

# DRAFT AIA® Document A141® - 2014

## Standard Form of Agreement Between Owner and Design-Builder

**AGREEMENT** made as of the «TBD» day of «TBD» in the year «TBD»  
(In words, indicate day, month and year.)

**BETWEEN** the Manager, also referred to as ("Company"):  
(Name, legal status, address and other information)

«AEG Management HCC, LLC »« a Delaware Limited Liability Company»  
«1801 Kalakaua Avenue»  
«Honolulu, Hawaii 96815»  
« »

and the Design-Builder:  
(Name, legal status, address and other information)

«TBD»  
«TBD»  
«TBD»

for the following Project:  
(Name, location and detailed description)

«Solar Photovoltaic (PV) System Project for the Hawaii Convention Center per the scope of work described in RFP 2024-18 (Section 2 Scope of Work/Specifications) and Contractor's proposal to RFP 2024-18 dated August 29, 2024.  
Hawaii Convention Center ("HCC")»  
«1801 Kalakaua Avenue  
Honolulu, Hawaii 96815»

The Manager and Design-Builder agree as follows.

### ADDITIONS AND DELETIONS:

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed.

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

Consultation with an attorney is also encouraged with respect to professional licensing requirements in the jurisdiction where the Project is located.

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**ARTICLE 1 GENERAL PROVISIONS**

**§ 1.1 Manager's Criteria**

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

*(Note the disposition for the following items by inserting the requested information or a statement such as "not applicable" or "unknown at time of execution." If the Manager intends to provide a set of design documents, and the requested information is contained in the design documents, identify the design documents and insert "see Manager's design documents" where appropriate.)*

**§ 1.1.1** The Manager's program for the Project:

*(Set forth the program, identify documentation in which the program is set forth, or state the manner in which the program will be developed.)*

«The scope of this project encompasses the design, procurement, installation, tie-in, and commissioning of solar PV systems at designated locations within the Hawaii Convention Center. The selected firm will be responsible for ensuring all systems are fully operational and compliant with relevant codes and standards. This project includes obtaining all necessary permits, conducting thorough site evaluations, and integrating infrastructure to support future enhancements like Electric Vehicle (EV) charging stations.»

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

(Identify below, or in an attached exhibit, the documentation that contains the Manager's design requirements, including any performance specifications for the Project.)

«All aspects of design & build, project management, supervision, procurement of materials and equipment, labor, all job-related incidental work, and the securing of all required permits, notifications, and/or inspections, including fees for such permits, notifications, and/or inspections, shall be the sole responsibility of the Design-Builder. The Design-Builder shall provide all engineering and design services necessary for the execution of this Project.»

**§ 1.1.3** The Project's physical characteristics:

*(Identify or describe, if appropriate, size, location, dimensions, or other pertinent information, such as geotechnical reports; site, boundary and topographic surveys; traffic and utility studies; availability of public and private utilities and services; legal description of the site; etc.)*

«See Attachment - TBD»

**§ 1.1.4** The Manager's anticipated Sustainable Objective for the Project, if any:

*(Identify the Manager's Sustainable Objective for the Project such as Sustainability Certification, benefit to the environment, enhancement to the health and well-being of building occupants, or improvement of energy efficiency. If the Manager identifies a Sustainable Objective, incorporate AIA Document A141™-2014, Exhibit C, Sustainable Projects, into this Agreement to define the terms, conditions and Work related to the Manager's Sustainable Objective.)*

«Yes, the intent to is furnish and install a renewable energy system.»

**§ 1.1.5** Incentive programs the Manager intends to pursue for the Project, including those related to the Sustainable Objective, and any deadlines for receiving the incentives that are dependent on, or related to, the Design-Builder's services, are as follows:

*(Identify incentive programs the Manager intends to pursue for the Project and deadlines for submitting or applying for the incentive programs.)*

«TBD»

**§ 1.1.6** The Manager's budget for the Work to be provided by the Design-Builder is set forth below:

*(Provide total for Manager's budget, and if known, a line item breakdown of costs.)*

«N/A»

**§ 1.1.7** The Manager's design and construction milestone dates:

.1 Design phase milestone dates:

«TBD»

.2 Submission of Design-Builder Proposal:

«TBD»

.3 Phased completion dates:

«TBD»

.4 Substantial Completion date:

«TBD»

.5 Other milestone dates:

«N/A»

§ 1.1.8 The Manager requires the Design-Builder to retain the following Architect/Engineer, Consultants and Contractors at the Design-Builder's cost:

*(List name, legal status, address and other information.)*

.1 Architect/Engineer

«TBD»

.2 Consultants

«TBD»

.3 Contractors

«TBD»

§ 1.1.9 Additional Manager's Criteria upon which the Agreement is based:

*(Identify special characteristics or needs of the Project not identified elsewhere, such as historic preservation requirements.)*

«§ 1.1.9.1 The Design-Builder agrees that TBD and TBD are key personnel whose services and professional experience are essential to the completion of this Project. TBD shall serve as the Principal, and TBD shall serve as the Project Architect. The Design-Builder shall ensure that these individuals will be available and dedicated throughout this Project and will perform the services within this Agreement throughout the duration of this Project, as appropriate.

§ 1.1.9.2 The Design-Builder agrees to immediately report any personnel problems it is aware of which may adversely affect the Project to the Manager.»

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

§ 1.1.10.1 If the Manager's Criteria conflicts with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Design-Builder shall notify the Manager of the conflict. The Design-Builder shall become familiar with laws, codes, and regulations applicable to the Design-Builder's services. The Design-Builder shall respond in the design of the Project to requirements imposed by governmental authorities having jurisdiction over the Project.

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

§ 1.1.12 If the Manager and Design-Builder intend to transmit Instruments of Service or any other information or documentation in digital form, they shall endeavor to establish necessary protocols governing such transmissions. Unless otherwise agreed, the parties will use AIA Document E203™-2013 to establish the protocols for the development, use, transmission, and exchange of digital data and building information modeling.

§ 1.2 Project Team

§ 1.2.1 The Manager identifies the following representative in accordance with Section 7.1.1. All work approvals and authorizations for Additional Services, Change Orders, Claims and Payment Requests must be approved, in writing, by the Manager. Directions from any other personnel which are not approved in writing by the Manager will not be binding according to this Agreement and any loss of revenue to correct unauthorized instructions to the Design-Builder will be at the Design-Builder's sole expense.

*(List name, address and other information.)*

«Teri Orton»

«Chief Procurement Officer»

«AEG Management HCC, LLC a Delaware Limited Liability Company»

«1801 Kalakaua Avenue»

«Honolulu, Hawaii 96815»

«Email: hccrfp@hccasm.com»

§ 1.2.2 The persons or entities, in addition to the Manager's representative, who are required to review the Design-Builder's Submittals are as follows:  
(List name, address and other information.)

«Andrew Tanton  
Project and Construction Manager for AEG/HCC (CM/PM)  
Cumming Management Group, Inc.  
841 Bishop Street, Suite 725  
Honolulu, HI 96813  
Email: atanton@cumming-group.com»

§ 1.2.3 The Manager will retain the following consultants and separate contractors:  
(List discipline, scope of work, and, if known, identify by name and address.)

«Project and Construction Manager for AEG/HCC (CM/PM):  
Cumming Management Group, Inc.  
841 Bishop Street, Suite 725  
Honolulu, HI 96813»

§ 1.2.4 The Design-Builder identifies the following representative in accordance with Section 3.1.2:  
(List name, address and other information.)

«TBD Name, TBD Title  
«TBD»  
«TBD»  
«TBD»  
«Email: TBD»  
« »

§ 1.2.5 Neither the Manager's nor the Design-Builder's representative shall be changed without ten (10) days' written notice to the other party.

§ 1.2.6 Design-Builder shall provide all necessary personnel, supplies, and equipment required to perform the Design, Pre-construction and Construction services described herein. The Design-Builder understands and agrees that time is of the essence of this Agreement and Design-Builder agrees to take all reasonable steps to avoid delays.

### § 1.3 Binding Dispute Resolution

For any Claim subject to, but not resolved by, mediation pursuant to Section 14.3, the method of binding dispute resolution shall be the following:

(Check the appropriate box. If the Manager and Design-Builder do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution other than litigation, Claims will be resolved by litigation in a court of competent jurisdiction.)

- Arbitration pursuant to Section 14.4
- Litigation in a court of competent jurisdiction
- Other: (Specify)

« »

### § 1.4 Definitions

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

**§ 1.4.2 The Contract.** The Design-Build Documents identified and listed in Section 3.1.4.1 collectively form the Contract. The Contract represents the entire and integrated agreement between the parties and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Design-Build Documents shall not be construed to create a contractual relationship of any kind between any persons or entities other than the Manager and the Design-Builder.

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

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

**§ 1.4.5 Instruments of Service.** Instruments of Service are representations, in any medium of expression now known or later developed, of the tangible and intangible creative work performed by the Design-Builder, Contractor(s), Architect, Engineer, and Consultant(s) under their respective agreements. Instruments of Service may include, without limitation, studies, surveys, models, sketches, drawings, specifications, digital models and other similar materials.

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

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

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

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

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

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

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

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

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

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

§ 1.4.16 **Approved.** When the words "approved", "satisfactory", "proper", or "as directed" are used, approval by the Manager shall be understood.

§ 1.4.17 **Provide.** When the word "provide" including derivatives thereof is used, it shall mean to properly fabricate, complete, transport, deliver, install, erect, construct, test and furnish all labor, materials, equipment, apparatus, appurtenances, and all items and expenses necessary to properly complete in place, ready for operation or use under the terms of the specifications and contract documents.

§ 1.4.18 **Knowledge.** The terms "knowledge", "recognize", and "discover", their respective derivatives and similar terms used in the Contract Documents, as used in reference to the Design-Builder, shall be interpreted to mean that which, in accordance with community standards and expectations, the Design-Builder knows or should reasonably know as defined by the conditions or environment, recognizes or discovers, in exercising the care, skill, and diligence required of the Design-Builder by the Contract Documents.

§ 1.4.19 **Persistently.** The phrase "persistently fails" and other similar expressions as used in reference to the Design-Builder, shall be interpreted to mean any combination of act and omissions which cause the Manager to reasonably conclude that the Design-Builder will not complete the Work within the Contract Time, for the Contract Sum or in substantial compliance with the requirements of the Contract Documents.

## ARTICLE 2 COMPENSATION AND PROGRESS PAYMENTS

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

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

*(Insert amount of, or basis for, compensation, including compensation for any Sustainability Services, or indicate the exhibit in which the information is provided. If there will be a limit on the total amount of compensation for Work performed prior to the execution of the Design-Build Amendment, state the amount of the limit.)*

«Design Services are a not-to-exceed amount of TBD Dollars (\$TBD) be compensated on a percent complete basis.»

§ 2.1.2 The hourly billing rates for services of the Design-Builder and the Design-Builder's Architect, Consultants and Contractors, if any, are set forth below.

*(If applicable, attach an exhibit of hourly billing rates or insert them below.)*

«Exhibit H – Design-Builder and Design-Builder's Architect, Engineer, Consultant and Contractor's Hourly Billing Rates»

**Individual or Position**

**Rate**

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

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

- .1 Transportation and authorized out-of-town travel and subsistence;
- .2 Dedicated data and communication services, teleconferences, Project web sites, and extranets;
- .3 Fees paid for securing approval of authorities having jurisdiction over the Project;
- .4 Printing, reproductions, plots, standard form documents;
- .5 Postage, handling and delivery;
- .6 Expense of overtime work requiring higher than regular rates, if authorized in advance by the Manager;
- .7 Renderings, physical models, mock-ups, professional photography, and presentation materials requested by the Manager;
- .8 All taxes levied on professional services and on reimbursable expenses; and
- .9 Other Project-related expenditures, if authorized in advance by the Manager, supported with and by detailed documentation and back-up.

§ 2.1.3.2 For Reimbursable Expenses, the compensation shall be the expenses the Design-Builder and the Design-Builder's Architect, Engineer, Consultants and Contractors incurred, plus an administrative fee of «zero» percent («0» %) of the expenses incurred. Reimbursables shall be paid at actual costs expended up and to a maximum not-to-exceed amount of TBD dollars (\$TBD) and are not included in the Compensation in 2.1.1.

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

§ 2.1.4.1 Payments are due and payable upon presentation of the Design-Builder's invoice. Amounts unpaid «thirty» («30») days after the invoice date shall bear interest at the rate entered below, or in the absence thereof at the legal rate prevailing from time to time at the principal place of business of the Design-Builder.  
(Insert rate of monthly or annual interest agreed upon.)

«6» % «per annum»

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

§ 2.1.4.3 The Design-Builder must, following execution of this Agreement, provide the Manager with a copy of its W-9.

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

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

**ARTICLE 3 GENERAL REQUIREMENTS OF THE WORK OF THE DESIGN-BUILD CONTRACT**

**§ 3.1 General**

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

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

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

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

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

§ 3.1.4 The Design-Builder shall be responsible to the Manager for acts and omissions of the Design-Builder's employees, Architect, Engineer, Consultants, Contractors, and their agents and employees, and other persons or entities performing portions of the Work.

§ 3.1.4.1 Notwithstanding anything to the contrary in this Agreement, in the event of a conflict or discrepancy among or in the Contract Documents as revised by the Manager and Design-Builder for this Project, interpretation shall be governed in the following priority, with this Agreement having ultimate precedence, modification having



precedence over the original document and any later modifications having precedence over earlier modifications to the same Contract Document (from top to bottom, highest to lowest priority, respectively):

- .1 This Agreement (AIA A141-2014 (as modified));
- .2 Exhibit A Design-Build Amendment;
- .3 A141-2014, Exhibit B (Insurance and Bonds);
- .4 The Special Conditions, attached hereto as Exhibit C;
- .5 The General Conditions, attached hereto as Exhibit D;
- .6 Change Orders and Modifications to the above documents issued after the date of the Agreement (A141 - 2014);
- .7 Other Exhibits to the Agreement;
- .8 The RFP No. 2024-18, dated 8/29/2024 (including all amendments and addenda);
- .9 The Design-Builders' Proposal (including BAFOs) in response to RFP No. 2024-18, dated 8/29/2024;
- .10 As-Built Specifications, and
- .11 As-Built Drawings.

§ 3.1.4.2 The Manager shall assume the rights and responsibilities of the defined terms of both ("STATE") and ("HOPA"), and the Design-Builder shall assume the rights and responsibilities of ("CONTRACTOR"), as defined within the Exhibit D (General Conditions) attached hereto. This shall apply to all Contract Documents under this Agreement.

§ 3.1.5 **General Consultation.** The Design-Builder shall schedule and conduct periodic meetings with the Manager to review matters such as procedures, progress, coordination, and scheduling of the Work.

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

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

### § 3.1.8 Progress Reports

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

- .1 Work completed for the period;
- .2 Project schedule status;
- .3 Submittal schedule and status report, including a summary of outstanding Submittals;
- .4 Responses to requests for information to be provided by the Manager;
- .5 Approved Change Orders and Change Directives;
- .6 Pending Change Order and Change Directive status reports;
- .7 Tests and inspection reports;
- .8 Status report of Work rejected by the Manager;
- .9 Status of Claims previously submitted in accordance with Article 14;
- .10 Cumulative total of the Cost of the Work to date including the Design-Builder's compensation and Reimbursable Expenses, if any;
- .11 Current Project cash-flow and forecast reports; and
- .12 Additional information as agreed to by the Manager and Design-Builder.

If the Manager provides a written request for daily construction reports, the Design-Builder shall submit said reports by no later than three (3) days after request by the Manager.

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

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

### **§ 3.1.9 Design-Builder's Schedules**

**§ 3.1.9.1** The Design-Builder, promptly after execution of this Agreement, and in no event more than thirty (30) consecutive days thereafter shall prepare and submit for the Manager's information a schedule for the Work. The schedule, including the time required for design and construction, shall not exceed time limits current under the Design-Build Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Design-Build Documents, shall provide for expeditious and practicable execution of the Work, and shall include allowances for periods of time required for the Manager's review and for approval of submissions by authorities having jurisdiction over the Project, as well as milestone dates. The Project schedule shall coordinate and integrate design, preconstruction and construction activities of the Architect or Engineer's services, the Design-Builder's services, other Manager consultants' services, and the Manager's responsibilities as well as identify major milestone items that could affect the Project's timely completion. The schedule shall include, but not be limited to the following: Schematic Design, Design Development, Construction Documents, Bidding, the Design/Build Amendment, components of the Work, times of commencement and completion required of each Subcontractor; ordering and delivery of products, including those that must be ordered well in advance of construction; and the occupancy requirements of the Manager.

**§ 3.1.9.1.1** At the time of the finalization of the Design/Build Amendment, the Design-Builder will submit a Construction Schedule in a computer-generated critical path method (CPM) format to the Manager. The Construction Schedule shall show separate activities for every trade anticipated to participate in the Work, the durations and dependencies of those activities, the critical path, and all other information normally included in such schedules. The Work activity descriptions and durations shall be as agreed upon by the Design-Builder and the Manager, but unless otherwise agreed, the duration for each activity shall not exceed fifteen (15) calendar days. The Construction Schedule must also incorporate the sequencing and interrelationship between each of the trades. The Design-Builder shall include within the Construction Schedule a specific number of weather delay days per year for the duration of the Project. Design-Builder shall state its assumptions used to determine the number of weather delay days.

**§ 3.1.9.1.2** The Construction Schedule shall be revised by the Design-Builder at least monthly or when directed to do so more frequently by the Manager. All revised Construction Schedules must demonstrate updates and or changes from the previously approved Construction Schedule. Should the Design-Builder fail to maintain an acceptable level of progress by failing to meet one of the scheduled milestone dates, Design-Builder shall provide Manager with a written recovery plan and recovery network schedule to ensure compliance with the agreed upon construction schedule and date of Substantial Completion. If Design-Builder fails to provide a written recovery plan and recovery network schedule within seven (7) calendar days after receipt of written notification from a representative of the Manager that a recovery schedule is required, Manager may take the following actions: (1) Any payments due to Design-Builder may be withheld, in part or in full; or (2) Design-Builder may be terminated by Manager if Design-Builder repeatedly fails to meet the construction schedule requirements, and/or fails to make satisfactory progress as determined by Manager.

**§ 3.1.9.1.3** The Design-Builder shall also prepare a three (3) week look-ahead schedule each week for review at the Manager meetings, focusing on the in-depth detail of the upcoming weeks' activities in a manner that reflects the planned day-to-day activities in the field. The detail shall be adequate to allow tracing of daily progress through field observation walks and reports.

**§ 3.1.9.1.4** Receiving revised schedules at the weekly Manager meeting or in another format shall not be construed as an acceptance by the Manager. Any revision to the approved Construction Schedule requires the Manager's written approval. Any adjustment in the Contract Time or date of Substantial Completion requires a Change Order.

**§ 3.1.9.1.5** During Construction, the Design-Builder shall keep detailed daily logs and submit these logs to the Manager each week at the Manager meetings. The detailed written daily logs shall include a description of the Work performed the previous week. Each such daily report shall be prepared and signed by the Project Manager or Superintendent, on behalf of the Design-Builder. Each report shall at a minimum include the following information for that day concerning the Design-Builder and each Subcontractor (including each Sub-Subcontractor): materials and equipment being installed, number of individuals working, the hours worked, the type and location of the work being performed by each trade and each item of major equipment being used. The report shall also include other information such as temperature and weather recorded during the work period and any significant events occurring on the job site with regard to the Work or the Project.

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

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

§ 3.1.11 **Design-Builder's Submittals**

§ 3.1.11.1 Prior to submission of any Submittals, the Design-Builder shall prepare a Submittal schedule, and shall submit the schedule for the Manager's approval. The Manager's approval shall not unreasonably be delayed or withheld. The Submittal schedule shall (1) be coordinated with the Design-Builder's schedule provided in Section 3.1.9.1, (2) allow the Manager reasonable time to review Submittals, and (3) be periodically updated to reflect the progress of the Work. If the Design-Builder fails to submit a Submittal schedule, the Design-Builder shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of Submittals.

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

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

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

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

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

§ 3.1.12.1 Design-Builder agrees to warrant the quality of Work, materials and equipment provided for a period of TBD(XX) year(s) from the date of Substantial Completion, except where longer periods for certain items are provided in the Project Manual or where a manufacturer's warranty is for a longer period. Design-Builder agrees to make all necessary repairs to the Work and to replace or repair any defective material and equipment during the

warranty period. Design-Builder agrees to transfer all equipment and manufacturer's warranties to Manager for all equipment, material and products provided as part of the Project. Nothing in this paragraph shall be construed to waive or limit any other claims, actions or warranties as may be made or brought on behalf of the Manager. This paragraph shall not require Design-Builder to repair or replace any Work, material or equipment damaged as a result of the negligence of the Manager. Manufacturer's warranties and Subcontractor's warranties shall not relieve the Design-Builder of any of its warranty obligations under the Contract Documents. All manufacturers and Subcontractor's warranties shall be assigned by Design-Builder to Manager at final payment of the Contract Sum.

**§ 3.1.12.2** If there is a conflict within the Contract Documents for the warranty period, the longest duration of time stated shall govern. As Work required on warranty is complete, rework, repair or replacement of Work not properly performed or the result of defective material or workmanship, the Manager will not compensate the Design-Builder or Subcontractors and material and equipment suppliers for the warranty Work.

**§ 3.1.12.3** All warranty items are the responsibility of the Design-Builder. When warranty items occur, the Manager will notify the Design-Builder or appropriate Subcontractor. The Design-Builder shall cause Work to commence on any warranty items within seven (7) days. If the warranty item(s) are impacting safety or rendering the Project or a portion of the Project unfit for its intended use or specific purpose, the Design-Builder shall take any and all measures to resolve the warranty item(s) immediately. This shall include the acceleration of labor, material and equipment, all to implement the resolution of the items or issues, regardless of the cost to achieve resolution. All costs associated with the resolution of the warranty issue(s) shall remain the responsibility of the Design-Builder.

### **§ 3.1.13 Royalties, Patents and Copyrights**

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

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

### **§ 3.1.14 Indemnification**

**§ 3.1.14.1** To the fullest extent permitted by law, the Design-Builder shall indemnify, defend, and hold harmless the Company Indemnitees (as defined in Exhibit B, Section B.2.1.5), from and against any and all claims, loss, cost, damage, injury (including, without limitation, injury to or death of an employee of the Design-Builder or its sub-consultants or contractors), expense and liability of every kind, nature, and description (including, without limitation, incidental and consequential damages, court costs, attorneys' fees, litigation expenses, fees of expert consultants or witnesses in litigation, and costs of investigation), that arise directly or indirectly, in whole or in part, from (a) the Services under this Agreement, or any part of such Services, and (b) any negligent, reckless, or willful act or omission of the Design-Builder, any sub-consultant or contractor, anyone directly or indirectly employed by them, or anyone that they control, unless due to the gross negligence or willful misconduct of the Company Indemnitees. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this paragraph.

The Design-Builder shall defend the Company Indemnitees using counsel selected by the Design-Builder and approved by the Manager. The Design-Builder's obligations shall include the obligation to pay reasonable attorneys' fees and costs in connection with such defense.

The Design-Builder shall also indemnify, defend and hold harmless all Company Indemnitees from all suits or claims by a third party for infringement of the patent rights, copyright, trade secret, trade name, trademark, service mark, or any other proprietary right of any person or persons in consequence of the use by the Company Indemnitees of articles or services to be supplied in the performance of the Design-Builder's Services under this Agreement. Infringement of patent rights, copyrights, or other proprietary rights in the performance of this Agreement, if not the basis for indemnification under the law, shall nevertheless be considered a material breach of the Agreement.

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

#### § 3.1.15 Contingent Assignment of Agreements

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

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

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

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

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

§ 3.1.15.4 To the extent that the Manager elects to accept assignment of subcontracts and purchase orders (including rental agreements), the Design-Builder shall execute and deliver all such papers and take all such steps, including the assignment of such subcontracts and other contractual rights of the Design-Builder, as the Manager may require for the purpose of fully vesting in the Manager the rights and benefits of the Design-Builder under such subcontracts or purchase orders. All contracts between Design-Builder and Subcontractors (including without limitation purchase orders, other contracts for purchase of materials and rental agreements) entered into by the Design-Builder shall contain provisions allowing for assignment to the Manager as described above and further assignment by Manager.

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

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

#### § 4.1 General

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

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

#### § 4.2 Evaluation of the Manager's Criteria

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

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

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

«All requirements as stipulated in Section 3.1.9 regarding Schedule.»

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

### § 4.3 Preliminary Design

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

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

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

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

§ 4.3.3 The Design-Builder shall provide fully qualified, trained, licensed and competent persons who shall provide Work and services safely and effectively. The Design-Builder shall maintain evidence for every person providing services hereunder of education and training consistent with applicable legal and regulatory requirements, professional licensure, competence and background checks, as may be required by law. Prior to the provision of any services, Design-Builder shall provide Manager with copies of appropriate information and primary source verification for each person who shall provide services under this Agreement. All persons providing services hereunder shall have the necessary credentials and privileges prior to provision of any services and all services provided shall be within the scope of such credentials and privileges.

§ 4.3.4 The Design-Builder shall be responsible for the coordination of all drawings and design documents relating to Design-Builder's design and used on the Project, regardless of whether such drawings and documents are prepared by Design-Builder or by Design-Builder's contractors, consultants, Subcontractors or subconsultants, provided the Design-Builder is entitled to rely upon the technical accuracy and professional competency of all materials, data, designs and other information provided to it by others who are not Design-Builder's consultants. Design-Builder's coordination shall include the internal checking of all drawings. Design-Builder shall be responsible for the completeness and accuracy of all drawings and specifications submitted by Design-Builder and its contractors, consultants, Subcontractors and sub consultants and for their compliance with all applicable codes, ordinances, regulations, laws and statutes.

§ 4.3.5 Project planning includes representation from the Design-Builder all relevant project planning meetings with the Manager. Along with meetings, the Design-Builder shall participate in the preparation of design package scope and scheduling needs with the Manager. This will include participation in collaboration methods, as the project requires (drawing review collaboration, posting of meeting minutes, specifications, etc.). The Design-Builder is

responsible for coordinating and scheduling the formal design coordination meetings with the Building Renovation Architect and Engineer.

§ 4.3.6 Record Drawings shall be prepared by the Design-Builder. The Design-Builder will submit, as a deliverable; the electronic version of record drawings including the assembly of all addenda, field bulletins, design change orders, and Requests for Information (RFI's), and contractor red line "as-builts". At a minimum, record documents shall be generated within thirty (30) days of submission of the Contractor's red lines. Soft copies of the record drawings shall be transmitted to the Manager. The drawings will be "bound" with all associated "Xref's" included.

§ 4.3.7 Calculations: The Design-Builder is responsible for providing the necessary engineering calculations for the execution of each design as required for the project specific scope of work. This includes, but not limited to, structural calculations, electrical, mechanical, pipe stress analysis including hanger and guide design, pipe sizing, and pressure drop calculations for process piping systems including updates based on record drawings.

§ 4.3.9 Project Documentation and Turnaround: Requests for Information shall have an average turnaround time of two (2) working days. Submittals and shop drawings shall have an average of five (5) working days turn around. Durations are from the time of Design-Builder receipt to the time of Prime Contractor receipt.

#### § 4.4 Design-Builder's Proposal

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

- .1 A list of the Drawings and Specifications and other information, including the Design-Builder's clarifications, assumptions and deviations from the Manager's Criteria, upon which the Design-Builder's Proposal is based;
- .2 The proposed Contract Sum, including the compensation method and, if based upon the Cost of the Work plus a fee, a written statement of estimated cost organized by trade categories including a detailed estimate broken down by CSI division incorporating Subcontractor bids, allowances, contingencies, Design-Builder's Fee, and other items that comprise the Contract Sum including indirect costs such as insurance and bonds in the format approved by the Manager, and a detailed list of all anticipated General Conditions costs;
- .3 A critical path method (CPM) Construction Schedule, including the proposed date the Design-Builder shall achieve Substantial Completion;
- .4 An enumeration of any qualifications and exclusions, if applicable;
- .5 A list of the Design-Builder's key personnel, Contractors and suppliers; and
- .6 The date on which the Design-Builder's Proposal expires.

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

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

### ARTICLE 5 WORK FOLLOWING EXECUTION OF THE DESIGN-BUILD AMENDMENT

#### § 5.1 Construction Documents

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

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

## **§ 5.2 Construction**

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

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

**§ 5.2.3** The Design-Builder shall supervise and direct the Work, using the Design-Builder's best skill and attention. The Design-Builder shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work under the Contract, unless the Design-Build Documents give other specific instructions concerning these matters. Design-Builder shall perform Construction services in accordance with the terms and conditions of this Agreement and the other Contract Documents. Design-Builder and its Subcontractors shall perform all Work and services as necessary to complete the Project in accordance with the Project Drawings, Specifications, approved Change Orders, and the other Contract Documents. Design-Builder shall provide all necessary labor, materials, equipment, tools and services required to complete the Project in accordance with the Contract Documents. Design-Builder agrees that time is of the essence of this Agreement and Design-Builder further agrees to take all reasonable steps to avoid delays.

### **§ 5.2.5 Review of Site and Drawings**

Design-Builder shall inspect the jobsite, all existing conditions, and shall carefully review all Project Drawings, Specifications, surveys, and test results prior to beginning the Work. Design-Builder shall take field measurements of existing conditions and shall compare the existing conditions with the information contained in the Drawings and Specifications. Design-Builder shall not receive any additional payments or compensation for Work or services that were accessible prior to construction and that could have been reasonably avoided by reviewing carefully all Project Drawings or Specifications or by inspecting the Project site and existing conditions.

### **§ 5.2.6 Safety Responsibility**

Design-Builder shall be solely responsible for job site safety and shall immediately report any and all job site accidents, including both injury accidents and non-injury accidents to the Manager immediately after the accident becomes known to the Design-Builder. Design-Builder shall have full and sole authority for all safety programs and precautions in connection with the Work. Design-Builder shall use all reasonable efforts to protect the Manager against any deviations or defects in the completed construction Work. Design-Builder shall use all reasonable efforts to protect the Manager and its employees and visitors from personal injury and property damages. Design-Builder shall have full authority to take any action whatsoever on the site regarding safety precautions and procedures.

### **§ 5.2.7 Conduct of Personnel**

Design-Builder's employees, officers, agents, representatives and Subcontractors shall conduct themselves in an appropriate and professional manner at all times while working with and for the Manager. Any such individual who behaves in an inappropriate manner, or who engages in the use of inappropriate language or conduct while on the Manager's property, as determined by the Manager, shall be removed from the Manager's property at the Manager's request. Such individual shall not be permitted to return without the written permission of the Manager. The Manager shall not be responsible or liable to Design-Builder or any Subcontractor for any additional costs, expenses, losses, claims or damages incurred by Design-Builder or its Subcontractors as a result of the removal of any individual(s) from the Manager's property.

### **§ 5.2.8 Work Area**

Design-Builder shall ensure that the job site and surrounding area are kept reasonably free from trash and waste building material. Design-Builder shall ensure that the job site and surrounding area are cleaned at least twice daily in accordance with the Manager's requirements. If, after receiving written notice of its failure to maintain a clean work site, Design-Builder fails to adhere to the requirements of the Manager regarding trash removal and clean-up, the Manager may use its own personnel to clean the site and surrounding area at the Design-Builder's sole expense. Such amounts may be deducted from Design-Builder's payment or billed directly to the Design-Builder.

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



### **§ 5.3 Labor and Materials**

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

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

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

**§ 5.3.4** All personnel working on the Manager's property are required to be US Citizens or, at minimum, have Permanent Resident Alien status; each Bidder shall provide proof of such for each of its employees working on the project.

### **§ 5.4 Taxes**

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

### **§ 5.5 Permits, Fees, Notices and Compliance with Laws**

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

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

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

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

### **§ 5.6 Allowances**

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

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

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

§ 5.6.3 The Manager shall make selections of materials and equipment with reasonable promptness for allowances requiring Manager selection. The Design-Builder shall separately track, on no less than a monthly basis, all materials and equipment provided under allowances including, but not limited to, (i) a description of the allowance; (ii) amounts actually spent for each allowance; and (iii) variances between allowance amounts in the Contract Sum and amounts actually spent.

### § 5.7 Key Personnel, Contractors and Suppliers

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

§ 5.7.2 If the Design-Builder changes any of the personnel, Contractors or suppliers identified in the Design-Build Amendment, the Design-Builder shall notify the Manager and provide the name and qualifications of the new personnel, Contractor or supplier. The Manager may reply within 14 days to the Design-Builder in writing, stating (1) whether the Manager has reasonable objection to the proposed personnel, Contractor or supplier or (2) that the Manager requires additional time to review. Failure of the Manager to reply within the 14-day period shall constitute notice of no reasonable objection. If the Design-Builder replaces any key staff member of its team for any reason, the Manager must be provided with a detailed resume in advance and then an opportunity to meet with and approve the proposed replacement staff member prior to assignment to the Project. No such approval shall in any way relieve the Design-Builder of responsibility for the performance and actions of its employees, contractors and agents in connection with the Project.

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

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

### § 5.8 Documents and Submittals at the Site

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

### § 5.9 Use of Site

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

unique site considerations applicable to the development and construction of the Project including, without limitation, (i) the necessity to perform the work in areas adjacent to existing services and buildings; (ii) limited availability of space within the project site for on-site storage of materials, parking, and for other than essential construction operations; and (iii) the need for careful scheduling of construction services to minimize to the greatest extent possible or eliminate any disruption to the surrounding facilities. Design-Builder shall plan its Work in a manner that does not have a negative impact on the facilities in immediate proximity to the Project. Therefore, Design-Builder shall provide strict guidelines related to hours of operation, noise levels, on street parking, off-site transportation, material delivery and general site logistics, all in a manner that assures the Manager and the neighborhood minimum disruption throughout the course of the Project. The related site logistics plan must be approved by the Manager prior to Work beginning, and the site logistics plan must be included within the bid documents to Subcontractors, vendors and suppliers.

#### **§ 5.10 Cutting and Patching**

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

#### **§ 5.11 Cleaning Up**

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

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

#### **§ 5.12 Access to Work**

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

#### **§ 5.13 Construction by Manager or by Separate Contractors**

##### **§ 5.13.1 Manager's Right to Perform Construction and to Award Separate Contracts**

**§ 5.13.1.1** The Manager reserves the right to perform construction or operations related to the Project with the Manager's own forces; and to award separate contracts in connection with other portions of the Project, or other construction or operations on the site, under terms and conditions identical or substantially similar to this Contract, including those terms and conditions related to insurance and waiver of subrogation. The Manager shall notify the Design-Builder promptly after execution of any separate contract. If the Design-Builder claims that delay or additional cost is involved because of such action by the Manager, the Design-Builder shall make a Claim as provided in Article 14. Design-Builder agrees to allow access to the Project site and all areas of the Work as may be reasonably necessary for the performance of work by others, including, without limitation, storage of materials and equipment and connection to utilities and services. Such parties shall abide by all safety program requirements of Design-Builder.

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

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

**§ 5.13.1.4** Unless otherwise provided in the Design-Build Documents, when the Manager performs construction or operations related to the Project with the Manager's own forces or separate contractors, the Manager shall be

deemed to be subject to the same obligations, and to have the same rights, that apply to the Design-Builder under the Contract.

#### **§ 5.14 Mutual Responsibility**

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

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

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

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

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

#### **§ 5.15 Manager's Right to Clean Up**

If a dispute arises among the Design-Builder, separate contractors and the Manager as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Manager may clean up and will allocate the cost among those who the Manager deems are responsible which allocation will be binding on Design-Builder's and Manager's separate contractors, and Design-Builder shall promptly pay to Manager its share of the costs as so determined.

### **ARTICLE 6 CHANGES IN THE WORK**

#### **§ 6.1 General, Also See Sections 19, 20, 21, 22 and 23 of Exhibit D (General Conditions)**

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

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

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

#### **§ 6.2 Change Orders**

A Change Order is a written instrument (on an AIA G701-2017 Change Order form) signed by the Manager and Design-Builder and stating their agreement upon all of the following:

- .1 The change in the Work;
- .2 The amount of the adjustment, if any, in the Contract Sum or, if prior to execution of the Design-Build Amendment, the adjustment in the Design-Builder's compensation; and
- .3 The extent of the adjustment, if any, in the Contract Time.

The Design-Builder acknowledges and agrees that the Contract Sum and Contract Time cannot be adjusted without a properly executed Change Order.

#### **§ 6.2.4** The Contract Sum will be modified only for the following reasons:

- .1 If the scope of Work is changed by the Manager;
- .2 If unforeseen or hidden conditions are encountered which the Design-Builder could not reasonably have foreseen or for which Design-Builder has no responsibility;
- .3 Costs which could not be reasonably inferred based on the Design-Builder's knowledge and relevant experience related to this Project type.

§ 6.2.5 Any additive adjustment to the Contract Sum shall include such markups for overhead and profit as follows:

§ 6.2.5.1 The maximum allowable mark-up for Change Orders during Construction by Subcontractors for Self-Performed Work shall be ten percent (10%) for overhead plus five percent (5%) for profit (a total of 15%). The maximum allowable mark-up by the Subcontractor on its sub-subcontractors shall be five percent (5%).

§ 6.2.5.2 The maximum allowable mark-up for Change Orders during Construction by sub-subcontractors for Self-Performed Work shall be ten percent (10%) for overhead plus five percent (5%) for profit (a total of 15%). The maximum allowable mark-up by the sub-subcontractor on its sub-subcontractors shall be five percent (5%).

§ 6.2.6 The total maximum allowable mark-up by a Subcontractor and sub-subcontractors for Change Orders during Construction shall be twenty percent (20%).

### § 6.3 Change Directives

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

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

§ 6.3.3 If the Change Directive provides for an adjustment to the Contract Sum or, if prior to execution of the Design-Build Amendment, an adjustment in the Design-Builder's compensation, the adjustment shall be based on one of the following methods:

- .1 Mutual acceptance of a lump sum or not to exceed amount properly itemized and supported by sufficient substantiating data to permit evaluation;
- .2 Unit prices stated in the Design-Build Documents or subsequently agreed upon;
- .3 Cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
- .4 As provided in Section 6.3.7.

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

§ 6.3.5 Upon receipt of a Change Directive, the Design-Builder shall promptly proceed with the change in the Work involved and advise the Manager of the Design-Builder's agreement or disagreement with the method, if any, provided in the Change Directive for determining the proposed adjustment in the Contract Sum or, if prior to execution of the Design-Build Amendment, the adjustment in the Design-Builder's compensation, or Contract Time.

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

§ 6.3.7 If the Design-Builder does not respond promptly or disagrees with the method for adjustment in the Contract Sum or, if prior to execution of the Design-Build Amendment, the method for adjustment in the Design-Builder's compensation, the Manager shall determine the method and the adjustment on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase, an amount for

overhead and profit as set forth in the Agreement, or if no such amount is set forth in the Agreement, a reasonable amount. In such case, and also under Section 6.3.3.3, the Design-Builder shall keep and present, in such form as the Manager may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Design-Build Documents, costs for the purposes of this Section 6.3.7 shall be limited to the following:

- .1 Additional costs of professional services;
- .2 Costs of labor, including social security, unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance, or at the billing rates reflected in the Agreement;
- .3 Costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;
- .4 Rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Design-Builder or others;
- .5 Costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and
- .6 Additional costs of supervision and field office personnel directly attributable to the change.

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

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

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

§ 6.3.11 A field directive or field order shall not be recognized as having any impact upon the Contract Sum or the Contract Time and Design-Builder shall have no claim therefore unless it shall notify the Manager, prior to complying with same and in no event later than ten (10) business days from the date such direction or order was given, that Design-Builder shall prepare and submit to the Architect or Engineer and Manager for Manager's approval its change proposal within ten (10) business days following the issuance of the field directive or field order, taking into account the nature and extent of the change to the Work required thereby.

§ 6.3.12 When submitting its change proposal, Design-Builder shall include and set forth, in clear and precise detail, breakdowns of labor, materials and all mark-ups for all trades involved and the estimated impact on the Construction Schedule. Design-Builder shall furnish spreadsheets from which the breakdowns were prepared, plus spreadsheets if requested of any Subcontractors and detailed breakdown from Subcontractors.

## ARTICLE 7 MANAGER'S RESPONSIBILITIES

### § 7.1 General

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

§ 7.1.2 The Manager shall render decisions in a timely manner and in accordance with the Design-Builder's schedule agreed to by the Manager. The Manager shall furnish to the Design-Builder, within fifteen (15) days after receipt of a written request, information necessary and relevant for the Design-Builder to evaluate, give notice of or

enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Manager's interest therein.

## **§ 7.2 Information and Services Required of the Manager**

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

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

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

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

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

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

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

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

**§ 7.2.9** Unless required by the Design-Build Documents to be provided by the Design-Builder, the Manager shall, upon request from the Design-Builder, furnish the services of geotechnical engineers or other consultants for investigation of subsurface, air and water conditions when such services are reasonably necessary to properly carry out the design services furnished by the Design-Builder. In such event, the Design-Builder shall specify the services required. Such services may include, but are not limited to, test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, ground corrosion and resistivity tests, and necessary operations for anticipating subsoil conditions. The services of geotechnical engineer(s) or other consultants shall include preparation and submission of all appropriate reports and professional recommendations.

**§ 7.2.10** The Manager shall purchase and maintain insurance as set forth in Exhibit B (Insurance and Bonds).

## **§ 7.3 Submittals**

**§ 7.3.1** The Manager shall review and approve or take other appropriate action on Submittals. Review of Submittals is not conducted for the purpose of determining the accuracy and completeness of other details, such as dimensions and quantities; or for substantiating instructions for installation or performance of equipment or systems; or for

determining that the Submittals are in conformance with the Design-Build Documents, all of which remain the responsibility of the Design-Builder as required by the Design-Build Documents. The Manager's action will be taken in accordance with the submittal schedule approved by the Manager or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time in the Manager's judgment to permit adequate review. The Manager's review of Submittals shall not relieve the Design-Builder of the obligations under Sections 3.1.11, 3.1.12, and 5.2.3. The Manager's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Manager, of any construction means, methods, techniques, sequences or procedures. The Manager's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

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

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

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

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

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

**§ 7.8 Manager's Right to Stop Work**

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

**§ 7.8.1** Manager shall, at its convenience, have the right to stop work due to an event or any other circumstance. If Contractor believes that it has been impacted by the stop work order, Contractor may submit the reasons it believes it has been impacted via a change order.

**§ 7.9 Manager's Right to Carry Out the Work**

If the Design-Builder defaults or neglects to carry out the Work in accordance with the Design-Build Documents and fails within a ten (10) day period after receipt of written notice from the Manager to commence and continue correction of such default or neglect with diligence and promptness, the Manager may, without prejudice to other remedies the Manager may have, correct such deficiencies. In such case, an appropriate Change Order shall be issued deducting from payments then or thereafter due the Design-Builder the reasonable cost of correcting such deficiencies. If payments then or thereafter due the Design-Builder are not sufficient to cover such amounts, the Design-Builder shall pay the difference to the Manager.



## **ARTICLE 8 TIME**

### **§ 8.1 Progress and Completion**

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

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

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

### **§ 8.2 Delays and Extensions of Time**

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

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

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

## **ARTICLE 9 PAYMENT APPLICATIONS AND PROJECT COMPLETION**

### **§ 9.1 Contract Sum**

The Contract Sum is stated in the Design-Build Amendment.

### **§ 9.2 Schedule of Values**

Where the Contract Sum is based on a stipulated sum or Guaranteed Maximum Price, the Design-Builder, prior to the first Application for Payment after execution of the Design-Build Amendment shall submit to the Manager a schedule of values allocating the entire Contract Sum to the various portions of the Work and prepared in such form and supported by such data to substantiate its accuracy as the Manager may require. This schedule, unless objected to by the Manager, shall be used as a basis for reviewing the Design-Builder's Applications for Payment, and shall not vary therefrom unless agreed to by the Manager.

**§ 9.2.1** The Design-Builder shall prepare a trade payment breakdown for the Work for which each trade is responsible, such breakdown being submitted on the uniform, standardized form approved by the Manager. The form shall be divided in detail sufficient to exhibit areas, floors and/or sections of Work and/or by convenient units, and shall be updated as required by either the Manager as necessary to reflect 1) the description of the Work; 2) total value; 3) percentage of Work completed to date; 4) value of the Work completed to date; 5) percent of previous amount billed; 6) previous amount billed; 7) current percent completed; and 8) value of the Work completed to date. Any breakdown which fails to include sufficient detail is unbalanced or exhibits "frontloading" of the value of the Work shall be rejected. If trade breakdown has been initially approved, and subsequently used, but later found improper for any reason, sufficient funds shall be withheld from future applications for payment to insure an adequate reserve (exclusive of normal retainage) to complete the Work.

### **§ 9.3 Applications for Payment**

**§ 9.3.1** At least ten (10) days before the date established for each progress payment, the Design-Builder shall submit to the Manager an itemized Application for Payment for completed portions of the Work, a "pencil draw". The application shall be notarized, if required, and supported by data substantiating the Design-Builder's right to payment as the Manager may require, such as copies of requisitions from the Architect, Engineer, Consultants, Contractors, and material suppliers, and shall reflect retainage if provided for in the Design-Build Documents. Each Application for Payment shall be accompanied by the following, in a form and substance satisfactory to the Manager;

a) A current Design-Builder's lien waiver, conditioned upon payment, showing all Subcontractors and materialmen with whom the Design-Builder has entered into subcontracts, the amount of each such subcontract,

the amount requested for any Subcontractor and materialmen in the requested progress payment, and the amount to be paid to the Design-Builder from such progress payment from all such Subcontractors and materialmen;

- b) Duly executed waivers of mechanics' and materialmen's liens from all Subcontractors establishing payment or satisfaction of payment of all amounts requested by the Design-Builder on behalf of such entities or persons in any previous application for payment.

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

**§ 9.3.1.2** Applications for Payment shall not include requests for payment for portions of the Work for which the Design-Builder does not intend to pay the Architect, Engineer, Consultant, Contractor, material supplier, or other persons or entities providing services or work for the Design-Builder, unless such Work has been performed by others whom the Design-Builder intends to pay. If the Design-Builder or Subcontractor intends to withhold payments to a Subcontractor or material or equipment supplier for any reason, those funds shall not be included within an Application for Payment to the Manager. Manager have the right to request and Design-Builder shall then also provide written evidence from the Design-Builder that the Design-Builder has properly paid Subcontractors, Sub-subcontractors, vendors and suppliers amounts paid by the Manager to the Design-Builder for subcontracted Work. If the Design-Builder fails to furnish such evidence with ten (10) days, the Manager shall have the right to contact Subcontractors and Sub-subcontractors to ascertain whether they have been properly paid. Neither the Manager nor Architect shall have an obligation to pay or to see the payment of money to a Subcontractor, except as may otherwise be required by law. Manager's inquiry of payment to Subcontractors, vendors and suppliers in no way relieves Design-Builder of its responsibility to ensure payment.

**§ 9.3.2** Unless otherwise provided in the Design-Build Documents, payments shall be made for services provided as well as materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Manager, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Design-Builder with procedures satisfactory to the Manager to establish the Manager's title to such materials and equipment or otherwise protect the Manager's interest, and shall include the costs of applicable insurance, storage and transportation to the site for such materials and equipment stored off the site. For materials and equipment stored off-site, the Design-Builder shall provide Manager a certificate of property insurance for the stored materials and/or equipment with the Manager and the City and County of Honolulu listed as an additional insured and loss payee, an itemized list of the stored materials and/or equipment, a bill of sale for the stored materials and/or equipment in the exact dollar value for the product and a site visit to the bonded and insured storage location to verify materials and/or equipment are in storage at the agreed location to be coordinated by the Design-Builder, all satisfactory to the Manager in its discretion.

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

**§ 9.3.4** Before the Design-Builder shall become entitled to any progress or final payments under the terms of this Contract, the Design-Builder must first submit waivers of liens on a form approved by the Manager. The required waivers of liens are required from the Design-Builder and all Subcontractors and Sub-subcontractors with each application for payment in the following manner:

- .1 Partial Conditional waivers of liens are required from the Design-Builder and all Subcontractors and material suppliers for whom the Design-Builder is requesting disbursement within the current Application for Payment.
- .2 Partial Unconditional waivers of liens are required from the Design-Builder and all Subcontractors and material suppliers for which Design-Builder previously received payment.
- .3 Final Conditional waivers of liens are required from the Design-Builder and all Subcontractors and material suppliers for whom the Design-Builder is requesting disbursement within the current Application for Payment.

- 4 Final Unconditional waivers of liens are required from the Design-Builder and all Subcontractors and material suppliers for which Design-Builder previously received final payments. Final Unconditional waivers of liens are due within ten (10) days of receipt of final payment to the Design-Builder or Subcontractors or material suppliers. Failure to comply shall constitute a default by Design-Builder.

§ 9.3.5 Failure to provide the proper waivers of liens shall result in payments or partial payment being withheld until such waivers have been properly provided to the Manager.

§ 9.3.6 The Design-Builder shall include in every Subcontractor and major supplier agreement the requirements of waivers of liens prior to award of a subcontract or purchase order.

§ 9.3.7 Design-Builder must provide a monthly report to the Manager notifying Manager of any lien waivers that have not been provided.

#### § 9.4 Certificates for Payment

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

#### § 9.5 Decisions to Withhold Certification

§ 9.5.1 The Manager may withhold a Certificate for Payment in whole or in part to the extent reasonably necessary to protect the Manager due to the Manager's determination that the Work has not progressed to the point indicated in the Design-Builder's Application for Payment, or the quality of the Work is not in accordance with the Design-Build Documents. If the Manager is unable to certify payment in the amount of the Application, the Manager will notify the Design-Builder as provided in Section 9.4. If the Design-Builder and Manager cannot agree on a revised amount, the Manager will promptly issue a Certificate for Payment for the amount that the Manager deems to be due and owing. The Manager may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued to such extent as may be necessary to protect the Manager from loss for which the Design-Builder is responsible because of

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

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

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

#### § 9.6 Progress Payments

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

§ 9.6.2 The Design-Builder shall pay each Architect, Engineer, Consultant, Contractor, and other person or entity providing services or work for the Design-Builder no later than the time period required by applicable law, but in no event more than seven (7) days after receipt of payment from the Manager the amount to which the Architect, Engineer, Consultant, Contractor, and other person or entity providing services or work for the Design-Builder is

entitled, reflecting percentages actually retained from payments to the Design-Builder on account of the portion of the Work performed by the Architect, Engineer, Consultant, Contractor, or other person or entity. The Design-Builder shall, by appropriate agreement with each Architect, Engineer, Consultant, Contractor, and other person or entity providing services or work for the Design-Builder, require each Architect, Engineer, Consultant, Contractor, and other person or entity providing services or work for the Design-Builder to make payments to subconsultants and subcontractors in a similar manner.

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

**§ 9.6.4** The Manager has the right to request written evidence from the Design-Builder that the Design-Builder has properly paid the Architect, Engineer, Consultants, Contractors, or other person or entity providing services or work for the Design-Builder, amounts paid by the Manager to the Design-Builder for the Work. If the Design-Builder fails to furnish such evidence within seven (7) days, the Manager shall have the right to contact the Architect, Engineer, Consultants, and Contractors to ascertain whether they have been properly paid. The Manager shall have no obligation to pay or to see to the payment of money to a Consultant or Contractor, except as may otherwise be required by law.

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

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

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

### **§ 9.7 Failure of Payment**

If the Manager does not issue a Certificate for Payment, through no fault of the Design-Builder, within the time required by the Design-Build Documents, then the Design-Builder may, upon seven (7) additional days' written notice to the Manager, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Design-Builder's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Design-Build Documents.

### **§ 9.8 Substantial Completion**

**§ 9.8.1** Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Design-Build Documents so that the Manager can occupy or utilize the Work for its intended use. The date of Substantial Completion is the date certified by the Manager in accordance with this Section 9.8. Substantial Completion of the Work shall mean the Work has progressed to the point that the Manager can beneficially occupy, the Work complies with the intent of the Contract Documents and the Manager is able to obtain a Certificate of Occupancy from the local governmental authority. The determination of Substantial Completion shall be made by the Manager based in part on the ability of the Manager to obtain a Certificate of Occupancy.

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

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

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

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

**§ 9.8.6** The Certificate of Substantial Completion shall be submitted by the Design-Builder to the Manager for written acceptance of responsibilities assigned to it in the Certificate. Upon the Manager's acceptance, and consent of surety, if any, the Manager shall make payment of retainage applying to the Work or designated portion thereof. Payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Design-Build Documents. The Manager reserves the right to withhold a value of up to three hundred percent (300%) of the cost of completing the Work that is incomplete or not in accordance with the requirements of the Contract Documents. The payment of retainage may also be adjusted by the Manager as necessary due to any outstanding lien, demand, security interest, encumbrance or Claim relating to the Project.

### **§ 9.9 Partial Occupancy or Use**

**§ 9.9.1** The Manager may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Design-Builder, provided such occupancy or use is consented to, by endorsement or otherwise, by the insurer providing property insurance and authorized by public authorities having jurisdiction over the Project. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Manager and Design-Builder have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Design-Build Documents. When the Design-Builder considers a portion substantially complete, the Design-Builder shall prepare and submit a list to the Manager as provided under Section 9.8.2. Consent of the Design-Builder to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Manager and Design-Builder.

**§ 9.9.2** Immediately prior to such partial occupancy or use, the Manager and Design-Builder shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

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

### **§ 9.10 Final Completion and Final Payment**

**§ 9.10.1** Upon receipt of the Design-Builder's written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Manager will promptly make such inspection. When the Manager finds the Work acceptable under the Design-Build Documents and the Contract fully performed, the Manager will, subject to Section 9.10.2, promptly issue a final Certificate for Payment. All warranties and guaranties required under or pursuant to the Contract Documents shall be assembled and delivered by the Design-Builder as part of the final application for payment. The Final Certificate for Payment will not be issued until all warranties and guaranties have been received and accepted by the Manager.

**§ 9.10.2** Neither final payment nor any remaining retained percentage shall become due until the Design-Builder submits to the Manager (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work, for which the Manager or the Manager's property might be responsible or encumbered, (less amounts withheld by Manager) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Design-Build Documents to remain in force after final payment is currently in effect, (3) a written statement that the Design-Builder knows of no substantial reason that the insurance will not be renewable to cover the period required by the Design-Build Documents, (4) consent of surety, if any, to final payment, (5) as-constructed record copy of the Construction Documents marked to indicate field changes and selections made during construction, (6) manufacturer's warranties, product data, and maintenance and operations manuals, and (7) if required by the Manager, other data establishing payment or satisfaction of obligations, such as receipts, or releases and waivers of liens, claims, security interests, or encumbrances, arising out of the Contract, to the extent and in such form as may be designated by the Manager, (8) a certificate executed by Design-Builder stating that all other terms of the Agreement have been satisfied and (9) receipt of a certificate of occupancy (or equivalent) and security accreditation from the applicable governmental authority has occurred and Manager's receipt of Final inspection and approval of the Work by all authorities having jurisdiction over the Work. If an Architect, Engineer, a Consultant, or a Contractor, or other person or entity providing services or work for the Design-Builder, refuses to furnish a release or waiver required by the Manager, the Design-Builder may furnish a bond satisfactory to the Manager to indemnify the Manager against such liens, claims, security interests, or encumbrances. If such liens, claims, security interests, or encumbrances remains unsatisfied after payments are made, the Design-Builder shall refund to the Manager all money that the Manager may be compelled to pay in discharging such liens, claims, security interests, or encumbrances, including all costs and reasonable attorneys' fees. If a Subcontractor refuses to furnish a release or waiver required by the Manager, the Design-Builder may furnish a bond satisfactory to the Manager to indemnify the Manager against such lien. If such lien remains unsatisfied after payments are made, the Design-Builder shall refund to the Manager all money that the Manager may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

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

**§ 9.10.4** Intentionally deleted.

- .1 intentionally deleted.
- .2 intentionally deleted.
- .3 intentionally deleted.

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

Design-Builder shall notify the Manager, in writing, upon final completion of the Work. The Project shall be considered completed when the Manager can fully occupy and use the Work for its intended purpose, and the Work is in full compliance with the Contract Documents. Once the Work has been inspected and accepted by the Manager, and all conditions of final payment are met, the Design-Builder shall be entitled to final payment.

Design-Builder agrees to maintain a lien-free Project for the benefit of the Manager. Design-Builder shall take all action necessary to obtain the prompt discharge of any lien or claim, including a Verified Statement of Claim, filed against the Manager or Project. If any lien or claim is filed against the Manager or Project, and the Design-Builder has been paid pursuant to the Agreement for that portion of the Work to which the lien or claim relates, then the Design-Builder shall promptly, but in no event more than fifteen (15) days after request and at its own cost, obtain the discharge and full release of the lien or claim by providing payment or filing a surety bond sufficient to discharge said lien or claim. If Design-Builder fails to take the action required by this Agreement to discharge a lien or claim, the Manager shall have the right to pay all sums necessary to obtain such a discharge and release, and the Design-Builder shall be responsible to the Manager for all costs and expenses incurred by the Manager in obtaining discharge and release of such lien or claim.

## **ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY**

### **§ 10.1 Safety Precautions and Programs**

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

### **§ 10.2 Safety of Persons and Property**

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

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

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

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

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

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

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

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

**§ 10.2.8 Injury or Damage to Person or Property.** If the Manager or Design-Builder suffers injury or damage to person or property because of an act or omission of the other, or of others for whose acts such party is legally responsible, oral notice of injury or damage must be given to the other party within twenty-four (24) hours of occurrence and written notice of the injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding twenty-one (21) days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

### **§ 10.3 Hazardous Materials**

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

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

**§ 10.3.3** Intentionally deleted.

**§ 10.3.4** The Manager shall not be responsible under this Section 10.3 for materials or substances the Design-Builder brings to the site unless such materials or substances are required by the Manager's Criteria and such materials and substances were properly transported, stored and used by the Design-Builder in accordance with applicable law and the Contract Documents. Nothing in this subparagraph shall relieve or excuse the Design-Builder of its duties and obligations regarding the proper transportation, storage or use of hazardous materials and substances. The Manager shall be responsible for materials or substances required by the Manager's Criteria, except to the extent of the Design-Builder's fault or negligence in the use and handling of such materials or substances.

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

**§ 10.3.6** Intentionally deleted.

#### **§ 10.4 Emergencies**

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

### **ARTICLE 11 UNCOVERING AND CORRECTION OF WORK**

#### **§ 11.1 Uncovering of Work**

The Manager may request to examine a portion of the Work that the Design-Builder has covered to determine if the Work has been performed in accordance with the Design-Build Documents. If such Work is in accordance with the Design-Build Documents, the Manager and Design-Builder shall execute a Change Order to adjust the Contract Time and Contract Sum, as appropriate. If such Work is not in accordance with the Design-Build Documents, the costs of uncovering and correcting the Work shall be at the Design-Builder's expense and without reimbursement and the Design-Builder shall not be entitled to a change in the Contract Time unless the condition was caused by the Manager or a separate contractor in which event the Manager shall be responsible for payment of such costs and the Contract Time will be adjusted as appropriate.

#### **§ 11.2 Correction of Work**

**§ 11.2.1 Before or After Substantial Completion.** The Design-Builder shall promptly correct Work rejected by the Manager or failing to conform to the requirements of the Design-Build Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections, the cost of uncovering and replacement, and compensation for any design consultant employed by the Manager whose expenses and compensation were made necessary thereby, shall be at the Design-Builder's expense and without reimbursement.

#### **§ 11.2.2 After Substantial Completion**

**§ 11.2.2.1** In addition to the Design-Builder's obligations under Section 3.1.12, if, within one (1) year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of an applicable special warranty required by the Design-



Build Documents, any of the Work is found not to be in accordance with the requirements of the Design-Build Documents, the Design-Builder shall correct it promptly after receipt of written notice from the Manager to do so unless the Manager has previously given the Design-Builder a written acceptance of such condition. The Manager shall give such notice promptly after discovery of the condition. During the one-year period for correction of the Work, if the Manager fails to notify the Design-Builder and give the Design-Builder an opportunity to make the correction, the Manager waives the rights to require correction by the Design-Builder and to make a claim for breach of warranty. If the Design-Builder fails to correct nonconforming Work within fourteen (14) days after receipt of notice from the Manager, the Manager may correct it in accordance with Section 7.9.

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

§ 11.2.2.3 The one-year period for correction of Work shall not be extended by corrective Work performed by the Design-Builder pursuant to this Section 11.2, but only as to the Work which was corrected.

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

§ 11.2.4 The Design-Builder shall bear the cost, without reimbursement, of correcting destroyed or damaged construction of the Manager or separate contractors, whether completed or partially completed, caused by the Design-Builder's correction or removal of Work that is not in accordance with the requirements of the Design-Build Documents.

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

### § 11.3 Acceptance of Nonconforming Work

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

## ARTICLE 12 COPYRIGHTS AND LICENSES

§ 12.1 The Design-Builder may retain copies of its work product and may reuse individual details in subsequent work. The Manager may reuse any of the Instruments of Service created by the Design-Builder for the Project on any addition or modification to this Project, or for any other project, including new projects, as the Manager desires without permission of or compensation to the Design-Builder. Any unilateral use by the Manager of the Instruments of Service for completing, using, maintaining, adding to or altering the Project or facilities shall be at the Manager's sole risk and without liability to the Design-Builder or the Design-Builder's consultants; provided however that if the Manager's unilateral use occurs for completing, using or maintaining the Project as a result of the Design-Builder's breach of this Agreement, nothing in this article shall be deemed to relieve the Design-Builder of liability for its own acts or omissions or breach of this Agreement. Designs, drawings, specifications, details, models, and other documents furnished by the Design-Builder, including those in electronic form, and all other work products of the Design-Builder are Instruments of Service whether or not the Project is completed, and are the property of the Manager along with all copyrights therein. The Manager is entitled to the possession of all such work products specifically developed for the Project upon completion of the Project, termination of this Agreement, or upon the Manager's request, whichever occurs first and upon payment in full of all amounts due to the Design-Builder under this Agreement. Submission or distribution of Instruments of Service to meet official regulatory requirements, or for similar purposes in connection with the Project, is not to be construed as publication in derogation of the reserved rights of the Design-Builder and the Architect, Engineer, Consultants, and Contractors, and any other person or entity providing services or work for any of them.

§ 12.2 Intentionally deleted.

§ 12.3 Upon execution of the Agreement, the Design-Builder grants to the Manager ownership of the Instruments of Service provided that the Manager performs its obligations, including prompt payment of all sums when due, under the Design-Build Documents.

§ 12.3.1 Intentionally deleted.

§ 12.3.2 In the event the Manager alters the Instruments of Service, the Manager releases the Design-Builder, Architect, Engineer, Consultants, Contractors and any other person or entity providing services or work for any of them, from all claims and causes of action arising from or related to such uses

## ARTICLE 13 TERMINATION OR SUSPENSION

§ 13.1 See Sections 12, 13 and 14 of Exhibit D (General Conditions)

§ 13.1.1 Intentionally Deleted.

§ 13.1.2 Intentionally Deleted.

§ 13.1.3 Intentionally Deleted.

§ 13.1.4 Intentionally Deleted.

§ 13.1.5 Intentionally Deleted.

§ 13.1.6 Intentionally Deleted.

§ 13.1.7 Intentionally Deleted.

§ 13.2 Intentionally Deleted.

§ 13.2.1 Intentionally Deleted.

§ 13.2.1.1 Intentionally Deleted.

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§ 13.2.1.3 Intentionally Deleted.

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§ 13.2.2.1 Intentionally Deleted.

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§ 13.2.2.4 Intentionally Deleted.

§ 13.2.3 Intentionally Deleted.

§ 13.2.3.1 Intentionally Deleted.

§ 13.2.3.2 Intentionally Deleted.

§ 13.2.4 Intentionally Deleted.

§ 13.2.4.1 Intentionally Deleted.

§ 13.2.4.2 Intentionally Deleted.

§ 13.2.4.3 Intentionally Deleted.

§ 13.2.4.4 Intentionally Deleted.

§ 13.2.4.5 Intentionally Deleted.

## ARTICLE 14 CLAIMS AND DISPUTE RESOLUTION

§ 14.1 Claims, Also See Sections 11 and 15 of General Conditions (Exhibit D)

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

§ 14.1.2 Intentionally deleted.

§ 14.1.3 Notice of Claims

§ 14.1.3.1 **Prior To Final Payment.** Prior to Final Payment, Claims by either the Manager or Design-Builder must be initiated by written notice to the other party within twenty-one (21) days after occurrence of the event giving rise to

such Claim or within twenty-one (21) days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

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

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

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

**§ 14.1.6 Claims for Additional Time**

**§ 14.1.6.1** If the Design-Builder intends to make a Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Design-Builder's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary. If the Design-Builder wishes to make claim of an increase in the Contract Time, the Design-Builder shall give the Manager written notice thereof within fifteen (15) days after occurrence of the event giving rise to such claim.

**§ 14.1.6.2** Weather delays which are normal and expected for the region and for the period of time must be included within the Construction Schedule. If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated, and had an adverse effect on the scheduled construction.

**§ 14.1.7 Claims for Consequential Damages**

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

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

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

**§ 14.2 Intentionally Deleted.**

**§ 14.3 Intentionally Deleted.**

**§ 14.4 Intentionally Deleted.**

**§ 14.4.4 Intentionally Deleted.**

**§ 14.4.5 Meet and Confer**

In the event of a dispute involving terms or performance of this Contract, the Parties agree to initially attempt to resolve the dispute through a meet and confer process. The aggrieved Party shall submit information regarding the nature of the dispute to the other Party at the addresses listed herein. Upon receipt of any such notice, decision-making representatives of the Parties shall meet and confer in person in an effort to resolve such dispute. In the event that the dispute is not resolved through this informal process, the Parties may attempt, but are not required, to resolve the dispute through mediation. If the Parties do not both agree to submit the dispute to mediation, then the dispute shall be resolved through litigation as provided herein.

#### **§ 14.4.6 Mediation**

The Parties may mediate disputes, but only if both Parties agree to use mediation. In the event mediation is utilized, the Party seeking mediation shall send a notice to the other Party, setting forth the nature of the controversy, the dollar amount involved, if any, and the remedy sought. There shall be one mediator. The Parties shall conduct the mediation through Dispute, Prevention & Resolution, Inc. ("DPR") and shall select a mediator from the DPR Panel. The cost of the mediator and the mediation shall be borne equally by the Parties and the mediation shall take place in Honolulu, Hawaii. In the event mediation is not successful, the dispute shall be resolved through litigation.

### **ARTICLE 15 MISCELLANEOUS PROVISIONS**

#### **§ 15.1 Governing Law**

The Contract shall be governed by the laws of the State of Hawaii.

#### **§ 15.2 Successors and Assigns**

**§ 15.2.1** The Manager and Design-Builder, respectively, bind themselves, their partners, successors, assigns and legal representatives to the covenants, agreements and obligations contained in the Design-Build Documents. Except as provided in Section 15.2.2. The Manager is currently operating the Hawaii Convention Center pursuant to a Management Agreement with the Hawai'i Tourism Authority ("HTA"). In the event that the Manager's Management Agreement with HTA is terminated for any reason, or expires pursuant to its terms, then the Design-Builder agrees to enter into an assignment from Manager to either (1) HTA, or (2) the new manager of the Hawaii Convention Center. In the event of an assignment from Manager to the HTA or the new manager, the Design-Builder agrees to continue providing the goods and services required by this Agreement, and continues to be bound by all the terms and provisions herein. In the event on this Agreement is assigned to the HTA, the Design-Builder agrees that the assignment will add requirements that the Design-Builder must follow State contracting laws, including, but not limited to, the Hawaii State Procurement Code.

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

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

#### **§ 15.3 Written Notice**

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

#### **§ 15.4 Rights and Remedies**

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

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

#### **§ 15.5 Tests and Inspections**

**§ 15.5.1** Tests, inspections and approvals of portions of the Work shall be made as required by the Design-Build Documents and by applicable laws, statutes, ordinances, codes, rules and regulations or lawful orders of public authorities. Unless otherwise provided, the Design-Builder shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Manager, or with the appropriate public

authority, and shall bear all related costs of tests, inspections and approvals. The Design-Builder shall give the Manager timely notice of when and where tests and inspections are to be made so that the Manager may be present for such procedures. The Manager shall bear costs of (1) tests, inspections or approvals that do not become requirements until after bids are received or negotiations concluded, and (2) tests, inspections or approvals where building codes or applicable laws or regulations prohibit the Manager from delegating their cost to the Design-Builder.

**§ 15.5.2** If the Manager determines that portions of the Work require additional testing, inspection or approval not included under Section 15.5.1, the Manager will instruct the Design-Builder to make arrangements for such additional testing, inspection or approval by an entity acceptable to the Manager, and the Design-Builder shall give timely notice to the Manager of when and where tests and inspections are to be made so that the Manager may be present for such procedures. Such costs, except as provided in Section 15.5.3, shall be at the Manager's expense.

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

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

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

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

#### **§ 15.6 Confidential Information**

If the Manager or Design-Builder transmits Confidential Information, the transmission of such Confidential Information constitutes a warranty to the party receiving such Confidential Information that the transmitting party is authorized to transmit the Confidential Information. If a party receives Confidential Information, the receiving party shall keep the Confidential Information strictly confidential and shall not disclose it to any other person or entity except as set forth in Section 15.6.1. Design-Builder acknowledges that in order to perform the services or provide the supplies and/or materials required herein, Manager may provide to Design-Builder or Design-Builder and Design-Builder's employees and personnel may become exposed to certain confidential information. The Design-Builder warrants and represents that the Design-Builder shall not knowingly or negligently communicate or disclose at any time to any person or entity any information in connection with the Work or the project, except: (1) with the prior written consent of the Manager, (2) information that was in the public domain prior to the date of this Agreement, (3) information which becomes part of the public domain by publication or otherwise not due to any unauthorized act or omission of the Design-Builder, or (4) as may be required to perform the Work by any applicable law.

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

#### **§ 15.7 Capitalization**

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

#### **§ 15.8 Interpretation**

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

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

§ 15.8.3 It is understood and agreed that all Contract Documents, including all drawings, specifications, details, designs reports, change orders, schedules, spreadsheets, logs, test results, invoices and records, including electronic records and computer data, prepared by the Design-Builder and its Subcontractors or consultants pursuant to this Agreement are the property of the Manager, including all copyrights thereto. Design-Builder shall obtain grants from its Subcontractors and consultants consistent with this Agreement. The Manager shall have the right to possess all such documents, drawings and electronic records as described above.

#### § 15.8.4 Severability

In the event any one or more of the provision contained in this Agreement shall, for any reason, be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or non-enforceability shall not affect any other provision of this Agreement, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained in this Agreement and this Agreement shall be enforced to the fullest extent permitted by law. The Parties agree to renegotiate in good faith those provisions of the Agreement invalidated so that an appropriate agreement may be maintained between the Parties.

### ARTICLE 16 SCOPE OF THE AGREEMENT

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

- .1 AIA Document A141™-2014, Standard Form of Agreement Between Manager and Design-Builder
- .2 AIA Document A141™-2014, Exhibit A, Design-Build Amendment, if executed, and
- .3 AIA Document A141™-2014, Exhibit B, Insurance and Bonds;
- .4 Other:
  - «Exhibit C – Special Conditions
  - Exhibit D – General Conditions
  - The RFP No. #TBD XXXX-XX (including all amendments and addenda)
  - The Design-Builder's Proposal (including BAFOs) in response to RFP No. #TBD XXXX-XX
  - Exhibit E – Design and Preconstruction Services Fee
  - Exhibit F – Construction Cost Summary
  - Exhibit G – Preconstruction Costs and General Conditions
  - Exhibit H – Design Services Rates
  - Exhibit I – Project Documents
  - Exhibit J – Insurance Certificate»

§ 16.2 This document constitutes the Agreement between the Parties with respect to the subject matter hereof, and is a complete and exclusive statement of the terms of their agreement, and no terms, conditions, understandings or agreement purporting to amend, modify, vary or waive the terms of this Agreement shall be binding unless made in writing and signed by an authorized representative of each Party.

§ 16.3 This Agreement, along with Exhibits and Attachments, and the other Contract Documents, as defined herein, reflect the entire Agreement of the parties with respect to the subject matter hereof and supersedes all prior oral or written statements, understandings or correspondence, if any, with respect thereto.

§ 16.4 This Agreement supersedes all prior written and oral agreements regarding the subject matter hereof. In the event of a conflict between the terms and conditions of this document and the terms and conditions of any document or Exhibit attached hereto or referenced herein, the terms and conditions of this document shall govern and control, with the exception of Exhibit C (Special Conditions), which takes precedence.

§ 16.5 This Agreement shall be interpreted and construed according to its fair meaning, without consideration as to which party drafted it.

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

**MANAGER** *(Signature)*

«Teri Orton» «Chief Procurement Officer»

*(Printed name and title)*

**DESIGN-BUILDER** *(Signature)*

«TBD» «TBD»

*(Printed name and title)*

