

AIA[®] Document A141[™] – 2014

Standard Form of Agreement Between Owner and Design-Builder (Modified)

CONTRACT made as of the 3rd day of May in the year 2022

BETWEEN the Owner:

The City of Delray Beach, Florida,
a municipal corporation and a political subdivision of the State of Florida,
its successors and assigns.

100 N.W. 1st Avenue
Delray Beach, FL 33444

and the Design-Builder:

Gulf Building, LLC,
a Florida corporation
John Scherer, President
10 SE 1st Avenue, #1 East
Delray Beach, FL 33444

Mailing Address
633 South Federal Highway, Suite 500
Fort Lauderdale, FL 33301

for the following Project:

Turnkey Design and Construction of Fire Station 113
("Project").

The Owner and Design-Builder agree as follows.

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§ 1.1 Owner's Criteria

This Contract is based on the Design-Builder's response to the Request for Proposals, attached hereto as Exhibit "F", and the Design Criteria Package, attached hereto as Exhibit "G" (hereinafter "Owner's Criteria"). Owner's Criteria generally defines the intent of the program including scope, quality, programming, and function of the proposed facility, and which may be modified during Phase 1 in collaboration with the Owner as a result of program requirements, project cost limitations, and schedule requirements. Upon approval of the GMP, the Owners Design Criteria shall be superseded by the Design-Builders 60% Construction Documents and the GMP submittal including, Drawings, Specifications and Qualifications and Clarifications shall take precedence over all other Contract Documents.

§ 1.1.1 The Owner's program for the Project:

The turnkey design and construction of a new Fire Rescue Station No. 113 in accordance with the Owner's Criteria and the Design-Builders Response to the Request for Proposal and shall include, but are not limited, the following:

- a. The design, pre-construction, and construction of a Fire-Rescue Station.
- b. Fire Rescue Station will include an Apparatus Bay with drive-through access for three parallel bays and a two-level, attached office/living quarters component. The building will accommodate four distinct functional zones: 1)Apparatus Bay, 2)Apparatus Bay Support, 3)Office and Administration, and 4)Crew Living Quarters.
- c. Complete fire station including all civil, emergency signalization, architectural, structural, plumbing, mechanical, fire alerting system, security access system, emergency generator, fire alarm system and electrical system.
- d. Security and information technology requirements.
- e. A payment and performance bond, applicable permits, fees, impacts, utility taps, and licenses.
- f. Provision of pre-design consulting services and stakeholder meetings to determine project scope, requirements, values, and community interests. Multiple public meetings as part of the program and design confirmation process will be required.
- g. Preparation of project schedules and cost estimates.
- h. Compliance with Federal, State, and Local Regulations and Requirements.

Project shall include two distinct phases per Article 4.2

All Work for the Phase 2 Services shall be delivered as more particularly set forth in this Contract and for a Guaranteed Maximum Price, in an amount as more specifically set forth in Article 2 of this Contract, plus any change orders issued in accordance with the terms of this Contract and less any Owner credits as described herein.

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

- a. Completion of the fire station design in accordance with the Owner's Criteria.
- b. Preparation of all required construction documents for the fire station including schematic design drawings, design development drawings, 60-percent contract documents, and documents required for permitting . The Plans and Specifications must be sealed by Registered Architect and/or Professional Engineer, as appropriate for the various disciplines, licensed to practice in Florida per the requirements of Chapter 481 or Chapter 471, Florida Statutes.
- c. Preparation of designs and layouts will be coordinated and reviewed with the Owner. Construction documents will be developed to the 60-percent Construction Document Level for the Guaranteed Maximum Price Amendment.
- d. Preparation of all required permit applications and submittal packages as required for permit issuance of all agency permits (i.e. Federal, State, County, and City).

§ 1.1.3 The Project's physical characteristics:

Fire Rescue Station will include an Apparatus Bay with drive-through access for three parallel bays and a two-level, attached office/living quarters component. The building will include four distinct functional zones: 1)Apparatus Bay,

2)Apparatus Bay Support, 3)Office and Administration, and 4)Crew Living Quarters as coordinated with Owner and as provided in the Owner's Criteria and Design-Builders Response to the Request for Proposals.

§ 1.1.4 The Owner's design and construction project duration:

The project shall have a duration of 730 calendar days (Twenty-four (24) months) for final completion of the Project, including design and construction.

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

§ 1.1.6 The Permit Documents shall comply with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities.

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

§ 1.1.8 If the Owner 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 Owner identifies the following representative ("Owner's Project Manager") in accordance with Section 7.1.1:

Terrence R. Moore, ICMA-CM, City Manager
100 N.W. 1st Avenue
Delray Beach, FL 33444
Phone: 561-243-7193
E-Mail: moore@mydelraybeach.com

§ 1.2.2 Owner designates the individual listed below as its Owner's Representative, which individual has the authority and responsibility set forth in Section 1.4.27.

Suzanne Mechler
CDM Smith
621 N.W. 53rd Street Suite 265
Boca Raton, FL 33487

§ 1.2.3 The Owner will retain the following consultants and separate contractors:
NONE

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

§ 1.2.5 The Design-Builder's representative shall not be changed absent ten (10) days' written notice to the Owner.

§ 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:

- ☐ Arbitration pursuant to Section 14.4
- ☒ Litigation in a court of competent jurisdiction
- ☐ Other:

§ 1.4 Definitions

§ 1.4.1 Design-Build Documents. The Design-Build Documents consist of this Contract between Owner and Design-Builder and its attached Exhibits (hereinafter, the “Contract”); attachments and forms, , the Request For Proposals, , and the responses of the Design-Builder (as negotiated and accepted by the City), any Addenda, the record of the contract award by the Commission, this Agreement, the Performance Bond and Payment Bond, the Notice of Award, the Notice(s) to Proceed, the Purchase Order and all agreed upon contract and design modifications issued after execution of the Agreement are the documents that are collectively referred to as the Design-Build Documents.

§ 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 written 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 Owner 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 Owner 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), Subcontractor (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 Owner 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 written Modification.

§ 1.4.7 Owner. The Owner is the person or entity identified as such in the Contract and is referred to throughout the Design-Build Documents as if singular in number. The term “Owner” means the Owner or the Owner’s authorized representative.

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

§ 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 before and after execution of the Design-Build Amendment, as identified in the Design-Build Amendment.

§ 1.4.16 Commission. The City Commission of the City of Delray Beach, Florida, which is the governing body of the Delray Beach municipal government created by the Delray Beach Charter.

§ 1.4.17 Contract Administrator. Entity or person designated by the City to administer this Agreement.

§ 1.4.18 Additional Work Authorization (“AWA”). A document issued to memorialize the allocation of Owner’s allowance account.

§ 1.4.19 City or Owner. The City of Delray Beach, Florida, the public body that is a party to this Contract and for which this Contract is to be performed. In all respects, City’s performance is pursuant to City’s position as the owner of a construction project. In the event City exercises its regulatory authority as a governmental body, the exercise of such regulatory authority and the enforcement of any rules, regulations, laws and ordinances shall be deemed to have occurred pursuant to City’s authority as a governmental body and shall not be attributable in any manner to City as a party to this Contract.

§ 1.4.20 City Attorney. The chief legal counsel for City.

§ 1.4.21 City Project Manager. Employee of City representing the Contract Administrator on this project.

§ 1.4.22 Design Build Architect/Engineer. The Registered Architect and/or Professional Engineer, as appropriate for the various disciplines, licensed to practice in Florida per the requirements of Chapter 481 or Chapter 471, Florida Statutes who will provide to the Design-Builder the design and other related professional services for the Project.

§ 1.4.23 Design Criteria Package. The performance-oriented drawings and specifications included as Exhibit G to the Contract.

§ 1.4.24 Design Criteria Professional. The primary design professional (architect or engineer) registered to practice the respective discipline under the laws of Florida, hired by or employed by the City to prepare the Design/Build

Design Criteria Package and perform related professional duties assigned by the City during the execution of the Project.

§ 1.4.25 Document Control Management System. This means “e-Builder”, the official electronic document control management system for the transfer, review and storage of Project documentation such as all of the Contract Documents, the required forms to be filled out by or utilized by the Design-Builder in accordance with the Contract Documents, Owner-approved plans specifications, permits, and all other documents for the Project.

§ 1.4.26 Final Acceptance. The completion of all Work required by, and in compliance with, the Contract Documents, including start-up, testing, obtaining regulatory approvals from all applicable authorities, completion of all punch lists, and all preparations necessary to operate and maintain the Project, as accepted by the Owner.

§ 1.4.27 Owner's Representative. The individual or firm named in writing by Owner to act on Owner's behalf in the administration of this Contract. Owner's Representative does not have authority to waive or modify any condition or term of the Contract Documents.

§ 1.4.28 Substantial Completion. The stage of completion of the Project, including testing, approval by any applicable regulatory authority, and receipt of a temporary certificate of occupancy or a final certificate of occupancy, whichever occurs first, and such that the Work and the Project are usable by Owner for the purpose for which they are intended.

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 Owner shall compensate the Design-Builder as follows:

(a). **Phase 1 Services.** Owner shall pay Design-Builder the not to exceed sum of per Exhibit K, *Phase 1 Services*, subject to adjustments made in accordance with the General Conditions of Contract. Monthly Progress Payment installments of the Phase 1 Services price, if applicable, shall be based on the percent completion of Phase 1 Requirements in accordance with the approved Phase 1 Services Schedule of Values created pursuant to subsection (b) of this section.

(b) **Phase 1 Services Schedule of Values.** In order to determine the percent completion of the Phase 1 Services, the Design-Builder, within seven (7) days of entry into this Contract, shall submit to the Owner's Representative for approval a proposed CSI-Formatted Phase 1 Services Schedule of Values. Once approved by Owner, the Phase 1 Services Schedule of Values shall be incorporated in and made part of this Contract and such Schedule shall control the timing of and amount of the Progress Payment to be made to the Design-Builder. Owner shall have no liability for any expenses of Design-Builder beyond payment of the Progress Payment amount noted in the Phase 1 Services Schedule of Values. Design-Builder shall not be entitled to receive additional compensation from Owner beyond that amount noted in the Phase 1 Services Schedule of Values.

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

TO BE DEFINED IN THE PHASE 1 SCOPE OF SERVICES

« »

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, and Subcontractors, as follows:

- .1 Fees paid for securing approval of authorities having jurisdiction over the Project;
- .2 Printing, reproductions, plots, standard form documents;
- .3 Postage, handling and delivery;
- .4 Renderings, physical models, mock-ups, professional photography, and presentation materials requested by the Owner;
- .5 All taxes levied on professional services and on reimbursable expenses; and
- .6 Other Project-related expenditures, if authorized in advance by the Owner.

§ 2.1.3.2 For Reimbursable Expenses, the compensation shall be the expenses incurred by the Design-Builder and the Design-Builder's Architect, and Subcontractors at cost, without mark-up. No compensation will be made for travel to or from the project site or other City facilities.

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

§ 2.1.4.1 Owner shall have ten (10) days to review the Design-Builder's invoices. Payments are due and payable thirty (30) days from Owner's approval of the Design-Builder's invoice. Undisputed amounts unpaid forty-five (45) days after the invoice date shall bear interest at the rate entered below.

four percent (4%) per annum

§ 2.1.4.2 Records of Reimbursable Expenses and services performed on the basis of hourly rates shall be attached to invoices submitted to the Owner.

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

Phase 2 Contract Sum. For the Phase 2 Services, Owner shall pay Design-Builder in accordance with Exhibit L, subject to adjustments made in accordance with the Article 2.2.1.

§2.2.1 Guaranteed Maximum Price "GMP" [This Article 2.2.1 acts as a placeholder and will be completed as part of the Design-Build Amendment].

§2.2.1.22 Design-Builder guarantees that it shall not exceed the GMP of _____ Dollars (\$ _____). Documents used as a basis for the GMP shall be identified in the Design-Build Amendment to this Agreement. Design-Builder does not guarantee any specific line item provided as part of the GMP, and has the sole discretion to apply payment due to overruns in one line item to savings due to underruns in any other line item. Design-Builder agrees, however, that it will be responsible for paying all costs of completing the Work which exceed the GMP, as adjusted in accordance with the Contract Documents.

§2.2.2 – Items to be Included in Guaranteed Maximum Price. The Guaranteed Maximum Price, once established shall be deemed by the Owner to include all aspects of final design and construction of the Project, including, but not limited to, the Design-Builder's overhead and profit or fee of any kind. By way of illustration, and not limitation, the following items shall be deemed by the Owner to be included in the Guaranteed Maximum Price:

(a) All compensation (including reasonable Project bonuses approved by Owner in writing) for salaried or hourly personnel of Design-Builder directly engaged in the performance of the Work for this Project, or employed at the Project, or engaged in estimating, drafting, engineering, expediting, scheduling, coordinating, purchasing, supervising, controlling, safety, quality, CAD, or information technology support for the Work, wherever stationed, including but not limited to the assigned Construction Executive, Director of Construction, Senior Project Manager, Project Manager, Assistant Project Manager, Superintendent and field personnel.

(b) Costs of Materials and Equipment Incorporated in the Completed Construction.

(1) Costs, including transportation, of materials and equipment incorporated or to be incorporated in the complete construction.

(2) Costs of materials in excess of those actually installed but required to provide reasonable allowance for waste and for spoilage.

(c) Costs of Other Materials and Equipment, Temporary Facilities and Related Items.

(1) Costs, including transportation, installation, maintenance, dismantling, storage and removal of materials, supplies, temporary facilities, machinery, equipment, and hand tools not customarily owned by the construction workers.

(2) Rental charges for temporary facilities, machinery, equipment, and hand tools not customarily owned by the construction workers, which are provided by the Design-Builder at the site, whether rented from the Design-Builder or others, and costs of transportation, installation, minor repairs and replacements, dismantling, storage and removal thereof. It is the expectation of the Owner that in calculating the Guaranteed Maximum Price, line items for such rental charges are not be in excess of 100% of the rates set forth in the latest edition of the Rental Rate Blue Book for Construction Equipment published by Primedia Information, Inc., unless equipment is rented from third parties specifically for the Project; the Owner specifically reserves the right to object to that portion of the Guaranteed Maximum Price, and receive a credit against the Guaranteed Maximum Price, in the event that Design-Builder utilizes rates in excess of those mentioned herein.

(3) Costs of removal of debris from the site.

(4) Reproduction costs, facsimile transmissions and long distance telephone calls, postage and express delivery charges, telephone services at the site for this Project.

(5) Costs for travel and subsistence expenses of the Design-Builder's personnel incurred in the performance of the Work, or any attendant duty to the Design—Builder's performance of the Work, including, but not limited to, costs for company owned trucks, trailers and equipment utilized by Design-Builder

(d) Subcontract Costs. Payments made by the Design-Builder to Subcontractors or Subconsultants in accordance with the requirements of the subcontracts for this Project; All expenses related to the engagement and/or termination of subcontractors/subconsultants and resultant Project expense increases, if any.

(e) Miscellaneous Costs.

- (1) Costs of premiums for insurance and bonds for this Project.
- (2) Sales, use or similar taxes imposed by any governmental authority which are related to the Work for this Project and for which the Design-Builder or Owner would be liable.
- (3) Fees, assessments and all building permits and other permits, licenses and inspections for the Project.
- (4) Fees of testing laboratories for tests required by the Contract Documents.
- (5) Data processing and software costs related to the Work for this Project.
- (6) Deposits lost for causes other than the Design-Builder's negligence or failure to fulfill a specific responsibility to the Owner set forth in this Contract.
- (7) Legal costs, other than those arising from disputes between the Owner and Design-Builder, Subcontractors and affiliates, reasonably incurred by the Design-Builder in the performance of the Work for this Project and with the Owner's written permission, which permission shall not be unreasonably withheld.
- (8) Expenses incurred in accordance with the Design-Builder's standard personnel policy for relocation and temporary living allowances of personnel required for the Work, in case it is necessary to relocate such personnel from distant locations.
- (9) Costs incurred by the Design-Builder in taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons or property.
- (10) Costs incurred by the Design-Builder in repairing or correcting damaged or nonconforming Work executed by the Design-Builder or its Subcontractors or suppliers;
- (11) Mobilization and demobilization costs associated with this Project.
- (12) Corporate safety inspection and related safety costs.
- (13) Corporate quality inspection and quality assurance and control costs.
- (14) Salaries and other compensation of the Design-Builder's personnel stationed at its principal office or offices other than the site office.
- (15) Expenses of the Design-Builder's principal office and offices other than the site office.
- (16) Overhead and general expenses.
- (17) The Design-Builder's capital expenses, including interest on the Design-Builder's capital employed for the Work.
- (18) Costs due to negligence and/or malfeasance and/or other acts of the Design-Builder, Subcontractors, and/or any agents thereof or to the failure of the Design-Builder, Subcontractors, and/or any agents thereof to fulfill and/or perform the Work of this Project in accordance with this Project.
- (f) All other reasonably foreseeable costs and expenditures of Design-Builder in connection with the construction of the Project.

§2.2.3 –Project Expenses to be Documented; Billing Against Guaranteed Maximum Price. Design-Builder shall substantiate all Project expenditures with paid receipts and/or invoices as the Owner may reasonably request to determine the financial status of the Project. As Design-Builder performs the Work necessary to deliver the Fire Station Project, the Design-Builder shall keep a running financial statement of all Project expenses incurred to date to include, but not be limited to, all items mentioned in Paragraph 2.23.1 and its subparagraphs. It is the expectation of the Owner that the Project be delivered to the Owner, ready and suitable for occupation and Owner's intended uses at a final cost to Owner of less than the Design-Builder's Guaranteed Maximum Price (but for no more than the Guaranteed Maximum Price, absent an Owner Directed Adjustment in the scope of Work).

§2.2.4 – Owner Directed Adjustments in Scope of Work. The Owner may, without invalidating the Contract, alter, add or deduct from the Design Work and/or Construction Work by issuing an Owner Directed Adjustment. In the event that the Owner issues an Owner Directed Adjustment to the Design-Builder, Design-Builder and Owner shall agree on an appropriate adjustment to the Guaranteed Maximum Price. This provision shall not be interpreted to authorize an increase in the Guaranteed Maximum Price in the event that Owner rejects Design Work and/or Construction Work performed by Design-Builder or Design-Builder's subcontractors/subconsultants.

§2.2.5 – No Automatic Adjustments to Guaranteed Maximum Price. Nothing in this Contract shall be construed to allow and/or authorize the payment to the Design-Builder of any monies in excess of the Guaranteed Maximum Price absent an Owner Directed Adjustment or an authorized Amendment to the Contract Documents, which includes Change Orders.

§2.2.6 – Guaranteed Maximum Price Credits. Owner shall be entitled to credits against the Guaranteed Maximum Price for the following items:

(a) Unused Excess Materials. Unused excess materials, if any, shall be handed over to the Owner at the completion of the Work or, at the Owner's option, shall be sold by the Design-Builder or returned to the supplier. Amounts realized, if any, from such sales or returns shall be credited to the Owner as a deduction from the Guaranteed Maximum Price.

(b) Discounts, Rebates and Refunds. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment and a waiver of any applicable building permit fees, if any, shall accrue to the Owner, and the Design-Builder shall make provisions so that they can be secured. Amounts which accrue to the Owner in accordance with the provisions of this Paragraph shall be credited to the Owner as a deduction from the Guaranteed Maximum Price, and shall be credited on the final Payment Application.

(c) Contingency.

(1) Design Builder Contingency. The GMP includes a Design-Builder Contingency in the amount of (to be established at time of Design Build Amendment) Dollars (\$) which is available for Design-Builder's exclusive use for unanticipated costs it has incurred that are not the basis for a Change Order under the Contract Documents. By way of example, and not as a limitation, such costs may include: (a) trade buy-out differentials; (b) overtime or acceleration ordered by the Owner; (c) escalation of materials; (d) omissions, however caused; (e) Subcontractor defaults; or (f) those events under Article 11.10 and Section 82 of the General Conditions of Contract that result in an extension of the Contract Time but do not result in an increase in the Contract Sum. The Design-Builder Contingency is not available to Owner for any reason, including changes in scope or any other item which would enable Design-Builder to increase the GMP under the Contract Documents. Design-Builder shall provide Owner notice of all anticipated charges against the Contingency, and shall provide Owner as part of the monthly status

report required by Article 17.4 an accounting of the Design-Builder Contingency, including all reasonably foreseen uses or potential uses of the Design Builder Contingency. Design-Builder agrees that with respect to any expenditure from the Design Builder Contingency relating to a Subcontractor default or an event for which insurance or bond may provide reimbursement, Design-Builder will in good faith exercise reasonable steps to obtain performance from the Subcontractor and/or recovery from any surety or insurance company. Design-Builder agrees that if Design-Builder is subsequently reimbursed for said costs, then said recovery will be credited back to the Contingency.

(2) Owner Contingency. The GMP includes an Owner Contingency in the amount of (to be established at time of Design-Build Amendment) Dollars (\$) which is available for Owner's exclusive use for unanticipated costs that are not the basis for a Change Order under the Contract Documents. By way of example, and not as a limitation, such costs may include: (a) specific Owner allowances, (b) Owner request(s) to accelerate, and (c) reasonable scope gaps as adjudicated reasonable by the Owner. The Owner Contingency is not available to Design-Builder for any reason without prior approval by the Owner. The Design-Builder will be required to furnish documentation justifying the use of the Owner Contingency and provide documentation evidencing proposed expenditures to be charged to the Owner Contingency prior to approval and the release of funds by the Owner. Proper Documentation for use of the Owner Contingency shall be determined by the Owner. Owner shall provide Design-Builder notice of all anticipated charges against the Owner Contingency.

(3) Savings. All remaining unused contingencies shall be credited back to the owner upon in the final payment application.

(d) Tax Exempt Purchases. Notwithstanding anything in the Contract Documents to the contrary, Owner, as a tax exempt Florida municipal corporation, may purchase materials for use in the Work and 100% of any savings realized by the Owner purchasing materials for use in the Work shall be credited to the Owner as a deduction from the Guaranteed Maximum Price.

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 and herein represents to Owner that Design-Builder has all licenses required by Palm Beach County, the State of Florida and any other entities having jurisdiction over the Project, that said licenses are current and in good standing, and that said licenses will remain current and in good standing throughout the course of the Project.

§ 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 Owner.

§ 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 all costs attributable to correction.

§ 3.1.3.2 Neither the Design-Builder nor any Subcontractor, 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 Owner, including those in the Owner'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 Owner in writing. Upon verification by the Owner that a change to the Owner's Criteria is required to remedy the violation, the Owner and the Design-Builder shall execute a Modification in accordance with Article 6.

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

§ 3.1.5 Meetings. The Design-Builder shall attend progress meetings at least bi-weekly, through the Substantial Completion milestone, with the Owner, Owner's Representative, and any others Owner may desire to participate. Design Builder shall attend other meetings, as requested by Owner, to review matters such as procedures, progress, coordination, and scheduling of the Work. Design-Builder shall review and comment on the agenda, presentation and meeting notes developed by Owner's Representative.

Design-Builder shall attend a preconstruction conference with the Owner, Owner's Representative, and any others Owner may desire to participate, to review the requirements of Owner with respect to the Work, including Project access, safety requirements, contract procedures, scheduling, requests for payment, Submittals, Change Orders, inspections, and any and all other matters they then deem relevant to the performance of Design-Builder and the Subcontractors. The location of this pre-construction conference can occur at Owner facilities. Coordination with the Owner's Project Manager should be made. Any costs incurred by the Design-Builder in conjunction with the pre-construction conference shall be borne by the Design-Builder. Design-Builder shall review and comment on the agenda, presentation and meeting notes developed by Owner's Representative.

Design-Builder shall attend one substantial completion meeting and corresponding follow-up meeting, attended by various Design-Builder Engineers of Record (EOR), which will include a walkthrough to develop punch list items. Design-Builder shall review and comment on the agenda, presentation and meeting notes developed by Owner's Representative for all meetings.

§ 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.

§ 3.1.7 The Design-Builder, with the assistance of the Owner, 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 Owner informed of the progress and quality of the Work. On a monthly basis and as required in Monthly Reports, or otherwise as required by the Owner, the Design-Builder shall submit written progress reports to the Owner's Representative, 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 Owner;
- .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 Owner;
- .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 Daily Logs;
- .13 Monthly progress photographs depicting progress of the Work
- .14 Additional information as agreed to by the Owner and Design-Builder.

§ 3.1.9 Design-Builder's Schedules

§ 3.1.9.1

(a)Phase 1 Schedule. The Design-Builder, within ten (10) calendar days of the execution of this Contract shall prepare and submit for the Owner's information a schedule for the Work ("Project Schedule"). The Project Schedule including the time required for design and construction, shall not exceed time limits 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 Owner's review and for approval of submissions by authorities having jurisdiction over the Project. The Project Schedule shall be detailed and shall specify the dates for Substantial Completion and Final Acceptance as identified in accordance with Phase 2 Documents and Article 5 herein. After development of the Project Schedule, and subsequent approval thereof by the Owner, the Project Schedule shall control the progress of the Project. Only with the Owner's prior written approval, may the Design-Builder adjust the Project Schedule, if necessary, as the Project proceeds until the commencement of construction.

§ 3.1.9.2 The Design-Builder shall perform the Work in general accordance with the original Project Schedule. The original Project Schedule and all subsequently submitted updated Project Schedules shall be in a detailed precedence-style, critical path method (CPM) type format satisfactory to the Owner which shall also: (1) provide a graphic representation of all activities and events that will occur during performance of the Work; (2) identify each phase of design, construction and occupancy; and (3) set forth dates that are critical in ensuring the timely and orderly completion of the Work in accordance with the requirements of the Design Build Documents (hereinafter referred to as "Milestone Dates"). Design-Builder shall provide Owner with the original/planned, Project Schedule electronic files. Upon review and acceptance by the Owner of the Milestone Dates, the Project Schedule shall be deemed part of the Design-Build Documents and attached to the Contract as **Exhibit "A"** and is incorporated in the Design-Build Documents. The Design-Builder shall monitor the progress of the Work for conformance with the requirements of the Project Schedule and shall promptly advise the Owner of any delays or potential delays. The accepted Project Schedule shall be updated one time each month to reflect actual conditions and Design-Builder shall provide Owner with a copy of the updated, schedule, the electronic files, and a list of all changes made to the schedule, at the time Design-Builder submits its monthly Payment Application. In the event any progress report or schedule update indicates any delays, the Design-Builder shall propose an affirmative plan to correct the delay, including resequencing of the Work, overtime and/or additional labor, if necessary. In no event shall any updated Project Schedule or progress report constitute an adjustment in the Contract Time, Milestone Dates, or the Contract Sum unless any such adjustment is agreed to by the Owner and authorized pursuant to properly executed written Change Order. Design-Builder shall

maintain such progress schedule on a current basis in accordance with the provisions of this Section and shall keep proper records available to inspection by Owner to substantiate actual activity, duration and completion dates.

§ 3.1.9.3 In the event the Owner determines that the performance of the Work has not progressed or reached the level of completion required by the Project Schedule, the Owner shall have the right to order the Design-Builder, in writing, to take corrective measures necessary to expedite the progress of the Work. Such corrective measures may include any or all of the following without limitation, (1) working additional shifts or overtime, (2) supplying additional manpower, equipment, and facilities, (3) re-sequencing the Work to avoid the effects of the potential delay; and (4) other similar measures utilizing the most cost effective and reasonable acceleration methods possible to avoid delays and liquidated damages (hereinafter referred to collectively as "Extraordinary Measures"). Such Extraordinary Measures shall continue until the progress of the Work complies with the stage of completion required by the Project Schedule. The Owner's right to require Extraordinary Measures is solely for the purpose of ensuring the Design-Builder's compliance with the Project Schedule. If delays are chargeable to the Design-Builder under the terms of this Contract, the Design-Builder shall be responsible for liquidated damages, as provided in Article 14 of the Contract, for delays for failure to meet the Project Schedule and to complete the Work within the Contract Time. All Extraordinary Measures required to keep the Work on Schedule and to avoid delays shall be a Cost of the Work and shall not be a basis to increase the compensation to Design-Builder. Should Design-Builder fail to perform the Extraordinary Measures as provided herein, the Owner shall give the Design-Builder a three (3) business day notice of default.

§ 3.1.9.4 Owner may exercise termination rights as provided for in the Contract.

§ 3.1.10 Certifications. Upon the Owner's written request, the Design-Builder shall obtain from the Architect, Consultants, and Subcontractors, and furnish to the Owner, certifications with respect to the documents and services provided by the Architect, Consultants, and Subcontractors (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 Owner 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 Subcontractors 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 Owner's approval. The Submittal schedule shall (1) be coordinated with the Design-Builder's Project Schedule provided in Section 3.1.9.1, (2) allow the Owner 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 extension of Contract Time based on the time required for review of Submittals. Design-Builder shall also maintain a detailed Submittal Log, reflecting: (a) the date, where applicable, the Subcontractors submit to Design-Builder, and the Design-Builder submits to Owner's Representative each Submittal; (b) the date of approval or rejection of each Submittal by Design-Builder; (c) the reason for the rejection of any Submittal; and (d) the date of each subsequent action by Design-Builder, Owner's Representative or Subcontractors with respect to any Submittal. The Submittal Log shall be part of the Job Progress Meeting minutes required in Paragraph 3.1.5 herein. Design-Builder shall immediately report to Owner's Representative in writing any substantial delays in the Submittal process and the cause thereof and shall take appropriate steps to coordinate and expedite the Submittal process. The Owner and Owner Representative's review of Submittals shall not relieve the Design-Builder from its obligation for performance of the Work in compliance with the Contract Documents.

§ 3.1.11.2 By providing Submittals the Design-Builder represents to the Owner 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 Work in accordance with the Design-Build Documents and approved Submittals.

§ 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 Owner 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 Owner'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 Owner 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 Owner 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. If required by Owner, the Design-Builder shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

§ 3.1.12.1 Design-Builder represents and warrants to Owner that all labor, materials and/or services furnished, and all Work performed by Design-Builder, will be free of defects for a period of one (1) year, unless otherwise provided herein for a longer period, from the date of Substantial Completion. This warranty is not in lieu of, but is in addition to any other warranties, express or implied, which may be provided by law and by manufacturers, Subcontractors, and suppliers. Design-Builder's warranty is attached hereto as **Exhibit "B"**.

§ 3.1.12.2 **Warranty Forms.**

Design-Builder shall obtain warranties, for a minimum period of one (1) year, from all subcontractors, manufacturers and suppliers. Design-Builder agrees that it shall at no additional cost to Owner, secure Extended Warranties for all items having Extended Warranties from the applicable subcontractors, or equipment or material manufacturers. Any warranties obtained by the Design-Builder which deviate from the forms attached hereto as **Exhibit "C"** must be approved by Owner.

§ 3.1.12.2 All material, equipment, or other special warranties required by the Design-Build Documents shall be issued in the name of the Owner, or shall be transferable to the Owner, and shall commence in accordance as of the date of Substantial Completion of the Work as defined in the Design-Build Documents.

§ 3.1.12.3 Design-Builder shall provide to the Owner three (3) bound hard-cover books and one (1) electronic copy of same containing the following information:

- .1 All Subcontractor warranties fully executed in the form approved by the Owner;
- .2 All Extended Warranties required by the Design-Build Documents;
- .3 The Design-Builder's warranty;
- .4 A list of all Subcontractors, Sub-subcontractors and suppliers who performed work on the Project or who furnished materials for use in the Project, such list to include the name,

address, telephone number, copies of any applicable licenses and responsible person at all such entities;

The delivery, endorsement or assignment of such warranties shall not release the Design-Builder from obligations pursuant to the Design-Build Documents.

§ 3.1.12.4 If the Design-Builder fails to commence to correct defective or nonconforming Work within three (3) business days from written notice to Design-Builder, the Owner may correct such defective or nonconforming Work. If the Design-Builder commences to correct such defective or nonconforming Work but fails to diligently and continuously work on such correction, the Owner may upon an additional three (3) business days' notice to Design-Builder, correct such item at Design-Builder and Surety's sole cost and expense. Owner may deduct such costs from any monies due Design-Builder. If the defective or nonconforming Work is discovered after final payment, then Design-Builder and its Surety shall pay such cost and expense, including attorney's fees incurred. The Design-Builder and its Surety shall bear all costs of correcting such defective Work.

§ 3.1.12.5 The warranty obligations of this Article shall survive completion and final payment or termination of this Contract for the Work performed to the date of termination.

§ 3.1.12.6 In the case of an emergency, Design-Builder, within twenty four (24) hours of written notice by Owner, shall diligently and continuously pursue any necessary repairs or replacements of defects until corrected and will restore the Work to the condition required by the Design-Build Documents. Design-Builder shall restore surface, subsurface, collateral and primary conditions disturbed during warranty work to their prior condition. Design-Builder agrees that if Design-Builder fails to diligently pursue correction of any deficiency in a continuous and expeditious manner until completion, Owner may, in its sole discretion, correct such deficiencies at Design-Builder and Design-Builder's sole and exclusive expense and that such action shall not invalidate any conditions of the Design-Build Documents. Design-Builder and its Surety shall indemnify and hold Owner harmless from any claims, loss, damage or expense due to defects in the Work.

§ 3.1.12.7 Design-Builder and its Surety, jointly and severally, shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of the Owner or separate contractors caused by the correction or removal of Work which is not in accordance with the requirements of the Design-Build Documents without reimbursement from the Owner.

§ 3.1.12.8 If the Owner prefers to accept Work which is not in accordance with the requirements of the Design-Build Documents, the Owner may do so in writing 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.

3.1.13 Requests for Information. Where appropriate, Design-Builder shall transmit to Owner's Representative requests for information or interpretation from itself or as made by any Subcontractor regarding the intent of the design criteria. Design-Builder shall maintain a log of all requests for information (the "Request Log"), recording: (a) the date each request was made; (b) the date the request was transmitted to Owner's Representative; (c) the date of receipt of the response to the request; and, if applicable; (d) the date the response to the request was transmitted to the Subcontractor. The request shall be a part of the minutes required in Section 3.1.5 for Progress Meetings.

§ 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 Owner 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 Owner, or where the copyright violations are required in the Owner's Criteria. However, if the Design-Builder has reason to believe that the design, process or product required in the Owner'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 Owner. If the Owner receives notice from a patent or copyright owner of an alleged violation of a patent or copyright, attributable to the Design-Builder, the Owner 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 defend, indemnify and hold harmless the Owner, including the Owner's officers, employees, agents, and instrumentalities, from and against claims, damages, losses and expenses, including but not limited to attorneys' fees (at trial or appellate levels), arising out of or resulting from performance of the Work, but only to the extent caused by the negligent acts or omissions of the Design-Builder, Architect, a Consultant, a Subcontractor, or anyone directly or indirectly employed by Design-Builder or anyone for whose acts Design-Builder may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. 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 Section 3.1.14.

§ 3.1.14.2 In any and all claims against the Indemnified Parties by any employee of the Design-Builder, or anyone for whose acts any of them may be liable, the indemnification obligation under this provision of this Contract shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or on behalf of the Design-Builder, Architect, a Consultant, or a Subcontractor under Workers Compensation Acts, Disability Benefit Acts or other employee benefit acts.

§ 3.1.14.3 The Parties hereto acknowledge and agree that, to the extent any portion of the indemnification provisions contained herein is deemed void or unenforceable in any action or proceeding, then such portion shall be considered severed such that it will not affect the remaining portions of these indemnification provisions.

§ 3.1.14.4 The Indemnitors' indemnity obligations under this Section shall also specifically include, without limitation, all claims, fines, penalties, damages, liability, costs, fees, expenses (including, without limitation, reasonable attorneys' fees and expenses), arising out of, or in connection with or attributable to, any claims made against the Indemnified Parties for (i) bodily injury, sickness, disease, death, or destruction of tangible property caused by the Design-Builder and/or any of the Indemnitors, or any person or entity for whom they are responsible, (ii) violation of or failure to comply with any law, statute, ordinance, rule, regulation, code or requirement of a public authority that bears upon the performance of the Work by the Design-Builder, and/or any of the Indemnitors, or any person or entity for whom they are responsible, (iii) Design-Builder's failure to comply with any provision of the Design-Build Documents including Warranty obligations, and obligations to correct damaged and defective work, (iv) means, methods, procedures, techniques, or sequences of execution or performance of the Work, and/or (v) failure to secure permits, fees, approvals, licenses, and inspections as required under this Contract and/or the other the Design-Build Documents, or any violation of any permit or other approval of a public authority applicable to the Work, by the Design-Builder and/or any of the Indemnitors, or any person or entity for whom they are responsible. Moreover, and without limiting the foregoing, the Indemnitor's indemnity obligations under this Section include any and all claims by third parties against Indemnified Parties for consequential damages arising from and/or in connection with this Contract and/or the performance and/or failure of the Work to the extent Design-Builder, or a party for which Design-Builder is responsible, has caused or contributed to such claims.

§ 3.1.14.5 The Design-Builder shall indemnify and hold harmless all of the Indemnified Parties from and against any costs and expenses (including reasonable attorneys' fees for all trial and appellate levels) incurred by any of the Indemnified Parties in enforcing any of the Design-Builder's defense, indemnity and hold-harmless obligations under this Contract.

§ 3.1.14.6 The Design-Builder shall include in all Subcontracts provisions by which each Subcontractor agrees to defend, indemnify and hold harmless Design-Builder and the Indemnified Parties from and against liability, damages, losses and costs, including, but not limited to, reasonable attorneys' fees for all trial and appellate levels, arising out of, in connection with, or resulting from the performance of the Work or any Subcontractor's obligations under the

Design-Build Documents to the same extent and in the same manner as the Design-Builder is liable to Owner pursuant to this provision.

§ 3.1.14.7 The provisions of this Section shall survive final acceptance and final payment or termination of this Contract.

§ 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 Owner, provided that:

- .1 assignment is effective only after termination of the Contract by the Owner for cause, pursuant to Sections 13.1.4 or 13.2.2, and only for those agreements that the Owner accepts by written notification to the Design-Builder and the Architect, Consultants, and Subcontractors 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 Owner accepts the assignment of an agreement, the Owner 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 Owner under this Section 3.1.15, the Owner may further assign the agreement to a successor design-builder or other entity. If the Owner assigns the agreement to a successor design-builder or other entity, the Owner shall nevertheless remain legally responsible for all of the successor design-builder's or other entity's obligations under the agreement.

§ 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 D**.

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 Owner, shall be for the purpose of facilitating the design process and shall not modify the Owner's Criteria unless the Owner and Design-Builder execute a written Modification.

§ 4.1.2 The Design-Builder shall advise the Owner on proposed site use and improvements, selection of materials, and building systems and equipment. The Design-Builder shall also provide the Owner with recommendations, consistent with the Owner's Criteria, on constructability; availability of materials and labor; time requirements for procurement, installation and construction; and value engineering, including but not limited to 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.

§ 4.1.3 The Design-Builder accepts the position of trust as the Owner's fiduciary, and will at all times work in good faith, in the Owner's best interests. Design-Builder will deliver to the Owner the most efficient design to achieve Owner's business goals and within budgets and timelines required by the Owner. The Design-Builder shall be responsible for and involved in the end product to assure all of Owner's concepts are incorporated in final design-build documents.

§ 4.1.4 The Design-Builder represents that it is competent and dependable to perform the duties described herein, including but not limited to completing its services in accordance with the Project Schedule and budget.

Article 4.2 Scope of Work for Phase 1 and Phase 2 Services

4.2.1 Phased Delivery. Owner and Design-Builder will implement the Project on a phased basis.

4.2.2 Phase 1 Services. Owner has selected Design-Builder on the basis of Design-Builder's proposal for the performance of design, pricing, and other services for the Project during Phase 1. Phase I deliverables include 1. Schematic Design Documents (SD), 2. 30% Design Development Documents/Site Plan Approval Documents (DD), 3. 60% Construction Documents (60% CD's), 4. A Guaranteed Maximum Price (GMP) Proposal, and 5. Permit Documents. The GMP Proposal shall be submitted 45 days after Owner's approval of the 60% Construction Documents deliverable. Owner shall provide approval of GMP via the GMP Amendment within 21 days from Design-Builders Submittal. Design-Builder shall perform such services to the level of completion required for Design-Builder and Owner to establish the Design-Build Amendment for Phase 2, as set forth in Section 4.2.3 below. The Design-Build Amendment for Phase 2 shall be developed during Phase 1 on an "Open-Book" basis. Upon approval of the 60% Construction Documents, Design-Builder shall proceed with the Permit Documents, in parallel with development of the GMP Proposal, and submit the drawings for a Building Permit along with any required permit applications. Design-Builder's level of completion and compensation for Phase 1 Services is set forth in Exhibit K, Phase 1 Services. Owner shall review all design deliverables (SD, DD and 60% CD's, GMP and Permit Documents including Specifications) and provide all comments to Design Builder within 21 days of Design-Builders Submittal for each deliverable contained in Phase I. Owner may at its option request Design-Builder to provide a proposal for demolition of existing structure(s).

4.2.3 Phase 2 Services. Design-Builder's Phase 2 services shall consist of the completion of the Project, design construction administration, the procurement of all materials and equipment for the Project, the performance of construction services for the Project, the start-up, testing, and commissioning of the Project, and the provision of warranty services, all as further described in Exhibit L, Design-Build Amendment. Upon receipt of Design-Build Amendment for Phase 2, Owner may (a) accept the Contract Sum and issue a Notice to Proceed with Phase 2 services, or (b) enter into a negotiation with Design-Builder on the scope and Contract Sum, and, if required, on the schedule, for Phase 2 services to achieve a mutually acceptable basis on which to proceed, or (c) reject Design-Builder's proposal for Phase 2 and either (i) cancel the Project, (ii) proceed with

another Design-Builder, or (iii) exercise the "off-ramp" final design provisions of Section 4.3, *Off-Ramp*. The Contract Sum for Phase 2 Services will be as set forth in Section 2.2 when mutually agreed between the parties, and this Contract shall be amended to add the agreed-upon Contract Sum for Phase 2 Services in Exhibit L. Once the parties have agreed upon the Contract Sum and Owner has issued a Notice to Proceed and necessary permissions have been issued by the AHJ the Design-Builder shall perform the Phase 2 services.

4.3 Off-Ramp

4.3.1 The parties acknowledge that Owner's ability to successfully complete the Project may be significantly impacted if Owner elects to terminate Design-Builder's services at the end of Phase 1, rather than proceeding to Phase 2 under Section 4.2.3 ("Phase 2 Services") and certain design subconsultants are not available to continue working on the Project. Consequently, Design-Builder hereby agrees that if Owner terminates Design-Builder for any reason. Owner shall have the right to contract directly with such design subconsultants for design-related services on this Project under a separate negotiated Agreement with the

Design Consultants, and Design-Builder shall take such steps as are reasonably necessary to enable Owner to implement such relationship. Owner shall have the right to negotiate directly with such design subconsultants for the continuation of their services with respect to the Project, and that any provisions with respect to copyright or the ownership of instruments of service confirm such right of Owner.

4.3.2 If the parties are unable to reach an agreement on Design-Builder's proposed Contract Sum for Phase 2 under Section 4.2.3 within the time limit for acceptance specified in the Proposal, as may be extended by the mutual agreement of the parties, then the proposed Contract Sum shall be deemed withdrawn and of no effect. In such event, Owner and Design-Builder shall meet and confer as to how the Project will proceed, with Owner having the following options:

.1 Owner may declare Phase 1 Services completed and authorize Design-Builder to continue to advance the final design of the Project as an extension of Phase 1 or as an Additional Service, as applicable; or

.2 Owner may terminate the relationship with Design-Builder and proceed to exercise its available options to perform the construction with parties other than Design-Builder.

4.3.3 If Owner fails to exercise either of its options under Section 4.3.2 in a reasonable period of time, Design-Builder may give written notice to Owner that it considers this Contract completed. If Owner fails to exercise either of the options under Section 4.3.2 within ten (10) days of receipt of Design-Builder's notice, then this Contract shall be deemed completed.

4.3.4 If Owner terminates the relationship with Design-Builder under Section 4.3.2.2, or if this Contract is deemed completed under Section 4.3.3, then Design-Builder shall have no further liability or obligations to Owner under this Contract.

ARTICLE 5 WORK FOLLOWING EXECUTION OF THE DESIGN-BUILD AMENDMENT

§ 5.1 Phase 2 Documents

§ 5.1.1 The Phase 2 Services shall commence on the date within ten (10) days of Design-Builder's receipt of City's Phase 2 Notice to Proceed unless the parties mutually agree otherwise in writing

§ 5.1.2 Design-Builder shall submit to Owner Construction Documents setting forth in detail drawings and specifications describing the requirements for construction of the Work. The Construction Documents shall be consistent with the latest set of interim design submissions, as such submissions may have been modified in a design review meeting and recorded in the meetings minutes. Design-Builder shall proceed with construction in accordance with the Construction Documents and shall submit three (3) sets of Construction Documents to Owner prior to commencement of construction. The Construction Documents shall establish the quality levels of materials and systems required. The Construction Documents shall be consistent with the Design-Build Documents.

§ 5.1.3 The Design-Builder shall provide the Construction Documents to the Owner for the Owner's information. If the Owner discovers any deviations between the Construction Documents and the Design-Build Documents, the Owner shall notify the Design-Builder of such deviations in writing. The Construction Documents shall not modify the Design-Build Documents unless the Owner and Design-Builder execute a written Modification. The failure of the Owner 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 § 5.2.2, construction shall not commence prior to execution of the Design-Build Amendment.

§ 5.2.2 If the Owner 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 Owner'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.

§ 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 or herein, 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.

§ 5.3.1.1 Direct Purchase

The Owner is tax exempt and upon agreement with the Design-Builder may purchase directly various construction materials, supplies and equipment that may be part of this Contract. If direct purchases are to be made by the Owner, the Owner will, via its purchase orders, purchase the materials and the Design-Builder shall assist the Owner in the preparation of purchase orders. The Owner may direct the Design-Builder to prepare the purchase order on the Owner's form and make ready for verification and execution by the Owner. The materials may be purchased from the vendors/suppliers selected by the Design-Builder, for the price originally negotiated by the Design-Builder. The Design-Builder will prepare a list of materials, supplies and equipment and the Owner will advise the Design-Builder which items from the list it wishes to purchase directly, with enough lead time to allow this request to be incorporated into the overall construction schedule.

ISSUANCE OF THE PURCHASE ORDERS BY THE OWNER DOES NOT CHANGE ANY OF THE DESIGN-BUILDER'S RESPONSIBILITIES REGARDING MATERIAL PURCHASES, OR INSTALLATIONS, WITH THE SOLE EXCEPTION OF THE PAYMENTS FOR THE MATERIALS SO PURCHASED AND THE CONSEQUENCES OF NON-PAYMENT BY OWNER. The Design-Builder remains fully responsible for all other obligations it has under the terms of this Contract regarding materials purchased, including but not limited to, coordination of the work including ordering of materials, correct quantities ordered, submittals, protection, storage, scheduling, shipping, security, expediting, receiving, checking shipping tickets, and invoices, installation, cleaning, and all applicable warranties. Regardless of any direct purchase, the Design-Builder remains responsible for ensuring that all materials purchased meet the requirements of the Contract Documents.

In the event that materials, supplies, or equipment purchased under this option, are defective or rejected for any reason whatsoever, and it becomes necessary in the opinion of the Design-Builder to initiate legal action against the responsible party, the Owner agrees to assign and subordinate to the Design-Builder any claims the Owner has against the responsible party resulting from the purchase order and to execute any legal documents necessary to accomplish the assignment, subordination or subrogation of such claims, and to cooperate with the Design-Builder in such legal action.

§ 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. If a proposed substitution modifies the design standards set forth in the Contract, then the Design-Builder shall submit the proposed substitution to the Owner for review and approval.

§ 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 – Materials Stored.

The City will pay for materials stored at the site or at a City approved, bonded and insured warehouse or facility.

§ 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. Permit fees will be included as a permit allowance and will be included in monthly Payment Applications as required at actual costs with no mark-up permitted.

§ 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 provide written notice to the Owner within three (3) calendar days after first observance of the conditions. The Owner shall promptly investigate such conditions and, if the Owner 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 Time. If the Owner 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 Owner shall promptly notify the Design-Builder in writing, stating the reasons. If the Design-Builder disputes the Owner'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 Owner. Upon receipt of such notice, the Owner 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 Owner 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 Owner 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. Where there is a savings on a deletion of any allowance, Owner shall receive a credit for the deletion plus a proportionate credit of Ten Percent (10%) for Design-Builder's overhead and profit.

§ 5.6.3 The Owner shall make selections of materials and equipment with reasonable promptness for allowances requiring Owner selection.

§ 5.7 Key Personnel, Subcontractors and Suppliers

§ 5.7.1 The Design-Builder shall not employ personnel, or contract with Subcontractors or suppliers to whom the Owner 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, Subcontractors or suppliers identified in the Design-Build Amendment, the Design-Builder shall notify the Owner in writing and provide the name and qualifications of the new personnel, Subcontractor or supplier. The Owner may reply within fourteen (14) calendar days to the Design-Builder in writing, stating (1) whether the Owner has reasonable objection to the proposed personnel, Subcontractor or supplier or (2) that the Owner requires additional time to review.

§ 5.7.3 Except for those persons or entities already identified or required in the Design-Build Amendment, the Design-Builder, within fourteen (14) calendar days after execution of the Design-Build Amendment, shall furnish in writing to the Owner 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 Owner may reply within fourteen (14) days to the Design-Builder in writing stating (1) whether the Owner has reasonable objection to any such proposed person or entity or (2) that the Owner requires additional time for review.

§ 5.7.3.1 If the Owner has reasonable objection to a person or entity proposed by the Design-Builder, the Design-Builder shall propose another to whom the Owner has no reasonable objection. This process shall continue pursuant to Section 5.7 until the Owner accepts the substitution.

§ 5.8 Documents and Submittals at the Site

The Design-Builder shall maintain at the site 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 Owner in accordance with **§ 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 shall obtain Owner's Representative's authorization before establishing staging or "lay-down" areas. If the Work requires the use of sidewalks, public ways or other areas outside of the Owner's Project site, the Design-Builder shall be responsible for obtaining all necessary approvals for such work, and Design-Builder shall secure and Owner shall reimburse for all necessary permits, including but not limited to road closure permits. The Design-Builder shall also arrange for and pay for all local police and fire officers and personnel required to be present at or adjacent to the Project site in connection with the Work. The Design-Builder must secure all materials and equipment that are stored on the Project site and shall take all safety precautions necessary to protect such materials and equipment. The Design-Builder shall be responsible, as a Cost of the Work included as part of the Contract Sum, for all measures to protect the Project site and property adjacent to the Project, from the Design-Builder's Work. The Design-Builder shall be responsible for all damages and costs for failure to comply with this section.

§ 5.9.1 Except for the Design-Builder, no other entity for whom the Design-Builder is responsible shall erect any sign on the Project site without the prior written consent of the Owner.

§ 5.10 Cutting and Patching

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

§ 5.11 Cleaning Up

§ 5.11.1 On a daily basis, the Design-Builder shall keep the Project, the site, 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, at its sole cost and expense, all 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 Owner may do so and Owner shall be entitled to reimbursement from the Design-Builder, or Owner may deduct the cost of cleanup from any amounts due the Design-Builder.

§ 5.11.3 Design-Builder agrees to immediately repair at its sole cost and expense all damages to the Property, including, but not limited to, any damages to real or personal property arising from or relating to Design-Builder's performance of the Work to the reasonable satisfaction of the Owner.

§ 5.12 Access to Work

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

§ 5.13 Construction by Owner or by Separate Contractors

§ 5.13.1 Owner's Right to Perform Construction and to Award Separate Contracts

§ 5.13.1.1 The term "Separate Contractor(s)" shall mean other contractors retained by the Owner under separate agreements. The Owner reserves the right to perform construction or operations related to the Project with the Owner'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 similar to this Contract, including those terms and conditions related to insurance and waiver of subrogation. The Owner shall notify the Design-Builder within a reasonable time after execution of any separate contract.

§ 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 Owner.

§ 5.13.1.3 The Owner shall provide for coordination of the activities of the Owner’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 Owner 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 Owner until subsequently revised.

§ 5.14 Mutual Responsibility

§ 5.14.1 The Design-Builder shall afford the Owner 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 Owner or a separate contractor, the Design-Builder shall, seven (7) days prior to proceeding with that portion of the Work prepare a written report to the Owner, identifying apparent discrepancies or defects in the construction or operations by the Owner 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 Owner’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 by a design-builder with Design-Builder’s knowledge, experience, and skill.

§ 5.14.3 The Design-Builder shall reimburse the Owner for costs the Owner incurs that are payable to a separate contractor because of the Design-Builder’s delays, improperly timed activities 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 Owner or separate contractors.

§ 5.14.5 The Owner 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 Owner or separate contractors.

§ 5.15 Owner’s Right to Clean Up

If a dispute arises among the Design-Builder, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the Project, the site, the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and allocate the cost among those responsible, and the Owner may deduct the allocated cost of cleanup from any amounts due the Design-Builder.

ARTICLE 6 CHANGES IN THE WORK

§ 6.1 General

§ 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 limitations 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 Owner and Design-Builder. The Owner 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. Once agreed terms have been reached, the Design-Builder shall proceed promptly with changes in the Work, unless otherwise provided in the Change Order or Change Directive.

§ 6.2 Change Orders

§ 6.2.1 A Change Order is a written instrument signed by the Owner 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; and
- .3 The extent of the adjustment, if any, in the Contract Time.

§ 6.2.2 All Claims arising out of or relating to a Change Order shall be deemed waived unless expressly reserved in such Change Order. Design-Builder is specifically prohibited from unilaterally preserving Claims, including Claims for extension of the Contract Time. Notwithstanding any other provision to the Contract, only the Owner will have authority to authorize changes to the Design-Build Documents.

§ 6.2.3 Agreement on any Change Order shall constitute a final settlement of all matters which the Design-Builder knew or should have known relating to the change in the Work that is the subject of the Change Order, including but not limited to all direct and indirect costs associated with such change and all adjustments to the Contract Sum and Contract Time. If Owner and Design-Builder cannot agree on the amount of the adjustment to Contract Sum or Contract Time, the Owner and Design-Builder shall execute a Change Order that includes a reservation of Claim rights for the portion of the adjustment to Contract Sum and Contract Time not accepted by the Owner.

§ 6.2.4 Change Order requests shall not be considered unless and until submitted in writing to the Owner together with documentation detailing the change and supporting the requested increase or decrease in the Contract Sum and/or Contract Time. Such documentation must show: (i) all materials by quantity and price, (ii) all labor by unit price, (iii) insurance, (iv) permits, (v) payroll taxes and employee benefits, (vi) equipment by quantity and rate, (vii) Subcontractor markup (limited to fifteen percent (15%) for overhead and profit) unless otherwise approved in writing by Owner, (viii) Design-Builder's Fee; (ix) a clear and concise statement of the basis for the claim, including dates and names of parties and people involved, with back up information, Design-Build Documents relied upon, including reference to sections of the Drawings and Specifications, daily reports, weather reports, meeting minutes, correspondence and the like; and (x) an updated schedule meeting the requirements of the Design-Build Documents, showing the impact of the Change to the agreed upon Project Schedule.

§ 6.2.5 Under no circumstances shall an increase in the cost of materials or labor be considered the basis for a Claims by the Design-Builder for additional compensation, no matter how severe the increase of the cost of the materials or labor to the Design-Builder.

§ 6.2.6 In the event of any dispute between Owner and Design-Builder arising out or relating to the requirements of the Contract, any modification, or the terms of a pending Change Order, the Design Builder shall continue to perform the Work, including any Work required by pending Change Orders (if specifically ordered by Owner in writing to perform said disputed Work), and Owner shall continue to make payments of undisputed sums in accordance with the Design-Build Documents, pending final resolution of such dispute.

§ 6.3 Change Directives

§ 6.3.1 A Change Directive is a written order signed by the Owner 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 Owner 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 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 **§ 6.3.6**.

§ 6.3.4 Within seven (7) days of receipt of a Change Directive, the Design-Builder shall proceed with the change in the Work involved and advise the Owner 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.

§ 6.3.5 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 and Design-Builder shall bill for and include any undisputed costs for the completed work.

§ 6.3.6 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 Owner 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 Contract, or if no such amount is set forth in the Contract, a reasonable amount. In such case, the Design-Builder shall keep and present, in such form as the Owner 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 6.3.6 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, provided that subcontractors may not charge more than fifteen percent (15%) for overhead and profit on their direct costs of the changed work unless otherwise approved in writing by the Owner;
- .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.

§ 6.3.7 The amount of credit to be allowed by the Design-Builder to the Owner 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.

§ 6.3.8 Pending final determination of the total cost of a Change Directive to the Owner, the Design-Builder may request payment for Work completed under the Change Directive in Applications for Payment. The Owner will make an interim determination for purposes of certification for payment for those costs deemed to be reasonably justified. The Owner'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.

§ 6.3.9 When the Owner 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 Owner and Design-Builder shall execute a Change Order. Change Orders may be issued for all or any part of a Change Directive.

ARTICLE 7 OWNER'S RESPONSIBILITIES

§ 7.1 General

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

§ 7.1.2 The Owner shall render decisions in a timely manner and in accordance with the Design-Builder's schedule agreed to by the Owner. The Owner shall furnish to the Design-Builder, within fourteen (14) days after receipt of a written request, information necessary and relevant for the Design-Builder to evaluate, give notice of or enforce construction 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 Owner's interest therein.

§ 7.2 Information and Services Required of the Owner

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

§ 7.2.2 The Owner shall provide, to the extent under the Owner's control and if not required by the Design-Build Documents to be provided by the Design-Builder available information as presented in the Design Criteria Package, Appendix G. conducted for the Project.

§ 7.2.3 The Owner 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 services, information, surveys and reports required to be provided by the Owner under this Contract, shall be furnished at the Owner's expense, and except as otherwise specifically provided in this Contract or elsewhere in the Design-Build Documents or to the extent the Owner advises the Design-Builder to the contrary in writing, Owner does not make any representations as to the accuracy or completeness of the documents or any information contained in said documents and Design-Builder shall be responsible for verifying the accuracy and completeness of the document and information provided prior to using or relying upon said documents or information. In no event shall the Design-Builder be relieved of its responsibility to exercise proper precautions relating to the safe performance of the Work. Any additional work, regardless of the nature and scope, required as a result of said surveys, tests, reports or plans in order to complete the Work shall be performed at Design-Builder's expense.

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

§ 7.2.6 Prior to the execution of the Design-Build Amendment, the Design-Builder may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner'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 Owner 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 Owner's ability to make payment when due. The Owner 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 Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Design-Builder.

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

§ 7.2.8 The Owner shall purchase and maintain insurance as set forth in **Exhibit D**.

§ 7.3 Submittals

§ 7.3.1 The Owner's Representative 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 Owner's Representative's action will be taken in accordance with the submittal schedule approved by the Owner's Representative or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time in the Owner's Representative's judgment to permit adequate review. The Owner's Representative'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 or other obligations contained in the Design-Build Documents. The Owner's Representative's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Owner's Representative, of any construction means, methods, techniques, sequences or procedures. The Owner's Representative'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 Owner's Representative shall notify the Design-Builder of any non-conformance with the Design-Build Documents the Owner's Representative discovers.

§ 7.4 Visits to the site by the Owner and/or Owner's Representative shall not be construed to create an obligation on the part of the Owner and/or Owner's Representative to make on-site inspections to check the quality or quantity of the Work. The Owner and/or Owner's Representative 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 Owner and/or Owner's Representative 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 Owner and/or Owner's Representative shall not have control over or charge of, and will not be responsible for, acts or omissions of the Design-Builder, Architect, Consultants, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work for the Design-Builder.

§ 7.6 The Owner and/or Owner's Representative has the authority to reject Work that does not conform to the Design-Build Documents. The Owner and/or Owner's Representative 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 Owner and/or Owner's Representative 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 Owner and/or Owner's Representative to the Design-Builder, the Architect, Consultants, Subcontractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.

§ 7.7 The Owner shall determine the date or dates of Substantial Completion in accordance with Section 9.8 and the date of Final Acceptance in accordance with Section 9.10.

§ 7.8 Owner'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 or fails to carry out Work in accordance with the Design-Build Documents, the Owner 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 Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Design-Builder or any other person or entity.

§ 7.9 Owner'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-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may, without prejudice to other remedies the Owner may have, correct such default or neglect. 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 Owner.

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 Owner 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 (1) an act or neglect of the Owner or of a consultant or separate contractor employed by the Owner; or (2) by changes ordered in the Work; or (3) by labor disputes, fire, unusual delay in deliveries impacting the Palm Beach County, Florida construction industry, unavoidable casualties, unusual and unforeseeable "Acts of God", or other causes beyond the Design-Builder's control (e.g. Acts of God include unavoidable labor disputes, unavoidable inability to procure materials, failure of power not resulting from the Owner's or Design-Builder's actions or omissions, restrictive governmental laws enacted or taking effect after the Effective Date of this Contract, riots, insurrections, wars, fire, hurricanes, unusually severe and prolonged bad weather, or other reason of a like nature not the fault of the party delayed in doing work or doing acts required under the Contract Documents). ; or (4) by delay authorized by the Owner pending mediation and binding dispute resolution or by other causes that the Owner determines may justify

delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Owner may determine is justified by the impact. In no event will problems with Design-Builder's Subcontractors, suppliers or employees entitle the Design-Builder to an extension of the contract times or deadlines.

§ 8.2.2 Adjustments in the Contract Time will be permitted for a delay only to the extent such delay (1) is not caused by the Design-Builder or any persons/entities under its control; (2) could not be avoided by the Design-Builder's timely notice to the Owner of the delay; (3) is of a duration not less than one (1) Business day; (4) impacts the critical path of the Project and (5) was reasonably mitigated by the Design-Builder. All requests for extensions of time other than those associated with changes in the Work, must be submitted in writing to the Owner within fourteen (14) days of the event giving rise to the delay. Failure to so request an extension will constitute a waiver of any right for an extension of time.

§ 8.2.3 No Damage for Delays. Except for delays due to the gross negligence of the Owner or active interference by the Owner, Design-Builder's sole and exclusive remedy for delays shall be an increase to the Contract Time. Design-Builder shall not be entitled to an increase in the Contract Sum or to payment of any other additional monies from Owner for costs incurred as a result of such delay, including additional or extended General Conditions costs or General Requirements costs. Owner's exercise of its rights under this Contract shall in no way be considered active interference.

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

§ 8.3 Owner's Delay and Entitlement to Liquidated Damages

§ 8.3.1 The Design-Builder acknowledges that the Contract Time for the Substantial Completion of the Work requires that the Substantial Completion of the entire Work occur on or before specified date(s) as provided in the Contract, subject to any extensions of the Contract Time. The Design-Builder acknowledges and agrees that the Owner will suffer financial loss in the event of Design-Builder caused delay and Owner shall be entitled to liquidated damages as provided in Article 14 of the Contract.

ARTICLE 9 PAYMENT APPLICATIONS AND PROJECT COMPLETION

§ 9.1 Contract Sum

The Contract Sum is stated in the Design-Build Amendment and, including authorized adjustments, is the total amount payable by the Owner to the Design-Builder for performance of the Work under the Design-Build Documents.

§ 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 Owner 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 Owner may require. This schedule, once approved by the Owner in writing, shall be used as a basis for reviewing the Design-Builder's Applications for Payment. Any changes to the schedule of values shall be submitted to the Owner and supported by such data to substantiate its accuracy as the Owner may require, and once approved by the Owner in writing, shall be used as a basis for reviewing the Design-Builder's subsequent Applications for Payment.

§ 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 Owner's Representative for review and certification, an itemized Application for Payment for completed portions of the Work. The application shall be notarized, if required, and supported by data and documents substantiating the Design-Builder's right to payment as the Owner may require, such as copies of requisitions from the Architect, Consultants, Subcontractors, and material suppliers, and shall reflect retainage per Florida Statute

255.078. . The period covered by each Application for Payment shall be one calendar month ending on the last day of the month. Applications for Payment 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.

§ 9.3.1.1 Along with the Design-Builder's Application for Payment, Design-Builder shall submit to Owner the following;

- .1 a sworn and certified progress payment affidavit which recites that all laborers, material suppliers and subcontractors dealing with the Design-Builder have been paid in full as relating to all Work performed under all prior applications;
- .2 partial conditional releases of lien from Design-Builder, material suppliers and subcontractors and any lienors serving a Notice to Owner and evidence of proof of payment of any indebtedness incurred with respect to the Work of Design-Builder as may be required by Owner;
- .3 evidence that all Work has been fully performed as required pursuant to the Design-Build Documents up to the time of the request for payment, and the Work has been inspected and accepted by the Architect and any governmental authorities required to inspect the Work;
- .4 proof of all required inspections by the manufacturers' representative for equipment and supplies or other acceptable documentation by the manufacturers' representative for equipment and supplies that all applicable items have been installed in accordance with the manufacturers' requirements for valid warranties;
- .5 an updated construction schedule meeting the requirements of the Design-Build Documents;
- .5 updated record drawings, and
- .6 any other document or information required elsewhere in the Design-Build Documents as a condition precedence to payment.

§ 9.3.1.2 Release of Liens.

Each release of lien given to the Owner shall waive and release any lien rights and claims of the lienors to the extent payment is made with respect to any Work performed through the date of that progress payment other than Claims reserved in writing. Design-Builder shall submit a partial release of lien for the current Application for Payment, submit partial releases of lien from all lienors through the date of the last previous payment made, and submit a partial release of lien conditioned only upon payment from Design-Builder, through the date of the current Application for Payment. For Final Payment, Design-Builder must submit a Final Release of Lien for itself and for all lienors. Each Final Release of Lien shall include a provision for the release of all Claims and causes of action other than Claims reserved in writing pursuant to the Contract.

§ 9.3.1.3 As provided in Section 6.3.8, 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 Owner, but not yet included in Change Orders.

§ 9.3.1.4 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, Subcontractor, 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. Further, with regard to retainage, Design-Builder may not hold retainage from the Architect, Consultant, Subconsultant, material supplier, or other persons or entities providing services or work to the Design-Builder in any amount greater than the amount or corresponding percentage that Owner is holding from Design-Builder.

§ 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 Owner, 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 Owner to establish the

Owner's title to such materials and equipment or otherwise protect the Owner'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.

§ 9.3.3 The Design-Builder warrants that title to all Work covered by an Application for Payment will pass to the Owner 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 Owner 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.

§ 9.4 Certificates for Payment

The Owner shall, within fourteen (14) days after receipt of the Design-Builder's Application for Payment, either (1) issue a Certificate for Payment in the full amount of the Application for Payment; or (2) issue a Certificate for Payment for such amount as the Owner determines is properly due, and notify the Design-Builder of the Owner's reasons for withholding certification in part as provided in Section 9.5.1; or (3) withhold certification of the entire Application for Payment, and notify the Design-Builder of the Owner's reason for withholding certification in whole as provided in Section 9.5.1.

§ 9.5 Decisions to Withhold Certification

§ 9.5.1 The Owner may withhold a Certificate for Payment in whole or in part 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 reasonably necessary to protect the Owner due to the Owner'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 Owner is unable to certify payment in the amount of the Application, the Owner will notify the Design-Builder as provided in Section 9.4. If the Design-Builder and Owner cannot agree on a revised amount, the Owner will promptly issue a Certificate for Payment for the amount that the Owner deems to be due and owing. The Owner 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 Owner from loss for which the Design-Builder is responsible because of:

- .1 defective Work, including design and construction, not remedied;
- .2 third party claims or liens filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the Design-Builder;
- .3 failure of the Design-Builder to make payments properly to the Architect, Consultants, Subcontractors 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 Owner 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 the remaining balance of the incomplete work coupled with liquidated damages for the anticipated delay;
- .7 repeated failure to carry out the Work in accordance with the Design-Build Documents;
- .8 failure of the Work to progress satisfactorily or according to the Project Schedule;
- .9 failure to provide releases of lien for each Application for Payment in accordance with the Design-Build Documents; or
- .10 any other failure to perform a material obligation contained in 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 Owner withholds certification for payment under Section 9.5.1.3, the Owner may, at its sole option, issue joint checks to the Design-BUILDER and to the Architect or any Consultants, Subcontractor, 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. However, Owner is under no obligation to issue joint checks and issuance of joint checks does not establish privity between Owner and the party paid. In making such payments to the Architect or any Consultants, Subcontractor, material or equipment suppliers, or other persons or entities providing services or work for the Design-BUILDER, the Owner shall require such lienor to execute a waiver of lien to the extent of payment.

§ 9.6 Progress Payments

§ 9.6.1 After the Owner has issued a Certificate for Payment, the Owner 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, Subcontractor, 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 days after receipt of payment from the Owner the amount to which the Architect, Consultant, Subcontractor, 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, Subcontractor, or other person or entity. The Design-BUILDER shall, by appropriate agreement with each Architect, Consultant, Subcontractor, and other person or entity providing services or work for the Design-BUILDER, require each Architect, Consultant, Subcontractor, 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 Owner will, on written request and if practicable, furnish to the Architect, Consultant, Subcontractor, 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 Owner on account of portions of the Work done by such Architect, Consultant, Subcontractor or other person or entity providing services or work for the Design-BUILDER.

§ 9.6.4 The Owner has the right to request written evidence from the Design-BUILDER that the Design-BUILDER has properly paid the Architect, Consultants, Subcontractors, or other person or entity providing services or work for the Design-BUILDER, amounts paid by the Owner to the Design-BUILDER for the Work. If the Design-BUILDER fails to furnish such evidence within seven (7) days, the Owner shall have the right to withhold payment and contact the Architect, Consultants, and Subcontractors to ascertain whether they have been properly paid. The Owner shall have no obligation to pay or to see to the payment of money to a Consultant or Subcontractor, except as may otherwise be required by law. Notwithstanding anything in the Design-Build Documents to the contrary, Owner has the right at any time and any number of times until final payment, to have direct communications with Design Builder's Architect, Consultants, Subcontractors, or other person or entity providing services or work for the Design-BUILDER regarding the Project, the status of the Work and the status of payments. Owner shall copy Design-BUILDER on such communications.

§ 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 Owner shall not constitute acceptance of Work that is not in accordance with the Design-Build Documents.

§ 9.6.7 Unless the Design-BUILDER provides the Owner 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, Subcontractors 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, Subcontractors, or other person or entity providing services or work for the Design-BUILDER, for which payment was made by the Owner. 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.

§ 9.6.9 Payments to Subcontractors by the Owner.

§ 9.6.9.1 If the Owner fails to approve an application for payment for a cause which is the fault of the Design-Builder and not the fault of the Architect or any Consultants, Subcontractor, material or equipment suppliers, or other persons or entities providing services or work for the Design-Builder, or if the Design-Builder fails to make a payment which is properly due to the Architect or any Consultants, Subcontractor, material or equipment suppliers, or other persons or entities providing services or work for the Design-Builder, the Owner may after ten (10) calendar days' written notice to Design-Builder, pay such Architect or any Consultants, Subcontractor, material or equipment suppliers, or other persons or entities providing services or work for the Design-Builder and Design-Builder jointly, less the amount to be retained under his subcontract.

§ 9.6.9.2 The Owner shall have no obligation to pay, or to see to the payment of, any monies to the Architect or any Consultants, Subcontractor, material or equipment suppliers, or other persons or entities providing services or work for the Design-Builder. Nothing contained herein shall be deemed to create any contractual relationship between the Owner and the Architect or any Consultants, Subcontractor, material or equipment suppliers, or other persons or entities providing services or work for the Design-Builder or to create any rights in the Architect or any Consultants, Subcontractor, material or equipment suppliers, or other persons or entities providing services or work for the Design-Builder as against the Owner.

§ 9.6.10 No payments made under this Contract shall be evidence of performance of this Contract, either wholly or in part, and no payment including Final Payment shall be construed to be an acceptance of defective Work or improper materials, nor shall use of the Work by the Owner constitute acceptance of the Work hereunder or any part thereof or a waiver of any of the Owner's claims.

§ 9.6.11 The Owner shall release any payments withheld due to a lien or claim if the Design-Builder obtains written Consent to Payment from Design-Builder's Surety, however, the Design-Builder shall not be relieved of any other responsibilities or obligations under this Article or the Design-Build Documents.

§ 9.6.12 If the Owner is entitled to reimbursement or payment from the Design-Builder under or pursuant to the Design-Build Documents, such payment shall be made promptly upon written demand by the Owner. Notwithstanding anything contained in the Design-Build Documents to the contrary, if the Design-Builder fails to promptly make any undisputed payment due the Owner after such written notice, the Owner shall have an absolute right to offset such amount against the Contract Sum and may, in the Owner's reasonable discretion, elect either to: (1) deduct an amount equal to that which the Owner is entitled from any payment then or thereafter due the Design-Builder from the Owner; (2) issue a written notice to the Design-Builder reducing the Contract Sum by an amount equal to that which the Owner is entitled; or (3) obtain payment from Design-Builder's surety.

§ 9.7 Failure of Payment

If the Owner does not issue a Certificate for Payment regarding undisputed amounts, through no fault of the Design-Builder, within the time required by the Design-Build Documents, then the Design-Builder may, upon fourteen (14) additional days' written notice to the Owner, 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, 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 Owner can occupy or utilize the Work for its intended use and obtain all permits, licenses, and certificates required for such use (unless the same are

delayed for reasons other than the fault of Design-Builder) and the Project obtains a temporary certificate of occupancy or a final certificate of occupancy, whichever occurs first.

§ 9.8.2 Owner Requirements for Substantial Completion

Thirty (30) days prior to Substantial Completion, Design-Builder must notify Owner of all items of which Design-Builder is aware that Owner must take care of in sufficient time for Owner to perform so the Project will not be delayed and Design-Builder must include all such times in its schedule.

§ 9.8.3 Substantial Completion Inspection

When the Design-Builder considers that the entire Work is Substantially Complete, the Architect, Design-Builder, Owner and Owner's Representative shall inspect the Work. Based upon the Substantial Completion Inspection, the Owner's Representative shall prepare, coordinate, and submit to the Design-Builder a detailed list of all remaining Work to be completed or corrected in the Work (the Design-Builder's Substantial Completion Punch List). The Design-Builder's Substantial Completion Punch List will identify all work necessary to be completed or corrected prior to issuance of the Substantial Completion Certificate, and the remaining items the Design-Builder shall correct prior to Final Payment. The Design-Builder shall promptly correct all items listed on the Substantial Completion Inspection List as a condition to the Owner's Certification of Substantial Completion. The Design-Builder shall notify Owner's Representative when all items in the Substantial Completion Punch List necessary for Substantial Completion are complete and correct, and request inspection by the Owner's Representative. The Owner's Representative will conduct an inspection to determine whether the Substantial Completion Punch List is complete. If the Owner Representative's inspection discloses any item, which is not sufficiently complete in accordance with the Design-Build Documents so that the Owner 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 Owner's Representative. In such case, the Design-Builder shall then submit a request for another inspection by the Owner's Representative to determine Substantial Completion. After the second inspection, the Design-Builder shall be responsible for all costs incurred by Owner's Representative to re-inspect the Work a third, fourth or more time to determine Substantial Completion, provided the re-inspection is due to Design-Builder's fault. The Design-Builder's obligation to complete all Work in accordance with the Design-Build Documents shall not be deemed waived, excused, or otherwise satisfied by any failure of any person or entity to include, discover, or identify any incomplete or defective Work in any punch list, completion list, or inspection report.

§ 9.8.5 When the Work or designated portion thereof is substantially complete, and the Design-Builder has completed the items listed on the Substantial Completion Punch List as necessary for the issuance of the Certificate of Substantial Completion, the Owner's Representative will prepare a Certificate of Substantial Completion that shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Design-Builder for security, maintenance, utilities, damage to the Work and insurance. Warranties required by the Design-Build Documents shall commence on the date of Substantial Completion of all of the Work not a designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.

§ 9.8.6 The Certificate of Substantial Completion shall be signed by the Owner and Design-Builder for their written acceptance of responsibilities assigned to them in such Certificate.

§ 9.9 Partial Occupancy or Use and Turnover

§ 9.9.1 The Owner 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 as may be required 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 Owner 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 Owner 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 Owner and Design-Builder.

§ 9.9.2 Immediately prior to such partial occupancy or use, the Owner 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 Acceptance and Final Payment

§ 9.10.1 Final Acceptance of the Project shall be achieved not later than sixty (60) consecutive calendar days from the date of Substantial Completion. When Design-Builder believes that completion of the entire Project has been achieved, it shall notify Owner's Representative in writing and request an inspection for Final Acceptance of the Project. Design-Builder shall thereafter meet on site with Owner and Owner's Representative to determine whether Final Acceptance of the Project has in fact been achieved. Design-Builder's request for such inspection shall constitute a representation by Design-Builder to Owner that Design-Builder has made all inspections of the Work as provided in the contract and that, to the best of Design-Builder's knowledge and belief, all the Work has been completed in compliance with the Contract Documents and that the quality of the Work meets or exceeds the requirements of the Contract Documents. If Owner's Representative agrees that Final Acceptance of the Project has been achieved, Owner's Representative shall execute a Final Acceptance of the Project and will, subject to § 9.10.2, promptly issue a final Certificate for Payment. If Owner's Representative, upon inspection, concludes that Final Acceptance has not been achieved from the fault of the Design-Builder, Subcontractors, and/or any agents thereof and that re-inspection will be necessary, Design-Builder shall bear all costs of same without adjustment to the Guaranteed Maximum Price.

§ 9.10.2 Final payment, including any remaining retention shall not become due until the Owner has issued a final Certificate for Payment and until the Design-Builder submits to the Owner:

- .1 an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work, for which the Owner or the Owner's property might be responsible or encumbered, (less amounts withheld by Owner) 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 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;
- .7 evidence that all Punch List items have been fully completed to the satisfaction of the Owner;
- .8 final releases of lien, waivers of claim, satisfactions of liens or claims, and such other affidavits as may be reasonably required by the Owner and Surety to assure a lien-free and claim-free completion of the Work;
- .9 all original drawings in Design-Builder's possession;
- .10 all Shop Drawings, revised Drawings and related information;
- .11 final As-Built Drawings;
- .12 the Design-Builder has fully cleaned and restored the site, including removal of all rubbish and construction debris;
- .13 the final certificate of occupancy and all final governmental and utility authority permits have been issued and all permits have been closed out, and

- .14 Design-BUILDER has complied with all other requirements of the Design-Build Documents and all reasonable requirements of Owner.

§ 9.10.3 The Design-BUILDER's obligation to complete all Work in accordance with the Design-Build Documents shall not be deemed waived, excused, or otherwise satisfied by any failure of any person or entity to include, discover, or identify any incomplete or defective Work in any punch list, completion list, or inspection report, including without limitation the Substantial Completion Punch List, or any further punch lists. Issuance of Final Payment shall not constitute a waiver of any incomplete or defective Work or of Design-BUILDER's obligations under the Design-Build Documents.

§ 9.10.4 Final payment may be withheld on account of (1) defective Work not remedied, (2) claims or liens filed, (3) failure of the Design-BUILDER to make payments properly to subcontractors or for labor, materials, or equipment, (4) failure to provide waivers of lien for all lienors giving notices, (5) damage to the Owner's property caused by Design-BUILDER or any person/entity for which it is responsible, in which case a reasonable estimated amount of such damages shall be withheld from Design-BUILDER's payment until such damages are satisfactorily corrected, (6) untimely performance, or (7) failure to carry out the Work in accordance with the Design-Build Documents.

§ 9.10.5 Owner may, in its discretion and after providing written notice to Design-BUILDER, make all or any portion of any of the final payment by check payable jointly to the order of Design-BUILDER and any lienor giving timely notice, and deduct said payment from the sum due Design-BUILDER. However, such payment, if made, shall not create any third party beneficiary or other rights in such lienor.

§ 9.10.6 If, after Substantial Completion of the Work, Final Acceptance thereof is materially delayed through no fault of the Design-BUILDER or by issuance of Change Orders affecting Final Acceptance, the Owner 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 Owner 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.

§ 9.10.7 The making of final payment shall not constitute a waiver of Claims by the Owner.

§ 9.10.8 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.

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 Subcontractors, or other person or entity providing services or work for the Design-BUILDER;

- 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;
- 4 Real property and personal property of members of the public whose real property and personal property are affected by this Work.

§ 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 but not limited to posting danger signs and other warnings against hazards, barricades, maintenance of traffic, promulgating safety regulations, and notify owners 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 to property caused in whole or in part by the Design-Builder, the Architect, a Consultant, a Subcontractor, 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 the Design-Build Documents; except damage or loss attributable solely to the grossly negligent acts or omissions of the Owner, or anyone directly or indirectly employed by the Owner, or by anyone for whose acts the Owner may be liable, and not attributable in whole or in part 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, which shall govern this Section.

§ 10.2.6 Any damage to adjacent property or improvements shall be promptly repaired by the Design-Builder, if caused in whole or in part by the Design-Builder, the Architect, a Consultant, a Subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable. The foregoing is not intended to prevent the Design-Builder from making claim against any insurance that may provide coverage to the Subcontractor.

§ 10.2.7 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 and theft. This person shall be the Design-Builder's superintendent unless otherwise designated by the Design-Builder in writing to the Owner.

§ 10.2.8 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.

§ 10.2.9 **Injury or Damage to Person or Property** If the Owner 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, written notice of the injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 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. Design-Builder shall not bring any hazardous materials on the Project site unless specifically required by the Design-Build Documents. 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, take precautions not to exacerbate the conditions and notify in writing the Owner of the condition. Design-Builder shall comply with all applicable federal, state and local environmental laws, codes, ordinances and regulations including, but not limited to, all OSHA requirements and regulations.

§ 10.3.2 Upon receipt of the Design-Builder's written notice, the Owner 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 Owner 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 Owner in writing stating whether or not the Design-Builder has reasonable objection to the persons or entities proposed by the Owner. If the Design-Builder has an objection to a person or entity proposed by the Owner, the Owner 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 Owner 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 The Owner shall indemnify and hold harmless the Design-Builder, the Architect, Consultants, and Subcontractors, and employees of any of them, from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area, if in fact the material or substance presents the risk of bodily injury or death as described in **§ 10.3.1** and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to, or destruction of, tangible property (other than the Work itself), except to the extent that such damage, loss or expense is due to the fault or negligence of the party seeking indemnity.

§ 10.3.4 The Owner shall not be responsible under this Section 10.3 for materials or substances the Design-Builder brings to or causes to be at the site.

§ 10.3.5 The Design-Builder shall indemnify the Owner for the cost and expense the Owner incurs (1) for remediation of a material or substance the Design-Builder brings to the site or negligently handles, (2) for Design-Builder's willful misconduct; or (3) where the Design-Builder fails to perform its obligations under **§ 10.3.1**, except to the extent that the cost and expense are due to the Owner's gross negligence or willful misconduct.

§ 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 Owner 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 Owner 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 the Design-Builder shall not be entitled to a change in the Contract Time unless the condition was caused by the Owner or a separate contractor in which event the Owner 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 Owner 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 Owner whose expenses and compensation were made necessary thereby, including any attorneys' fees incurred by the Owner, shall be at the Design-Builder's expense. The obligations of this Section shall survive completion and final payment or termination of the Contract.

§ 11.2.2 After Substantial Completion

§ 11.2.2.1 In addition to the Design-Builder's obligations under this Contract, if, within one year after the date of Substantial Completion of all the Work or any longer period provided in an Extended Warranty, 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 Owner to do. The Owner shall give such notice promptly after discovery of the condition. If the Design-Builder fails to correct or commence correction of nonconforming Work within five (5) calendar days after receipt of prior reasonable notice by the Owner, the Owner may correct the nonconforming Work. Design-Builder and its surety are obligated to reimburse Owner for all corrective costs and damages incurred as a result of Design-Builder's failure to correct nonconforming Work. This obligation shall survive completion and final payment or termination of the Contract.

§ 11.2.2.2 The one-year period for correction of Work or any longer period provided in an Extended Warranty 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 or any longer period provided in an Extended Warranty shall be extended for corrected Work performed by the Design-Builder pursuant to this Section 11.2.

§ 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 Owner.

§ 11.2.4 The Design-Builder shall bear the cost of correcting destroyed or damaged construction of the Owner 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 Owner prefers to accept Work that is not in accordance with the requirements of the Design-Build Documents, the Owner may do so in writing 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. If payments due to the Design-Builder are insufficient to cover the adjustment, the Design-Builder shall pay the difference to the Owner.

ARTICLE 12 COPYRIGHTS AND LICENSES

§ 12.1 It is understood and agreed that the tangible product of Design-Builder's services, along with the services of all of Design-Builder's consultants, as well as the underlying engineering calculations, and other documents, including those in electronic form, for this Project (the "Design-Build Documents") are being developed by Design-Builder and its Consultants for the sole and exclusive use of Owner and that Owner shall be deemed to be the sole and exclusive owner of all right, title, and interest therein, including all copyright and proprietary rights relating thereto. All work performed by the Design-Builder and its Consultants on the Projects and all Work generated in connection therewith is and shall be considered as 'Works Made for Hire' (as defined under the U.S. Copyright Laws) and, as such, shall be owned by and for the benefit of Owner. Design-Builder is neither an owner nor licensee of same and may not use any Work Product for any other reason, whatsoever, without the express written consent of the Owner. Owner shall have the right to use or not use the Construction Documents and to use and reproduce the Construction Documents as it sees fit and for any purpose upon payment for the services described above.

§ 12.2 The provisions of this Article 12 shall survive the termination of this Contract.

ARTICLE 13 TERMINATION OR SUSPENSION

§ 13.1 Termination or Suspension Prior to Execution of the Design-Build Amendment

§ 13.1.1 If the Owner fails to make payments for a period in violation of Florida's Prompt Payment Act; Florida Statute 715.12, the Design-Builder may, upon seven (7) additional calendar days' written notice to the Owner, suspend or terminate the Work.

§ 13.1.2 If the Owner suspends the Project, the Design-Builder shall be compensated for the Work performed prior to notice of such suspension. When the Project is resumed, the Design-Builder shall be compensated for expenses incurred in the interruption and resumption of the Design-Builder's Work. The Design-Builder's compensation for, and time to complete, the remaining Work shall be equitably adjusted. However, in no event shall the Owner be liable to the Design-Builder for lost profits or Fee on any Work not performed, home office overhead, or any other type of consequential, special or indirect damages. Design-Builder hereby waives all such damages. Payments to the Design-Builder shall be reduced by any setoffs to which the Owner is entitled under this Contract.

§ 13.1.3 If the Owner suspends the Project for more than 90 cumulative days for reasons other than the fault of the Design-Builder, the Design-Builder may terminate this Contract by giving not less than seven (7) calendar days' written notice.

§ 13.1.4 Either party may terminate this Contract upon not less than thirty (30) calendar days' written notice should the other party fail to substantially perform in accordance with the terms of this Contract through no fault of the party initiating the termination.

§ 13.1.5 The Owner may terminate this Contract upon not less than forty-five (45) calendar days' written notice to the Design-Builder for the Owner's convenience and without cause.

§ 13.1.6 In the event of termination not the fault of the Design-Builder, the Design-Builder shall be compensated for Work performed prior to termination, together with Reimbursable Expenses then due and any other expenses directly attributable to termination for which the Design-Builder is not otherwise compensated. In no event shall the Design-Builder's compensation under this Section 13.1.6 be greater than the compensation set forth in Section 2.1.

§ 13.2 Termination or Suspension Following Execution of the Design-Build Amendment

§ 13.2.1 Termination by the Design-Builder

§ 13.2.1.1 If the Owner fails to certify payment as provided in Section 9.4, or if the Owner fails to make payment as provided in Section 13.1.1, the Design-Builder may, upon seven (7) additional calendar days' written notice to the Owner and the Owner's Representative, terminate the Contract.

§ 13.2.1.2 The Design-Builder may terminate the Contract if, through no act or fault of the Design-Builder, the Architect, a Consultant, a Subcontractor, or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Design-Builder, repeated suspensions, delays or interruptions of the entire Work by the Owner as described in Section 13.2.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

§ 13.2.1.3 If one of the reasons described in Section 13.2.1.1 or 13.2.1.2 exists, the Design-Builder may, upon fourteen (14) calendar days' written notice to the Owner, terminate the Contract and recover from the Owner payment for Work executed, including reasonable overhead and profit, costs incurred by reason of such termination, and damages. However, in no event shall the Owner be liable to the Design-Builder for lost profits or Fee on any Work not performed, home office overhead, or any other type of consequential, special or indirect damages. Design-Builder hereby waives all such damages. Payments to the Design-Builder shall be reduced by any setoffs to which the Owner is entitled under this Contract.

§ 13.2.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Design-Builder or any other persons or entities performing portions of the Work under contract with the Design-Builder because the Owner has repeatedly failed to fulfill the Owner's obligations under the Design-Build Documents with respect to matters important to the progress of the Work, the Design-Builder may, upon seven (7) additional calendar days' written notice to the Owner, terminate the Contract and recover from the Owner as provided in Section 13.2.1.3.

§ 13.2.2 Termination by the Owner For Cause

§ 13.2.2.1 The Owner may terminate the Contract if the Design-Builder:

- .1 fails to submit the Proposal by the date required by this Contract, or if no date is indicated, within a reasonable time consistent with the date of Substantial Completion;
- .2 repeatedly refuses or fails to supply an Architect, or enough properly skilled Consultants, Subcontractors, or workers or proper materials;
- .3 fails to make payment to the Architect, Consultants, or Subcontractors for services, materials or labor in accordance with their respective agreements with the Design-Builder;
- .4 disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or
- .5 is otherwise in substantial breach of a provision of the Design-Build Documents;
- .6 admits in writing its inability to pay its debts generally as they become due, or if the Design-Builder makes a general assignment for the benefit of its creditors, or if a receiver, liquidator, trustee or assignee is appointed on account of its bankruptcy or insolvency; or
- .7 submits an Application for Payment, sworn statement, waiver of lien, affidavit or document that is intentionally falsely filed.

§ 13.2.2.2 When any of the above reasons exist, the Owner, may, without prejudice to any other remedy it may have and after giving the Design-Builder and its surety seven (7) day's written notice, terminate the Contract and take possession of the site and all materials, thereon owned by the Design-Builder. Design-Builder's surety shall then promptly complete the Project and failing same, Owner may finish the Work by whatever reasonable method the Owner may deem expedient.

§ 13.2.2.3 When the Owner terminates the Contract for one of the reasons stated in Section 13.2.2.1, the Design-Builder shall not be entitled to receive further payment until the Work is finished.

§ 13.2.2.4 The Owner's right to terminate the Contract, pursuant to this Article, shall be in addition to and not in limitation of any rights or remedies existing hereunder or pursuant thereto or at law or in equity.

§ 13.2.2.5 Should Owner Terminate for Cause and should a court of competent jurisdiction subsequently determine that the Termination for Cause was improper, then in that event, the Termination shall be considered a Termination for Convenience as set forth in Section 13.2.4 below.

§ 13.2.3 Suspension by the Owner for Convenience

§ 13.2.3.1 The Owner may, without cause, order the Design-Builder in writing to suspend, delay or interrupt the Work in whole or in part for such period of 30 calendar days.

§ 13.2.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption as described in Section 13.2.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent:

- .1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Design-Builder is responsible; or
- .2 that an equitable adjustment is made or denied under another provision of the Contract.

§ 13.2.4 Termination by the Owner for Convenience

§ 13.2.4.1 The Owner may, within forty-five (45) calendar day's prior written notice, terminate the Contract for the Owner's convenience and without cause.

§ 13.2.4.2 Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Design-Builder shall:

- .1 cease operations as directed by the Owner in the notice;
- .2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and,
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing Project agreements, including agreements with the Architect, Consultants, Subcontractors, and purchase orders, and enter into no further Project agreements and purchase orders.

§ 13.2.4.3 In case of such termination for the Owner's convenience, the Design-Builder shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination. In the event of Termination for Convenience, the Owner shall not be liable to the Design-Builder for lost profits on any Work not performed, home office overhead, or any other type of consequential, special or indirect damages and Design-Builder hereby waives same. All costs of performance claimed by Design-Builder must be fully supported by the Design-Builder's invoices and other documentation acceptable to the Owner, and shall be subject to the Owner's audit. The Design-Builder shall make its records available at reasonable times and place for the Owner's audit. Payments to the Design-Builder shall be reduced by any setoffs, damages, claims to which the Owner is entitled under this Contract.

§ 13.2.4.4 The Owner's right to terminate the Contract shall be in addition to and not in limitation of any rights or remedies existing hereunder or pursuant thereto or at law or in equity.

ARTICLE 14 CLAIMS AND DISPUTE RESOLUTION

§ 14.1 Claims

§ 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 Owner and Design-Builder arising out of or relating to the Contract. The responsibility

to substantiate Claims shall rest with the party making the Claim. Submittal of a request for Change Order shall not be considered notice of a Claim required by this Article.

§ 14.1.2 Time Limits on Claims. The Owner 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 § 1.3, within the time period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Design-Builder waive all claims and causes of action not commenced in accordance with this § 14.1.2.

§ 14.1.3 Notice of Claims

§ 14.1.3.1 Prior To Final Payment. Prior to Final Payment, Claims by the Design-Builder for an increase in the Contract Sum or the Contract Time must be made within five (5) days after occurrence of the event giving rise to such Claim.

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

§ 14.1.6.2 If exceptional and unusual 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

§ 14.1.7.1 Consequential Damages. In no event shall either Party be liable to the other Party for any incidental, indirect, special, punitive, economic or consequential damages, (including but not limited to loss of profits) suffered or incurred by a Party, including but not limited to any such damages arising as a result of this Agreement or the other Party's performance or non-performance of the Work.

§ 14.1.7.2 The consequential damages limitation set forth in this Section 14.1.7.1 above is not intended to affect the payment of liquidated damages or lost early completion bonus, if any, set forth in Section 5 of the Agreement, which both parties recognize has been established, in part, to reimburse Owner or reward Design-Builder for some damages that might otherwise be deemed to be consequential.

§ 14.1.7.3 Full Effect. Excluding liabilities assumed under indemnification, all waivers of and limitations of liability contained in this Agreement shall apply whether such liability is claimed to arise in contract, breach of warranty, breach of contract, strict liability, or otherwise.

This waiver is applicable, without limitation, to all of Design-Builder's consequential damages due to Owner's termination in accordance with **Article 13**. Nothing contained in this § 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 Owner and Design-Builder initiated prior to the date final payment is due, excluding those arising under § 10.3 and § 10.4 of the Contract and **Exhibit B** to this Contract, unless 30 days have passed after the Claim has been initiated with no decision having been rendered. Unless otherwise mutually agreed in writing, the Owner shall render the initial decision on Claims. Design-Builder must continue with its Work when a Claim is pending before the Owner.

§ 14.2.2 Procedure

§ 14.2.2.1 Claims Initiated by the Owner. If the Owner initiates a Claim, the Design-Builder shall provide a written response to Owner within ten (10) days after receipt of the notice required under § 14.1.3.1. Thereafter, the Owner shall render an initial decision within ten (10) 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 Owner will take one or more of the following actions within ten (10) days after receipt of the notice required under § 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 Owner lacks sufficient information to evaluate the merits of the Claim.

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

§ 14.2.4 If the Owner 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 Owner when the response or supporting data will be furnished or (3) advise the Owner that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Owner will either reject or approve the Claim in whole or in part.

§ 14.2.5 The Owner'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 In the event of a Claim against the Design-Builder, the Owner 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 Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

§ 14.3 Mediation

§ 14.3.1 If agreed to by the parties in writing, claims, disputes, or other matters in controversy arising out of or related to the Contract, except those waived as provided for in **§ 9.10.4**, **§ 9.10.5** and **§ 14.1.7**, may be mediated prior to binding dispute resolution. However, mediation shall not be a condition precedent to binding dispute resolution.

§ 14.3.2 In the event that the parties agree in writing to mediation, such mediation shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Contract. The written agreement to mediate shall be filed with the person or entity administering the mediation. If the mediation process is initiated concurrently with the filing of binding dispute resolution, including litigation proceedings, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

§ 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.

§ 14.3.4 Litigation

Litigation of Claims, disputes or other matters in question between the Owner and Design-Builder arising out of or relating to this Contract or breach thereof, which are not resolved by mediation, shall be subject to and decided by litigation exclusively in the state courts of Palm Beach County, Florida. Design-Builder and Owner consent to the venue of the State Courts of Palm Beach County, Florida and specifically recognize and acknowledge the waiver of any right to remove any action to federal court on the basis of diversity jurisdiction or on any other basis.

§ 14.3.5 It is hereby understood and agreed that in the event any lawsuit in the judicial system, federal or state, is brought to enforce compliance with this contract or interpret same, or if any administrative proceeding is brought for the same purposes, each party shall pay their own attorney's fees and costs, including appellate fees and costs.

§ 14.3.6 Liquidated Damages

§ 14.3.6.1 In the event that the Design-Builder fails to perform the Work within a timely manner as set forth in this Contract, and the time to complete such services has not been extended by a properly executed Change Order, if such delay is caused by the Design-Builder, the Architect or any Consultants, Subcontractor, material or equipment suppliers, or other persons or entities providing services or work for the Design-Builder, the Owner shall be entitled to collect liquidated damages from the Design-Builder. Design-Builder and Owner agree that, because of the nature of the Work, the inability of the parties to precisely calculate actual damages for delay and the difficulty of determining these damages, the amount of \$2,500 shall be assessed for each calendar day of delay in reaching Substantial Completion of the Work. Design-Builder and Owner agree that, because of the nature of the Work, the inability of the parties to precisely calculate actual damages for delay and the difficulty of determining these damages, the amount of \$1,250 shall be assessed for each calendar day of delay in reaching Final Acceptance. It is hereby agreed that the amount of the per diem assessment is not a penalty and not excessive in light of the circumstances known to the parties at the time this Contract is executed.

§ 14.3.6.2 The above liquidated damage provision shall not affect either party's right to terminate this Contract nor shall it limit any of the other remedies as provided in the Contract. The Owner's exercise of its right to terminate this Contract shall not release the Design-Builder from its obligation to pay liquidated damages in the amount set forth herein. Such assessments shall be immediately due and payable to the Owner or, at the Owner's option may be

deducted from payments that may be due and owing to the Design-Builder.

ARTICLE 15 MISCELLANEOUS PROVISIONS

§ 15.1 Governing Law

The Contract and Design-Build Documents shall be governed by the law of the State of Florida without regard to conflicts of law provisions.

§ 15.1.1 Compliance with Applicable Laws Including but Not Limited to Public Records Laws

(a) The Design-Builder agrees to comply with all federal, state, and local laws or ordinances applicable to all of the provisions of the Contract (including, but not limited to, building codes, fire and safety regulations, and environmental regulations) and specifically acknowledges the applicability of the Public Records provisions of Florida law found in Chapter 119, Florida Statutes and as more specifically set forth in this Paragraph below. The Design-Builder represents and warrants unto the Owner that no elected official, officer, employee, or agent of the Owner has any interest, either directly or indirectly, in the business of the Design-Builder to be conducted hereunder. The Design-Builder further represents and warrants to the Owner that it has not employed or retained any company or person, other than a bona fide employee working solely for the Design-Builder, to solicit or secure this Contract, and that it has not paid, or agreed to pay, or given or offered any fee, commission, percentage, gift, loan, or anything of value to any person, company, corporation, individual, or firm, other than bona fide Personnel working solely for the Design-Builder, in consideration for or contingent upon, or resulting from the award or making of this Contract. Further, the Design-Builder also acknowledges that it has not agreed, as an expressed or implied condition for obtaining this Contract, to employ or retain the services of any person, company, individual or firm in connection with carrying out this Contract. It is absolutely understood and agreed by the Design-Builder that, for the breach or violation of this Paragraph, the Owner shall have the right to terminate this Contract without liability and at its sole discretion, and to deduct from any amounts owed, or to otherwise recover, the full amount of any value paid by the Design-Builder. The Design-Builder shall also require, by contract, that all subcontractors shall comply with the provisions of this Paragraph.

(b) Public Records. Design-Builder agrees to:

1. Keep and maintain public records required by the public agency to perform the service.
2. Upon request from the public agency's custodian of public records, provide the public agency with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in Chapter 119 of the Florida Statutes or as otherwise provided by law.
3. Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law for the duration of the contract term and following completion of the contract if the Design-Builder does not transfer the records to the public agency.
4. Upon completion of the contract, transfer, at no cost, to the public agency all public records in possession of the Design-Builder or keep and maintain public records required by the public agency to perform the service. If the Design-Builder transfers all public records to the public agency upon completion of the contract, the Design-Builder shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If the Design-Builder keeps and maintains public records upon completion of the contract, the Design-Builder shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to the public agency, upon request from the public agency's custodian of public records, in a format that is compatible with the information technology systems of the public agency.

IF DESIGN-BUILDER HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO THE DESIGN-BUILDER'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS CONTRACT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS AT OFFICE OF THE CITY CLERK LOCATED AT 100 NW 1ST STREET, DELRAY BEACH, FLORIDA 33444, PHONE NUMBER (561) 243-7000, EMAIL ADDRESS: JOHNSONK@MYDELRAYBEACH.COM

If the Design-Builder does not comply with a public records request, Owner shall enforce the contract provisions which may include termination of this Agreement.

§ 15.1.2 E-Verify Requirements

By entering into this Agreement, Design-Builder acknowledges its obligation to comply with the provisions of Section 448.095, Fla. Stat., "Employment Eligibility." Design-Builder affirms and represents it is registered with the E-Verify system, utilizing same, and will continue to utilize same as required by law. Compliance with this section includes, but is not limited to, utilization of the E-Verify System to verify the work authorization status of all newly hired employees and requiring all subcontractors to provide an affidavit attesting that the subcontractor does not employ, contract with, or subcontract with, an unauthorized alien. Failure to comply with this section will result in the termination of this Agreement, or if your subcontractor knowingly violates the statute, the subcontract must be terminated immediately. Any challenge to termination under this provision must be filed in the Circuit Court no later than 20 calendar days after the date of termination. If terminated for a violation of the statute by Design-Builder, the Design-Builder may be prohibited from conducting future business with the City or awarded a solicitation or contract for a period of 1 year after the date of termination. All costs incurred to initiate and sustain the aforementioned programs shall be the responsibility of the Design-Builder.

§ 15.1.3 Tax Exempt Purchases Notwithstanding anything in the Contract Documents to the contrary, Owner, as a tax exempt Florida municipal corporation, may purchase materials for use in the Work and 100% of any savings realized by the Owner purchasing materials for use in the Work shall be credited to the Owner as a deduction from the Contract Sum.

§ 15.2 Successors and Assigns

§ 15.2.1 The Owner 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 **§ 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 Owner may, without consent of the Design-Builder, assign the Contract to a lender providing construction financing for the Project, if the lender assumes the Owner'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 Owner requests the Design-Builder, Architect, Consultants, or Subcontractors to execute certificates, other than those required by **§ 3.1.10**, the Owner shall submit the proposed language of such certificates for review at least 14 days prior to the requested dates of execution. If the Owner requests the Design-Builder, Architect, Consultants, or Subcontractors to execute consents reasonably required to facilitate assignment to a lender, the Design-Builder, Architect, Consultants, or Subcontractors shall execute all such consents that are consistent with this Contract, provided the proposed consent is submitted to them for review at least 14 days prior to execution. The Design-Builder, Architect, Consultants, and Subcontractors 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

Notices shall be effective when received at the addresses specified in the contract. Changes in respective addresses to which such notices are to be directed may be made from time to time by either party by written notice to the other party. Facsimile and email transmissions are acceptable notice effective when received; however, facsimile and email transmissions received after 5:00 p.m. or on weekends or holidays will be deemed received on the next business day. The original of the notice must also be mailed to the receiving party.

To Owner: City of Delray Beach
Attention: Terrence R. Moore, ICMA-CM, City Manager
100 N.W. 1st Avenue
Delray Beach, FL 33444

With a copy to: *(which shall not constitute notice)*

City of Delray Beach
100 NW 1st Avenue
Delray Beach, FL 33444
Attn: City Attorney

To Design-Builder:

Gulf Building, LLC.
John Scherer, President
10 SE 1st Avenue, #1 East
Delray Beach, FL 33444

With a copy to: *(which shall not constitute notice)*

CDM Smith, Inc.
Suzanne Mechler
621 N.W. 53rd Street, Suite 265
Boca Raton, FL 33487

§ 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 Owner 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. The invalidity of any part or provisions of the Design-Build Documents shall not affect the validity or enforceability of any other part of the Design-Build Documents. Any waiver by the Owner of any breach of the Design-Build Documents shall not be held to be a waiver of any other or subsequent breach, and any waiver by the Owner of any right to terminate the Contract shall not be held to be a waiver of any breach of the Design-Build Documents, but the Owner retains all its rights to recover damages therefor.

§ 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 Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals. The Design-Builder shall give the Owner timely notice of when and where tests and inspections are to be made so that the Owner may be present for such procedures.

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

§ 15.5.3 If such procedures for testing, inspection or approval under **§ 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. Owner may deduct such amounts from the balance due the Design-Builder.

§ 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 Owner.

§ 15.5.5 If the Owner is to observe tests, inspections or approvals required by the Design-Build Documents, the Owner 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 Owner 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 **§ 15.6.1**.

§ 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.

§ 15.9 Time Limits on Claims

The Owner 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 within the time period specified by applicable law.

§ 15.10 It shall be incumbent upon the Design-Builder to have permit revisions issued and executed by the Building Department in a timely manner so as not to delay the construction process, and the Contractor shall bear the cost of such revisions.

§ 15.11 No Agency Relationship

It is understood that Design-Builder is not herein appointed the agent of Owner but is and shall remain an independent contractor. Accordingly, all aspects of Design-Builder's performance of the Contract, except as specifically provided in the Contract, shall be under the direction and control of Design-Builder.

§ 15.12 Third Parties

No provision in the Contract shall create or give to third parties any claim or right of action against Owner.

§ 15.13 Place of Work

Design-Builder, under regulations prescribed by Owner, shall use only established roadways, and such temporary roadways as may be approved by Owner. When materials or equipment are transported in performance of the Work, vehicles shall not be loaded beyond the load limit as established by federal, state or local law regulations. When it is necessary to cross curbing and/or sidewalks, protection against damage shall be provided by Design-Builder, and any damage caused will be immediately repaired by Design-Builder at Design-Builder's cost, and if not repaired by Design-Builder within five days after notice in writing, Owner may make such repairs and charge the amount of such repairs to the Design-Builder. All existing sidewalks, curbs and pavements disturbed, broken, removed, or otherwise damaged by Design-Builder, during the performance of the Work under the Contract, shall be replaced by the Design-Builder at its sole expense. Replaced or repaired sidewalks, curbs, and pavements shall be constructed of similar materials and by similar methods to the original construction. Replaced or repaired sidewalks, curbs and payment shall be smoothly blended into the existing Work and shall not present depressions or humps and shall be acceptable to Owner.

§ 15.14 Equal Opportunity and Anti-Discrimination

Owner complies with all laws prohibiting discrimination on the basis of age, race, gender, religion, creed, political affiliation, sexual orientation, physical or mental disability, color or national origin, and therefore is committed to assuring equal opportunity in the award of contracts and encourages small, local, minority, and female-owned businesses to participate.

During the performance of this contract, the Design-Builder agrees it will not discriminate or permit discrimination in its hiring practices or in its performance of the contract. The Design-Builder shall strictly adhere to the equal employment opportunity requirements and any applicable requirements established by the State of Florida, Palm Beach County, and the federal government.

The Design-Builder further acknowledges and agrees to provide Owner with all information and documentation that may be requested by Owner from time to time regarding the Solicitation, selection, treatment, and payment of subcontractors, suppliers, and Proposers in connection with this contract.

§15.15 Force Majeure

Owner and Design-Builder are excused from the performance of their respective obligations under the contract when and to the extent that their performance is delayed or prevented by any circumstances beyond their control, including fire, flood, explosion, strikes or other labor disputes, natural disasters, public emergency, viral pandemic or widespread infections (other than COVID-19 discussed in §15.15.1 below), whether or not resulting in government closures or other restrictions, war, riot, civil commotion, malicious damage, act or omission of any governmental authority, delay or failure or shortage of any type of transportation, equipment, or service from a public utility needed for their performance provided that:

- a. The non-performing party gives the other party prompt written notice describing the particulars of the force majeure, including, but not limited to, the nature of the occurrence and its expected

duration, and continues to furnish timely reports with respect thereto during the period of the force majeure.

- b. The excuse of performance is of no greater scope and of no longer duration than is required by the force majeure.
- c. No obligations of either party that arose before the force majeure causing the excuse of performance are excused as a result of the force majeure.
- d. The non-performing party uses its best efforts to remedy its inability to perform.

§15.15.1 The above notwithstanding, at the time of execution of this Agreement, there is an ongoing global pandemic caused by COVID-19. Design-Builder has considered the impact of COVID-19 on this Project in agreeing to all dates and prices set forth in the Agreement and further agrees that Design-Builder is not entitled to an extension of any dates or increases in price, due to COVID-19 impacts unless the governmental authorities having jurisdiction of the Project prevent the continuation of the Work. Design-Builder shall also factor COVID-19 impacts into its prices and schedules when providing Owner with the Design-Build Amendment.

ARTICLE 16 SCOPE OF THE CONTRACT

§ 16.1 This Contract is comprised of the following documents listed below (the "Contract Documents"):

- .1 AIA Document A141™–2014, Standard (modified) Form of Agreement Between Owner and Design-Builder
- .2 Exhibit A Project Schedule
- .3 Exhibit B Design-Builder Warranty
- .4 Exhibit C Subcontractor Warranty Forms
- .5 Exhibit D AIA Document A141™–2014, Insurance and Bond Requirements;
- .6 Exhibit E RESERVED;
- .7 Exhibit F Design-Builder's Qualifications Proposal to the Owner, RFP-2019-008;
- .8 Exhibit G Design Criteria Package;
- .9 Exhibit H RESERVED
- .10 Exhibit I Addenda, Modifications, Change Orders and Field Orders as issued to the Design-Builder by the Owner and agreed to by Design-Builder;
- .11 Exhibit J Construction Documents prepared and approved in accordance with Article 5 of this Contract;
- .12 **Exhibit K Scope and Compensation of Design-Builder's Phase 1 Services**
- .13 Exhibit L The Design-Build Amendment as set forth in Article 2 of this Contract.

The Contract Documents are complimentary as to the design and construction of the Project; what is called for by one is called for by all. If during the performance of the Work, Design-Builder or any member of Design-Builder or any Subcontractor finds a conflict, error or discrepancy in the Contract Documents, Design-Builder shall report the discrepancy to the Owner, via Owner's Representative, in writing at once before proceeding with the Work affected thereby. The Owner's Representative, upon such notice, will promptly investigate the circumstances and the Owner's Representative will give appropriate instructions to the Design-Builder. Until such instructions are given, any work done by the Design-Builder after the discovery of such conflict, error, or discrepancy, which is directly or indirectly affected by such conflict, error or discrepancy, will be at its own risk and it shall bear all costs arising therefrom. In resolving conflicts, errors or discrepancies, the Owner Representative's instructions to the Design-Builder shall be the final interpretation of the requirements of the Contract Documents.

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

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ARTICLE 17 PROJECT DOCUMENTATION

§17.1 Document Control Management System Owner will use the e-Builder management services for electronic project documentation and document control. Design-Builder shall utilize this service for Project documentation.

§17.2 Basic Project Documentation Design-Builder shall maintain the following documents on behalf of and for the use of Owner: (a) a complete set of current Subcontracts and Contract Documents, including a current set of drawings, specifications, Change Orders and modifications reflecting product and materials selections and as-built conditions on the Project; (b) all shop drawings, samples, product data, and other Submittals; (c) a clean set of the principal building layout lines, floor levels, and key site elevations certified by a qualified surveyor or Architect; (d) all required insurance certificates from Subcontractors; and (e) all other documents required by the Contract Documents.

§17.3 Daily Log Design-Builder shall maintain a log of daily reports ("Daily Log") which shall identify daily weather conditions and any impact on the Work caused thereby, Design-Builder's personnel on site, all Subcontractors working each day and the number of employees of each on the Project, all visitors, the Work accomplished each day, any equipment failures or breakdowns, any procurement or delivery problems, any job site accidents or injuries, any safety or environmental violations, warnings or citations, and any other events, circumstances, or occurrences impacting the progress or cost of the Project. Design-Builder shall submit a copy of the "Daily Log" to the Owner's Representative with each pay request.

§17.4 Monthly Reports Each month, Design-Builder shall prepare and submit to Owner's Representative a written report detailing the progress of the Project (the "Monthly Report"). The Monthly Report shall contain Design-Builder's estimate of percentage of completion of the Project and each element thereof, including a comparison of the status of the Project to the approved Schedule of Values, identify any and all delays to the Project and the cause and extent thereof and describe the remedial measures being taken to overcome such delays, identify any defective or deficient Work installed during the preceding month and describe the remedial measures being taken to correct the defective or deficient Work, identify any outstanding requests for information or clarification, requests for interpretation, change order requests, questions, or other matters requiring the response of either Owner, Design-Builder or a Subcontractor and shall include any and all other information required to fully inform Owner of the status of the Project and the performance of Design-Builder and Subcontractors. The Monthly Report shall include the construction schedule updates, updated cash flow forecasts, and status of the Design-Builder and Owner contingency accounts as required by the terms of the Contract Documents.

§17.5 Review and Assignment of Warranties Design-Builder shall obtain and shall transmit to Owner's Representative all special product, system, equipment or material warranties required by the Contract Documents and the Subcontracts. Design-Builder shall review all such warranties to confirm that the warranties are in compliance with the requirements of the Contract Documents and Subcontracts. By execution of this Contract, Design-Builder hereby assigns to Owner all of Design-Builder's rights, title and interest in and to any and all warranties, including Uniform Commercial Code warranties, that Design-Builder receives or is entitled to receive from any Subcontractor or supplier in connection with the Project.

§17.6 Operations and Maintenance Documentation Design-Builder shall obtain and transmit to Owner's Representative all documentation required by the Contract Documents regarding the operation and recommended maintenance programs relating to the various elements of the Project. Two (2) complete sets of documentation shall be furnished to Owner's Representative in uniform three-ring binders labeled with the Project name and number.

§17.7 Review and Approval of As-Built Drawings Design-Builder shall continuously maintain a set of drawings clearly indicating the exact location and depth of all buried plumbing, sanitary sewers, storm sewers, heating, gas piping and electrical work with accurate dimensional reference to buildings or other fixed points.

§17.7.1 Withholding of Periodic Payments Failure on the part of the Design-Builder to maintain current As-Built Drawings will be cause for Owner to withhold all or portions of the monthly payments.

§17.7.2 Completion Upon completion of the Work under this contract and prior to requesting final payment, the Design-Builder shall submit final Record Drawings to Owner's Representative.

§17.8 Availability of Project-Related Records to Owner All records relating to the Project which are in the possession or control of Design-Builder shall be made available to Owner, its designee, and any governmental authority for audit, inspection, and copying upon request of Owner's Representative. Such records include, without limitation: all drawings, specifications, submittals, subcontractor bids, the Daily Log, correspondence, the Request Log, the Submittal Log, permits, minutes, e-mail documents, memoranda, tape or videotape recording, photographs, including aerial photographs, or other writings or things which document the Project, its design, and its construction.

§17.9 Maintenance of Project-Related Records Design-Builder shall maintain and protect all Project-related records, including but not limited to Daily Log and Project journal, other than those required to be returned to Owner, for no less than two (2) years after Final Acceptance of the Project and for any longer period of time as may be required by law.

§17.10 Project Video Recording and Photographs Design-Builder shall take monthly photographs and/or video (including but not limited to drone photographs and videos from the same location every two weeks) depicting progress of the Work.

OWNER

City of Delray Beach, Florida, a Municipal Corporation and a Political Subdivision of the State of Florida, its successors and assigns.
100 N.W. 1st Avenue
Delray Beach, FL 33444

DESIGN-BUILDER

Gulf Building, LLC.
John Scherer, President
10 SE 1st Avenue, #1 East
Delray Beach, FL 33444

IN WITNESS WHEREOF, the City and Contractor hereto have executed this Agreement as of the day and year first above written.

ATTEST:

CITY OF DELRAY BEACH

BY: Katerri Johnson
Katerri Johnson, City Clerk

BY: Shelly Petrolia
Shelly Petrolia, Mayor

Approved as to form for legal sufficiency:

BY: Lynn Gelin
Lynn Gelin, City Attorney

CONTRACTOR – DESIGN/BUILDER

By: [Signature]
John Scherer
Printed Name
CEO
Title

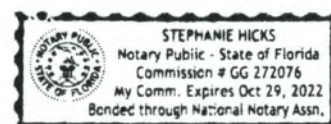
STATE OF FLORIDA
COUNTY OF PALM BEACH

The foregoing instrument was acknowledged before me by means of ☒ physical presence or ☐ online notarization, this 8 day of April, 2022, by John Scherer (name of person), as CEO (type of authority) for Gulf Building, LLC. (name of party on behalf of whom instrument was executed).

Personally known ☒ OR Produced Identification

Type of Identification Produced FL Drivers License

[Signature]
Notary Public – State of Florida



RESOLUTION NO. 38-22

A RESOLUTION OF THE CITY COMMISSION OF THE CITY OF DELRAY BEACH, FLORIDA, AMENDING RESOLUTION 161-19 TO REMOVE ANY REFERENCES TO THE CONSTRUCTION OF AN EMERGENCY OPERATIONS CENTER; APPROVING AN AGREEMENT WITH GULF BUILDING LLC FOR DESIGN-BUILD AND CONSTRUCTION SERVICES FOR FIRE STATION 113; AUTHORIZING THE CITY MANAGER TO EXECUTE ANY AMENDMENTS AND TAKE ALL ACTIONS NECESSARY TO EFFECTUATE THIS AGREEMENT; PROVIDING AN EFFECTIVE DATE; AND FOR OTHER PURPOSES.

WHEREAS, the City of Delray Beach (the “City”) is authorized to enter into agreements to provide services, programming and products in accordance with its Charter; and

WHEREAS, at the September 5, 2019, City Commission meeting, the City Commission approved Resolution 161-19, authorizing staff to commence negotiations with Gulf Building, LLC, for design-build and construction services for Fire Station 113 and an Emergency Operations Center (the “Project”); and

WHEREAS, since the approval of Resolution 161-19, the need for an Emergency Operation Center located at the same site as Fire Station 113 no longer existed and negotiations for that portion of the Project ceased; and

WHEREAS, City staff held multiple negotiation meetings with Gulf Building for Phase 1 preconstruction services resulting in the agreement attached hereto; and

WHEREAS, this Agreement encompasses the first of two phases in the design-build delivery method and Phase 2, the final construction phase, remains contingent upon future City Commission approval; and

WHEREAS, the City Commission deems approval of this Resolution to be in the best interest of the health, safety, and welfare of the residents and citizens of the City of Delray Beach and the public at large.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF DELRAY BEACH, FLORIDA, AS FOLLOWS:

Section 1. The foregoing recitals are hereby affirmed and ratified.

Section 2. Resolution 161-19, authorizing City staff to negotiate an agreement with Gulf Building, LLC, is amended insofar as any references to an “Emergency Operations Center” are hereby stricken. All other portions of Resolution 161-19 remain in full force and effect.

Section 3. The City Commission of the City of Delray Beach has reviewed and hereby approves the Agreement between the City and Gulf Building, LLC, attached hereto as Exhibit “A”.

Section 4. The City Commission authorizes the City Manager to execute any amendments and take any other actions necessary to effectuate this Agreement.

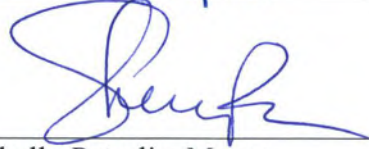
Section 5. This Resolution shall become effective immediately upon adoption.

PASSED AND ADOPTED in regular session on the 5th day of April, 2022.

ATTEST:

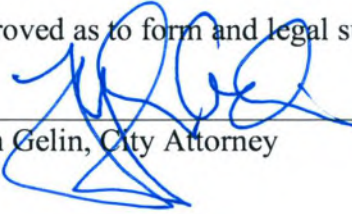


Katerri Johnson, City Clerk



Shelly Petrolia, Mayor

Approved as to form and legal sufficiency:



Lynn Gelin, City Attorney