-Builder's schedule.

**3.1.3** Owner shall give Design-Builder timely notice of any Work that Owner notices to be defective or not in compliance with the Contract Documents.

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

**3.2.1** Unless expressly stated to the contrary in the Contract Documents, Owner shall provide, at its own cost and expense, for Design-Builder's information and use the following, all of which Design-Builder is entitled to reasonably rely upon in performing the Work, unless otherwise provided in the Contract Documents:

~~**3.2.1.1** — Surveys describing the property, boundaries, topography and reference points for use during construction, including existing service and utility lines;~~

~~**3.2.1.2** — Geotechnical studies describing subsurface conditions, and other surveys describing other latent or concealed physical conditions at the Site;~~

**3.2.1.3** 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-Builder to perform the Work;

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

**3.2.1.5** To the extent available, record drawings of any existing structures at the Site; and

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

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

### **3.3 Financial Information.**

**3.3.1** At Design-Builder's request, Owner shall promptly furnish reasonable evidence satisfactory to Design-Builder that Owner has adequate funds available and committed to fulfill all of Owner's contractual obligations under the Contract Documents. If Owner fails to furnish such financial information in a timely manner, Design-Builder may stop Work under Section 11.3 hereof or exercise any other right permitted under the Contract Documents.

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

### **3.4 Owner's Representative.**

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

### **3.5 Government Approvals and Permits.**

**3.5.1** Owner shall obtain and pay for all necessary permits, approvals, licenses, government charges and inspection fees set forth in the Owner's Permit List attached as an exhibit to the Agreement.

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

### **3.6 Owner's Separate Contractors.**

**3.6.1** Owner is responsible for all work performed on the Project or at the Site by separate contractors under Owner's control. Owner shall contractually require its separate contractors to cooperate with, and coordinate their activities so as not to interfere with, Design-Builder in order

to enable Design-Builder to timely complete the Work consistent with the Contract Documents.

## **Article 4**

### **Hazardous Conditions and Differing Site Conditions**

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

**4.1.1** Unless otherwise expressly provided in the Contract Documents to be part of the Work, Design-Builder is not responsible for any Hazardous Conditions encountered at the Site. Upon encountering any Hazardous Conditions, Design-Builder will stop Work immediately in the affected area and duly notify Owner and, if required by Legal Requirements, all government or quasi-government entities with jurisdiction over the Project or Site.

**4.1.2** Upon receiving notice of the presence of suspected Hazardous Conditions, Owner shall take the necessary measures required to ensure that the Hazardous Conditions are remediated or rendered harmless. Such necessary measures shall include Owner retaining qualified independent experts to (i) ascertain whether Hazardous Conditions have actually been encountered, and, if they have been encountered, (ii) prescribe the remedial measures that Owner must take either to remove the Hazardous Conditions or render the Hazardous Conditions harmless.

**4.1.3** Design-Builder shall be obligated to resume Work at the affected area of the Project only after Owner's expert provides it with written certification that (i) the Hazardous Conditions have been removed or rendered harmless and (ii) all necessary approvals have been obtained from all government and quasi-government entities having jurisdiction over the Project or Site.

**4.1.4** Design-Builder will be entitled, in accordance with these General Conditions of Contract, to an adjustment in its Contract Price and/or Contract Time(s) to the extent Design-Builder's cost and/or time of performance have been adversely impacted by the presence of Hazardous Conditions.

~~**4.1.5** To the fullest extent permitted by law, Owner shall indemnify, defend and hold harmless Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them, and their officers, directors, employees and agents, from and against any and all claims, losses, damages, liabilities and expenses, including attorneys' fees and expenses, arising out of or resulting from the presence, removal or remediation of Hazardous Conditions at the Site.~~

**4.1.6** Notwithstanding the preceding provisions of this Section 4.1, Owner is not responsible for Hazardous Conditions introduced to the Site by Design-Builder, Subcontractors or anyone for whose acts they may be liable. To the fullest extent permitted by law, Design-Builder shall indemnify, defend and hold harmless Owner and Owner's officers, directors, employees and agents from and against all claims, losses, damages, liabilities and expenses, including attorneys' fees and expenses, arising out of or resulting from those Hazardous Conditions introduced to the Site by Design-Builder, Subcontractors or anyone for whose acts they may be liable.

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

**4.2.1** It is the responsibility of the Design-Builder to obtain information concerning conditions below ground at the project site. The Design-Builder shall plan the design and construction of the Work with an understanding of the below ground conditions.

~~Concealed or latent physical conditions or subsurface conditions at the Site that (i) materially differ from the conditions indicated in the Contract Documents or (ii) are of an unusual nature, differing materially from the conditions ordinarily encountered and generally recognized as inherent in the Work are collectively referred to herein as "Differing Site Conditions." If Design-Builder encounters a Differing Site Condition, Design-Builder will be entitled to an adjustment in~~

~~the Contract Price and/or Contract Time(s) to the extent Design-Builder's cost and/or time of performance are adversely impacted by the Differing Site Condition.~~

4.2.2 Should concealed or unknown conditions that differ materially from conditions ordinarily encountered (a "Differing Site Condition") in the area and generally recognized as inherent in the Work of the character provided for in the Agreement be encountered, and which the Design-Builder could not have reasonably been aware of, the Contract Price and Contract Time may be equitably adjusted by Change Order upon written notice and claim by either party made within seven (7) days after the first observance of the condition. As a condition precedent to any possible Owner responsibility, Design-Builder shall give Owner written notice of, and an opportunity to observe the "Differing Site Condition". Failure of Design-Builder to make the written notice and claim as required herein shall constitute a waiver by Design-Builder of any claim arising out of, or related to such concealed or unknown conditions. After providing such notice and affording the Owner an opportunity to observe the concealed or unknown condition, Engineer shall provide a written response within fourteen (14) days either confirming and accepting the claim that a Differing Site Condition exists or denying and rejecting that a Differing Site Condition exists.

~~Upon encountering a Differing Site Condition, Design-Builder shall provide prompt written notice to Owner of such condition, which notice shall not be later than fourteen (14) days after such condition has been encountered. Design-Builder shall, to the extent reasonably possible, provide such notice before the Differing Site Condition has been substantially disturbed or altered.~~

## Article 5

### **Insurance and Bonds**

#### **5.1 Design-Builder's Insurance Requirements.**

**5.1.1** Design-Builder is responsible for procuring and maintaining the insurance for the coverage amounts all as set forth in the Insurance Exhibit to the Agreement. Coverage shall be secured from insurance companies authorized to do business in the state in which the Project is located, and with a minimum rating set forth in the Agreement.

**5.1.2** Design-Builder's insurance shall specifically delete any design-build or similar exclusions that could compromise coverages because of the design-build delivery of the Project.

**5.1.3** Prior to commencing any construction services hereunder, Design-Builder shall provide Owner 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 Owner. If any of the foregoing insurance coverages are required to remain in force after final payment are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the Final Application for Payment. If any information concerning reduction of coverage is not furnished by the insurer, it shall be furnished by the Design-Builder with reasonable promptness according to the Design-Builder's information and belief.

**5.1.4** Design-Builder, upon receipt of notice of any claim in connection with the Agreement, shall promptly notify Owner, providing full details thereof, including an estimate of the amount of loss or liability. Design-Builder shall also promptly notify Owner of any reduction in limits of protection afforded under any policy listed in the certificate(s) of insurance in excess of \$50,000.00, whether or not such impairment came about as a result of this Agreement.

**5.1.5** If Owner subsequently determines that Design-Builder's aggregate limits of protection

shall have been impaired or reduced to such extent that Owner determines such limits inadequate for the balance of the Project. Design-Builder shall, upon notice to from Owner promptly reinstate the original limits of liability required hereunder and shall furnish evidence thereof to Owner.

## ~~5.2 — Owner's Liability Insurance.~~

~~5.2.1 — Owner shall procure and maintain from insurance companies authorized to do business in the state in which the Project is located such liability insurance as set forth in the Insurance Exhibit to the Agreement to protect Owner from claims which may arise from the performance of Owner's obligations under the Contract Documents or Owner's conduct during the course of the Project.~~

## ~~5.3 — Owner's Property Insurance.~~

~~5.3.1 — Unless otherwise provided in the Contract Documents, Owner shall procure and maintain from insurance companies authorized to do business in the state in which the Project is located property insurance upon the entire Project to the full insurable value of the Project, including professional fees, overtime premiums and all other expenses incurred to replace or repair the insured property. The property insurance obtained by Owner shall be the broadest coverage commercially available, and shall include as additional insureds the interests of Owner, Design-Builder, Design Consultants and Subcontractors of any tier. Such insurance shall include but not be limited to the perils of fire and extended coverage, theft, vandalism, malicious mischief, collapse, flood, earthquake, debris removal and other perils or causes of loss as called for in the Contract Documents. The property insurance shall include physical loss or damage to the Work, including materials and equipment in transit, at the Site or at another location as may be indicated in Design-Builder's Application for Payment and approved by Owner. The Owner is responsible for the payment of any deductibles under the insurance required by this Section 5.3.1.~~

~~5.3.2 — Unless the Contract Documents provide otherwise, Owner shall procure and maintain boiler and machinery insurance that will include the interests of Owner, Design-Builder, Design Consultants, and Subcontractors of any tier. The Owner is responsible for the payment of any deductibles under the insurance required by this Section 5.3.2.~~

~~5.3.3 — Prior to Design-Builder commencing any Work, Owner shall provide Design-Builder with certificates evidencing that (i) all Owner's insurance obligations required by the Contract Documents are in full force and in effect and will remain in effect until Design-Builder has completed all of the Work and has received final payment from Owner and (ii) no insurance coverage will be canceled, renewal refused, or materially changed unless at least thirty (30) days prior written notice is given to Design-Builder. Owner's property insurance shall not lapse or be canceled if Owner occupies a portion of the Work pursuant to Section 6.6.3 hereof. Owner shall provide Design-Builder with the necessary endorsements from the insurance company prior to occupying a portion of the Work.~~

~~5.3.4 — Any loss covered under Owner's property insurance shall be adjusted with Owner and Design-Builder and made payable to both of them as trustees for the insureds as their interests may appear, subject to any applicable mortgage clause. All insurance proceeds received as a result of any loss will be placed in a separate account and distributed in accordance with such agreement as the interested parties may reach. Any disagreement concerning the distribution of any proceeds will be resolved in accordance with Article 10 hereof.~~

~~5.3.5 — Owner and Design-Builder waive against each other and Owner's separate contractors, Design Consultants, Subcontractors, agents and employees of each and all of them, all damages covered by property insurance provided herein, except such rights as they may have to the proceeds of such insurance. Design-Builder and Owner shall, where appropriate, require similar waivers of subrogation from Owner's separate contractors, Design 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.~~

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

5.4.1 Design-Builder shall, in accordance with these General Conditions, furnish to Owner a Statutory Bond, Performance Bond and Maintenance Bond on forms approved by Owner and secured by a surety company acceptable to Owner. With each bond there shall be filed with Owner one copy of a "Power of Attorney" certified to include the date of the bonds. Surety companies executing bonds must appear on the Treasury Department's most current list (Circular 570 as amended) and be authorized to transact business in Kansas.

~~If Owner requires Design-Builder to obtain performance and labor and material payment bonds, or other forms of performance security, the amount, form and other conditions of such security shall be as set forth in the Agreement.~~

5.4.2 Design-Builder shall notify and obtain the consent and approval of Design-Builder's surety for all Change Orders and written amendments, if such notice is required by Design-Builder's surety or by law. Design-Builder's execution of a Change Order or written amendments to the Agreements shall constitute Design-Builder's warranty to Owner that the surety has been notified and that the surety consents to such Change Orders or written amendment; accordingly surety shall be conclusively deemed to have been notified of such Change Order or written amendment and to have expressly consented thereto.

~~All bonds furnished by Design-Builder shall be in a form satisfactory to Owner. The surety shall be a company qualified and registered to conduct business in the state in which the Project is located.~~

5.4.3 If Design-Builder's surety or any Bond furnished by Design-Builder is declared bankrupt, or becomes insolvent, or its right to do business is terminated in the State of Kansas, or it ceases to meet the requirements herein, Design-Builder shall within five (5) days thereafter substitute an acceptable surety and appropriate Bond.

## **Article 6**

### **Payment**

#### **6.1 Schedule of Values.**

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

**6.1.2** The Owner will timely review and approve the schedule of values so as not to delay the submission of the Design-Builder's first application for payment. The Owner and Design-Builder shall timely resolve any differences so as not to delay the Design-Builder's submission of its first application for payment.

#### **6.2 Monthly Progress Payments.**

**6.2.1** On or before the date established in the Agreement, Design-Builder shall submit for Owner's review and approval its Application for Payment requesting payment for all Work

performed as of the date of the Application for Payment. The Application for Payment shall be accompanied by all supporting documentation required by the Contract Documents and/or established at the meeting required by Section 2.1.4 hereof.

6.2.2 The Application for Payment must be notarized and supported by sufficient data to demonstrate the Design-Builder's right to payment and compliance with the payment provisions of the Contract to the satisfaction of the Owner, such as copies of requisitions from Subcontractors and material suppliers, partial lien waivers, releases and other documents. Each Application for Payment must reflect approved Contract Modifications and the Contract retainage provided herein. Applications for Payment may include materials and equipment delivered and suitably stored at the Site for subsequent incorporation in the Work. The Owner has no obligation or responsibility to pay for materials stored off the Site. However, if specifically approved in writing in advance by the Owner, an Application for Payment may include materials and equipment stored off the Site at a location agreed upon in writing. Payment for materials and equipment stored on or off the Site is conditioned upon compliance by the Design-Builder with procedures satisfactory to the Owner to protect the Owner's interests. Payment for materials and equipment stored off the Site will, in addition, be conditioned upon the Design-Builder's provision of applicable insurance, storage and transportation to the Site.

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

~~6.2.3 All discounts offered by Subcontractor, Sub-Subcontractors and suppliers to Design-Builder for early payment shall accrue one hundred percent to Design-Builder to the extent Design-Builder advances payment. Unless Owner advances payment to Design-Builder specifically to receive the discount, Design-Builder may include in its Application for Payment the full undiscounted cost of the item for which payment is sought.~~

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

6.2.5 Prior to Substantial Completion, Applications for Payment will be made in an amount equal to the percentage indicated below, but, in each case, less the aggregate of payments previously made and less such amounts as Owner shall determine, or Owner may withhold in accordance with paragraph 6.3.1 of the General Conditions.

6.2.5.1 90% of Work completed;

6.2.5.2 90% of materials and equipment not incorporated in the Work (but delivered, suitably stored, insured, and accompanied by documentation satisfactory to Owner as provided in Section 6.2.2 of these General Conditions);

6.2.5.3 100% of the Design-Builder Fee earned based upon the value of the Work complete.

6.2.6 Upon Substantial Completion, payment will be made in an amount sufficient to increase total payments to Contractor to 95% of the Contract Price, less such amounts as Owner shall determine, or Owner may withhold in accordance with paragraph 6.3.1 of the General Conditions.

6.2.7 Owner shall require at intervals as it shall determine and at any time before Final

Payment is made for the Work specified herein that Design-Builder furnish Owner with written acknowledgements by all Subcontractors and vendors who have done Work or labor on, or who have furnished materials for this Project, that they have been fully paid by Design-Builder for such Work, or labor done or materials furnished by them. Design-Builder's failure to furnish said list or to include all such Subcontractors and vendors shall not relieve Design-Builder of its surety of any obligation assumed under the Contract, nor shall Owner's request for such list create any obligation on Owner's part to verify accuracy. Owner may require, at its option, lien waivers on forms supplied by Owner. Further, it is agreed that Design-Builder shall promptly pay each subcontractor out of the amount paid to Design-Builder on account of such Subcontractor's Work, the amount to which subcontractor is entitled. In the event Owner becomes informed that Design-Builder has not paid a Subcontractor, Owner shall have the right, but not duty, to issue future checks in payment to Design-Builder of amounts otherwise due hereunder naming Design-Builder and such Subcontractor as joint payees. Such joint check procedure, if employed by Owner, shall create no rights in favor of any person or entity beyond the right of the named payees to payment of the check and shall not be deemed to commit Owner to this procedure in the future.

**6.2.8** Design-Builder has formulated the GMP Exhibit net of all sales and compensation taxes. No applications for Payment shall include any amount for reimbursement of such taxes paid by Design-Builder resulting from Design-Builder's failure to use Owner's tax exemption certificate for any purchase in connection with the Work. Final Payment will not be made to Design-Builder until Owner has received a Project Completion Certificate from the Design-Builder along with a consent of surety to Final Payment.

**6.2.9** Design-Builder shall be responsible for the return and/or exchange of surplus materials, and all credits for returned or exchanged materials shall be first submitted to Owner for approval. Applications for Payment shall reflect any such credits, and the Contract Price shall be adjusted as necessary to reflect any such credits. Non-returnable excess materials shall be turned over to Owner, or, at its option, be removed from the Project site at Design-Builder's expense.

### **6.3 Withholding of Payments.**

**6.3.1** On or before the date established in the Agreement, Owner shall pay Design-Builder all amounts properly due. If Owner determines that Design-Builder is not entitled to all or part of an Application for Payment as a result of Design-Builder's failure to meet its obligations hereunder, it will notify Design-Builder in writing at least five (5) days prior to the date payment is due. The notice shall indicate the specific amounts Owner intends to withhold, the reasons and contractual basis for the withholding, and the specific measures Design-Builder must take to rectify Owner's concerns. Design-Builder and Owner will attempt to resolve Owner's concerns prior to the date payment is due. If the parties cannot resolve such concerns, Design-Builder may pursue its rights under the Contract Documents, including those under Article 10 hereof. Owner may decline to make payment, may withhold funds, and, if necessary, may demand the return of some or all of the amounts previously paid to Design-Builder, to protect Owner from loss because of:

**6.3.1.1** Defective Work not remedied by Design-Builder nor, in the opinion of Owner, likely to be remedied by Design-Builder;

**6.3.1.2** Claims of third parties against Owner or Owner's property;

**6.3.1.3** Failure by Design-Builder to pay Subcontractors or others in a prompt and proper fashion;

**6.3.1.4** Evidence that the balance of the Work cannot be completed in accordance with the Agreement for the unpaid balance of the Contract Price;

**6.3.1.5** Evidence that the Work will not be completed in the Contract Time required for substantial or final completion;

6.3.1.6 Persistent failure to carry out the Work in accordance with this Agreement;

6.3.1.7 Damage to Owner or a third party to whom Owner is, or may be, liable;

6.3.1.8 Condition unfavorable for the prosecution of Work, or because of conditions which, in the opinion of the Owner, warrant such action.

**6.3.2** Notwithstanding anything to the contrary in the Contract Documents, Owner shall pay Design-Builder all undisputed amounts in an Application for Payment within the times required by the Agreement.

#### **6.4 Right to Stop Work and Interest.**

**6.4.1** If Owner fails to pay timely Design-Builder any amount that becomes due, Design-Builder, in addition to all other remedies provided in the Contract Documents, may stop Work pursuant to Section 11.3 hereof. All payments due and unpaid shall bear interest at the rate set forth in the Agreement.

#### **6.5 Design-Builder's Payment Obligations.**

**6.5.1** Design-Builder will pay Design Consultants and Subcontractors, in accordance with its contractual obligations to such parties, all the amounts Design-Builder has received from Owner on account of their work. Design-Builder will impose similar requirements on Design Consultants and Subcontractors to pay those parties with whom they have contracted. Design-Builder will indemnify and defend Owner against any claims for payment and mechanic's liens as set forth in Section 7.3 hereof.

#### **6.6 Substantial Completion.**

6.6.1 When Design-Builder considers the entire Work ready for its intended use and all final site restoration, equipment start-up, and testing is complete, Design-Builder shall notify Owner in writing that the entire Work is substantially complete and request that Owner issue a statement of Substantial Completion. Within a reasonable time thereafter, Owner and Design-Builder shall observe the Work to determine the status of completion. If Owner does not consider the Work substantially complete, Owner will notify Design-Builder in writing, giving its reasons therefor. If Owner considers the Work substantially complete, Owner will prepare a tentative statement of Substantial Completion which shall fix the date of Substantial Completion. There shall be attached to the statement a tentative list of item to be completed or corrected before Final Payment. This list shall be called a Punch List. The statement shall state the responsibilities of Owner and Design-Builder for maintenance, utilities, damage to the Work and insurance if any of these items shall be treated differently upon Substantial Completion and shall further state the time within which Design-Builder shall complete the items on the Punch List attached thereto.

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

~~6.6.2 Upon Substantial Completion of the entire Work or, if applicable, any portion of the Work,~~

~~Owner shall release to Design-Builder all retained amounts relating, as applicable, to the entire Work or completed portion of the Work, less an amount equal to the reasonable value of all remaining or incomplete items of Work as noted in the Certificate of Substantial Completion.~~

**6.6.3** Owner shall have the right to exclude Design-Builder from the Work after the date of Substantial Completion, but Owner shall allow Design-Builder reasonable access to complete or correct items on the Punch List.

~~Owner, at its option, may use a portion of the Work which has been determined to be Substantially Complete, provided, however, that (i) a Certificate of Substantial Completion has been issued for the portion of Work addressing the items set forth in Section 6.6.1 above, (ii) Design-Builder and Owner have obtained the consent of their sureties and insurers, and to the extent applicable, the appropriate government authorities having jurisdiction over the Project, and (iii) Owner and Design-Builder agree that Owner's use or occupancy will not interfere with Design-Builder's completion of the remaining Work.~~

## **6.7 Final Payment.**

**6.7.1** Upon written notice from Design-Builder that Work or an agreed portion thereof is complete, Engineer will make a final inspection with Design-Builder and will notify Design-Builder in writing of all particulars in which this inspection reveals that the Work is incomplete or defective. Design-Builder shall immediately take such measures as are necessary to remedy such deficiencies. If a repeat final inspection(s) is required, Design-Builder shall bear the cost of such repeat inspection, if any, including engineering and other professional fees. After Design-Builder has completed all such corrections and delivered all maintenance and operating instructions, schedules, guarantees, bonds, certificates of inspection, marked-up record documents and other documents, and provide all required training, all as required by the Contract Documents, and after Owner has indicated that the Work is complete, Design-Builder may make application for Final Payment following the procedure for progress payment requests.

~~After receipt of a Final Application for Payment from Design-Builder, Owner shall make final payment by the time required in the Agreement, provided that Design-Builder has achieved Final Completion.~~

**6.7.2** The Final Payment request shall be accompanied by all documentation called for in the Contract Documents, together with complete and legally effective releases or waivers (satisfactory to Owner) of all liens arising out of or filed in connection with the Work. In lieu thereof and as approved by Owner, Design-Builder may furnish receipts or releases in full; an affidavit of Design-Builder that the releases and receipts include all labor, services, material and equipment for which a lien could be filed, and that all payrolls, material and equipment bills, and other indebtedness connected with the Work for which Owner or its property might in any way be responsible, have been paid or otherwise satisfied; and consent of the surety, if any, to Final Payment. If any Subcontractor or supplier fails to furnish a release or receipt in full, Design-Builder may furnish a bond or other collateral satisfactory to Owner to indemnify Owner against any lien.

If, on the basis of Owner's observation of the Work during construction and final inspection, Owner determines that the Work has been completed and Design-Builder's other obligations under the Contract Documents have been fulfilled, Final Payment certificates together with acceptance certificates will be submitted for payment.

~~At the time of submission of its Final Application for Payment, Design-Builder shall provide the following information:~~

**6.7.2.1** ~~An affidavit that there are no claims, obligations or liens outstanding or unsatisfied for labor, services, material, equipment, taxes or other items performed, furnished or incurred for or in connection with the Work which will in any way affect~~

Owner's interests;

~~6.7.2.2~~ A general release executed by Design-Builder waiving, upon receipt of final payment by Design-Builder, all claims, except those claims previously made in writing to Owner and remaining unsettled at the time of final payment;

~~6.7.2.3~~ Consent of Design-Builder's surety, if any, to final payment;

~~6.7.2.4~~ All operating manuals, warranties and other deliverables required by the Contract Documents; and

~~6.7.2.5~~ Certificates of insurance confirming that required coverages will remain in effect consistent with the requirements of the Contract Documents.

**6.7.3** Design-Builder's obligation to perform and complete the Work in accordance with the Contract Documents shall be absolute. Neither payment of any progress or final payment by Owner, nor the issuance of a certificate of Substantial Completion, nor any use or occupancy of the Work or any part thereof by Owner, nor any act of acceptance by Owner nor any failure to do so, nor any correction of Defective Work by Owner shall constitute an acceptance of Work not in accordance with the Contract Documents or a release of Design-Builder's obligation to perform the Work in accordance with the Contract Documents.

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

**6.7.4** The making and acceptance of the final payment shall constitute a waiver of all claims by Design-Builder against Owner other than those claims previously made in writing against Owner by Design-Builder, pending at the time of final payment and identified in writing by Design-Builder as unsettled as of the time of request for final payment.

~~Deficiencies in the Work discovered after Substantial Completion, whether or not such deficiencies would have been included on the Punch List if discovered earlier, shall be deemed warranty Work. Such deficiencies shall be corrected by Design-Builder under Sections 2.9 and 2.10 herein, and shall not be a reason to withhold final payment from Design-Builder, provided, however, that Owner shall be entitled to withhold from the Final Payment the reasonable value of completion of such deficient work until such work is completed.~~

## **Article 7**

### **Indemnification**

#### **7.1 Patent and Copyright Infringement.**

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

**7.1.2** If Owner is enjoined from the operation or use of the Work, or any part thereof, as the result of any patent or copyright suit, claim, or proceeding, Design-Builder shall at its sole expense take reasonable steps to procure the right to operate or use the Work. If Design-Builder cannot so procure such right within a reasonable time, Design-Builder shall promptly, at Design-Builder's option and at Design-Builder's expense, (i) modify the Work so as to avoid infringement of any such patent or copyright or (ii) replace said Work with Work that does not infringe or violate any such patent or copyright, provided however, that all modifications and/or replacement work performed by the Design-Builder is approved by the Owner and all modifications and/or replacement work meet the requirements of the Contract Documents.

~~**7.1.3** Sections 7.1.1 and 7.1.2 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 Owner and not offered or recommended by Design-Builder to Owner or (ii) arising from modifications to the Work by Owner or its agents after acceptance of the Work. If the suit, claim or proceeding is based upon events set forth in the preceding sentence, Owner shall defend, indemnify and hold harmless Design-Builder to the same extent Design-Builder is obligated to defend, indemnify and hold harmless Owner in Section 7.1.1 above.~~

**7.1.4** The obligations set forth in this Section 7.1 shall constitute the sole agreement between the parties relating to liability for infringement of violation of any patent or copyright.

## **7.2 Tax Claim Indemnification.**

**7.2.1** If, in accordance with Owner's direction, an exemption for all or part of the Work is claimed for taxes, Owner shall indemnify, defend and hold harmless Design-Builder from and against any liability, penalty, interest, fine, tax assessment, attorneys' fees or other expenses or costs incurred by Design-Builder as a result of any action taken by Design-Builder in accordance with Owner's directive. Owner shall furnish Design-Builder with any applicable tax exemption certificates necessary to obtain such exemption, upon which Design-Builder may rely. However, nothing herein shall be construed to waive any right, immunity, or defense available to the City by law.

## **7.3 Payment Claim Indemnification.**

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

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

**7.4.1** To the fullest extent permitted by all applicable Laws and Regulations, Design-Builder shall defend, indemnify and hold harmless 1) the City of Olathe and their agents and employees; 2) the Board of County Commissioners of Johnson County, Kansas, its officers, Commissions, Agencies and employee; and 3) the Kansas City Area Transportation Authority (KCATA) from and against third-party all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only when caused in whole or in part by negligent acts or omissions of the Design-

Builder, their officer, employees, and persons utilized by the Design-Builder. The City of Olathe, their agents and employees; the Board of County Commissioners of Johnson County, Kansas, its officers, Commissions, Agencies and employee; and the Kansas City Area Transportation Authority (KCATA), their agents and employees shall not be indemnified under this contract for their sole negligence. In any and all claims against Owner or any of their consultants, agents or employees by any employee of Design-Builder, any Subcontractor, any person or organization directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation described herein shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Design-Builder or any Subcontractor under worker' compensation acts, disability benefits acts, or other employee benefit acts.

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

~~7.4.2 If an employee of Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable has a claim against Owner, its officers, directors, employees, or agents, Design-Builder's indemnity obligation set forth in Section 7.4.1 above shall not be limited by any limitation on the amount of damages, compensation or benefits payable by or for Design-Builder, Design Consultants, Subcontractors, or other entity under any employee benefit acts, including workers' compensation or disability acts.~~

## ~~7.5 Owner's General Indemnification.~~

~~7.5.1 Owner, to the fullest extent permitted by law, shall indemnify, hold harmless and defend Design-Builder and any of Design-Builder's officers, directors, and employees, from and against claims, losses, damages, liabilities, including attorneys' fees and expenses, for bodily injury, sickness or death, and property damage or destruction (other than to the Work itself) to the extent resulting from the negligent acts or omissions of Owner's separate contractors or anyone for whose acts any of them may be liable.~~

## **Article 8**

### **Time**

#### **8.1 Obligation to Achieve the Contract Times.**

8.1.1 Design-Builder agrees that it will commence performance of the Work and achieve the Contract Time(s) in accordance with Article 5 of the Agreement.

#### **8.2 Delays to the Work.**

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

**8.2.2** Except as otherwise provided in the Contract Documents, no Party shall be liable for any failure to perform its obligations where such failure is as a result of a Force Majeure event. Any Party asserting Force Majeure as an excuse shall have the burden of proving that reasonable steps were taken to minimize delay or damages caused by foreseeable events, that all non-excused obligations were substantially fulfilled, and that the other Party was timely notified of the likelihood or actual occurrence which would justify such an assertion, so that other prudent precautions could be contemplated.

~~In addition to Design-Builder's right to a time extension for those events set forth in Section 8.2.1 above, Design-Builder shall also be entitled to an appropriate adjustment of the Contract Price provided, however, that the Contract Price shall not be adjusted for Force Majeure Events unless otherwise provided in the Agreement.~~

**8.2.3** Excusable delays are delays in the progress of the Work which at the time of the delays were critical path activities as shown on the most recently approved Construction Schedule, or delays to Work not previously identified as critical path activities as shown on the most recently approved Construction Schedule but which become critical path activities as a result of a delay, and which prevent the Design-Builder from achieving Substantial Completion before the expiration of the Contract Time, caused by conditions which could not reasonably be anticipated by, are beyond the control of, and are without the fault or negligence of the Owner as set forth in Sections 8.2.2 and 8.2.4, the Design-Builder, or anyone for whose acts the Design-Builder is responsible. Excusable delays do not include any delays caused in whole or in part by any Subcontractors, Sub-subcontractors or suppliers. There shall be no compensation whatsoever for excusable delays. Excusable delays may, but do not necessarily, include:

**8.2.3.1** weather delays as further defined in Section 8.2.8;

**8.2.3.2** acts of government and regulatory agencies and officials (other than the Owner in its capacity as Owner);

**8.2.3.3** catastrophic events such as fire, flood and unavoidable casualties; and

**8.2.3.4** strikes or labor disputes.

**8.2.4** Compensable delays are limited to delays in the progress of the Work which at the time of the delays were critical path activities as shown on the most recently approved Construction Schedule, or delays to Work not previously identified as critical path activities as shown on the most recently approved Construction Schedule but which become critical path activities as a result of a delay, and which prevent the Design-Builder from achieving Substantial Completion before the expiration of the Contract Time, caused solely and exclusively by acts or omissions of the Owner (except actions taken by the Owner acting as a regulatory authority to protect the public health or safety or to conform to law).

**8.2.5** Unexcused delays are delays in Work which at the time of the delays were critical path activities as shown on the most recently approved Construction Schedule, or delays to Work not previously identified as critical path activities as shown on the most recently approved Construction Schedule but which become critical path activities as a result of a delay, and which prevent the Design-Builder from achieving Substantial Completion before the expiration of the Contract Time, and which are not excusable delays or compensable delays. No increase in the Contract Sum or extension of the Contract Time will be made for an unexcused delay.

**8.2.6** The Design-Builder must provide written notice of any actual or prospective delay promptly, and in no event later than ten (10) days after the occurrence of the event giving rise to such delay. The notice must be given to the Owner within the specified time. In the case of a continuing delay, the Design-Builder must provide an initial notice and a further notice at each progress meeting throughout the duration of the delay. The notice must contain all of the specific information required in Section 8.2.7. The Design-Builder's failure to provide the written notice

containing the information specified in Section 8.2.7 within the ten (10) days prescribed above will be conclusively deemed a waiver of any claim for delay arising from such occurrence.

**8.2.7** The Design-Builder's notice must identify those portions of the Construction Schedule affected by the delay and must include an estimate of the cost and probable effect of the delay, if any, on the progress of the Work. Supporting documentation must include, but is not limited to:

**8.2.7.1** A written detailed statement of the reasons and causes for the delay;

**8.2.7.2** inclusive dates of the delay;

**8.2.7.3** specific trades and portions of the Work affected by the delay;

**8.2.7.4** status of Work affected before commencement of the delay;

**8.2.7.5** effect of the delay on available "float" time;

**8.2.7.6** a critical path method (CPM) analysis demonstrating that the delay has affected an activity then on the critical path at the time of the occurrence of the delay as shown on the most recently approved Construction Schedule, or that the delay has an effect on an activity not previously on the critical path as shown on the most recent approved Construction Schedule, but which becomes a critical path activity as a result of a delay; and

**8.2.7.7** if the Design-Builder claims that the delay is an excusable delay or compensable delay, evidence that the delay was unforeseeable, beyond the Design-Builder's control, and without the fault or negligence of the Design-Builder or the negligence of anyone for whose acts the Design-Builder is responsible including any Subcontractor, Sub-subcontractor, Design Consultant, or supplier; and in the case of a compensable delay, was caused solely and exclusively by the acts or omissions of the Owner (excepting actions taken by the Owner to protect the public health or safety or to conform to law) or anyone for whose acts the Owner is responsible, and which are unreasonable under the circumstances involved and not reasonably within the contemplation of the parties.

**8.2.8** In order for the Design-Builder to be entitled to an extension of the Contract Time for unusually severe weather, the following conditions must be satisfied:

**8.2.8.1** The weather experienced at the Site during the Contract period must be found to be unusually severe, that is, more severe than the adverse weather anticipated for the Project location during any given month;

**8.2.8.2** The unusually severe weather must delay Work which at the time of the unusual severe weather was a critical path activity as shown on the most recently approved Construction Schedule, or delays Work not previously identified as critical path activity as shown on the most recently approved Construction Schedule but which become critical path activity as a result of a delay, and which prevents the Design-Builder from achieving Substantial Completion before expiration of the Contract Time. The delay must be beyond the control and without the fault or negligence of the Design-Builder. For example, the impacted activity must not have occurred during unusually severe weather due to previous unexcused delays; and

**8.2.8.3** The Design-Builder must have provided written notice of the weather-related delay complying with Sections 8.2.6 and 8.2.7 above.

8.2.8.4 The following schedule of monthly anticipated adverse weather delays constitute the base line for monthly weather time evaluations. The Design-Builder's Construction Schedule must reflect these anticipated adverse weather delays in all-weather dependent activities.

MONTHLY ANTICIPATED ADVERSE WEATHER DELAY

Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
6	4	3	3	3	3	2	2	2	2	3	3

8.2.8.5 Upon acknowledgement of the Notices to Proceed and continuing throughout the Contract, the Design-Builder must record on the daily superintendent report, the occurrence of adverse weather and resultant impact to normally scheduled Work. Actual adverse weather delay days must prevent Work on critical path activities, or must prevent Work not previously identified as a critical path activity as shown on the most recent approved Construction Schedule but which becomes a critical path activity as a result of a delay, for fifty (50) percent or more of the Design-Builder's scheduled workday. The number of actual adverse weather delays must include Design-Builder's scheduled workdays impacted by actual adverse weather (even if the adverse weather occurred in the previous month), be calculated chronologically from the first to the last day each month, and be recorded as full days. If the Design-Builder has complied with Sections 8.2.6 and 8.2.7 and the provisions of this Section 8.2.8.1 and the number of actual adverse weather delay workdays exceeds the number of days anticipated in the table above, and have adversely affected critical path weather-dependent activities, the Design-Builder is entitled to a Modification of the Contract Time but not the Contract Sum.

8.2.9 If strikes or labor disputes are to be considered as the basis for an excusable delay, they must be documented by data evidencing (i) the trades directly and indirectly involved in or affected by the strike or labor dispute, (ii) reasons for the strike or labor dispute, (iii) the onset and duration of the strike or labor dispute, and (iv) the measures taken by the Design-Builder to avoid or overcome the effects of any delay.

8.2.10 Upon receipt of a notice from the Design-Builder of the occurrence of a delay complying with Sections 8.2.6 and 8.2.7 (and if applicable 8.2.8 and 8.2.9), the Owner will review the most recently approved Construction Schedule to determine (i) whether the delay is in fact an excusable or compensable delay, and (ii) whether any adverse effects of the delay can be overcome by an adjustment in the Construction Schedule, including the application of any unused "float" time available in the schedule. The Owner may require the Design-Builder to submit a more detailed Construction Schedule than previously required in order to permit the Owner to evaluate the delay. Based on such review, the Design-Builder must, if required by the Owner, submit for the Owner's approval a revised Construction Schedule which minimizes the adverse effects of the delay.

8.2.11 No extension of the Contract Time or increase in the Contract Sum will be allowed for any delay or part thereof occurring more than ten (10) days before written notice of the delay is provided by the Design-Builder. No extension of the Contract Time or increase in the Contract Sum will be made to the extent that performance is, was or would have been suspended, delayed or interrupted by another cause for which the Design-Builder is responsible. No increase in the Contract Sum will be made to the extent performance was or would have been suspended, delayed or interrupted by another cause for which the Owner is not solely and exclusively responsible.

8.2.12 The Design-Builder acknowledges and agrees that the profit, additional bond cost and overhead (which includes extended office overhead and site-specific overhead and general conditions) if any, incurred by the Design-Builder in performing work beyond the Work required by the Contract Documents and any and all other costs, compensation or damages due Design-Builder (including any of its Subcontractors or suppliers), is included in, and payable to the

Design-Builder as part of the Change Order or Construction Directive. Design-Builder waives any and all other damages and cost of any nature or kind whatsoever including claims for local and cumulative impacts as a result of such Change Order or Construction Directive Work and any and all other claims of any type or nature whatsoever including any claim for loss of productivity or loss of efficiency. The Design-Builder will be compensated for compensable delays only for actual and direct damages resulting from such compensable delays. Actual direct damages are limited to site specific general conditions and do not include any indirect costs such as home office overhead. The Design-Builder will be compensated for such actual and direct damages for compensable delays not attributable to performance of Change Order.

**8.2.13** In the event the Owner denies the Design-Builder's request for a change in the Contract Time or, in the case of a compensable delay, a change in the Contract Sum, the Design-Builder may, within ten (10) days after such denial, submit a Claim as provided in Article 15. Submissions made prior to the denial must be resubmitted after the denial. Any Claim on account of denial of a change that is not made within such ten (10) days of the denial is deemed waived.

**8.2.14** The Contract Time may only be changed by a Change Order. Any claim for an extension or shortening of the Contract Time shall be based on written notice delivered by the party requesting the change to the other party promptly and stating the general nature of the claim. A written claim with supporting data shall be delivered according to Section 8.2.6 (unless the Owner allows an additional period of time to ascertain more accurate data in support of the claim) and shall be accompanied by the claimant's written statement that the adjustment claimed is the entire adjustment to which the claimant has reason to believe it is entitled as a result of the occurrence of said event. All claims for adjustment in the Contract Time shall be determined by the Owner. No claim for an adjustment in the Contract Time will be valid if not submitted in accordance with the requirements of this Article 8.

**8.2.15** In executing this Agreement, Design-Builder expressly covenants and agrees that, in undertaking to complete the Work within the time therein fixed, it has taken into consideration and made allowances for all hindrances and delays incident to such Work, whether growing out of delays in securing materials, workers, weather conditions or otherwise.

### **8.3 Progress and Completion.**

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

**8.3.2** The Design-Builder shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence operations on the site or elsewhere prior to the effective date of insurance required by the Contract to be furnished by the Design-Builder and Owner, or prior to approval of Certificates of Insurance, and Additional Insured Endorsement and Notice of Cancellation Endorsement required to be submitted to Owner under the Contract. The date of commencement of the Work shall not be changed by the effective date of such insurance.

**8.3.3** The Design-Builder shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time. If Design-Builder's Work shall fall behind schedule for reasons that are not excused under the terms of the Contract, Design-Builder shall add additional workers or shifts, and/or work overtime as necessary to maintain the Construction Schedule as a cost of the Work.

**8.3.4** The Design-Builder must conform to the most recently approved Construction Schedule. The Design-Builder must complete the indicated Work or achieve the required percentage of completion, as applicable, within any interim completion dates established in the most recently approved Construction Schedule.

8.3.5 The Design-Builder must maintain at the Site, available to the Owner for their reference during the progress of the Work, a copy of the approved Construction Schedule and any approved revisions thereto. The Design-Builder must keep current records of and mark on a copy of the approved Construction Schedule the actual commencement date, progress, and completion date of each scheduled activity indicated on the Construction Schedule.

8.3.6 The Design-Builder represents that its bid includes all costs, overhead and profit which may be incurred throughout the Contract Time and the period between Substantial and Final Completion. Accordingly, the Design-Builder may not make any claim for delay damages based in whole or in part on the premise that the Design-Builder would have completed the Work prior to the expiration of the Contract Time but for any claimed delay.

8.3.7 If the Design-Builder's progress is not maintained in accordance with the approved Construction Schedule, or the Owner determines that the Design-Builder is not diligently proceeding with the Work or has evidence reasonably indicating that the Design-Builder will not be able to conform to the most recently approved Construction Schedule, the Design-Builder must, promptly and at no additional cost to the Owner, take all measures necessary to accelerate its progress to overcome the delay and ensure that there will be no further delay in the progress of the Work and notify the Owner.

8.3.8 The Owner reserves the right to issue a written directive to accelerate the Work that may be subject to an appropriate adjustment, if any, in the Contract Sum. If the Owner requires an acceleration of the Construction Schedule and no adjustment is made in the Contract Sum, or if the Design-Builder disagrees with any adjustment made, the Design-Builder must file a claim as provided herein or the same will be deemed to be conclusively waived.

#### 8.4 Delay Damages.

8.4.1 By executing a Change Order or Contract Amendment, the Design-Builder represents that the Design-Builder is not entitled to an increase in the Contract Sum or an extension of the Contract Time beyond that specified in the Change Order or Contract Amendment for the Work performed or to be performed under the Change Order. The Design-Builder is not entitled to an increase in the Contract Sum or extension of the Contract Time as a result of the issuance by the Owner of Construction Change Directive unless the Design-Builder asserts a claim as required by this Article 8 and Article 10.

8.4.2 The provisions of Section 8.3.1 do not apply to claims that meet all of the following conditions: (i) the claim arises under the Contract; (ii) the claim is limited to actual and direct damages (i.e. profit, additional bond and insurance cost (if any) and overhead (only site-specific overhead and not including home office overhead)) incurred as a result of a delay in completing the Project which the Design-Builder acknowledges are fully compensated for by payment of the adjustment amount specified in Section 8.2.13; (iii) the Contract establishes a time limit for achieving Substantial Completion and the claim is for delays that prevent achievement of Substantial Completion of the Contract within that time limit; (iv) the delay for which damages are claimed is caused solely and exclusively by the Owner or anyone for whom they are responsible; (v) the delay is not caused by actions taken by the Owner to protect the public health or safety or to conform to law; and (vi) the Design-Builder has fully complied with Sections 8.2.6 and 8.2.7.

8.4.3 A time extension may be granted only for an excusable delay that is beyond the Design-Builder's control and occurs without the Design-Builder's fault or negligence. No time extension will be granted in the absence of a written claim for the time extension complying with Sections 8.2.6 and 8.2.7 (and if applicable, 8.2.8 and 8.2.9).

## Article 9

### Changes to the Contract Price and Time

#### 9.1 Change Orders.

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

- 9.1.1.1** The scope of the change in the Work;
- 9.1.1.2** The amount of the adjustment to the Contract Price; and
- 9.1.1.3** The extent of the adjustment to the Contract Time(s).

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

**9.1.3** Except for Work done as a result of an emergency endangering life or property, no Work resulting in an addition to the Contract Price shall be done by Design-Builder nor shall a claim for an addition to the Contract Price be made by Design-Builder unless pursuant to the provisions of a Change Order.

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

#### ~~9.2 Work Change Directives.~~

~~**9.2.1** A Work Change Directive is a written order prepared and signed by Owner directing a change in the Work prior to agreement on an adjustment in the Contract Price and/or the Contract Time(s).~~

~~**9.2.2** Owner and Design-Builder shall negotiate in good faith and as expeditiously as possible the appropriate adjustments for the Work Change Directive. Upon reaching an agreement, the parties shall prepare and execute an appropriate Change Order reflecting the terms of the agreement.~~

#### 9.3 Minor Changes in the Work.

**9.3.1** Minor changes in the Work do not involve an adjustment in the Contract Price and/or Contract Time(s) and do not materially and adversely affect the Work, including the design, quality, performance and workmanship required by the Contract Documents. Design-Builder may make minor changes in the Work consistent with the intent of the Contract Documents, provided, however, that Design-Builder shall promptly inform Owner, in writing, of any such changes and record such changes on the documents maintained by Design-Builder.

#### 9.4 Contract Price Adjustments.

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

- 9.4.1.1** Unit prices set forth in the Agreement or as subsequently agreed to between the parties;

**9.4.1.2** A mutually accepted lump sum, properly itemized and supported by sufficient substantiating data to permit evaluation by Owner;

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

**9.4.1.4** If an increase or decrease cannot be agreed to as set forth in items 9.4.1.1 through 9.4.1.3 above and Owner issues a Work Change Directive, the cost of the change of the Work shall be determined by the reasonable expense and savings in the performance of the Work resulting from the change, including a reasonable overhead and profit, as may be set forth in the Agreement.

**9.4.2** In the event that Unit Prices are provided for in the Contract Documents or are subsequently agreed to by the parties as to all or a part of the Work, and if the quantities originally contemplated are so changed in a proposed Change Order that application of the original agreed upon Unit Price to the quantities of Work proposed in the Change Order is substantially inequitable to either Owner or Design-Builder, the Unit Prices shall be reevaluated and may be adjusted by Owner.

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

**9.4.3** If Owner and Design-Builder disagree upon whether Design-Builder is entitled to be paid for any services required by Owner, or if there are any other disagreements over the scope of Work or proposed changes to the Work, Owner and Design-Builder shall resolve the disagreement pursuant to Article 10 hereof. As part of the negotiation process, Design-Builder shall furnish Owner with a good faith estimate of the costs to perform the disputed services in accordance with Owner's interpretations. If the parties are unable to agree and Owner expects Design-Builder to perform the services in accordance with Owner's interpretations, Design-Builder shall proceed to perform the disputed services, conditioned upon Owner issuing a written order to Design-Builder (i) directing Design-Builder to proceed and (ii) specifying Owner's interpretation of the services that are to be performed. If this occurs, Design-Builder shall be entitled to submit in its Applications for Payment an amount equal to fifty percent (50%) of its reasonable estimated direct cost to perform the services, and Owner agrees to pay such amounts, with the express understanding that (i) such payment by Owner does not prejudice Owner's right to argue that it has no responsibility to pay for such services and (ii) receipt of such payment by Design-Builder does not prejudice Design-Builder's right to seek full payment of the disputed services if Owner's order is deemed to be a change to the Work.

**9.4.4** No change in the Work shall entitle Design-Builder an extension to the Contract Time unless the Owner determines that additional Contract Time is required and specifically so provides in the Change Order. No change in the Work shall entitle Design-Builder to delay damages. By executing a Change Order, Design-Builder represents that Design-Builder is not entitled to an increase in the Contract Price or an extension of the Contract Time beyond that specified in the Change Order for the Work to be performed under the Change Order.

**9.4.5** The Contract Price and Contract Time may only be adjusted by Change Order. The value of any change in the Work which results in an addition or deduction to the Contract Price shall be determined at the option of the Owner to be either by agreed lump sum or by unit prices named in this Agreement or subsequently agreed upon. In order to arrive at the value for any deletion, Design-Builder shall credit Owner with its projected cost(s), including overhead and fee for any Work which was previously included but which has been excluded by any such Change Order.

**9.4.6** No claim for extra Work of any kind will be allowed except as provided herein. If extra Work orders are given in accordance with the provisions of this Agreement, such Work shall be

considered a part hereof and subject to each and all of the terms and requirements of this Agreement.

9.4.7 Design-Builder shall be responsible for notifying its surety(ies) of any modifications to the Contract Price or Contract Time, and said surety(ies) shall not seek discharge as a result of any failure on Design-Builder's part to notify surety(ies).

## **9.5 Emergencies.**

9.5.1 In emergencies affecting the safety or protection of persons, the Work, or property at the Project site or adjacent thereto, Design-Builder, without special instruction or authorization from Owner, is obligated to act to prevent threatened damage, injury, or loss. Design-Builder shall give Owner prompt written notice of any significant changes in the Work or deviations from the Contract Documents caused by such emergencies. If the Owner determines that a change in the Contract Documents is required because of the action taken in response to an emergency, a written Amendment or Change Order will be issued to document the consequences of the changes or variations. Owner shall also have the right to immediately cure an emergency without notice to Contractor. If Owner observes a situation in which it believes Design-Builder has not taken sufficient precaution for the safety of the public or the protection of the Project, Owner may direct Design-Builder to take immediate action and Design-Builder shall immediately respond.

In any emergency affecting the safety of persons and/or property, Design-Builder shall act, at its discretion, to prevent threatened damage, injury or loss. Any change in the Contract Price and/or Contract Time(s) on account of emergency work shall be determined as provided in this Article 9.

## **Article 10**

### **Contract Adjustments and Disputes**

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

**10.1.1** If either Design-Builder or Owner believes that it is entitled to relief against the other for any event arising out of or related to the Work or Project, such party shall provide written notice to the other party of the basis for its claim for relief. Such notice shall, if possible, be made prior to incurring any cost or expense and in accordance with any specific notice requirements contained in applicable sections of these General Conditions of Contract. In the absence of any specific notice requirement, written notice shall be given within a reasonable time, not to exceed twenty-one (21) days, after the occurrence giving rise to the claim for relief or after the claiming party reasonably should have recognized the event or condition giving rise to the request, whichever is later. Such notice 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.

#### **10.2 Dispute Avoidance and Resolution.**

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

**10.2.2** Design-Builder and Owner will first attempt to resolve disputes or disagreements at the field level through discussions between Design-Builder's Representative and Owner's Representative which shall conclude within fourteen (14) days of the written notice provided for in Section 10.1.1 unless the Owner and Design-Builder mutually agree otherwise.

**10.2.3** If a dispute or disagreement cannot be resolved through Design-Builder's Representative and Owner's Representative, Design-Builder's Senior Representative and Owner'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 dispute or disagreement. Five (5) days prior to any meetings between the Senior Representatives, the parties will exchange relevant information that will assist the parties in resolving their dispute or disagreement.

**10.2.4** If after meeting the Senior Representatives determine that the dispute or disagreement cannot be resolved on terms satisfactory to both parties, the parties shall submit within ~~thirty (30)~~ sixty (60) days of the conclusion of the meeting of Senior Representatives the dispute or disagreement to non-binding mediation. The mediation shall be conducted by a mutually agreeable impartial mediator, or if the parties cannot so agree, a mediator designated by the American Arbitration Association ("AAA") pursuant to its Construction Industry Mediation Rules. The mediation will be governed by and conducted pursuant to a mediation agreement negotiated by the parties or, if the parties cannot so agree, by procedures established by the mediator. Unless otherwise mutually agreed by the Owner and Design-Builder and consistent with the mediator's schedule, the mediation shall commence within ninety (90) days of the submission of the dispute to mediation.

**10.2.4.1** Claims, disputes, or other matters in controversy arising out of or related to the Contract shall be subject to mediation as a condition precedent to the institution of legal or equitable proceedings by either party.

**10.2.4.2** Mediation shall proceed in advance of legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

**10.2.4.3** The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof. Any dispute under the Agreement not resolved by mediation shall be litigated in the District Court of Johnson County, Kansas, or the closest Court of competent jurisdiction thereto.

### **10.3 Arbitration.**

**10.3.1** No dispute will be submitted to arbitration without both Parties express written consent.

~~Any claims, disputes or controversies between the parties arising out of or relating to the Agreement, or the breach thereof, which have not been resolved in accordance with the procedures set forth in Section 10.2 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.~~

~~**10.3.2** The award of the arbitrator(s) shall be final and binding upon the parties without the right of appeal to the courts. Judgment may be entered upon it in accordance with applicable law by any court having jurisdiction thereof.~~

~~**10.3.3** Design Builder and Owner expressly agree that any arbitration pursuant to this Section 10.3 may be joined or consolidated with any arbitration involving any other person or entity (i) necessary to resolve the claim, dispute or controversy, or (ii) substantially involved in or affected by such claim, dispute or controversy. Both Design Builder and Owner will include appropriate provisions in all contracts they execute with other parties in connection with the Project to require such joinder or consolidation.~~

~~**10.3.4** 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.~~

#### **10.4 Duty to Continue Performance.**

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

#### **10.5 CONSEQUENTIAL DAMAGES.**

**10.5.1** NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY (EXCEPT AS SET FORTH IN SECTION 10.5.2 BELOW), NEITHER DESIGN-BUILDER NOR OWNER 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.

**10.5.2** The consequential damages limitation set forth in Section 10.5.1 above is not intended to affect the payment of liquidated damages or lost early completion bonus, if any, set forth in Article 5 of the Agreement, which both parties recognize has been established, in part, to reimburse Owner or reward Design-Builder for some damages that might otherwise be deemed to be consequential.

## **Article 11**

### **Stop Work and Termination for Cause**

#### **11.1 Owner's Right to Stop Work.**

**11.1.1** Owner may, at any time and without cause, suspend the Work or any portion thereof for a period of not more than ninety (90) days by notice in writing to Design-Builder which shall fix the date on which Work shall be resumed. Design-Builder shall resume the Work on the date so fixed. Design-Builder will not be entitled to an increase in the Contract Price, but may be granted an extension of Contract Time for any suspension of Work made as a result of delays to the Work caused by utility companies, or other contractors outside of the Owner's control. Design-Builder will not be allowed an increase in the Contract Price or an extension of the Contract Time, if such suspension is made as the result of an act or omission of Design-Builder including but not limited to the occurrence of any one or more of the following events:

**11.1.1** If Design-Builder fails to supply a qualified superintendent, sufficient skilled workmen, Subcontractors, or suitable materials or equipment;

**11.1.2** If Design-Builder repeatedly fails to make prompt payments to Subcontractors or suppliers or for labor, materials or equipment;

**11.1.3** If Design-Builder disregards Laws and Regulations of any public body having jurisdiction;

**11.1.4** If Design-Builder otherwise violates in any substantial way any provisions of the Contract Documents Owner shall have authority to suspend the Work wholly or in part, for such period of time as it may deem necessary, due to conditions unfavorable for

the prosecution of the Work, or due to conditions which warrant such action, or for such time as is necessary by reason of failure on the part of Design-Builder to carry out orders given, or to perform any or all provisions of the Contract.

If it becomes necessary to suspend Work for an indefinite period of time, Design-Builder shall (a) store all materials and equipment in such manner that the stored materials and equipment will not obstruct or impeded vehicular or pedestrian travel on either public or private property or become damaged in any way; (b) take every precaution to prevent damage or deterioration of the Work performed; and (c) erect temporary structures, surfaces, and protective barriers where necessary. Design-Builder shall not suspend Work without written authority from Owner.

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

11.1.2 If the Work is defective, or Design-Builder fails to supply sufficient skilled workmen or suitable materials or equipment, or Design-Builder fails to furnish or perform the Work in such a way that the completed Work will conform to the Contract Documents, Owner may order Design-Builder to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, this right of Owner to stop the Work shall not give rise to any duty on the part of Owner to exercise this right for the benefit of Design-Builder or any other party. Further, such order by Owner shall not result in a claim by Design-Builder for an increase in Contract Time or Contract Price.

~~Design-Builder is entitled to seek an adjustment of the Contract Price and/or Contract Time(s) if its cost or time to perform the Work has been adversely impacted by any suspension of stoppage of the Work by Owner.~~

## **11.2 Owner's Right to Perform and Terminate for Cause.**

11.2.1 Without in any manner limiting the right of Owner to terminate the Contract or declare Design-Builder in default thereof for any reason set forth in the Contract Documents, if the Work to be done under this Agreement shall be abandoned by Design-Builder; or if this Contract shall be assigned by Design-Builder otherwise than as herein provided; or if Design-Builder should be adjudicated to be bankrupt; or if a general assignment of its assets should be made for the benefit of its creditors; or if a receiver should be appointed for Design-Builder or any of its property; or if at any time Owner believes that the performance of the Work under Contract is being unnecessarily delayed, that Design-Builder is violating any of the conditions or covenants of this Agreement or the specifications therefore, that it is executing the same in bad faith or otherwise not in accordance with the terms of said Contract; or if all Work of the Project is not completed within the Contract Time **(except for a Force Majeure event and/or excusable delay)** named for the completion or within the time to which such completion date may be extended; then, in addition to other rights Owner may choose to exercise, Owner may, at its option, serve written notice upon Design-Builder and its surety of Owner's intention to terminate this Agreement, and, unless within five (5) days after the serving of such notice upon Design-Builder, a satisfactory arrangement is made for the continuance thereof, this Contract shall cease and terminate. Whether or not a satisfactory arrangement has been proposed by the Design-Builder shall be in the sole discretion of the Owner.

~~If Design-Builder persistently fails to (i) provide a sufficient number of skilled workers, (ii) supply the materials required by the Contract Documents, (iii) comply with applicable Legal Requirements, (iv) timely pay, without cause, Design Consultants or Subcontractors, (v) prosecute the Work with promptness and diligence to ensure that the Work is completed by the Contract Time(s), as such times may be adjusted, or (vi) perform material obligations under the Contract Documents, then Owner, in addition to any other rights and remedies provided in the Contract Documents or by law, shall have the rights set forth in Sections 11.2.2 and 11.2.3 below.~~

**11.2.2** In the event of such termination, or in the event that Design-Builder fails to perform and abide by any obligation set forth herein in any respect, Owner shall serve notice thereof upon the surety and Design-Builder within a reasonable time, and the surety shall have the right to take over and complete the Work; provided, however, that if the surety does not commence performance thereof within fourteen (14) days from the date of said notice of termination, Owner may take over the Work and prosecute same to completion, by contract or otherwise, for the amount and at the expense of Design-Builder, and Design-Builder and its surety shall be liable to Owner for any and all excess cost sustained by Owner by reason of such prosecution and completion; and in such event Owner may take possession of, and utilize in completing the Work, all such materials, equipment, tools and plants as may be on the site of the Work and necessary therefore. When Design-Builder's services have been so terminated, such termination shall not affect any rights or remedies of Owner against Design-Builder then existing or which may later accrue. Similarly, any retention or payment of monies due Design-Builder shall not release Design-Builder from liability.

~~Upon the occurrence of an event set forth in Section 11.2.1 above, Owner may provide written notice to Design-Builder that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be cured, within seven (7) days of Design-Builder's receipt of such notice. If Design-Builder fails to cure, or reasonably commence to cure, such problem, then Owner may give a second written notice to Design-Builder of its intent to terminate within an additional seven (7) day period. If Design-Builder, within such second seven (7) day period, fails to cure, or reasonably commence to cure, such problem, then Owner may declare the Agreement terminated for default by providing written notice to Design-Builder of such declaration.~~

**11.2.3** Owner reserves the right, in its sole discretion and for its convenience and without cause or default on part of Design-Builder, to terminate the Contract by providing written notice of such termination to Design-Builder specifying when such termination becomes effective. Upon receipt of such notice from Owner, Design-Builder shall: (1) immediately cease all Work; or (2) meet with Owner and, subject to Owner's approval, determine what Work shall be required of Design-Builder in order to bring the Project to a reasonable termination in accordance with the request of Owner. If Owner shall terminate for its convenience as herein provided, Owner shall compensate Design-Builder for all purchased materials and actual cost of Work completed to date of termination. Design-Builder agrees that it shall require all its Subcontractor agreements to contain termination for convenience provision thereby releasing Design-Builder from its obligations to its subcontractors should Owner terminate this Agreement for convenience. The provision shall also contain a waiver of liability against Owner in the event of such termination.

~~Upon declaring the Agreement terminated pursuant to Section 11.2.2 above, Owner may enter upon the premises and take possession, for the purpose of completing the Work, of all materials, equipment, scaffolds, tools, appliances and other items thereon, which have been purchased or provided for the performance of the Work, all of which Design-Builder hereby transfers, assigns and sets over to Owner for such purpose, and to employ any person or persons to complete the Work and provide all of the required labor, services, materials, equipment and other items. In the event of such termination, Design-Builder shall not be entitled to receive any further payments under the Contract Documents until the Work shall be finally completed in accordance with the Contract Documents. At such time, if the unpaid balance of the Contract Price exceeds the cost and expense incurred by Owner in completing the Work, such excess shall be paid by Owner to Design-Builder. Notwithstanding the preceding sentence, if the Agreement establishes a Guaranteed Maximum Price, Design-Builder will only be entitled to be paid for Work performed prior to its default. If Owner's cost and expense of completing the Work exceeds the unpaid balance of the Contract Price, then Design-Builder shall be obligated to pay the difference to Owner. Such costs and expense shall include not only the cost of completing the Work, but also losses, damages, costs and expense, including attorneys' fees and expenses, incurred by Owner in connection with the procurement and defense of claims arising from Design-Builder's default, subject to the waiver of consequential damages set forth in Section 10.5 hereof.~~

**11.2.4** If Owner improperly terminates the Agreement for cause, the termination for cause will be

converted to a termination for convenience in accordance with ~~the provisions of Article 8 of the Agreement~~ section 11.2.3, above.

### **11.3 Design-Builder's Right to Stop Work.**

**11.3.1** Design-Builder may, in addition to any other rights afforded under the Contract Documents or at law, stop the Work for the following reasons:

~~**11.3.1.1** Owner's failure to provide financial assurances as required under Section 3.3 hereof; or~~

**11.3.1.2** Owner's failure to pay undisputed amounts properly due under Design-Builder's Application for Payment.

**11.3.2** Should any of the events set forth in Section 11.3.1 above occur, Design-Builder has the right to provide Owner with written notice that Design-Builder will stop the Work unless said event is cured within seven (7) days from Owner's receipt of Design-Builder's notice. If Owner does not cure the problem within such seven (7) day period, Design-Builder may stop the Work. In such case, Design-Builder shall be entitled to make a claim for adjustment to the Contract Price and Contract Time(s) to the extent it has been adversely impacted by such stoppage. The provisions of this paragraph shall not relieve Contractor of his obligations to carry on the Work in accordance with the progress schedule and without delay during disputes and disagreements with Owner.

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

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

**11.4.1.1** The Work has been stopped for sixty (60) consecutive days, or more than ninety (90) days during the duration of the Project, because of court order, any government authority having jurisdiction over the Work, or orders by Owner under Section 11.1.1 hereof, provided that such stoppages are not due to the acts or omissions of Design-Builder or anyone for whose acts Design-Builder may be responsible.

**11.4.1.2** Owner's failure to provide Design-Builder with any information, permits or approvals that are Owner's responsibility under the Contract Documents which result in the Work being stopped for sixty (60) consecutive days, or more than ninety (90) days during the duration of the Project, even though Owner has not ordered Design-Builder in writing to stop and suspend the Work pursuant to Section 11.1.1 hereof.

**11.4.1.3** Owner's failure to cure the problems set forth in Section 11.3.1 above after Design-Builder has stopped the Work.

**11.4.2** Upon the occurrence of an event set forth in Section 11.4.1 above, Design-Builder may provide written notice to Owner that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be cured, within seven (7) days of Owner's receipt of such notice. If Owner fails to cure, or reasonably commence to cure, such problem, then Design-Builder may give a second written notice to Owner of its intent to terminate within an additional seven (7) day period. If Owner, within such second seven (7) day period, fails to cure, or reasonably commence to cure, such problem, then Design-Builder may declare the Agreement terminated for default by providing written notice to Owner of such declaration. In such case, Design-Builder shall be entitled to recover in the same manner as if Owner had terminated the Agreement for its convenience under Article 8 of the Agreement.

### **11.5 Bankruptcy of Owner or Design-Builder.**

**11.5.1** ~~If either Owner or~~ Design-Builder institutes or has instituted against it a case under the

United States Bankruptcy Code (such party being referred to as the “Bankrupt Party”), such event may impair or frustrate the ~~Bankrupt Party’s~~ Design-Builder’s ability to perform its obligations under the Contract Documents. Accordingly, should such event occur:

**11.5.1.1** The ~~Bankrupt Party~~ Design-Builder, its trustee or other successor, shall furnish, upon request of the ~~non-Bankrupt Party~~ Owner, adequate assurance of the ability of the ~~Bankrupt Party~~ Design-Builder 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

**11.5.1.2** The ~~Bankrupt Party~~ Design-Builder 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~~ Design Builder fails to comply with its foregoing obligations, the ~~non-Bankrupt Party~~ Owner 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~~ Owner under this Article 11.

**11.5.2** The rights and remedies under Section 11.5.1 above shall not be deemed to limit the ability of the ~~non-Bankrupt Party~~ Owner to seek any other rights and remedies provided by the Contract Documents or by law, including, but not limited to its ability to seek relief from any automatic stays under the United States Bankruptcy Code or the right of ~~Design-Builder~~ to stop Work under any applicable provision of these General Conditions of Contract.

## **Article 12**

### **Electronic Data**

#### **12.1 Electronic Data.**

**12.1.1** The parties recognize that Contract Documents, including drawings, specifications and three-dimensional modeling (such as Building Information Models) and other Work Product may be transmitted among Owner, Design-Builder and others in electronic media as an alternative to paper hard copies (collectively “Electronic Data”). However, Design-Builder will provide paper hard copies of any such documents when requested by Owner.

#### **12.2 Transmission of Electronic Data.**

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

**12.2.2** 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.

**12.2.3** 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.

### **12.3 Electronic Data Protocol.**

**12.3.1** The parties acknowledge that Electronic Data may be altered or corrupted, intentionally or otherwise, due to occurrences beyond their reasonable control or knowledge, including but not limited to compatibility issues with user software, manipulation by the recipient, errors in transcription or transmission, machine error, environmental factors, and operator error. Consequently, the parties understand that there is some level of increased risk in the use of Electronic Data for the communication of design and construction information and, in consideration of this, agree, and shall require their independent contractors, Subcontractors and Design Consultants to agree, to the following protocols, terms and conditions set forth in this Section 12.3.

**12.3.2** Electronic Data will be transmitted in the format agreed upon in Section 12.2.1 above, including file conventions and document properties, unless prior arrangements are made in advance in writing.

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

**12.3.4** 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.

## **Article 13**

### **Miscellaneous**

#### **~~13.1 Confidential Information.~~**

~~**13.1.1** 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.~~

#### **13.2 Assignment.**

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

**13.2.2** In case Design-Builder assigns all, or any part, of the monies due or to become due under this Agreement, the instrument of assignment shall contain a clause substantially as follows: "It is agreed that the right of the assignee in and to any monies due or to become due to Design-Builder shall be subject to all prior claims of all persons, firms and corporations for services rendered or materials supplied for the performance of the Work called for in this

Agreement and that no money shall be paid to assignee on behalf of Design-Builder by Owner until such time as Design-Builder has discharged its obligations to Owner under this Agreement. It is expressly understood and agreed that no assignment shall be effective as against Owner unless the assignment complies with the foregoing.”

### **13.3 Successorship.**

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

### **13.4 Governing Law.**

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

### **13.5 Severability.**

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

### **13.6 No Waiver.**

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

### **13.7 Headings.**

**13.7.1** Title and subheadings as used herein are provided only as a matter of convenience and shall have no legal bearing on the interpretation of any provision of this Agreement. Some terms are capitalized throughout this Agreement but the use of or failure to use capitals shall have no legal bearing on the interpretation of such terms.

~~The headings used in these General Conditions of Contract, 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.~~

### **13.8 Notice.**

**13.8.1** Whenever the Contract Documents require that notice be provided to the other party, notice will be deemed to have been validly given (i) if delivered in person to the individual intended to receive such notice, (ii) four (4) days after being sent by registered or certified mail, postage prepaid to the address indicated in the Agreement, or (iii) if transmitted by facsimile, by the time stated in a machine generated confirmation that notice was received at the facsimile number of the intended recipient. Unless otherwise specified in the Contract Documents, notice to Design-Builder shall be made to the resident superintendent with a copy to the individual who executed the Contract Documents on behalf of the Design-Builder. Notice to Owner should be made to Owner's Project Representative with a copy to City Attorney.

### **13.9 Amendments.**

**13.9.1** 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.

### **13.10 Nondiscrimination & EEOC.**

**13.10.1** Design-Builder agrees: (a) to comply with the Kansas Act Against Discrimination (K.S.A. 44-1001 et seq.) and the Kansas Age Discrimination in Employment Act (K.S.A. 44-1111 et seq.) and the applicable provisions of the Americans with Disabilities Act (42 U.S.C. 12101 et seq.) (ADA) and to not discriminate against any person because of race, religion, color, sex, disability, national origin or ancestry, or age in the admission or access to, or treatment or employment in, its programs or activities; (b) to include in all solicitations or advertisements for employees, the phrase "equal opportunity employer"; (c) to comply with the reporting requirements as set out at K.S.A. 44-1031 and K.S.A. 44-1116; (d) to include the provisions of (a) through (c) above in every subcontract and purchase order so that they are binding upon such subcontractors and vendors; (e) that a failure to comply with any of the requirements set forth above constitutes a breach of this Agreement and Owner shall have the ability to terminate this Agreement for such a breach.

**13.10.2** Design-Builder must execute a Certificate of Nondiscrimination as provided in K.S.A. 44-1030.

**13.10.3** Design-Builder may be required under Section 60-1.40 Title 41, of the C.F.R. to develop a written Affirmative Action Compliance Program if Design-Builder has two or more employees. If Design-Builder is so required, it agrees to do so no later than 120 days after the Effective Date of the Contract and to maintain such program until such time as it is no longer required by law or regulations.

**13.10.4** Design-Builder shall be bound by and agrees to the provisions of the Vietnam Era Veteran's Readjustment Act of 1974 and all regulations, rules and orders promulgated thereunder.

**13.10.5** Design-Builder shall be bound by and agrees to the provisions of Section 503 of the Rehabilitation Act of 1973 and all regulations, rules and orders promulgated thereunder.

### **13.11 Sexual Harassment.**

**13.11.1** Harassment on the basis of sex is a violation of Sec. 703 of Title VII of the federal Civil Rights Act of 1964. Any such proven harassment of employees or of other persons shall be deemed a breach of the present Contract and it may be canceled, terminated or suspended, in whole or in part, by City.

Applying general Title VII principles, Design-Builder is responsible for the acts of its agents, employees and Subcontractors with respect to sexual harassment regardless of whether the specific acts complained of were authorized or were forbidden by Design-Builder and regardless of whether Contractor knew of should have known of their occurrence. Design-Builder agrees to abide by all other federal, state or local laws, ordinances and regulations applicable to this project and to furnish any certification required by any federal, state or local governmental agency in connection with same.

### **13.12 Entire Agreement.**

**13.12.1** This Agreement, including all documents and exhibits included by reference herein, constitutes the entire Agreement between the parties and supersedes all prior agreements, whether oral or written, covering the same subject matter.

### **13.13 Taxes.**

**13.13.1** The Owner enjoys tax exempt status. To enjoy the cost-savings benefits of its tax-exempt

status, the Owner will provide a Tax Exemption Certificate to the Design-Builder for use on the Project. The Design-Builder shall use that certificate to exempt any purchases made for the Work from taxes. Design-Builder will pass on all savings for the tax-exempt status to the Owner. The Design-Builder agrees to bind all Subcontractors of any tier to the obligation to present and use the Tax Exemption Certificate and pass all savings to the Owner.

**13.13.2** The Design-Builder will require all Subcontractors and bidders to provide cost information for materials separate from other costs for labor, profit, overhead, etc. to allow the Owner to verify that no taxes are to be paid on material procurement and that such savings shall be passed on to the Owner.

**13.13.3** The Design-Builder will maintain all records, invoices, receipts, or other accounting data regarding material purchases and will allow, upon written request of the Owner and within a reasonable time frame after receipt of such request, the Owner to audit such records to verify tax savings. If an audit reveals taxes paid or savings not transferred to the Owner, the Design-Builder will be liable to the Owner for those amounts and the Owner may back-charge the Design-Builder for those amounts if a balance of funds due and payable remains at the time of such discovery.

**13.13.3.1** The Design-Builder will require all Subcontractors of any tier maintain all records, invoices, receipts, or other accounting data regarding material purchases. The Design-Builder will collect such records with each application for payment it receives from its Subcontractors and shall maintain such records in the same manner and location as the Design-Builder's records.

**13.13.3.2** The Design-Builder will ensure its Subcontractors and any lower-tier Subcontractors include these obligations in their contracts and bind themselves in the same manner as Design-Builder is bound to the Owner.

#### **13.14 Survival of Obligations.**

**13.14.1** All representations, indemnifications, warranties, and guarantees made in, required by, or given in accordance with the Contract, as well as all continuing obligations indicated in the Contract, will survive final payment, completion, and acceptance of the Work or termination or completion of the Contract or termination of the services of Contractor