

**ADDENDUM NO. 2**  
**TO**  
**REQUEST FOR PROPOSAL**  
**FOR**  
**A DESIGN AND BUILD PROJECT**  
**FOR THE REPAIR OF THE THIRD FLOOR PLANTERS**  
**FOR HAWAI'I CONVENTION CENTER**  
**RFP NO. 2023-16**

DATED: April 24, 2023

**I. Amendments to the Appendices**

**Appendix B: AIA Document A141 – 2014 Standard Form of Agreement Between Owner and Design-Builder**

**Appendix C: Exhibit A: AIA Document A141 – 2014, Appendix A: Design-Build Amendment  
Exhibit B: AIA Document A141 – 2014, Appendix B: Insurance and Bonds  
Exhibit C: General Conditions  
Exhibit D: Special Conditions**

**In all other respects, the RFP shall remain unchanged.**

# **APPENDIX B**

**AIA DOCUMENT A141 – 2014 PROJECT DRAFT SAMPLE  
STANDARD FORM OF AGREEMENT BETWEEN OWNER AND DESIGN-BUILDER**

# 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 «Two Thousand Twenty-Three»  
(In words, indicate day, month and year.)

**BETWEEN** the Manager:  
(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» « »  
« »  
« »  
« »

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

«Third Floor Planter Repairs»  
«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.)*

«This is a turn-key Project. The Project will require the remediation of existing water intrusion damage and provide a water-tight exterior building envelope. The Manager's program is subject to further development by the Manager and Design-Builder. The building has experienced water intrusion damage to various components, including but not limited to building materials, fixtures, and finishes, in general along the exterior third floor of the building, adjacent to Kalakaua Avenue and the Ala Wai Canal Promenade. The planter boxes have issues with leaking, EFIS/structural damage due to water intrusion and drains that have been installed that do not have any fall to drain. There is also

evidence of ponding in some areas. The planter boxes have areas where the waterproofing membrane has separated from the planter box support wall and the outer support wall has also separated in various areas that tie into the main building envelope. On level three at high level, underneath the planter boxes, the EFIS has separated from the structure and the support framework has corroded in certain areas and locations.»

**§ 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 F - Project Documents.»

**§ 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.)

«None.»

**§ 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.)

«None»

**§ 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.)

«To Be Determined»

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

.1 Design phase milestone dates:

«TBD»

.2 Submission of Design-Builder Proposal:

«May 5, 2023»

.3 Phased completion dates:

«N/A»

.4 Substantial Completion date:

«TBD»

.5 Other milestone dates:

«TBD»

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

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

.1 Architect

«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 \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_ are key personnel whose services and professional experience are essential to the completion of this Project. \_\_\_\_\_ shall serve as the Principal, and \_\_\_\_\_ shall serve as the Associate 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.)*

«Mari Tait  
Contracting Officer»  
«AEG Management HCC, LLC a Hawaii 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 (PM/CM)  
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.)*

«TBD»

§ 1.2.4 The Design-Builder identifies the following representative in accordance with Section 3.1.2:

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

«TBD»

«TBD»

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

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

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



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

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

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

§ 1.4.16 **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) and shall 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.)*

«Attachment C – Design-Builder and Design-Builder's Architect, 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, 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, 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, or Architect 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, 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 Special Conditions (Exhibit C) 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 Special Conditions, attached hereto as Exhibit C
- .2 General Conditions, attached hereto as Exhibit D;
- .3 Change Orders and Modifications issued after the date of the Agreement (A141-2014), incl. Exhibit A (Design-Build Amendment);
- .4 Agreement, AIA A141-2014 as modified by the parties;
- .5 A141-2014, Exhibit B (Insurance and Bonds);
- .6 Other Exhibits to the Agreement;
- .7 Drawings;
- .8 Specifications; and
- .9 Contractor's GMP Clarifications and Qualifications

§ 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 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'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, Consultants, and Contractors, and furnish to the Manager, certifications with respect to the documents and services provided by the Architect, Consultants, and Contractors (a) that, to the best of their knowledge, information and belief, the documents or services to which the certifications relate (i) are consistent with the Design-Build Documents, except to the extent specifically identified in the certificate, and (ii) comply with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities governing the design of the Project; and (b) that the 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, 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 one (1) year 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 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, 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, 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 individuals(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 signed by the Manager and Design-Builder 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 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, 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, 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, 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, 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, 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, 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 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, 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, Consultant, Contractor, and other person or entity providing services or work for the Design-Builder is entitled, reflecting percentages actually retained from payments to the Design-Builder on account of the portion of the Work performed by the Architect, Consultant, Contractor, or other person or entity. The Design-Builder shall, by appropriate agreement with each Architect, Consultant, Contractor, and other person or entity providing services or work for the Design-Builder, require each Architect, Consultant, Contractor, and other person or entity providing services or work for the Design-Builder to make payments to subconsultants and subcontractors in a similar manner.

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

**§ 9.6.4** The Manager has the right to request written evidence from the Design-Builder that the Design-Builder has properly paid the Architect, Consultants, Contractors, or other person or entity providing services or work for the Design-Builder, amounts paid by the 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, 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, Consultants, Contractors and other person or entity providing services or work for the Design-Builder, shall be held by the Design-Builder for the Architect and those Consultants, Contractors, or other person or entity providing services or work for the Design-Builder, for which payment was made by the 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, 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, 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, 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 a 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, 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, 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.

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

§ 14.1.3 **Notice of Claims**

§ 14.1.3.1 **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 Initial Decision**

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

#### **§ 14.2.2 Procedure**

**§ 14.2.2.1 Claims Initiated by the Manager.** If the Manager initiates a Claim, the Design-Builder shall provide a written response to Manager within ten (10) days after receipt of the notice required under Section 14.1.3.1. Thereafter, the Manager shall render an initial decision within ten days of receiving the Design-Builder's response: (1) withdrawing the Claim in whole or in part, (2) approving the Claim in whole or in part, or (3) suggesting a compromise.

**§ 14.2.2.2 Claims Initiated by the Design-Builder.** If the Design-Builder initiates a Claim, the Manager will take one or more of the following actions within ten (10) days after receipt of the notice required under Section 14.1.3.1: (1) request additional supporting data, (2) render an initial decision rejecting the Claim in whole or in part, (3) render an initial decision approving the Claim, (4) suggest a compromise or (5) indicate that it is unable to render an initial decision because the Manager lacks sufficient information to evaluate the merits of the Claim.

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

**§ 14.2.4** If the Manager requests the Design-Builder to provide a response to a Claim or to furnish additional supporting data, the Design-Builder shall respond, within ten (10) days after receipt of such request, and shall either (1) provide a response on the requested supporting data, (2) advise the Manager when the response or supporting data will be furnished or (3) advise the Manager that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Manager will either reject or approve the Claim in whole or in part.

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

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

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

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

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

### § 14.3 Mediation

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

§ 14.3.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of sixty (60) days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration proceeding is stayed pursuant to this Section 14.3.2, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.

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

### § 14.4 Arbitration

§ 14.4.1 If the parties have selected arbitration as the method for binding dispute resolution in Section 1.3, any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. A demand for arbitration shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

§ 14.4.1.1 A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation, but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the Claim would be barred by the applicable statute of limitations or statute of repose. For statute of limitations or statute of repose purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the Claim.

§ 14.4.2 The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction.

§ 14.4.3 The foregoing agreement to arbitrate, and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement, shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

### § 14.4.4 Consolidation or Joinder

§ 14.4.4.1 Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

§ 14.4.4.2 Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional

person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.

**§ 14.4.4.3** The Manager and Design-Builder grant to any person or entity made a party to an arbitration conducted under this Section 14.4, whether by joinder or consolidation, the same rights of joinder and consolidation as the Manager and Design-Builder under this Agreement.

## **ARTICLE 15 MISCELLANEOUS PROVISIONS**

### **§ 15.1 Governing Law**

The Contract shall be governed by the law of the place where the Project is located except that, if the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 14.4.

### **§ 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, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

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

### **§ 15.3 Written Notice**

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

### **§ 15.4 Rights and Remedies**

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

**§ 15.4.2** No action or failure to act by the 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 following 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 Intentionally deleted;
- .5 or the following:

« »

- .6 Other:

«Exhibit C – Special Conditions  
Exhibit D – General Conditions  
Attachment A – Design and Preconstruction Services Fee  
Attachment A-1 – Construction Cost Summary  
Attachment B – Preconstruction Costs and General Conditions  
Attachment C – Design Services Rates  
Attachment C-1 – Preconstruction & Construction Rates  
Attachment D – Design Staffing Allocation  
Attachment D-1 – Preconstruction and Construction Staffing Allocation  
Attachment E – Responsibility Matrices  
Attachment F – Project Documents»

**§ 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 or 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)  
«TBD»«TBD»  
(Printed name and title)

DESIGN-BUILDER (Signature)  
«TBD»«TBD»  
(Printed name and title)



# **APPENDIX C**

**AIA Document A141 – 2014**

**EXHIBIT A: DESIGN-BUILD AMENDMENT**

**EXHIBIT B: INSURANCE AND BONDS**

**EXHIBIT C: GENERAL CONDITIONS**

**EXHIBIT D: SPECIAL CONDITIONS**

# DRAFT AIA® Document A141® – 2014

## Exhibit A

### Design-Build Amendment

This Amendment is incorporated into the accompanying AIA Document A141™–2014, Standard Form of Agreement Between Manager and Design-Builder dated the «TBD» day of «TBD» in the year «Two Thousand Twenty-Three» (the "Agreement")  
(In words, indicate day, month and year.)

#### for the following PROJECT:

(Name and location or address)

«Third Floor Planter Repairs»  
«Hawaii Convention Center ("HCC")  
1801 Kalakaua Avenue  
Honolulu, Hawaii 96815»

#### THE MANAGER:

(Name, legal status and address)

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

#### THE DESIGN-BUILDER:

(Name, legal status and address)

«TBD»« »  
« »

The Manager and Design-Builder hereby amend the Agreement as follows.

#### TABLE OF ARTICLES

- A.1 CONTRACT SUM
- A.2 CONTRACT TIME
- A.3 INFORMATION UPON WHICH AMENDMENT IS BASED
- A.4 DESIGN-BUILDER'S PERSONNEL, CONTRACTORS AND SUPPLIERS
- A.5 COST OF THE WORK

#### ARTICLE A.1 CONTRACT SUM

§ A.1.1 The Manager shall pay the Design-Builder the Contract Sum in current funds for the Design-Builder's performance of the Contract after the execution of this Amendment. The Contract Sum shall be one of the following and shall not include compensation the Manager paid the Design-Builder for Work performed prior to execution of this Amendment:

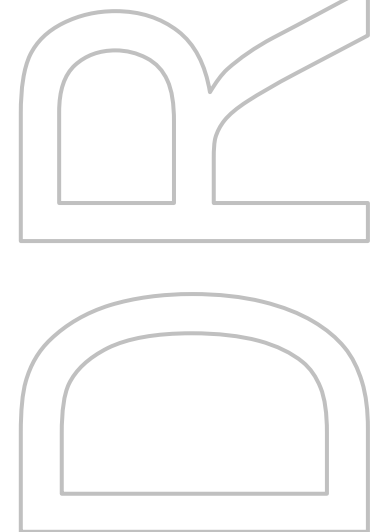
(Check the appropriate box.)

[ «X» ] Stipulated Sum, in accordance with Section A.1.2 below

**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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[ « » ] Cost of the Work plus the Design-Builder's Fee, in accordance with Section A.1.3 below

[ « » ] Cost of the Work plus the Design-Builder's Fee with a Guaranteed Maximum Price, in accordance with Section A.1.4 below

(Based on the selection above, complete Section A.1.2, A.1.3 or A.1.4 below.)

**§ A.1.2 Stipulated Sum**

**§ A.1.2.1** The Stipulated Sum shall be «TBD» (\$ «TBD» ), subject to authorized adjustments as provided in the Design-Build Documents.

**§ A.1.2.2** The Stipulated Sum is based upon the following alternates, if any, which are described in the Design-Build Documents and are hereby accepted by the Manager:

*(State the numbers or other identification of accepted alternates. If the Manager is permitted to accept other alternates subsequent to the execution of this Amendment, attach a schedule of such other alternates showing the change in Stipulated Sum for each and the deadline by which the alternate must be accepted.)*

«TBD»

The Stipulated Sum includes the Design-Builder's Fee of TBD Percent (TBD %).

The Design-Builder's Fee will be the same for changes in the Work.

**§ A.1.2.3** Unit prices, if any:

*(Identify item, state the unit price, and state any applicable quantity limitations.)*

| Item | Units and Limitations | Price per Unit (\$0.00) |
|------|-----------------------|-------------------------|
|------|-----------------------|-------------------------|

**§ A.1.3 Cost of the Work Plus Design-Builder's Fee**

Intentionally deleted.

**§ A.1.4 Cost of the Work Plus Design-Builder's Fee With a Guaranteed Maximum Price**

Intentionally deleted.

**§ A.1.5 Payments, Also See Sections 16, 17, 18 and 27 of Exhibit D (General Conditions)**

**§ A.1.5.1 Progress Payments**

**§ A.1.5.1.1** Based upon Applications for Payment submitted to the Manager by the Design-Builder, the Manager shall make progress payments on account of the Contract Sum to the Design-Builder as provided below and elsewhere in the Design-Build Documents.

**§ A.1.5.1.2** The period covered by each Application for Payment shall be one calendar month ending on the last day of the month.

«TBD»

**§ A.1.5.1.3** Provided that an Application for Payment is received not later than the «1st» day of the month, the Manager shall make payment of the certified and approved amount to the Design-Builder not later than the «1st» day of the «following» month. If an Application for Payment is received by the Manager after the application date fixed above, payment shall be made by the Manager not later than «thirty» ( «30» ) days after the Manager approves the Application for Payment.

*(Federal, state or local laws may require payment within a certain period of time.)*

**§ A.1.5.1.4** With each Application for Payment where the Contract Sum is based upon the Cost of the Work, or the Cost of the Work with a Guaranteed Maximum Price, the Design-Builder shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence required by the Manager to demonstrate that cash disbursements already made by the Design-Builder on account of the Cost of the Work equal or exceed (1) progress

payments already received by the Design-Builder, less (2) that portion of those payments attributable to the Design-Builder's Fee; plus (3) payrolls for the period covered by the present Application for Payment.

**§ A.1.5.1.5** With each Application for Payment where the Contract Sum is based upon a Stipulated Sum or Cost of the Work with a Guaranteed Maximum Price, the Design-Builder shall submit the most recent schedule of values in accordance with the Design-Build Documents. The schedule of values shall allocate the entire Contract Sum among the various portions of the Work. Compensation for design services, if any, shall be shown separately. Where the Contract Sum is based on the Cost of the Work with a Guaranteed Maximum Price, the Design-Builder's Fee shall be shown separately. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Manager may require. This schedule of values, unless objected to by the Manager, shall be used as a basis for reviewing the Design-Builder's Applications for Payment.

**§ A.1.5.1.6** In taking action on the Design-Builder's Applications for Payment, the Manager shall be entitled to rely on the accuracy and completeness of the information furnished by the Design-Builder and shall not be deemed to have made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Sections A.1.5.1.4 or A.1.5.1.5, or other supporting data; to have made exhaustive or continuous on-site inspections; or to have made examinations to ascertain how or for what purposes the Design-Builder has used amounts previously paid. Such examinations, audits and verifications, if required by the Manager, will be performed by the Manager's auditors acting in the sole interest of the Manager.

**§ A.1.5.1.7** Except with the Manager's prior approval, the Design-Builder shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

**§ A.1.5.2 Progress Payments—Stipulated Sum**

**§ A.1.5.2.1** Applications for Payment where the Contract Sum is based upon a Stipulated Sum shall indicate the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment.

**§ A.1.5.2.2** Subject to other provisions of the Design-Build Documents, the amount of each progress payment shall be computed as follows:

- .1 Take that portion of the Contract Sum properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the Contract Sum allocated to that portion of the Work in the schedule of values, less retainage of ~~«five»~~ percent ( ~~«5»~~ %) on the Work. Pending final determination of cost to the Manager of Changes in the Work, amounts not in dispute shall be included as provided in Section 6.3.9 of the Agreement;
- .2 Add that portion of the Contract Sum properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the completed construction (or, if approved in advance by the Manager, suitably stored off the site at a location agreed upon in writing), less retainage of ~~«five»~~ percent ( ~~«5»~~ %);
- .3 Subtract the aggregate of previous payments made by the Manager; and
- .4 Subtract amounts, if any, the Manager has withheld or nullified, as provided in Section 9.5 of the Agreement.
- .5 Section 103-32.1(d)(3), HRS, allows the Design-Builder to withhold from amounts due its Subcontractors, only the same percentage of retainage as that of the Design-Builder, and only if its Subcontractors have provided valid performance and payment bonds or other bond or collateral acceptable to the Design-Builder. Section 103-32.1(e), HRS, allows the Design-Builder or Subcontractor to negotiate with, and retain from its respective Subcontractors, a different retainage percentage which cannot exceed 10%. All amounts retained shall be held by the procurement officer. Therefore no additional amounts are to be retained by the State unless: (1) the Design-Builder's progress is not satisfactory, in which case the State may continue to withhold up to 5% of the amount due the Contract, after 50% of the Contract is completed; or (2) there is a subcontract in which the Design-Builder or Subcontractor has negotiated a retainage in excess of the 5%, but no more than 10%.

**§ A.1.5.2.3** The progress payment amount determined in accordance with Section A.1.5.2.2 shall be further modified under the following circumstances:

- .1 Add, upon Substantial Completion of the Work, a sum sufficient to increase the total payments to the full amount of the Contract Sum, less such amounts as the Manager shall determine for incomplete Work, retainage applicable to such work and unsettled claims; and

(Section 9.8.6 of the Agreement discusses release of applicable retainage upon Substantial Completion of Work.)

- 2 Add, if final completion of the Work is thereafter materially delayed through no fault of the Design-Builder, any additional amounts payable in accordance with Section 9.10.3 of the Agreement.

**§ A.1.5.2.4** Reduction or limitation of retainage, if any, shall be as follows:

*(If it is intended, prior to Substantial Completion of the entire Work, to reduce or limit the retainage resulting from the percentages inserted in Sections A.1.5.2.2.1 and A.1.5.2.2.2 above, and this is not explained elsewhere in the Design-Build Documents, insert provisions here for such reduction or limitation.)*

«At the Manager's sole discretion, if the Work is proceeding to the satisfaction of the Manager, retainage may be reduced or discontinued on a case-by-case basis based on the quality and level of completeness of a Subcontractor's Work.»

**§ A.1.5.3 Progress Payments—Cost of the Work Plus a Fee**

Intentionally deleted.

**§ A.1.5.4 Progress Payments—Cost of the Work Plus a Fee with a Guaranteed Maximum Price**

Intentionally deleted.

**§ A.1.5.5 Final Payment**

**§ A.1.5.5.1** Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Manager to the Design-Builder not later than 30 days after the Design-Builder has fully performed the Contract and the requirements of Section 9.10 of the Agreement have been satisfied, except for the Design-Builder's responsibility to correct non-conforming Work discovered after final payment or to satisfy other requirements, if any, which extend beyond final payment.

**§ A.1.5.5.2** If the Contract Sum is based on the Cost of the Work, the Manager's auditors will review and report in writing on the Design-Builder's final accounting within 30 days after the Design-Builder delivers the final accounting to the Manager. Based upon the Cost of the Work the Manager's auditors report to be substantiated by the Design-Builder's final accounting, and provided the other conditions of Section 9.10 of the Agreement have been met, the Manager will, within seven days after receipt of the written report of the Manager's auditors, either issue a final Certificate for Payment, or notify the Design-Builder in writing of the reasons for withholding a certificate as provided in Section 9.5.1 of the Agreement.

**ARTICLE A.2 CONTRACT TIME**

**§ A.2.1** Contract Time, as defined in the Agreement at Section 1.4.13, is the period of time, including authorized adjustments, for Substantial Completion of the Work.

**§ A.2.2** The Design-Builder shall achieve Substantial Completion of the Work not later than «TBD» ( «TBD» ) days from the date of this Amendment, or as follows:

*(Insert number of calendar days. Alternatively, a calendar date may be used when coordinated with the date of commencement. If appropriate, insert requirements for earlier Substantial Completion of certain portions of the Work.)*

«TBD»

**Portion of Work**

**Substantial Completion Date**

, subject to adjustments of the Contract Time as provided in the Design-Build Documents.

*(Insert provisions, if any, for liquidated damages relating to failure to achieve Substantial Completion on time or for bonus payments for early completion of the Work. See also Section 9 of General Conditions (Section C)*

«TBD»

**ARTICLE A.3 INFORMATION UPON WHICH AMENDMENT IS BASED**

**§ A.3.1** The Contract Sum and Contract Time set forth in this Amendment are based on the following:



§ A.3.1.1 The Supplementary and other Conditions of the Contract:

| Document | Title | Date | Pages |
|----------|-------|------|-------|
| TBD      |       |      |       |

§ A.3.1.2 The Specifications:

(Either list the specifications here or refer to an exhibit attached to this Amendment.)

«TBD»

| Section | Title | Date | Pages |
|---------|-------|------|-------|
|         |       |      |       |

§ A.3.1.3 The Drawings:

(Either list the drawings here or refer to an exhibit attached to this Amendment.)

«TBD»

| Number | Title | Date |
|--------|-------|------|
|        |       |      |

§ A.3.1.4 The Sustainability Plan, if any:

(If the Manager identified a Sustainable Objective in the Manager's Criteria, identify the document or documents that comprise the Sustainability Plan by title, date and number of pages, and include other identifying information. The Sustainability Plan identifies and describes the Sustainable Objective; the targeted Sustainable Measures; implementation strategies selected to achieve the Sustainable Measures; the Manager's and Design-Builder's roles and responsibilities associated with achieving the Sustainable Measures; the specific details about design reviews, testing or metrics to verify achievement of each Sustainable Measure; and the Sustainability Documentation required for the Project, as those terms are defined in Exhibit C to the Agreement.)

| Title | Date | Pages |
|-------|------|-------|
|       |      |       |

Other identifying information:

«TBD»

§ A.3.1.5 Allowances and Contingencies:

(Identify any agreed upon allowances and contingencies, including a statement of their basis.)

.1 Allowances

«TBD»

.2 Contingencies

«TBD»

§ A.3.1.6 Design-Builder's assumptions and clarifications:

«TBD»

§ A.3.1.7 Deviations from the Manager's Criteria as adjusted by a Modification:

« »

§ A.3.1.8 To the extent the Design-Builder shall be required to submit any additional Submittals to the Manager for review, indicate any such submissions below:

« »

#### ARTICLE A.4 DESIGN-BUILDER'S PERSONNEL, CONTRACTORS AND SUPPLIERS

§ A.4.1 The Design-Builder's key personnel are identified below:

*(Identify name, title and contact information.)*

.1 Superintendent

«TBD»

.2 Project Manager

«TBD»

.3 Others

« »

§ A.4.2 The Design-Builder shall retain the following Consultants, Contractors and suppliers, identified below:

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

«TBD»

#### ARTICLE A.5 COST OF THE WORK

§ A.5.1 Cost To Be Reimbursed as Part of the Contract

§ A.5.1.1 Labor Costs

§ A.5.1.1.1 Wages of construction workers directly employed by the Design-Builder to perform the construction of the Work at the site or, with the Manager's prior approval, at off-site workshops in accordance with the approved hourly billing rates attached hereto.

§ A.5.1.1.2 With the Manager's prior approval, wages or salaries of the Design-Builder's supervisory and administrative personnel when stationed at the site, in accordance with the approved hourly billing rates attached hereto, which include all fringe benefits and labor burden. With the prior approval of the Manager, certain accounting or estimating personnel assigned to the Project may be reimbursed for all or part of their time when stationed at the Design/Builder's principal office, if included in the Contract Sum. Under no circumstances shall salaried employees be compensated for overtime without the Manager's prior written approval.

*(If it is intended that the wages or salaries of certain personnel stationed at the Design-Builder's principal or other offices shall be included in the Cost of the Work, identify below the personnel to be included, whether for all or only part of their time, and the rates at which their time will be charged to the Work.)*

| Person Included | Status (full-time/part-time) | Rate (\$0.00) | Rate (unit of time) |
|-----------------|------------------------------|---------------|---------------------|
|-----------------|------------------------------|---------------|---------------------|

§ A.5.1.1.3 Wages and salaries of the Design-Builder's supervisory or administrative personnel engaged at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work in accordance with the approved hourly billing rates attached hereto.

§ A.5.1.1.4 Costs paid or incurred by the Design-Builder for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided such costs are based on wages and salaries included in the Cost of the Work under Section A.5.1.1, and are attached hereto.

§ **A.5.1.1.5** Bonuses, profit sharing, incentive compensation and any other discretionary payments paid to anyone hired by the Design-Builder or paid to the Architect or any Consultant, Contractor or supplier shall not be reimbursable as a Cost of the Work and shall not be allocated to or included within the wages, salaries or hourly billing rates attached hereto. Bonuses, profit sharing and other discretionary incentive compensation must be included in the Design/Builder's Fee, if provided..

§ **A.5.1.2 Contract Costs.** Payments made by the Design-Builder to the Architect, Consultants, Contractors and suppliers in accordance with the requirements of their subcontracts.

§ **A.5.1.3 Costs of Materials and Equipment Incorporated in the Completed Construction**

§ **A.5.1.3.1** Costs, including transportation and storage, of materials and equipment incorporated or to be incorporated in the completed construction.

§ **A.5.1.3.2** Costs of materials described in the preceding Section A.5.1.3.1 in excess of those actually installed to allow for reasonable waste and spoilage. Unused excess materials, if any, shall become the Manager's property at the completion of the Work or, at the Manager's option, shall be sold by the Design-Builder. Any amounts realized from such sales shall be credited to the Manager as a deduction from the Cost of the Work.

§ **A.5.1.4 Costs of Other Materials and Equipment, Temporary Facilities and Related Items**

§ **A.5.1.4.1** Costs of transportation, storage, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by the Design-Builder at the site and fully consumed in the performance of the Work. Costs of materials, supplies, temporary facilities, machinery, equipment and tools that are not fully consumed shall be based on the cost or value of the item at the time it is first used on the Project site less the value of the item when it is no longer used at the Project site. Costs for items not fully consumed by the Design-Builder shall mean fair market value.

§ **A.5.1.4.2** Rental charges for temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by the Design-Builder at the site and costs of transportation, installation, minor repairs, dismantling and removal. The total rental cost of any Design-Builder-owned item may not exceed the purchase price of any comparable item. Rates of Design-Builder-owned equipment and quantities of equipment shall be subject to the Manager's prior approval.

§ **A.5.1.4.3** Costs of removal of debris from the site of the Work and its proper and legal disposal.

§ **A.5.1.4.4** Costs of document reproductions, electronic communications, postage and parcel delivery charges, dedicated data and communications services, teleconferences, Project websites, extranets and reasonable petty cash expenses of the site office.

§ **A.5.1.4.5** Costs of materials and equipment suitably stored off the site at a mutually acceptable location, with the Manager's prior approval.

§ **A.5.1.5 Miscellaneous Costs**

§ **A.5.1.5.1** Premiums for that portion of insurance and bonds required by the Design-Build Documents that can be directly attributed to the Contract. With the Manager's prior approval self-insurance for either full or partial amounts of the coverages required by the Design-Build Documents.

§ **A.5.1.5.2** Sales, use or similar taxes imposed by a governmental authority that are related to the Work and for which the Design-Builder is liable.

§ **A.5.1.5.3** Fees and assessments for the building permit and for other permits, licenses and inspections for which the Design-Builder is required by the Design-Build Documents to pay.

§ **A.5.1.5.4** Fees of laboratories for tests required by the Design-Build Documents, except those related to defective or nonconforming Work for which reimbursement is excluded by Section 15.5.3 of the Agreement or by other provisions of the Design-Build Documents, and which do not fall within the scope of Section A.5.1.6.3.

§ **A.5.1.5.5** Royalties and license fees paid for the use of a particular design, process or product required by the Design-Build Documents; the cost of defending suits or claims for infringement of patent rights arising from such

requirement of the Design-Build Documents; and payments made in accordance with legal judgments against the Design-Builder resulting from such suits or claims and payments of settlements made with the Manager's consent. However, such costs of legal defenses, judgments and settlements shall not be included in the calculation of the Design-Builder's Fee or subject to the Guaranteed Maximum Price. If such royalties, fees and costs are excluded by the second to last sentence of Section 3.1.13.2 of the Agreement or other provisions of the Design-Build Documents, then they shall not be included in the Cost of the Work.

**§ A.5.1.5.6** With the Manager's prior approval, costs for electronic equipment and software directly related to the Work.

**§ A.5.1.5.7** Deposits lost for causes other than the Design-Builder's negligence or failure to fulfill a specific responsibility in the Design-Build Documents.

**§ A.5.1.5.8** With the Manager's prior approval, which shall not be unreasonably withheld, legal, mediation and arbitration costs, including attorneys' fees, other than those arising from disputes between the Manager and Design-Builder, reasonably incurred by the Design-Builder after the execution of the Agreement and in the performance of the Work.

**§ A.5.1.5.9** With the Manager's prior approval, expenses incurred in accordance with the Design-Builder's standard written personnel policy for relocation, and temporary living allowances of, the Design-Builder's personnel required for the Work.

**§ A.5.1.5.10** That portion of the reasonable expenses of the Design-Builder's supervisory or administrative personnel incurred while traveling in discharge of duties connected with the Work.

#### **§ A.5.1.6 Other Costs and Emergencies**

**§ A.5.1.6.1** Other costs incurred in the performance of the Work if, and to the extent, approved in advance in writing by the Manager.

**§ A.5.1.6.2** Costs incurred in taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property.

**§ A.5.1.6.3** Costs of repairing or correcting damaged or nonconforming Work executed by the Design-Builder, Contractors or suppliers, provided that such damaged or nonconforming Work was not caused by negligence or failure to fulfill a specific responsibility of the Design-Builder and only to the extent that the cost of repair or correction is not recovered by the Design-Builder from insurance, sureties, Contractors, suppliers, or others.

#### **§ A.5.1.7 Related Party Transactions**

**§ A.5.1.7.1** For purposes of Section A.5.1.7, the term "related party" shall mean a parent, subsidiary, affiliate or other entity having common Managership or management with the Design-Builder; any entity in which any stockholder in, or management employee of, the Design-Builder owns any interest in excess of ten percent in the aggregate; or any person or entity which has the right to control the business or affairs of the Design-Builder. The term "related party" includes any member of the immediate family of any person identified above.

**§ A.5.1.7.2** If any of the costs to be reimbursed arise from a transaction between the Design-Builder and a related party, the Design-Builder shall notify the Manager of the specific nature of the contemplated transaction, including the identity of the related party and the anticipated cost to be incurred, before any such transaction is consummated or cost incurred. If the Manager, after such notification, authorizes the proposed transaction, then the cost incurred shall be included as a cost to be reimbursed, and the Design-Builder shall procure the Work, equipment, goods or service from the related party, as a Contractor, according to the terms of Section A.5.4. If the Manager fails to authorize the transaction, the Design-Builder shall procure the Work, equipment, goods or service from some person or entity other than a related party according to the terms of Section A.5.4.

#### **§ A.5.2 Costs Not to Be Reimbursed as Part of this Contract**

The Cost of the Work shall not include the items listed below:

- .1 Salaries and other compensation of the Design-Builder's project executives or personnel stationed at the Design-Builder's principal office or offices other than the site office, except as specifically provided in Section A.5.1.1;

- .2 Expenses of the Design-Builder's principal office and offices other than the site office;
- .3 Overhead and general expenses, except as may be expressly included in Section A.5.1;
- .4 The Design-Builder's capital expenses, including interest on the Design-Builder's capital employed for the Work;
- .5 Except as provided in Section A.5.1.6.3 of this Agreement, costs due to the negligence or failure of the Design-Builder, Contractors and suppliers or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable to fulfill a specific responsibility of the Contract;
- .6 Any cost not specifically and expressly described in Section A.5.1; and
- .7 Costs, other than costs included in Change Orders approved by the Manager, that would cause the Guaranteed Maximum Price to be exceeded.

### **§ A.5.3 Discounts, Rebates, and Refunds**

**§ A.5.3.1** Cash discounts obtained on payments made by the Design-Builder shall accrue to the Manager if (1) before making the payment, the Design-Builder included them in an Application for Payment and received payment from the Manager, or (2) the Manager has deposited funds with the Design-Builder with which to make payments; otherwise, cash discounts shall accrue to the Design-Builder. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Manager, and the Design-Builder shall make provisions so that they can be obtained.

**§ A.5.3.2** Amounts that accrue to the Manager in accordance with Section A.5.3.1 shall be credited to the Manager as a deduction from the Cost of the Work.

### **§ A.5.4 Other Agreements**

**§ A.5.4.1** When the Design-Builder has provided a Guaranteed Maximum Price, and a specific bidder (1) is recommended to the Manager by the Design-Builder; (2) is qualified to perform that portion of the Work; and (3) has submitted a bid that conforms to the requirements of the Design-Build Documents without reservations or exceptions, but the Manager requires that another bid be accepted, then the Design-Builder may require that a Change Order be issued to adjust the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Manager by the Design-Builder and the amount of the subcontract or other agreement actually signed with the person or entity designated by the Manager.

**§ A.5.4.2** Agreements between the Design-Builder and Contractors shall conform to the applicable payment provisions of the Design-Build Documents, and shall not be awarded on the basis of cost plus a fee without the prior consent of the Manager. If an agreement between the Design Builder and a Contractor is awarded on a cost plus a fee basis, the Design-Builder shall provide in the agreement for the Manager to receive the same audit rights with regard to the Cost of the Work performed by the Contractor as the Manager receives with regard to the Design-Builder in Section A.5.5, below.

**§ A.5.4.3** The agreements between the Design-Builder and Architect and other Consultants identified in the Agreement shall be in writing. These agreements shall be promptly provided to the Manager upon the Manager's written request.

### **§ A.5.5 Accounting Records**

The Design-Builder shall keep full and detailed records and accounts related to the cost of the Work and exercise such controls as may be necessary for proper financial management under the Contract and to substantiate all costs incurred. The accounting and control systems shall be satisfactory to the Manager. The Manager and the Manager's auditors shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy, the Design-Builder's records and accounts, including complete documentation supporting accounting entries, books, correspondence, instructions, drawings, receipts, subcontracts, Contractor's proposals, purchase orders, vouchers, memoranda and other data relating to the Contract. The Design-Builder shall preserve these records for a period of three years after final payment, or for such longer period as may be required by law.

### **§ A.5.6 Relationship of the Parties**

The Design-Builder accepts the relationship of trust and confidence established by this Agreement and covenants with the Manager to exercise the Design-Builder's skill and judgment in furthering the interests of the Manager; to furnish efficient construction administration, management services and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the Work in an expeditious and economical manner consistent with the Manager's interests.

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

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

«TBD»«TBD»

\_\_\_\_\_  
*(Printed name and title)*

\_\_\_\_\_  
**DESIGN-BUILDER** *(Signature)*

«TBD»«TBD»

\_\_\_\_\_  
*(Printed name and title)*



# DRAFT AIA® Document A141® – 2014

## Exhibit B

### *Insurance and Bonds*

for the following PROJECT:  
(Name and location or address)

«Third Floor Planter Repairs»  
«Hawaii Convention Center ("HCC")  
1801 Kalakaua Avenue  
Honolulu, Hawaii 96815»

THE MANAGER:  
(Name, legal status and address)

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

THE DESIGN-BUILDER:  
(Name, legal status and address)

«TBD»« »  
« »

#### THE AGREEMENT

This Insurance Exhibit is part of the accompanying agreement for the Project, between the Manager and the Design-Builder (hereinafter, the Agreement), dated the «TBD» day of «TBD» in the year «Two Thousand Twenty-Three».  
(In words, indicate day, month and year.)

#### TABLE OF ARTICLES

- B.1 GENERAL
- B.2 DESIGN BUILDER'S INSURANCE AND BONDS
- B.3 MANAGER'S INSURANCE
- B.4 SPECIAL TERMS AND CONDITIONS

#### ARTICLE B.1 GENERAL

The Manager and Design-Builder shall purchase and maintain insurance and provide bonds as set forth in this Exhibit B. Where a provision in this Exhibit conflicts with a provision in the Agreement into which this Exhibit is incorporated, the provision in this Exhibit will prevail.

#### ARTICLE B.2 DESIGN BUILDER'S INSURANCE AND BONDS

§ B.2.1 The Design-Builder shall purchase and maintain the following types and limits of insurance from a company or companies lawfully authorized to do business in the jurisdiction where the Project is located. The Design-Builder shall maintain the required insurance at its own expense, insuring the Design-Builder, its employees, agents and designees, until termination of this Agreement and for such additional periods as may be

**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.

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specified herein with insurance companies admitted or authorized to do business in the State where the Project is located as required by law. The Design-Builder shall cause its consultants, subconsultants and agents to maintain equivalent insurance coverages for the services provided by such third party.

«TBD»

**§ B.2.1.1** Commercial General Liability with policy limits of not less than «two million dollars» (\$ «2,000,000») for each occurrence, five million dollars (\$5,000,000) general aggregate and «five million dollars» (\$ «5,000,000») in the aggregate providing coverage for claims including

- .1 damages because of bodily injury, sickness or disease, including occupational sickness or disease, and death of any person;
- .2 personal injury;
- .3 damages because of injury to or destruction of tangible property;
- .4 bodily injury or property damage arising out of completed operations; and
- .5 contractual liability applicable to the Design-Builder's obligations under Section 3.1.14 of the Agreement.

Commercial General Liability insurance on a per occurrence basis, shall include: (i) Broad form property damage; (ii) Contractual liability insurance, as part of the Commercial General Liability policy, insuring the Design-Builder's liabilities assumed under this Contract, including indemnification obligations under Section 3.1.14 of the AIA A141-2014; and (iii) personal injury and advertising injury.

Products and Completed Operations with policy limits of not less than «two million dollars» (\$«2,000,000») for each occurrence and «five million dollars» (\$«5,000,000») in the aggregate for products and complete operations.

**§ B.2.1.2** Automobile Liability covering vehicles owned by the Design-Builder and non-owned vehicles used by the Design-Builder with policy limits of not less than «one million dollars» (\$ «1,000,000») per accident for bodily injury, death of any person, and property damage arising out of the ownership, maintenance and use of those motor vehicles, along with any other statutorily required automobile coverage. Automobile Liability insurance shall include coverage for automobile contractual liability.

**§ B.2.1.3** The Design-Builder may achieve the required limits and coverage for Commercial General Liability and Automobile Liability through a combination of primary and excess liability insurance, provided such primary and excess insurance policies result in not less than five million dollars (\$5,000,000.00) and in no event shall any excess or umbrella liability insurance provide narrower coverage than the primary policy. The excess policy shall not require the exhaustion of the underlying limits only through the actual payment by the underlying insurers.

**§ B.2.1.4** Workers' Compensation at statutory limits and requirements of the State where the Project.

**§ B.2.1.5** Employers' Liability with policy limits as provided below:

« Employers' Liability with policy limits not less than «one million dollars» (\$ «1,000,000») each accident, «one million dollars» (\$ «1,000,000») each employee, and «two million dollars» (\$ «2,000,000») policy limit.

Employers' Liability insurance shall also include a Waiver of Subrogation in favor of Manager, the Hawai'i Convention Center, the Hawai'i Tourism Authority, Anschutz Entertainment Group, Inc. and the State of Hawai'i, and each of its and their respective boards, commissions, agents, Managers, members, shareholders, directors, officers, servants, employees, subsidiaries, and affiliates (hereinafter referred to as "Company Indemnitees"), unless not permitted by applicable law. The Workers' Compensation and Employer's Liability policy shall provide a waiver of subrogation in favor of Manager and any other entity or individual required by the Contract. Design-Builder waives all rights against Manager, and their respective affiliates, agents, officers, directors and employees to the extent of any damages covered by such policy obtained by Design-Builder pursuant to this paragraph.»

**§ B.2.1.6** Professional Liability covering negligent acts, errors and omissions in the performance of professional services, with policy limits of not less than «two million dollars» (\$ «2,000,000») per claim and «two million dollars» (\$ «2,000,000») in the aggregate.

**§ B.2.1.7** Pollution Liability covering performance of the Work, with policy limits of not less than «one million dollars» (\$ «1,000,000») per claim and «one million dollars» (\$ «1,000,000») in the aggregate.



§ B.2.1.7.1 The Design-Builder may obtain a combined Professional Liability and Pollution Liability policy to satisfy the requirements set forth in Sections B.2.1.6 and B.2.1.7, with combined policy limits that are not less than «two million dollars» (\$ «2,000,000») per claim and «two million dollars» (\$ «2,000,000») in the aggregate.

§ B.2.1.8 The Design-Builder shall provide written notification to the Manager of the cancellation or expiration of any insurance required by this Article B.2. The Design-Builder shall provide such written notice within five (5) business days of the date the Design-Builder is first aware of the cancellation or expiration, or is first aware that the cancellation or expiration is threatened or otherwise may occur, whichever comes first.

§ B.2.1.9 **Additional Insured Obligations.** To the fullest extent permitted by law, the Manager and its consultants and contractors shall be additional insureds on the Design-Builder's primary and excess insurance policies for Commercial General Liability, Automobile Liability and Pollution Liability for claims caused in whole or in part by the Design-Builder's negligent acts or omissions. The additional insured coverage shall be primary and non-contributory to any of the Manager's insurance policies. The additional insured coverage shall apply to both ongoing operations and completed operations. The policy limits applicable to the additional insureds shall be the same amount applicable to the named insured or, if the policy provides otherwise, policy limits not less than the amounts required under this Agreement.

§ B.2.1.10 **Certificates of Insurance.** The Design-Builder shall provide certificates of insurance acceptable to the Manager evidencing compliance with the requirements in this Article B.2: (1) prior to commencement of the Work; (2) upon renewal or replacement of each required policy of insurance; and (3) upon Manager's written request. Upon Manager's request, true and correct copies of the insurance policies along with original copies of the amendatory riders to any such policies for Manager's approval. Each and every policy shall provide, by endorsement or policy provision, that the insurer will not terminate coverage or fail to be renewed without first mailing written notice of such action at least ten (10) days prior for non-payment of premium or forty-five (45) days for any other reason prior to such termination or lapse to the Manager. An additional certificate evidencing continuation of liability coverage, including coverage for completed operations, shall be submitted with the final Application for Payment as required by Section 9.10.2 of the Agreement and thereafter upon renewal or replacement of such coverage until the expiration of the time required by Section B.2.1. The certificates will show the Manager and its consultants and contractors as additional insureds on the Design-Builder's primary and excess insurance policies for Commercial General Liability, Automobile Liability, and Pollution Liability. Information concerning reduction of coverage on account of revised limits, claims paid under the General Aggregate or both, shall be furnished by the Design-Builder with reasonable promptness.

§ B.2.1.11 The policies shall be written on an occurrence basis (or in the case of personal injury and advertising injury coverage, an offense basis). Carriers furnishing such insurance shall be required to waive all rights of subrogation against Manager, its officers, agents, employees and other contractors, consultants, subconsultants and Subcontractors.

Design-Builder shall orally report promptly to Manager and promptly confirm to Manager in writing, upon Design-Builder becoming aware of any injury, loss, or damage incurred by Design-Builder or its contractors, consultants, Subcontractors, agents and assignees in connection with the Project, or upon Design-Builder's receipt of such claim by a third party, or upon Design-Builder becoming aware of any occurrence that Design-Builder believes may give rise to such claim.

Design-Builder shall include Manager, and any subsequent Manager of or lender to the Project (collectively referred to as the "Manager Related Parties") as additional insureds on a primary and noncontributory basis on the Commercial General Liability policy, and on the Business Auto policy, and on all Umbrella policies (if any). If a separate policy is obtained for Products/Completed Operations, Manager will also be named as an additional insured on it.

§ B.2.1.12 If the Design-Builder fails to furnish and maintain the insurance required by this Agreement, the Manager may purchase such insurance on behalf of the Design-Builder, and the Design-Builder shall pay the cost thereof to the Manager (or Manager shall be entitled to offset such costs from amounts due Design-Builder hereunder) and Design-Builder shall provide any information needed to obtain such insurance.

§ B.2.1.13 **Consultant Insurance.** Design-Builder shall cause each of its consultants of every tier to purchase and maintain insurance of the type specified above and to otherwise comply with the insurance requirements set forth

above, except that Commercial General Liability insurance shall be at least Two Million Dollars (\$2,000,000) each occurrence and general aggregate, and Professional Liability Insurance shall be at least Two Million Dollars (\$2,000,000). When requested by Manager, Design-Builder shall furnish copies of certificates to Manager evidencing such coverage for each consultant of any tier. Nothing in this section shall limit Design-Builder's indemnification requirements to Manager under this Agreement.

**§ B.2.1.14** Design-Builder shall and hereby does subordinate all of its lien rights and shall ensure that all of its consultants of every tier shall subordinate all of their lien rights, to the lien of the mortgage(s) relating to this Project held by any of Manager's lender(s) for the Project, their successors and assigns. Any consultants which refuse to so subordinate their lien rights must be specifically approved in advance and in writing by Manager. Design-Builder shall and Design-Builder shall ensure that all of its consultants of every tier shall, if requested by Manager, execute an agreement, in form and substance satisfactory to Manager, so subordinating lien rights to the interests of Project lender(s).

**§ B.2.1.15** All of the insurance in this Article shall be subject to the following terms, conditions and endorsements.

**§ B.2.1.15.1 Insurer.** The insurance shall be purchased from a company with an "A-:IX" or better rating from A.M. Best Company, where said insurance company is both lawfully able to provide insurance in the State of Hawaii and that is satisfactory to the Manager.

**§ B.2.1.15.2 Additional Insureds Endorsements.** All insurance, except the workers compensation and professional liability insurance, shall include the Company Indemnitees as additional insureds under ISO Form CG 2010 and Form CG 2037 or their equivalents. These endorsements shall apply without regard to other provisions of this Agreement.

**§ B.2.1.15.3 Primary Insurance.** The commercial general liability insurance and the automobile liability insurance to be carried by the Design-Builder shall apply as primary insurance, without any right of contribution by any other insurance that may be carried by the Manager regarding the Work under this Agreement.

**§ B.2.1.15.4 Severability of Interest.** The insurance shall include a severability of interest clause for all named insureds and additional insureds.

**§ B.2.1.15.5 Duration.** Coverage shall be maintained, without interruption, from the date of commencement of the Design-Builder's Services under this Agreement and shall continue for a period of three years beyond the expiration of this Agreement, to the effect that, should occurrences during the contract term give rise to claims made after expiration of the Agreement, such claims shall be covered by such claims-made policies. The insurance obligations shall survive the expiration or termination of this Agreement.

**§ B.2.1.15.6 Notice of Cancellation, Etc.** The Design-Builder's insurer shall give the Manager immediate written notice of any cancellation in accordance with the policy terms but shall provide at least 10 days' written notice for non-payment of premium. The Design-Builder shall be required to immediately notify Manager of any termination, of coverage or if its coverage no longer meets the requirements of this Agreement by registered or certified mail, return receipt requested.

**§ B.2.1.15.7 Defense.** The insurance obtained by the Design-Builder, except for professional liability and workers compensation insurance, shall provide that the insurer shall defend any suit against the additional insureds, even if such suit is allegedly or actually frivolous or fraudulent. Defense costs shall apply in excess of any per occurrence limit of liability and shall not reduce any aggregate limits of liability applying under the policies.

**§ B.2.1.15.8 Delivery of Certificates and Policies.** Original certificates of insurance and all requested endorsements, in a form acceptable to the Manager, must be filed with the Manager prior to commencement of the Design-Builder's Services. The Design-Builder's certificate of insurance shall be endorsed as follows: "The Company Indemnitees (as defined in Section B.2.1.5) are named as additional insureds for all insurance except the workers compensation and the professional liability insurance. This insurance is primary to and non-contributing with any and all insurance of the Company Indemnitees." The Certificate Holder box shall identify the name and address of the Manager listed on the first page of this Agreement. With respect to insurance coverage required to remain in force after final payment, the Design-Builder shall annually submit certificates of insurance evidencing continuation of such coverage. The Design-Builder shall submit copies of the policies within seven days following a request from the Manager.

**§ B.2.1.15.9 Lapse in Insurance.** Failure to maintain insurance shall constitute a material breach of this Agreement. Should any required insurance lapse during the term of this Agreement, requests for payments originating after such lapse shall not be processed until the Manager receives satisfactory evidence of reinstated coverage as required by this Agreement, effective as of the lapse date. If insurance is not reinstated, the Manager may, at its sole option, terminate this Agreement effective on the date of such lapse of insurance.

**§ B.2.1.15.10 Subcontractors.** If the Design-Builder subcontracts a third-party sub-consultant to complete any portion of this Agreement, the Design-Builder shall ensure that the sub-consultant shall provide all necessary insurance and shall name the Company Indemnities and the Design-Builder listed as additional insureds. The Design-Builder shall provide such insurance documents to the Manager on behalf of sub-consultant.

**§ B.2.1.15.11 Non-Waiver.** PERMITTING THE DESIGN-BUILDER TO START WORK OR RELEASING ANY PAYMENT PRIOR TO COMPLIANCE WITH THESE REQUIREMENTS SHALL NOT CONSTITUTE A WAIVER THEREOF.

**§ B.2.1.15.12** The Design-Builder and the Manager waive all rights of recovery against each other and the Company Indemnities for any losses covered by insurance with the exception of the Professional Liability policy. The Design-Builder agrees to defend and indemnify the Indemnities from all such subrogation claims.

**§ B.2.1.16 Builders Risk Insurance.** Unless otherwise provided, at the time of execution of the Design-Build Amendment, the Design-Builder shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction where the Project is located, property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus the value of subsequent Modifications and cost of materials supplied or installed by others, comprising the total value for the entire Project at the site on a replacement cost basis without optional deductibles. If any construction that is part of the Work shall commence prior to execution of the Design-Build Amendment, the Design-Builder shall, prior to commencement of construction, purchase and maintain property insurance as described above in an amount sufficient to cover the total value of the Work at the site on a replacement cost basis without optional deductibles. The insurance required under this section shall include interests of the Manager, Design-Builder, Architect, Consultants, Contractors, and Subcontractors in the Project. The property insurance shall be maintained, unless otherwise provided in the Design-Build Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of the insurance, until the Manager has issued a Certificate of Substantial Completion in accordance with Section 9.8 of the Agreement. Unless the parties agree otherwise, upon issuance of a Certificate of Substantial Completion, the Manager shall replace the insurance policy required under this Section B.3.2 with another property insurance policy written for the total value of the Project that shall remain in effect until expiration of the period for correction of the Work set forth in Section 11.2.2 of the Agreement.

**§ B.2.1.16.1** The insurance required under Section B.2.1.16 shall include, without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal, including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for the Design-Builder's services and expenses required as a result of such insured loss.

**§ B.2.1.16.2** If the insurance required under Section B.2.1.16 requires deductibles, the Design-Builder shall pay costs not covered because of such deductibles.

**§ B.2.1.16.3** The insurance required under Section B.2.1.16 shall cover portions of the Work stored off the site, and also portions of the Work in transit.

**§ B.2.1.16.4** Partial occupancy or use in accordance with Section 9.9 of the Agreement shall not commence until the insurance company or companies providing the insurance required under Section B.2.1.16 have consented to such partial occupancy or use by endorsement or otherwise. The Manager and the Design-Builder shall take reasonable steps to obtain consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

**§ B.2.1.17 Loss of Use Insurance.** The Design-Builder shall purchase and maintain insurance to insure the Manager against loss of use of the Manager's property due to fire or other hazards, however caused.

**§ B.2.2 Performance Bond and Payment Bond**

The Manager shall have the right to require the Design-Builder to furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder as stipulated in the Contract Documents on the date of execution of the Contract.

The Design-Builder shall provide surety bonds as follows:  
(Specify type and penal sum of bonds.)

| Type                       | Penal Sum (\$0.00) |
|----------------------------|--------------------|
| Payment & Performance Bond | \$1,000,000.00     |

The Manager shall be named as obligees on all bonds. Bonds to be provided by the Design-Builder, Subcontractors, and sub-subcontractor(s) must be conditioned (1) that prompt payment shall be made for all amounts lawfully due to all contractors, subcontractors, and persons or entities furnishing labor or materials used in the prosecution of the Work on any phase of the Project; and (2) as guarantee of the obligation to complete the Project as provided in this Agreement. The dollar amount of such bonds shall be modified, as needed, to reflect any approved change orders that modify the total value of the Project or part of the Project. Failure to comply with the requirements of this section shall be legal grounds under this Agreement for Work to be ordered to cease or to be restricted, as deemed appropriate by the Manager, until compliance is achieved, and any unpaid claims are resolved to the reasonable satisfaction of the Manager.

**§ B.2.2.1** Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Agreement, the Design-Builder shall promptly furnish a copy of the bonds or shall permit a copy to be made.

**ARTICLE B.3 MANAGER'S INSURANCE**

**§ B.3.1 Manager's Liability Insurance**

The Manager shall be responsible for purchasing and maintaining the Manager's usual liability insurance.

**§ B.3.2 Property Insurance**

**§ B.3.2.1** Intentionally deleted.

**§ B.3.2.2** Intentionally deleted.

**§ B.3.2.3** Intentionally deleted.

**§ B.3.2.4** Intentionally deleted.

**§ B.3.2.5** If during the Project construction period the Manager insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Manager shall waive all rights in accordance with the terms of Section B.3.2.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

**§ B.3.2.6** Before an exposure to loss may occur, the Manager shall file with the Design-Builder a copy of each policy that includes insurance coverages required by this Section B.3.2. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project. The Manager shall provide written notification to the Design-Builder of the cancellation or expiration of any insurance required by this Article B.3. The Manager shall provide such written notice within five (5) business days of the date the Manager is first aware of the cancellation or expiration, or is first aware that the cancellation or expiration is threatened or otherwise may occur, whichever comes first.

**§ B.3.2.7 Waivers of Subrogation.** The Manager and Design-Builder waive all rights against (1) each other and any of their consultants, subconsultants, contractors and Subcontractors, agents and employees, each of the other, and (2) any

separate contractors described in Section 5.13 of the Agreement, if any, and any of their Subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to Section B.3.2 or other property insurance applicable to the Work and completed construction, except such rights as they have to proceeds of such insurance held by the Manager as fiduciary. The Manager or Design-Builder, as appropriate, shall require of the separate contractors described in Section 5.13 of the Agreement, if any, and the Subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of the other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

**§ B.3.2.8** A loss insured under the Manager's property insurance shall be adjusted by the Manager as fiduciary and made payable to the Manager as fiduciary for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Section B.3.2.10. The Design-Builder shall pay the Architect, Consultants and Contractors their just shares of insurance proceeds received by the Design-Builder, and by appropriate agreements, written where legally required for validity, the Design-Builder shall require the Architect, Consultants and Contractors to make payments to their consultants and Subcontractors in similar manner.

**§ B.3.2.9** If required in writing by a party in interest, the Manager as fiduciary shall, upon occurrence of an insured loss, give bond for proper performance of the Manager's duties. The cost of required bonds shall be charged against proceeds received as fiduciary. The Manager shall deposit in a separate account proceeds so received, which the Manager shall distribute in accordance with such agreement as the parties in interest may reach, or as determined in accordance with the method of binding dispute resolution selected in the Agreement between the Manager and Design-Builder. If after such loss no other special agreement is made and unless the Manager terminates the Contract for convenience, replacement of damaged property shall be performed by the Design-Builder after notification of a Change in the Work in accordance with Article 6 of the Agreement.

**§ B.3.2.10** The Manager as fiduciary shall have power to adjust and settle a loss with insurers unless one of the parties in interest shall object in writing within five days after occurrence of a loss to the Manager's exercise of this power. If an objection is made, the dispute shall be resolved in the manner selected by the Manager and Design-Builder as the method of binding dispute resolution in the Agreement. If the Manager and Design-Builder have selected arbitration as the method of binding dispute resolution, the Manager as fiduciary shall make settlement with insurers or, in the case of a dispute over distribution of insurance proceeds, in accordance with the directions of the arbitrators.

#### **ARTICLE B.4 SPECIAL TERMS AND CONDITIONS**

Special terms and conditions that modify this Insurance and Bonds Exhibit, if any, are as follows:

«TBD»

## **SPECIAL CONDITIONS**

The following Special Conditions modify, change, delete from, and add to, the State of Hawaii's General Conditions which are included as part of the Contract Documents as Appendix E.

1. Changes to Terminology: Except as provided herein, the Terms throughout the entire document shall be changed and interpreted as follows:

“STATE” shall mean either the State of Hawaii or AEG Management HCC, LLC (“AEG”) as a contractor for the state.

“HOPA” shall mean the “Contracting Officer” as defined in the Request for Proposals (“RFP”).

“CPO” shall mean the “Contracting Officer” as defined in the RFP.

“Agency procurement officer” shall mean the “Contracting Officer” as defined in the RFP.

2. Delete Paragraph 6.d. in its entirety.
3. The first sentence of Paragraph 7 shall be changed to read: “The CONTRACTOR shall defend, indemnify, and hold harmless AEG Management Hawaii HCC, LLC, the Hawaii Tourism Authority (“HTA”), the State of Hawaii, and their respective officers, employees, and agents from and against all liability, loss, damage, cost, and expense, including attorneys’ fees, and all claims, suits, and demands therefore, arising out of or resulting from the acts or omissions of the CONTRACTOR or the CONTRACTOR’s employees, officers, agents, suppliers, or subcontractors under this Contract.”
4. Delete Paragraph 10 in its entirety.
5. Delete Paragraph 11 in its entirety.
6. The second sentence of Paragraph 13.c. shall be changed to read as follows: “If the parties fail to agree, the Contracting Officer shall set an amount subject to the CONTRACTOR’s legal rights.”
7. The first sentence of Paragraph 14.a. shall be changed to read as follows: “The Contracting Officer may, when the interests of AEG, HTA, and/or the State of Hawaii so require, terminate this Contract in whole or in part, for the convenience of the STATE.”
8. Delete Paragraph 17.b. in its entirety.
9. Add the following language to the beginning of Paragraph 17.d.: “Notwithstanding final payment requirements set forth elsewhere in the Contract, final payment under this contract . . . “
10. Delete Paragraph 18 in its entirety.
11. Delete Paragraphs 19.g., 19.h., and 19.i. in their entirety.
12. Delete the phrase “and applicable sections of chapters 3-123 and 3-126, HAR.” at the end of Paragraph 21.a.(5).
13. Delete Paragraph 23 in its entirety.

14. The first sentence of Paragraph 25 shall be changed to read as follows: “The CONTRACTOR shall not refer to AEG, HTA, the State of Hawaii, or the Hawaii Convention Center, or any officer thereof, or any employees of the foregoing, or to the services or goods, or both, provided under this Contract, in any of the CONTRACTOR’s brochures, advertisements, or other publicity of the CONTRACTOR.
15. The term “STATE” in Paragraph 33 shall mean “AEG, HTA, and the State of Hawaii” as those terms are defined herein.
16. The body of Paragraph 36, which is entitled “Conflict Between General Conditions and Procurement Rules” shall be changed to read as follows: “In the event of a conflict between the General Conditions and the STATE procurement rules (as set forth in Part III of chapter 103D, including the Hawaii Administrative Rules relating thereto), the procurement rules in effect on the date this Contract became effective shall control and are hereby incorporated by reference.”
17. The first sentence of Paragraph 37 shall be changed to read as follows: “The Contract documents identified and set forth in the Contract itself comprise all of the agreements, conditions, understandings, promises, warranties, and representations between AEG, HTA, the State of Hawaii and the CONTRACTOR relative to this Contract.

## GENERAL CONDITIONS

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## GENERAL CONDITIONS

1. Coordination of Services by the STATE. The head of the purchasing agency ("HOPA") (which term includes the designee of the HOPA) shall coordinate the services to be provided by the CONTRACTOR in order to complete the performance required in the Contract. The CONTRACTOR shall maintain communications with HOPA at all stages of the CONTRACTOR'S work, and submit to HOPA for resolution any questions which may arise as to the performance of this Contract. "Purchasing agency" as used in these General Conditions means and includes any governmental body which is authorized under chapter 103D, HRS, or its implementing rules and procedures, or by way of delegation, to enter into contracts for the procurement of goods or services or both.
2. Relationship of Parties: Independent Contractor Status and Responsibilities, Including Tax Responsibilities.
  - a. In the performance of services required under this Contract, the CONTRACTOR is an "independent contractor," with the authority and responsibility to control and direct the performance and details of the work and services required under this Contract; however, the STATE shall have a general right to inspect work in progress to determine whether, in the STATE'S opinion, the services are being performed by the CONTRACTOR in compliance with this Contract. Unless otherwise provided by special condition, it is understood that the STATE does not agree to use the CONTRACTOR exclusively, and that the CONTRACTOR is free to contract to provide services to other individuals or entities while under contract with the STATE.
  - b. The CONTRACTOR and the CONTRACTOR'S employees and agents are not by reason of this Contract, agents or employees of the State for any purpose, and the CONTRACTOR and the CONTRACTOR'S employees and agents shall not be entitled to claim or receive from the State any vacation, sick leave, retirement, workers' compensation, unemployment insurance, or other benefits provided to state employees.
  - c. The CONTRACTOR shall be responsible for the accuracy, completeness, and adequacy of the CONTRACTOR'S performance under this Contract. Furthermore, the CONTRACTOR intentionally, voluntarily, and knowingly assumes the sole and entire liability to the CONTRACTOR'S employees and agents, and to any individual not a party to this Contract, for all loss, damage, or injury caused by the CONTRACTOR, or the CONTRACTOR'S employees or agents in the course of their employment.
  - d. The CONTRACTOR shall be responsible for payment of all applicable federal, state, and county taxes and fees which may become due and owing by the CONTRACTOR by reason of this Contract, including but not limited to (i) income taxes, (ii) employment related fees, assessments, and taxes, and (iii) general excise taxes. The CONTRACTOR also is responsible for obtaining all licenses, permits, and certificates that may be required in order to perform this Contract.
  - e. The CONTRACTOR shall obtain a general excise tax license from the Department of Taxation, State of Hawaii, in accordance with section 237-9, HRS, and shall comply with all requirements thereof. The CONTRACTOR shall obtain a tax clearance certificate from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of the Treasury, showing that all delinquent taxes, if any, levied or accrued under state law and the Internal Revenue Code of 1986, as amended, against the CONTRACTOR have been paid and submit the same to the STATE prior to commencing any performance under this Contract. The CONTRACTOR shall also be solely responsible for meeting all requirements necessary to obtain the tax clearance certificate required for final payment under sections 103-53 and 103D-328, HRS, and paragraph 17 of these General Conditions.
  - f. The CONTRACTOR is responsible for securing all employee-related insurance coverage for the CONTRACTOR and the CONTRACTOR'S employees and agents that is or may be required by law, and for payment of all premiums, costs, and other liabilities associated with securing the insurance coverage.

- g. The CONTRACTOR shall obtain a certificate of compliance issued by the Department of Labor and Industrial Relations, State of Hawaii, in accordance with section 103D-310, HRS, and section 3-122-112, HAR, that is current within six months of the date of issuance.
- h. The CONTRACTOR shall obtain a certificate of good standing issued by the Department of Commerce and Consumer Affairs, State of Hawaii, in accordance with section 103D-310, HRS, and section 3-122-112, HAR, that is current within six months of the date of issuance.
- i. In lieu of the above certificates from the Department of Taxation, Labor and Industrial Relations, and Commerce and Consumer Affairs, the CONTRACTOR may submit proof of compliance through the State Procurement Office's designated certification process.

3. Personnel Requirements.

- a. The CONTRACTOR shall secure, at the CONTRACTOR'S own expense, all personnel required to perform this Contract.
- b. The CONTRACTOR shall ensure that the CONTRACTOR'S employees or agents are experienced and fully qualified to engage in the activities and perform the services required under this Contract, and that all applicable licensing and operating requirements imposed or required under federal, state, or county law, and all applicable accreditation and other standards of quality generally accepted in the field of the activities of such employees and agents are complied with and satisfied.

4. Nondiscrimination. No person performing work under this Contract, including any subcontractor, employee, or agent of the CONTRACTOR, shall engage in any discrimination that is prohibited by any applicable federal, state, or county law.

5. Conflicts of Interest. The CONTRACTOR represents that neither the CONTRACTOR, nor any employee or agent of the CONTRACTOR, presently has any interest, and promises that no such interest, direct or indirect, shall be acquired, that would or might conflict in any manner or degree with the CONTRACTOR'S performance under this Contract.

6. Subcontracts and Assignments. The CONTRACTOR shall not assign or subcontract any of the CONTRACTOR'S duties, obligations, or interests under this Contract and no such assignment or subcontract shall be effective unless (i) the CONTRACTOR obtains the prior written consent of the STATE, and (ii) the CONTRACTOR'S assignee or subcontractor submits to the STATE a tax clearance certificate from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of Treasury, showing that all delinquent taxes, if any, levied or accrued under state law and the Internal Revenue Code of 1986, as amended, against the CONTRACTOR'S assignee or subcontractor have been paid. Additionally, no assignment by the CONTRACTOR of the CONTRACTOR'S right to compensation under this Contract shall be effective unless and until the assignment is approved by the Comptroller of the State of Hawaii, as provided in section 40-58, HRS.

- a. Recognition of a successor in interest. When in the best interest of the State, a successor in interest may be recognized in an assignment contract in which the STATE, the CONTRACTOR and the assignee or transferee (hereinafter referred to as the "Assignee") agree that:
  - (1) The Assignee assumes all of the CONTRACTOR'S obligations;
  - (2) The CONTRACTOR remains liable for all obligations under this Contract but waives all rights under this Contract as against the STATE; and
  - (3) The CONTRACTOR shall continue to furnish, and the Assignee shall also furnish, all required bonds.
- b. Change of name. When the CONTRACTOR asks to change the name in which it holds this Contract with the STATE, the procurement officer of the purchasing agency (hereinafter referred to as the "Agency procurement officer") shall, upon receipt of a document acceptable or satisfactory to the

Agency procurement officer indicating such change of name (for example, an amendment to the CONTRACTOR'S articles of incorporation), enter into an amendment to this Contract with the CONTRACTOR to effect such a change of name. The amendment to this Contract changing the CONTRACTOR'S name shall specifically indicate that no other terms and conditions of this Contract are thereby changed.

- c. Reports. All assignment contracts and amendments to this Contract effecting changes of the CONTRACTOR'S name or novations hereunder shall be reported to the chief procurement officer (CPO) as defined in section 103D-203(a), HRS, within thirty days of the date that the assignment contract or amendment becomes effective.
  - d. Actions affecting more than one purchasing agency. Notwithstanding the provisions of subparagraphs 6a through 6c herein, when the CONTRACTOR holds contracts with more than one purchasing agency of the State, the assignment contracts and the novation and change of name amendments herein authorized shall be processed only through the CPO's office.
- 7. Indemnification and Defense. The CONTRACTOR shall defend, indemnify, and hold harmless the State of Hawaii, the contracting agency, and their officers, employees, and agents from and against all liability, loss, damage, cost, and expense, including all attorneys' fees, and all claims, suits, and demands therefore, arising out of or resulting from the acts or omissions of the CONTRACTOR or the CONTRACTOR'S employees, officers, agents, or subcontractors under this Contract. The provisions of this paragraph shall remain in full force and effect notwithstanding the expiration or early termination of this Contract.
  - 8. Cost of Litigation. In case the STATE shall, without any fault on its part, be made a party to any litigation commenced by or against the CONTRACTOR in connection with this Contract, the CONTRACTOR shall pay all costs and expenses incurred by or imposed on the STATE, including attorneys' fees.
  - 9. Liquidated Damages. When the CONTRACTOR is given notice of delay or nonperformance as specified in paragraph 13 (Termination for Default) and fails to cure in the time specified, it is agreed the CONTRACTOR shall pay to the STATE the amount, if any, set forth in this Contract per calendar day from the date set for cure until either (i) the STATE reasonably obtains similar goods or services, or both, if the CONTRACTOR is terminated for default, or (ii) until the CONTRACTOR provides the goods or services, or both, if the CONTRACTOR is not terminated for default. To the extent that the CONTRACTOR'S delay or nonperformance is excused under paragraph 13d (Excuse for Nonperformance or Delay Performance), liquidated damages shall not be assessable against the CONTRACTOR. The CONTRACTOR remains liable for damages caused other than by delay.
  - 10. STATE'S Right of Offset. The STATE may offset against any monies or other obligations the STATE owes to the CONTRACTOR under this Contract, any amounts owed to the State of Hawaii by the CONTRACTOR under this Contract or any other contracts, or pursuant to any law or other obligation owed to the State of Hawaii by the CONTRACTOR, including, without limitation, the payment of any taxes or levies of any kind or nature. The STATE will notify the CONTRACTOR in writing of any offset and the nature of such offset. For purposes of this paragraph, amounts owed to the State of Hawaii shall not include debts or obligations which have been liquidated, agreed to by the CONTRACTOR, and are covered by an installment payment or other settlement plan approved by the State of Hawaii, provided, however, that the CONTRACTOR shall be entitled to such exclusion only to the extent that the CONTRACTOR is current with, and not delinquent on, any payments or obligations owed to the State of Hawaii under such payment or other settlement plan.
  - 11. Disputes. Disputes shall be resolved in accordance with section 103D-703, HRS, and chapter 3-126, Hawaii Administrative Rules ("HAR"), as the same may be amended from time to time.
  - 12. Suspension of Contract. The STATE reserves the right at any time and for any reason to suspend this Contract for any reasonable period, upon written notice to the CONTRACTOR in accordance with the provisions herein.
    - a. Order to stop performance. The Agency procurement officer may, by written order to the CONTRACTOR, at any time, and without notice to any surety, require the CONTRACTOR to stop all or any part of the performance called for by this Contract. This order shall be for a specified

period not exceeding sixty (60) days after the order is delivered to the CONTRACTOR, unless the parties agree to any further period. Any such order shall be identified specifically as a stop performance order issued pursuant to this section. Stop performance orders shall include, as appropriate: (1) A clear description of the work to be suspended; (2) Instructions as to the issuance of further orders by the CONTRACTOR for material or services; (3) Guidance as to action to be taken on subcontracts; and (4) Other instructions and suggestions to the CONTRACTOR for minimizing costs. Upon receipt of such an order, the CONTRACTOR shall forthwith comply with its terms and suspend all performance under this Contract at the time stated, provided, however, the CONTRACTOR shall take all reasonable steps to minimize the occurrence of costs allocable to the performance covered by the order during the period of performance stoppage. Before the stop performance order expires, or within any further period to which the parties shall have agreed, the Agency procurement officer shall either:

- (1) Cancel the stop performance order; or
  - (2) Terminate the performance covered by such order as provided in the termination for default provision or the termination for convenience provision of this Contract.
- b. Cancellation or expiration of the order. If a stop performance order issued under this section is cancelled at any time during the period specified in the order, or if the period of the order or any extension thereof expires, the CONTRACTOR shall have the right to resume performance. An appropriate adjustment shall be made in the delivery schedule or contract price, or both, and the Contract shall be modified in writing accordingly, if:
- (1) The stop performance order results in an increase in the time required for, or in the CONTRACTOR'S cost properly allocable to, the performance of any part of this Contract; and
  - (2) The CONTRACTOR asserts a claim for such an adjustment within thirty (30) days after the end of the period of performance stoppage; provided that, if the Agency procurement officer decides that the facts justify such action, any such claim asserted may be received and acted upon at any time prior to final payment under this Contract.
- c. Termination of stopped performance. If a stop performance order is not cancelled and the performance covered by such order is terminated for default or convenience, the reasonable costs resulting from the stop performance order shall be allowable by adjustment or otherwise.
- d. Adjustment of price. Any adjustment in contract price made pursuant to this paragraph shall be determined in accordance with the price adjustment provision of this Contract.

13. Termination for Default.

- a. Default. If the CONTRACTOR refuses or fails to perform any of the provisions of this Contract with such diligence as will ensure its completion within the time specified in this Contract, or any extension thereof, otherwise fails to timely satisfy the Contract provisions, or commits any other substantial breach of this Contract, the Agency procurement officer may notify the CONTRACTOR in writing of the delay or non-performance and if not cured in ten (10) days or any longer time specified in writing by the Agency procurement officer, such officer may terminate the CONTRACTOR'S right to proceed with the Contract or such part of the Contract as to which there has been delay or a failure to properly perform. In the event of termination in whole or in part, the Agency procurement officer may procure similar goods or services in a manner and upon the terms deemed appropriate by the Agency procurement officer. The CONTRACTOR shall continue performance of the Contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services.
- b. CONTRACTOR'S duties. Notwithstanding termination of the Contract and subject to any directions from the Agency procurement officer, the CONTRACTOR shall take timely, reasonable, and

necessary action to protect and preserve property in the possession of the CONTRACTOR in which the STATE has an interest.

- c. Compensation. Payment for completed goods and services delivered and accepted by the STATE shall be at the price set forth in the Contract. Payment for the protection and preservation of property shall be in an amount agreed upon by the CONTRACTOR and the Agency procurement officer. If the parties fail to agree, the Agency procurement officer shall set an amount subject to the CONTRACTOR'S rights under chapter 3-126, HAR. The STATE may withhold from amounts due the CONTRACTOR such sums as the Agency procurement officer deems to be necessary to protect the STATE against loss because of outstanding liens or claims and to reimburse the STATE for the excess costs expected to be incurred by the STATE in procuring similar goods and services.
- d. Excuse for nonperformance or delayed performance. The CONTRACTOR shall not be in default by reason of any failure in performance of this Contract in accordance with its terms, including any failure by the CONTRACTOR to make progress in the prosecution of the performance hereunder which endangers such performance, if the CONTRACTOR has notified the Agency procurement officer within fifteen (15) days after the cause of the delay and the failure arises out of causes such as: acts of God; acts of a public enemy; acts of the State and any other governmental body in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather. If the failure to perform is caused by the failure of a subcontractor to perform or to make progress, and if such failure arises out of causes similar to those set forth above, the CONTRACTOR shall not be deemed to be in default, unless the goods and services to be furnished by the subcontractor were reasonably obtainable from other sources in sufficient time to permit the CONTRACTOR to meet the requirements of the Contract. Upon request of the CONTRACTOR, the Agency procurement officer shall ascertain the facts and extent of such failure, and, if such officer determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, the CONTRACTOR'S progress and performance would have met the terms of the Contract, the delivery schedule shall be revised accordingly, subject to the rights of the STATE under this Contract. As used in this paragraph, the term "subcontractor" means subcontractor at any tier.
- e. Erroneous termination for default. If, after notice of termination of the CONTRACTOR'S right to proceed under this paragraph, it is determined for any reason that the CONTRACTOR was not in default under this paragraph, or that the delay was excusable under the provisions of subparagraph 13d, "Excuse for nonperformance or delayed performance," the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to paragraph 14.
- f. Additional rights and remedies. The rights and remedies provided in this paragraph are in addition to any other rights and remedies provided by law or under this Contract.

14. Termination for Convenience.

- a. Termination. The Agency procurement officer may, when the interests of the STATE so require, terminate this Contract in whole or in part, for the convenience of the STATE. The Agency procurement officer shall give written notice of the termination to the CONTRACTOR specifying the part of the Contract terminated and when termination becomes effective.
- b. CONTRACTOR'S obligations. The CONTRACTOR shall incur no further obligations in connection with the terminated performance and on the date(s) set in the notice of termination the CONTRACTOR will stop performance to the extent specified. The CONTRACTOR shall also terminate outstanding orders and subcontracts as they relate to the terminated performance. The CONTRACTOR shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated performance subject to the STATE'S approval. The Agency procurement officer may direct the CONTRACTOR to assign the CONTRACTOR'S right, title, and interest under terminated orders or subcontracts to the STATE. The CONTRACTOR must still complete the performance not terminated by the notice of termination and may incur obligations as necessary to do so.

- c. Right to goods and work product. The Agency procurement officer may require the CONTRACTOR to transfer title and deliver to the STATE in the manner and to the extent directed by the Agency procurement officer:

- (1) Any completed goods or work product; and
- (2) The partially completed goods and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing material") as the CONTRACTOR has specifically produced or specially acquired for the performance of the terminated part of this Contract.

The CONTRACTOR shall, upon direction of the Agency procurement officer, protect and preserve property in the possession of the CONTRACTOR in which the STATE has an interest. If the Agency procurement officer does not exercise this right, the CONTRACTOR shall use best efforts to sell such goods and manufacturing materials. Use of this paragraph in no way implies that the STATE has breached the Contract by exercise of the termination for convenience provision.

- d. Compensation.

- (1) The CONTRACTOR shall submit a termination claim specifying the amounts due because of the termination for convenience together with the cost or pricing data, submitted to the extent required by chapter 3-122, HAR, bearing on such claim. If the CONTRACTOR fails to file a termination claim within one year from the effective date of termination, the Agency procurement officer may pay the CONTRACTOR, if at all, an amount set in accordance with subparagraph 14d(3) below.
- (2) The Agency procurement officer and the CONTRACTOR may agree to a settlement provided the CONTRACTOR has filed a termination claim supported by cost or pricing data submitted as required and that the settlement does not exceed the total Contract price plus settlement costs reduced by payments previously made by the STATE, the proceeds of any sales of goods and manufacturing materials under subparagraph 14c, and the Contract price of the performance not terminated.
- (3) Absent complete agreement under subparagraph 14d(2) the Agency procurement officer shall pay the CONTRACTOR the following amounts, provided payments agreed to under subparagraph 14d(2) shall not duplicate payments under this subparagraph for the following:
  - (A) Contract prices for goods or services accepted under the Contract;
  - (B) Costs incurred in preparing to perform and performing the terminated portion of the performance plus a fair and reasonable profit on such portion of the performance, such profit shall not include anticipatory profit or consequential damages, less amounts paid or to be paid for accepted goods or services; provided, however, that if it appears that the CONTRACTOR would have sustained a loss if the entire Contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss;
  - (C) Costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to subparagraph 14b. These costs must not include costs paid in accordance with subparagraph 14d(3)(B);
  - (D) The reasonable settlement costs of the CONTRACTOR, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the Contract and for the termination of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to the terminated portion of this Contract. The total sum to be paid the CONTRACTOR under this subparagraph shall not exceed the

total Contract price plus the reasonable settlement costs of the CONTRACTOR reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under subparagraph 14d(2), and the contract price of performance not terminated.

- (4) Costs claimed, agreed to, or established under subparagraphs 14d(2) and 14d(3) shall be in accordance with Chapter 3-123 (Cost Principles) of the Procurement Rules.

15. Claims Based on the Agency Procurement Officer's Actions or Omissions.

- a. Changes in scope. If any action or omission on the part of the Agency procurement officer (which term includes the designee of such officer for purposes of this paragraph 15) requiring performance changes within the scope of the Contract constitutes the basis for a claim by the CONTRACTOR for additional compensation, damages, or an extension of time for completion, the CONTRACTOR shall continue with performance of the Contract in compliance with the directions or orders of such officials, but by so doing, the CONTRACTOR shall not be deemed to have prejudiced any claim for additional compensation, damages, or an extension of time for completion; provided:

- (1) Written notice required. The CONTRACTOR shall give written notice to the Agency procurement officer:

- (A) Prior to the commencement of the performance involved, if at that time the CONTRACTOR knows of the occurrence of such action or omission;
- (B) Within thirty (30) days after the CONTRACTOR knows of the occurrence of such action or omission, if the CONTRACTOR did not have such knowledge prior to the commencement of the performance; or
- (C) Within such further time as may be allowed by the Agency procurement officer in writing.

- (2) Notice content. This notice shall state that the CONTRACTOR regards the act or omission as a reason which may entitle the CONTRACTOR to additional compensation, damages, or an extension of time. The Agency procurement officer, upon receipt of such notice, may rescind such action, remedy such omission, or take such other steps as may be deemed advisable in the discretion of the Agency procurement officer;

- (3) Basis must be explained. The notice required by subparagraph 15a(1) describes as clearly as practicable at the time the reasons why the CONTRACTOR believes that additional compensation, damages, or an extension of time may be remedies to which the CONTRACTOR is entitled; and

- (4) Claim must be justified. The CONTRACTOR must maintain and, upon request, make available to the Agency procurement officer within a reasonable time, detailed records to the extent practicable, and other documentation and evidence satisfactory to the STATE, justifying the claimed additional costs or an extension of time in connection with such changes.

- b. CONTRACTOR not excused. Nothing herein contained, however, shall excuse the CONTRACTOR from compliance with any rules or laws precluding any state officers and CONTRACTOR from acting in collusion or bad faith in issuing or performing change orders which are clearly not within the scope of the Contract.

- c. Price adjustment. Any adjustment in the price made pursuant to this paragraph shall be determined in accordance with the price adjustment provision of this Contract.

16. Costs and Expenses. Any reimbursement due the CONTRACTOR for per diem and transportation expenses under this Contract shall be subject to chapter 3-123 (Cost Principles), HAR, and the following guidelines:

- a. Reimbursement for air transportation shall be for actual cost or coach class air fare, whichever is less.
- b. Reimbursement for ground transportation costs shall not exceed the actual cost of renting an intermediate-sized vehicle.
- c. Unless prior written approval of the HOPA is obtained, reimbursement for subsistence allowance (i.e., hotel and meals, etc.) shall not exceed the applicable daily authorized rates for inter-island or out-of-state travel that are set forth in the current Governor's Executive Order authorizing adjustments in salaries and benefits for state officers and employees in the executive branch who are excluded from collective bargaining coverage.

17. Payment Procedures; Final Payment; Tax Clearance.

- a. Original invoices required. All payments under this Contract shall be made only upon submission by the CONTRACTOR of original invoices specifying the amount due and certifying that services requested under the Contract have been performed by the CONTRACTOR according to the Contract.
- b. Subject to available funds. Such payments are subject to availability of funds and allotment by the Director of Finance in accordance with chapter 37, HRS. Further, all payments shall be made in accordance with and subject to chapter 40, HRS.
- c. Prompt payment.
  - (1) Any money, other than retainage, paid to the CONTRACTOR shall be disbursed to subcontractors within ten (10) days after receipt of the money in accordance with the terms of the subcontract; provided that the subcontractor has met all the terms and conditions of the subcontract and there are no bona fide disputes; and
  - (2) Upon final payment to the CONTRACTOR, full payment to the subcontractor, including retainage, shall be made within ten (10) days after receipt of the money; provided that there are no bona fide disputes over the subcontractor's performance under the subcontract.
- d. Final payment. Final payment under this Contract shall be subject to sections 103-53 and 103D-328, HRS, which require a tax clearance from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of Treasury, showing that all delinquent taxes, if any, levied or accrued under state law and the Internal Revenue Code of 1986, as amended, against the CONTRACTOR have been paid. Further, in accordance with section 3-122-112, HAR, CONTRACTOR shall provide a certificate affirming that the CONTRACTOR has remained in compliance with all applicable laws as required by this section.

18. Federal Funds. If this Contract is payable in whole or in part from federal funds, CONTRACTOR agrees that, as to the portion of the compensation under this Contract to be payable from federal funds, the CONTRACTOR shall be paid only from such funds received from the federal government, and shall not be paid from any other funds. Failure of the STATE to receive anticipated federal funds shall not be considered a breach by the STATE or an excuse for nonperformance by the CONTRACTOR.

19. Modifications of Contract.

- a. In writing. Any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract permitted by this Contract shall be made by written amendment to this Contract, signed by the CONTRACTOR and the STATE, provided that change orders shall be made in accordance with paragraph 20 herein.
- b. No oral modification. No oral modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract shall be permitted.



- c. Agency procurement officer. By written order, at any time, and without notice to any surety, the Agency procurement officer may unilaterally order of the CONTRACTOR:
    - (A) Changes in the work within the scope of the Contract; and
    - (B) Changes in the time of performance of the Contract that do not alter the scope of the Contract work.
  - d. Adjustments of price or time for performance. If any modification increases or decreases the CONTRACTOR'S cost of, or the time required for, performance of any part of the work under this Contract, an adjustment shall be made and this Contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined, where applicable, in accordance with the price adjustment clause of this Contract or as negotiated.
  - e. Claim barred after final payment. No claim by the CONTRACTOR for an adjustment hereunder shall be allowed if written modification of the Contract is not made prior to final payment under this Contract.
  - f. Claims not barred. In the absence of a written contract modification, nothing in this clause shall be deemed to restrict the CONTRACTOR'S right to pursue a claim under this Contract or for a breach of contract.
  - g. Head of the purchasing agency approval. If this is a professional services contract awarded pursuant to section 103D-303 or 103D-304, HRS, any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract which increases the amount payable to the CONTRACTOR by at least \$25,000.00 and ten per cent (10%) or more of the initial contract price, must receive the prior approval of the head of the purchasing agency.
  - h. Tax clearance. The STATE may, at its discretion, require the CONTRACTOR to submit to the STATE, prior to the STATE'S approval of any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract, a tax clearance from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of Treasury, showing that all delinquent taxes, if any, levied or accrued under state law and the Internal Revenue Code of 1986, as amended, against the CONTRACTOR have been paid.
  - i. Sole source contracts. Amendments to sole source contracts that would change the original scope of the Contract may only be made with the approval of the CPO. Annual renewal of a sole source contract for services should not be submitted as an amendment.
20. Change Order. The Agency procurement officer may, by a written order signed only by the STATE, at any time, and without notice to any surety, and subject to all appropriate adjustments, make changes within the general scope of this Contract in any one or more of the following:
- (1) Drawings, designs, or specifications, if the goods or services to be furnished are to be specially provided to the STATE in accordance therewith;
  - (2) Method of delivery; or
  - (3) Place of delivery.
- a. Adjustments of price or time for performance. If any change order increases or decreases the CONTRACTOR'S cost of, or the time required for, performance of any part of the work under this Contract, whether or not changed by the order, an adjustment shall be made and the Contract modified in writing accordingly. Any adjustment in the Contract price made pursuant to this provision shall be determined in accordance with the price adjustment provision of this Contract. Failure of the parties to agree to an adjustment shall not excuse the CONTRACTOR from proceeding with the Contract as changed, provided that the Agency procurement officer promptly and duly makes the provisional adjustments in payment or time for performance as may be reasonable. By

proceeding with the work, the CONTRACTOR shall not be deemed to have prejudiced any claim for additional compensation, or any extension of time for completion.

- b. Time period for claim. Within ten (10) days after receipt of a written change order under subparagraph 20a, unless the period is extended by the Agency procurement officer in writing, the CONTRACTOR shall respond with a claim for an adjustment. The requirement for a timely written response by CONTRACTOR cannot be waived and shall be a condition precedent to the assertion of a claim.
- c. Claim barred after final payment. No claim by the CONTRACTOR for an adjustment hereunder shall be allowed if a written response is not given prior to final payment under this Contract.
- d. Other claims not barred. In the absence of a change order, nothing in this paragraph 20 shall be deemed to restrict the CONTRACTOR'S right to pursue a claim under the Contract or for breach of contract.

21. Price Adjustment.

- a. Price adjustment. Any adjustment in the contract price pursuant to a provision in this Contract shall be made in one or more of the following ways:
  - (1) By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
  - (2) By unit prices specified in the Contract or subsequently agreed upon;
  - (3) By the costs attributable to the event or situation covered by the provision, plus appropriate profit or fee, all as specified in the Contract or subsequently agreed upon;
  - (4) In such other manner as the parties may mutually agree; or
  - (5) In the absence of agreement between the parties, by a unilateral determination by the Agency procurement officer of the costs attributable to the event or situation covered by the provision, plus appropriate profit or fee, all as computed by the Agency procurement officer in accordance with generally accepted accounting principles and applicable sections of chapters 3-123 and 3-126, HAR.
- b. Submission of cost or pricing data. The CONTRACTOR shall provide cost or pricing data for any price adjustments subject to the provisions of chapter 3-122, HAR.

22. Variation in Quantity for Definite Quantity Contracts. Upon the agreement of the STATE and the CONTRACTOR, the quantity of goods or services, or both, if a definite quantity is specified in this Contract, may be increased by a maximum of ten per cent (10%); provided the unit prices will remain the same except for any price adjustments otherwise applicable; and the Agency procurement officer makes a written determination that such an increase will either be more economical than awarding another contract or that it would not be practical to award another contract.

23. Changes in Cost-Reimbursement Contract. If this Contract is a cost-reimbursement contract, the following provisions shall apply:

- a. The Agency procurement officer may at any time by written order, and without notice to the sureties, if any, make changes within the general scope of the Contract in any one or more of the following:
  - (1) Description of performance (Attachment 1);
  - (2) Time of performance (i.e., hours of the day, days of the week, etc.);
  - (3) Place of performance of services;

- (4) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the STATE in accordance with the drawings, designs, or specifications;
    - (5) Method of shipment or packing of supplies; or
    - (6) Place of delivery.
  - b. If any change causes an increase or decrease in the estimated cost of, or the time required for performance of, any part of the performance under this Contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this Contract, the Agency procurement officer shall make an equitable adjustment in the (1) estimated cost, delivery or completion schedule, or both; (2) amount of any fixed fee; and (3) other affected terms and shall modify the Contract accordingly.
  - c. The CONTRACTOR must assert the CONTRACTOR'S rights to an adjustment under this provision within thirty (30) days from the day of receipt of the written order. However, if the Agency procurement officer decides that the facts justify it, the Agency procurement officer may receive and act upon a proposal submitted before final payment under the Contract.
  - d. Failure to agree to any adjustment shall be a dispute under paragraph 11 of this Contract. However, nothing in this provision shall excuse the CONTRACTOR from proceeding with the Contract as changed.
  - e. Notwithstanding the terms and conditions of subparagraphs 23a and 23b, the estimated cost of this Contract and, if this Contract is incrementally funded, the funds allotted for the performance of this Contract, shall not be increased or considered to be increased except by specific written modification of the Contract indicating the new contract estimated cost and, if this contract is incrementally funded, the new amount allotted to the contract.
24. Confidentiality of Material.
- a. All material given to or made available to the CONTRACTOR by virtue of this Contract, which is identified as proprietary or confidential information, will be safeguarded by the CONTRACTOR and shall not be disclosed to any individual or organization without the prior written approval of the STATE.
  - b. All information, data, or other material provided by the CONTRACTOR to the STATE shall be subject to the Uniform Information Practices Act, chapter 92F, HRS.
25. Publicity. The CONTRACTOR shall not refer to the STATE, or any office, agency, or officer thereof, or any state employee, including the HOPA, the CPO, the Agency procurement officer, or to the services or goods, or both, provided under this Contract, in any of the CONTRACTOR'S brochures, advertisements, or other publicity of the CONTRACTOR. All media contacts with the CONTRACTOR about the subject matter of this Contract shall be referred to the Agency procurement officer.
26. Ownership Rights and Copyright. The STATE shall have complete ownership of all material, both finished and unfinished, which is developed, prepared, assembled, or conceived by the CONTRACTOR pursuant to this Contract, and all such material shall be considered "works made for hire." All such material shall be delivered to the STATE upon expiration or termination of this Contract. The STATE, in its sole discretion, shall have the exclusive right to copyright any product, concept, or material developed, prepared, assembled, or conceived by the CONTRACTOR pursuant to this Contract.
27. Liens and Warranties. Goods provided under this Contract shall be provided free of all liens and provided together with all applicable warranties, or with the warranties described in the Contract documents, whichever are greater.

28. Audit of Books and Records of the CONTRACTOR. The STATE may, at reasonable times and places, audit the books and records of the CONTRACTOR, prospective contractor, subcontractor, or prospective subcontractor which are related to:

- a. The cost or pricing data, and
- b. A state contract, including subcontracts, other than a firm fixed-price contract.

29. Cost or Pricing Data. Cost or pricing data must be submitted to the Agency procurement officer and timely certified as accurate for contracts over \$100,000 unless the contract is for a multiple-term or as otherwise specified by the Agency procurement officer. Unless otherwise required by the Agency procurement officer, cost or pricing data submission is not required for contracts awarded pursuant to competitive sealed bid procedures.

If certified cost or pricing data are subsequently found to have been inaccurate, incomplete, or noncurrent as of the date stated in the certificate, the STATE is entitled to an adjustment of the contract price, including profit or fee, to exclude any significant sum by which the price, including profit or fee, was increased because of the defective data. It is presumed that overstated cost or pricing data increased the contract price in the amount of the defect plus related overhead and profit or fee. Therefore, unless there is a clear indication that the defective data was not used or relied upon, the price will be reduced in such amount.

30. Audit of Cost or Pricing Data. When cost or pricing principles are applicable, the STATE may require an audit of cost or pricing data.

31. Records Retention.

- (1) Upon any termination of this Contract or as otherwise required by applicable law, CONTRACTOR shall, pursuant to chapter 487R, HRS, destroy all copies (paper or electronic form) of personal information received from the STATE.
- (2) The CONTRACTOR and any subcontractors shall maintain the files, books, and records that relate to the Contract, including any personal information created or received by the CONTRACTOR on behalf of the STATE, and any cost or pricing data, for at least three (3) years after the date of final payment under the Contract. The personal information shall continue to be confidential and shall only be disclosed as permitted or required by law. After the three (3) year, or longer retention period as required by law has ended, the files, books, and records that contain personal information shall be destroyed pursuant to chapter 487R, HRS or returned to the STATE at the request of the STATE.

32. Antitrust Claims. The STATE and the CONTRACTOR recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the purchaser. Therefore, the CONTRACTOR hereby assigns to STATE any and all claims for overcharges as to goods and materials purchased in connection with this Contract, except as to overcharges which result from violations commencing after the price is established under this Contract and which are not passed on to the STATE under an escalation clause.

33. Patented Articles. The CONTRACTOR shall defend, indemnify, and hold harmless the STATE, and its officers, employees, and agents from and against all liability, loss, damage, cost, and expense, including all attorneys fees, and all claims, suits, and demands arising out of or resulting from any claims, demands, or actions by the patent holder for infringement or other improper or unauthorized use of any patented article, patented process, or patented appliance in connection with this Contract. The CONTRACTOR shall be solely responsible for correcting or curing to the satisfaction of the STATE any such infringement or improper or unauthorized use, including, without limitation: (a) furnishing at no cost to the STATE a substitute article, process, or appliance acceptable to the STATE, (b) paying royalties or other required payments to the patent holder, (c) obtaining proper authorizations or releases from the patent holder, and (d) furnishing such security to or making such arrangements with the patent holder as may be necessary to correct or cure any such infringement or improper or unauthorized use.

34. Governing Law. The validity of this Contract and any of its terms or provisions, as well as the rights and duties of the parties to this Contract, shall be governed by the laws of the State of Hawaii. Any action at law or in equity to enforce or interpret the provisions of this Contract shall be brought in a state court of competent jurisdiction in Honolulu, Hawaii.
35. Compliance with Laws. The CONTRACTOR shall comply with all federal, state, and county laws, ordinances, codes, rules, and regulations, as the same may be amended from time to time, that in any way affect the CONTRACTOR'S performance of this Contract.
36. Conflict Between General Conditions and Procurement Rules. In the event of a conflict between the General Conditions and the procurement rules, the procurement rules in effect on the date this Contract became effective shall control and are hereby incorporated by reference.
37. Entire Contract. This Contract sets forth all of the agreements, conditions, understandings, promises, warranties, and representations between the STATE and the CONTRACTOR relative to this Contract. This Contract supersedes all prior agreements, conditions, understandings, promises, warranties, and representations, which shall have no further force or effect. There are no agreements, conditions, understandings, promises, warranties, or representations, oral or written, express or implied, between the STATE and the CONTRACTOR other than as set forth or as referred to herein.
38. Severability. In the event that any provision of this Contract is declared invalid or unenforceable by a court, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining terms of this Contract.
39. Waiver. The failure of the STATE to insist upon the strict compliance with any term, provision, or condition of this Contract shall not constitute or be deemed to constitute a waiver or relinquishment of the STATE'S right to enforce the same in accordance with this Contract. The fact that the STATE specifically refers to one provision of the procurement rules or one section of the Hawaii Revised Statutes, and does not include other provisions or statutory sections in this Contract shall not constitute a waiver or relinquishment of the STATE'S rights or the CONTRACTOR'S obligations under the procurement rules or statutes.
40. Pollution Control. If during the performance of this Contract, the CONTRACTOR encounters a "release" or a "threatened release" of a reportable quantity of a "hazardous substance," "pollutant," or "contaminant" as those terms are defined in section 128D-1, HRS, the CONTRACTOR shall immediately notify the STATE and all other appropriate state, county, or federal agencies as required by law. The Contractor shall take all necessary actions, including stopping work, to avoid causing, contributing to, or making worse a release of a hazardous substance, pollutant, or contaminant, and shall promptly obey any orders the Environmental Protection Agency or the state Department of Health issues in response to the release. In the event there is an ensuing cease-work period, and the STATE determines that this Contract requires an adjustment of the time for performance, the Contract shall be modified in writing accordingly.
41. Campaign Contributions. The CONTRACTOR is hereby notified of the applicability of 11-355, HRS, which states that campaign contributions are prohibited from specified state or county government contractors during the terms of their contracts if the contractors are paid with funds appropriated by a legislative body.
42. Confidentiality of Personal Information.
- a. Definitions.
- "Personal information" means an individual's first name or first initial and last name in combination with any one or more of the following data elements, when either name or data elements are not encrypted:
- (1) Social security number;
  - (2) Driver's license number or Hawaii identification card number; or

- (3) Account number, credit or debit card number, access code, or password that would permit access to an individual's financial information.

Personal information does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.

"Technological safeguards" means the technology and the policy and procedures for use of the technology to protect and control access to personal information.

b. Confidentiality of Material.

- (1) All material given to or made available to the CONTRACTOR by the STATE by virtue of this Contract which is identified as personal information, shall be safeguarded by the CONTRACTOR and shall not be disclosed without the prior written approval of the STATE.
- (2) CONTRACTOR agrees not to retain, use, or disclose personal information for any purpose other than as permitted or required by this Contract.
- (3) CONTRACTOR agrees to implement appropriate "technological safeguards" that are acceptable to the STATE to reduce the risk of unauthorized access to personal information.
- (4) CONTRACTOR shall report to the STATE in a prompt and complete manner any security breaches involving personal information.
- (5) CONTRACTOR agrees to mitigate, to the extent practicable, any harmful effect that is known to CONTRACTOR because of a use or disclosure of personal information by CONTRACTOR in violation of the requirements of this paragraph.
- (6) CONTRACTOR shall complete and retain a log of all disclosures made of personal information received from the STATE, or personal information created or received by CONTRACTOR on behalf of the STATE.

c. Security Awareness Training and Confidentiality Agreements.

- (1) CONTRACTOR certifies that all of its employees who will have access to the personal information have completed training on security awareness topics relating to protecting personal information.
- (2) CONTRACTOR certifies that confidentiality agreements have been signed by all of its employees who will have access to the personal information acknowledging that:
  - (A) The personal information collected, used, or maintained by the CONTRACTOR will be treated as confidential;
  - (B) Access to the personal information will be allowed only as necessary to perform the Contract; and
  - (C) Use of the personal information will be restricted to uses consistent with the services subject to this Contract.

d. Termination for Cause. In addition to any other remedies provided for by this Contract, if the STATE learns of a material breach by CONTRACTOR of this paragraph by CONTRACTOR, the STATE may at its sole discretion:

- (1) Provide an opportunity for the CONTRACTOR to cure the breach or end the violation; or
- (2) Immediately terminate this Contract.

In either instance, the CONTRACTOR and the STATE shall follow chapter 487N, HRS, with respect to notification of a security breach of personal information.

c. Records Retention.

- (1) Upon any termination of this Contract or as otherwise required by applicable law, CONTRACTOR shall, pursuant to chapter 487R, HRS, destroy all copies (paper or electronic form) of personal information received from the STATE.
- (2) The CONTRACTOR and any subcontractors shall maintain the files, books, and records that relate to the Contract, including any personal information created or received by the CONTRACTOR on behalf of the STATE, and any cost or pricing data, for at least three (3) years after the date of final payment under the Contract. The personal information shall continue to be confidential and shall only be disclosed as permitted or required by law. After the three (3) year, or longer retention period as required by law has ended, the files, books, and records that contain personal information shall be destroyed pursuant to chapter 487R, HRS or returned to the STATE at the request of the STATE.