

# Progressive Design-Build Agreement for Water and Wastewater Projects

This Progressive Design-Build Agreement has been developed in conjunction with and endorsed by the Water Collaborative Delivery Association.



**Water Collaborative  
Delivery Association**

**Better Projects, Together.**

**Document No. 545**

Second Edition, 2024

© Design-Build Institute of America  
Washington, D.C.





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

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

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

# INSTRUCTIONS

For DBIA Document No. 545, Progressive Design-Build Agreement for Water and Wastewater Projects (2024 Edition)

## Checklist

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

_____	Page 1	Owner's name, address and form of business
_____	Page 1	Design-Builder's name, address and form of business
_____	Page 1	Project name and address
_____	Section 2.1.7	Identify other exhibits to the Agreement
_____	Section 4.3.2	Complete blanks for additional sum for use of Work Product
_____	Section 5.2.1	Complete blanks for calendar days and note the optional language that is provided
_____	Section 5.2.2	Insert any interim milestones (optional)
_____	Section 5.4	Complete blanks for liquidated damages and note the optional provisions that are provided
_____	Section 5.5	If the parties select the option provided, they must insert an amount
_____	Section 5.6	Complete blanks for early completion bonus and note the optional provision that is provided
_____	Section 5.7	Note the optional provisions that are provided
_____	Section 6.1.1	Complete blank for Phase 1 Services price
_____	Section 6.1.3	Insert basis for pricing specific Work (optional)
_____	Section 6.2	Complete blank for Lump Sum pricing (optional)
_____	Section 6.3	Choose markups for changes
_____	Section 6.4	Choose basis for Fee and complete blanks
_____	Section 6.4.2	Insert financial arrangements for adjustments and note optional provisions
_____	Section 6.5.1.3	Complete blanks for markup; insert or attach personnel names, etc.
_____	Section 6.5.1.4	Note optional language that is provided
_____	Section 6.5.1.23	Note the optional provision that is provided
_____	Section 6.7.4	Note the optional provision that is provided
_____	Section 7.2.1	Complete blanks for day of month
_____	Section 7.3.1	Complete blanks for retention percentage and note optional provision
_____	Section 7.3.2	Note optional provision
_____	Section 7.5	Complete blanks for interest rate
_____	Section 8.1	Choose overhead/profit method for termination for convenience
_____	Section 8.2.1	Complete blanks for percentages
_____	Section 8.2.2	Complete blanks for percentages
_____	Section 9.1.1	Insert Owner's Senior Representative's name, etc. (optional)
_____	Section 9.1.2	Insert Owner's Representative's name, etc. (optional)
_____	Section 9.2.1	Insert Design-Builder's Senior Representative's name, etc. (optional)
_____	Section 9.2.2	Insert Design-Builder's Representative's name, etc. (optional)
_____	Section 10.1	Attach Insurance Exhibit
_____	Section 10.2	Insert amount and conditions of bonds or other security and note the options that are provided
_____	Section 11	Insert any other provisions (optional) or exhibits or documents incorporated or referenced in the Agreement
_____	Section 12	Complete blank for rate
_____	Last Page	Owner's and Design-Builder's execution of the Agreement
_____	Exhibit A, Detail	Owner's Project Criteria as referenced at Section 1.1.1
_____	Exhibit B, Detail	Phase 1 Scope of Work as referenced in Section 1.2.1

## General Instructions

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

### Specific Instructions

Section	Title	Instruction
General	Purpose of This Agreement	<p>DBIA Document No. 545 ("Agreement") should be used for progressive design-build water and wastewater projects. Progressive Design-Build allows an Owner to complete a Design-Build project in two phases. In Phase 1 Owner completes preliminary design, sets the construction plan and establishes the Phase 2 costs to complete final design and the planned construction. This Agreement allows for Owner to pay Design-Builder for design services and construction work in Phase 2 using Cost of the Work plus a Fee, with or without a Guaranteed Maximum Price ("GMP"), or Lump Sum.</p> <p>If there is uncertainty about Owner's final design Project Criteria after Phase 1, or the final design Project Criteria remain to be developed by Owner and Design-Builder together during Phase 2, a cost-plus/GMP contracting approach is desirable.</p> <p>If there is certainty as to Owner's Project Criteria and project design after Phase 1, a lump sum fixed price for the completion of all design and construction services in Phase 2 may be suitable, especially when Owner procures Design-Builder's services by competitive means.</p>
General	Purpose of These Instructions	These Instructions are not part of this Agreement but are provided to aid the parties in their understanding of the Agreement and in completing the Agreement.
General	Related Documents	This Agreement shall be used in conjunction with the General Conditions of Contract. Other related Contract Documents are listed in Article 2 of this Agreement.
General	Date	On Page 1, enter the date when both parties reach a final understanding. It is possible, due to logistical reasons, that the dates when the parties execute the Agreement may be different. Once both parties execute the Agreement, the effective date of the Agreement will be the date recorded on Page 1. This date does not, however, determine Contract Time, which is measured according to the terms of Article 5.
General	Parties: Owner and Design-Builder	On Page 1 enter the legal name and full address of Owner and Design-Builder, as well as the legal form of each entity, e.g., corporation, partnership, limited partnership, limited liability company or other.
1.3	Contract Price Amendment and Proposal	<p>When a GMP or Lump Sum is established after execution of this Agreement for Phase 2 work, the Proposal must be attached to the Contract Price Amendment pursuant to Section 1.3.2. Both the Contract Price Amendment and Proposal will include those Basis of Design Documents Design-Builder uses as the basis for its Contract Price.</p> <p>This Agreement provides the parties flexibility in establishing the Phase 2 Contract Price. Parties can establish a GMP or Lump Sum for Phase 2 after entering into this Agreement, or elect to proceed on the basis of costs plus a fee, without a GMP or Lump Sum.</p> <p>If a GMP or Lump Sum method is elected, the GMP or Lump Sum should not be established until the Basis of Design Documents are sufficiently defined during Phase 1 to make the GMP or Lump Sum realistic and meaningful. Setting it too early does not permit reasonable opportunity for scope definition and evaluation of Project risk. On the other hand, setting it too late may not achieve Owner's objective of having an early price guarantee to enable it to make decisions relative to the Project.</p>
1.3	Proposal After Execution of This Agreement	<p>At the completion of Phase 1 Services, Design-Builder shall submit its Proposal, which shall include the items listed in Sections 1.3.1.1 to 1.3.1.12. If the parties agree to additions or deletions from this list, modify Section 1.3 appropriately.</p> <p>The Agreement provides the parties with flexibility as to when the Proposal will be submitted after execution of the Agreement. Prior to execution of the Agreement the parties should discuss when Owner desires Design-Builder to submit its Proposal.</p>

Section	Title	Instruction
1.3.1.4	Schedule	Given that expedited delivery is one of the primary factors driving many owners to select the design-build method, DBIA strongly believes that the parties should discuss and understand what each party must do to support the Project schedule. The entire Work, both design and construction, should be scheduled. The schedule should indicate the dates for the start and completion of the various stages of the Work, including the date when Owner information and approvals are required, and any Owner-created constraints. The Agreement also provides flexibility to establish the Scheduled Substantial Completion Date prior to submission of the Proposal.
1.3.2.2	Acceptance of Proposal	If Owner accepts the Proposal, the parties should amend this Agreement to add the final Proposal as a Contract Document pursuant to Section 2.1.2.
1.3.2.3	Failure to Accept the Proposal	<p>This Agreement provides three options for Owner in the event it fails to accept the Proposal and two choices for Design-Builder if Owner fails to exercise any of the three options. These options are specifically designed to prevent one party from receiving a windfall in the event the parties cannot agree on the GMP or Lump Sum and the Agreement is terminated. This Agreement also states when the Agreement terminates or the Agreement is deemed completed if Owner fails to exercise one of the options.</p> <p>The parties should take note that if Owner exercises its option to terminate for convenience, or Design-Builder suspends performance, Design-Builder will not be entitled to payment for uncompleted Work provided by Section 8.2. However, additional payment for Owner's use of Work Product will be due Design-Builder pursuant to Section 4.3, if Owner proceeds to complete the Project using Design-Builder's Work Product.</p>
2.1.5	Construction Documents	After execution of the Agreement, and consistent with the requirements of Section 2.4 of the General Conditions of Contract, Design-Builder will prepare Construction Documents, subject to Owner's review and approval.
2.1	Order of Precedence	The Contract Documents are listed in Section 2.1 in the order of their precedence. The Contract Price Amendment and Proposal are based on the Basis of Design Documents, which are comprised of various documents. The parties should strongly consider establishing the priority of the various documents comprising the Contract Price Amendment or Proposal to avoid disputes should discrepancies arise among the documents. Moreover, Section 2.1.7 recognizes that there may be other exhibits attached to this Agreement. If this is the case, the parties should discuss whether these exhibits should be part of the Basis of Design Documents. If these exhibits are not made part of the Basis of Design Documents, these exhibits will not take priority over the Basis of Design Documents in the event of a conflict.
3.3	Definitions	Terms, words and phrases used in the Agreement shall have the same meanings used in the General Conditions of Contract.
3.4	Design Specifications	Owner is cautioned that consistent with legal precedent, if it includes design specifications in its Project Criteria Design-Builder is entitled to rely on the information provided and to the extent said information is not accurate, Design-Builder is entitled to an adjustment in the Contract Price and/or Contract Time. Accordingly, Owner should consider using performance specifications to avoid such potential liability.
4.1	Work Product	This Agreement provides that Design-Builder shall retain ownership of the Work Product it produces, but obligates Design-Builder to grant a limited license to Owner to use the Work Product according to the terms and circumstances described in Sections 4.2, 4.3, 4.4 and 4.5.



Section	Title	Instruction
4.2	Owner's Limited License Upon Payment in Full	Design-Builder shall grant Owner, at Owner's sole risk, a limited license to use the Work Product at the completion of the Work in connection with Owner's occupation of the Project. This Section also provides the parties with the option of transferring ownership of some or all of the Work Product to Owner upon payment in full for all Work performed. Generally, where Owner desires ownership of Work Product, it is sufficient to transfer ownership of unique architectural and design elements.
4.3	Owner's Limited License Upon Owner's Termination for Convenience or Design-Builder's Election to Terminate	Owner should not use the Termination for Convenience Clause to obtain Design-Builder's valuable design concepts, and then seek lower bids from other design-builders. Therefore, where Owner terminates this Agreement for its convenience, and then decides to complete the Project with its own or third party forces, Design-Builder shall grant Owner the rights set forth in Section 4.3, provided Owner pays Design-Builder all amounts due Design-Builder as required by the Contract Documents, including paying Design-Builder an additional sum per Section 4.3.2 for the use of the Work Product. In the event Design-Builder elects to terminate this Agreement for cause, for reasons set forth in Section 11.4 of the General Conditions of Contract, these same conditions apply to Owner's use of the Work Product.
4.3.2	Additional Compensation	To minimize disputes, the parties should negotiate prior to the execution of the Agreement the amount Owner shall pay Design-Builder for the use of Design-Builder's Work Product in the event Owner terminates this Agreement for its convenience or Design-Builder elects to terminate this Agreement for cause. Enter this amount.
4.4	Owner's Limited License upon Design-Builder's Default	If Design-Builder is properly terminated for default, Owner is granted a limited license to use the Work Product, to complete the Project, and Owner shall thereafter have the same rights and obligations as set forth in Section 4.2.
4.5	Owner's Indemnification for Use of Work Product	Owner's use or alteration of the Work Product shall be at its sole risk, and Owner must agree to defend, indemnify and hold harmless Design-Builder and anyone working by or through Design-Builder, including Design Consultants of any tier.
5.1	Date of Commencement	Design-Builder's obligation to commence work is triggered by its receipt of a Notice to Proceed unless the parties mutually agree otherwise.
5.2.1	Substantial Completion of the Entire Work	Enter the calendar days of duration by which Substantial Completion has to be achieved. The parties in this Section have the option of modifying the definition of Substantial Completion set forth in the General Conditions of Contract. If this option is selected, Substantial Completion will be deemed to be achieved no later than the date a Temporary Certificate of Occupancy is issued if applicable to the Project.
5.2.2	Interim Milestones	It may be that some portions of the Work must be completed in phases or within a prescribed period of time to accommodate Owner's needs. The parties may, at their option, identify these portions of the Work to be completed prior to Substantial Completion of the entire Work. Enter the calendar days, starting from the Date of Commencement, for achieving Substantial Completion of these identified portions of the Work. If these portions of the Work are required to be substantially completed by certain milestone dates, enter those dates. As presently drafted, no remedy is provided to Owner if an interim milestone is not met. If Owner has special requirements as it relates to interim milestones, Owner may want to consider a remedy for Design-Builder's failure to meet an interim milestone, as well as providing a bonus to Design-Builder for satisfying such interim milestone.

Section	Title	Instruction
5.4	Liquidated Damages	<p>Owner should make a good faith evaluation of the amount that is reasonably necessary to compensate it for delay. Owner should not establish liquidated damages to penalize Design-Builder. Moreover, in the event a GMP or Lump Sum is not established upon execution of the Agreement, it appears prudent for the parties to refrain from establishing liquidated damages until such time as the GMP or Lump Sum is established.</p> <p>Section 5.4 establishes a grace period between the Scheduled Substantial Completion Date and the assessment of liquidated damages in order to prevent disputes as to which party bears responsibility for only a few days of delay. The parties should enter the calendar days that may pass following the Scheduled Substantial Completion Date before liquidated damages will be assessed.</p> <p>The parties are also provided the option of establishing liquidated damages if Design-Builder fails to achieve Final Completion within a specified number of days after Substantial Completion. If this option is selected, the parties must negotiate the number of days, as well as the liquidated damages amount. The parties in negotiating liquidated damages should keep in mind that the amount of liquidated damages for failing to achieve Final Completion should be a considerably scaled down amount and should reflect the financial harm to Owner. In no case should the total amount of liquidated damages for the Project exceed an amount that is reasonably necessary to compensate Owner for Project delay.</p>
		<p>The parties also have the option here of eliminating liquidated damages altogether, in which case Owner can recover actual damages for Project delay at an amount that is capped by the parties. Owner is cautioned that it still cannot recover consequential damages under Section 10.5.1 of the General Conditions of Contract.</p> <p>Owner is advised to seek the advice of legal counsel as liquidated damages for failing to timely attain Final Completion should constitute a reasonable estimate of the damages Owner will incur if Final Completion is not met within the specified number of days after Substantial Completion. It is foreseeable that such damages would be significantly less than any liquidated damages assessed for failing to timely attain Substantial Completion.</p>
5.5	Liquidated Damages Cap	The parties can agree to cap liquidated damages at a negotiated amount.
5.6	Early Completion Bonus	If the Project economics justify liquidated damages, then it is appropriate to couple these liquidated damages with an early completion bonus. The parties should enter the number of calendar days prior to the Scheduled Substantial Completion Date that will set the Bonus Date. Also, enter the amount of the bonus to be paid per day that will allow Owner to share with Design-Builder the economic benefits of early completion. Moreover, in the event a GMP or Lump Sum is not established upon execution of the Agreement, it appears prudent for the parties to refrain from establishing an early completion bonus until such time as the GMP or Lump Sum is established. The parties also have the option in Section 5.6 of capping the early completion bonus at a negotiated amount.
5.6	Compensation for Force Majeure Events	The parties are provided the opportunity of providing Design-Builder the right to receive compensation for Force Majeure Events. By selecting this option, the parties agree to modify Section 8.2.1 of the General Conditions of Contract, in which case the parties must negotiate how many cumulative days of Force Majeure delays must occur before Design-Builder is entitled to either a negotiated amount per day for delay or the direct costs it has incurred as a result of such delay.



Section	Title	Instruction
6.1	GMP or Lump Sum at Agreement Execution	<p>Enter the GMP or Lump Sum for Phase 2 Services, if appropriate. Attach as an amendment to this Agreement the Basis of Design Documents used to establish the GMP or Lump Sum. These documents comprise the Contract Price Amendment which shall become a Contract Document pursuant to Section 2.1.2 of the Agreement. Design-Builder does not guarantee any specific line item provided as part of a GMP.</p> <p>By selecting the alternate option if using a GMP, Design-Builder agrees to guarantee the line item in its GMP for general conditions costs only. Design-Builder agrees that it is responsible for paying general conditions costs in excess of this line item. Design-Builder does not guarantee any other line items in the GMP.</p>
6.1.3	Optional Pricing	This Agreement allows the parties the flexibility to establish within the Contract Price a different payment basis for certain portions of the Work which may be necessary to permit Design-Builder to furnish Owner with a GMP or Lump Sum.
6.4.1	Design-Builder's Fee	Enter the amount of Design-Builder's Fee as a sum certain or as a percentage of the Cost of the Work. Design-Builder's Fee shall be commensurate with the services it provides and the risk it assumes in providing single point responsibility to Owner.
6.4.2	Adjustments to Design-Builder's Fee	For additive Change Orders, the parties must negotiate the Fee Design-Builder will receive. For deductive Change Orders, the parties have the option by checking the appropriate box of whether there will be no additional reduction or whether there will be an additional reduction based on a negotiated percentage.
6.5.1.3	Wages for Design-Builder's Employees at Principal or Branch Offices	DBIA endorses reimbursing salaries and associated benefits of Design-Builder's Project personnel, such as accountants, stationed at offices other than the field office, when to do so is more efficient and cost effective. Enter the percentage markup to be applied for Project-related overhead associated with such personnel. Insert, or attach as an exhibit, a list of such personnel and their job functions.
6.5.1.4	Employee Benefits	It may be simpler for the parties to agree on a multiplier (rather than actual costs) to compensate Design-Builder for employee benefits. Accordingly, the parties may want to insert the multiplier to be applied to the wages and salaries of its reimbursable employees.
6.5.1.7	Costs for Defective/Non-Conforming Work	The Cost of the Work shall include the costs to repair or correct defective or non-conforming Work (including warranty or corrective work performed after Substantial Completion) unless caused by Design-Builder's negligence. DBIA believes that Design-Builder should not be penalized for inadvertent mistakes which are inevitable when designing and constructing a Project. To do so would encourage ultra-conservatism in every task, the ultimate cost of which would be greater than a proactive approach to performing the Work, which includes ordinary mistakes or inadvertence.
6.5.1.23	Warranty Escrow	At this section, the parties are provided the opportunity to establish prior to Final Completion an escrow account in a negotiated amount to be used to reimburse Design-Builder for its costs incurred in performing warranty Work if a GMP is used. If funds remain in the escrow account after the expiration of the warranty period, the funds are returned to Owner subject to Design-Builder's share of any savings. Note that even if the escrow account is exhausted, if funds remain under the GMP, Owner is still obligated to reimburse Design-Builder for its warranty Work.

Section	Title	Instruction
6.6.2	GMP Contingency	<p>Enter the amount of Design-Builder's Contingency if using a GMP. The Contingency is for the exclusive use of Design-Builder and covers all unanticipated costs incurred that are not the basis of a Change Order. This section sets forth by way of example only the type of costs that would be funded out of the Contingency. Other costs such as, but not limited to, any deductibles Design-Builder is obligated to pay would be subject to reimbursement. Design-Builder is also required to provide Owner with a monthly status report accounting for the Contingency, including all reasonably foreseen uses and potential uses, of the Contingency for the upcoming three months.</p> <p>While not provided for in the Contingency provision, DBIA recognizes that there may be situations where Owner will want to recapture the Contingency prior to Final Completion. For example, Owner may want to use amounts in the Contingency to fund changes to the Project. Owner's desire must be balanced against Design-Builder's need to use the Contingency to fund unanticipated costs for which it is liable. An option to consider to accommodate both interests is to establish an "Owner's Contingency" and a "Design-Builder's Contingency" in the GMP. If this option is used, any savings clause in the agreement should be drafted appropriately to address these pools of funds.</p>
6.6.3	Savings	<p>One of the benefits of a GMP approach is the possibility that with good management by Design-Builder and timely support from Owner the actual Cost of the Work and Fee may be less than the GMP. This creates a savings pool that should result in a benefit to both Design-Builder and Owner. Sharing these savings creates an incentive for Design-Builder to save costs. Some factors to consider in determining how the Savings are shared include the timing for the establishment of the GMP and the amount of Design-Builder's Fee established under Section 6.4.1.</p>
6.6.3.1	Savings Calculations	<p>This section provides that if the actual Cost of the Work and Design-Builder's Fee is less than the GMP, as such GMP may have been adjusted, the savings, if any, shall be shared. The Agreement offers two choices for distributing Savings. Choose a method and enter the appropriate figures.</p>
6.7.4	Allowance Value	<p>This section recognizes that the parties may agree that certain items of Work should be treated as an Allowance Item and priced based on Allowance values. The Allowance Value for which Design-Builder will be entitled to receive compensation includes direct cost of labor, materials, equipment, transportation, taxes and insurance associated with the Allowance Item. All other costs associated with the Allowance Item, such as design fees, general conditions costs, and Fee are deemed to be included in the Contract Price. However, by checking the box, the parties agree that in the event the actual cost of the Allowance Item is greater than or less than the Allowance Value by a negotiated percentage, then Design-Builder's right to Fee and markup shall be determined pursuant to Section 6.4.</p>
6.8	Performance Incentives	<p>In addition, for the potential of Design-Builder to share in Savings as set forth in Section 6.6.3, there may be other performance incentives that will influence Project success. Such incentives may include award fees tied to Design-Builder achieving certain standards relative to client satisfaction, safety and personnel retention. The parties are encouraged to discuss the use of such incentives during negotiation of this Agreement. Any agreement on the use of incentives should be set forth in an exhibit attached to this Agreement.</p>
7.2.1	Progress Payments	<p>Enter the day of the month when Design-Builder shall submit its Application for Payment.</p>

Section	Title	Instruction
7.3.1	Retainage	<p>Enter the percentage Owner will retain from Progress Payments to Design-Builder until fifty percent (50%) of the Work is completed. Owner should recognize that it creates undue hardship to hold retainage on Subcontractors that have completed their work early in the Project. Owner should accordingly consider releasing retainage on Subcontractors that complete work early in the Project, providing that these Subcontractors have satisfactorily performed their portion of the Work.</p> <p>The parties are provided the option of modifying the retainage provision by checking the box. This option excludes from retainage Design-Builder's general conditions costs and amounts paid to Design-Builder's Design Consultant. The rationale for selecting this option is that Design-Builder is obligated to pay its general conditions costs in full each month and that under the design-bid-build delivery method, Owner typically does not retain sums from its Designer.</p>
7.3.2	Release of Retainage	This section requires Owner to release retainage to Design-Builder. If Design-Builder and Owner have established a warranty reserve in accordance with Section 6.5.1.23, the parties shall establish an escrow account at this time.
7.5	Interest	The parties should enter the rate at which interest will accrue on Design-Builder's payments if unpaid five (5) days after due. Late payment creates a hardship for Design-Builder, its Design Consultants, and Subcontractors.
7.6	Record Keeping	Owner is provided access to Design-Builder's accounting information as it relates to Costs of the Work. However, if the parties have agreed to multipliers or markups, the time to challenge and negotiate those percentages is at the time the parties execute the Agreement and not during the Project or after it has been completed. Accordingly, Owner can at any time audit these percentages only to confirm that such percentage has been properly charged and not to challenge the composition of such percentage.
8.1	Termination for Convenience: Overhead and Profit	The parties should choose prior to execution of the Agreement the method that will be used to determine overhead and profit paid to Design-Builder in the event Owner terminates Design-Builder for its convenience. The parties may choose to set percentage rates for overhead and profit prior to execution of the Agreement, or may choose to determine reasonable sums to be paid for overhead and profit at the time of the termination. If the parties choose to set overhead and profit rates prior to execution of the Agreement, the percentages should be entered in Section 8.1.
8.2	Termination for Convenience: Additional Payments	Although it is important for Owner to have a process for terminating this Agreement for convenience, the process must consider the interests of Design-Builder. If Owner terminates this Agreement for its own convenience, compensating Design-Builder for its costs will not be adequate because Design-Builder will have committed its resources for a small amount of revenue. Therefore, in addition to the overhead and profit paid in Section 8.1, Owner shall pay Design-Builder an additional sum, calculated as a percentage of the remaining balance of the Contract Price or, if a GMP or Lump Sum has not been established, the remaining balance of the most recent estimated Contract Price. Enter the percentages Owner shall pay Design-Builder if Owner terminates this Agreement for its own convenience prior to or after the start of construction.

Section	Title	Instruction
Article 9	Representatives of the Parties	<p>Enter the name, title, address and telephone number of Owner's Senior Representative and Owner's Representative at Sections 9.1.1 and 9.1.2, respectively.</p> <p>Enter the name, title, address and telephone number of Design-Builder's Senior Representative and Design-Builder's Representative at Sections 9.2.1 and 9.2.2, respectively.</p> <p>The parties can elect to establish these Representatives during the performance of the Project rather than at the time of execution of this Agreement. If Representatives are identified after execution of the Agreement, an appropriate amendment should be made to the Agreement at the time these individuals are designated.</p>
10.1	Insurance	Attach an Insurance Exhibit setting forth in detail the insurance coverages required for the Project. Parties are advised to familiarize themselves with the terms of Article 5 of the General Conditions of Contract, Insurance and Bonds, and to consult their insurance advisor.
10.2	Bonds	Enter the type and amount of bonds or other performance security required for the Project. Where bonding is not required by statute, Owner may want to evaluate the project risks versus the bonding costs in deciding what type of performance security to require.
11.1	Other Provisions	Insert any other provisions. For example, the parties may elect to have disputes resolved through litigation rather than arbitration, in which case the following optional language in this Section should be included.
11.2	Listing of Exhibits	Include a listing of exhibits and documents incorporated or referenced in the Agreement. This listing includes the exhibits and documents referenced in the Agreement. Additional documents or exhibits referenced in the Agreement should be listed here.
12	Limitation of Liability	This provision establishes a limit of liability of Design-Builder's liability for the Project.



## Progressive Design-Build Agreement for Water and Wastewater Projects

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

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This **AGREEMENT** is made as of the \_\_\_\_\_ day of \_\_\_\_\_ in  
the year of 20\_\_\_\_\_, by and between the following parties, for services in connection with the Project identified  
below:

**OWNER:**

City of Chesapeake  
306 Cedar Road  
Chesapeake, VA 23322

**DESIGN-BUILDER:**

Garney Companies, Inc.  
277 Bendix Road, Suite 430  
Virginia Beach, VA 23452

**PROJECT:**

Public Safety Training Academy

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

## **Article 1**

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

#### **1.1 General Services.**

1.1.1 Owner shall provide Design-Builder with Owner's Project Criteria describing Owner's program requirements and objectives for the Project as set forth in Exhibit A. Owner's Project Criteria shall include Owner's use, space, price, time, site, performance and expandability requirements. Owner's Project Criteria may include conceptual documents, design specifications, design performance specifications and other technical materials and requirements prepared by or for Owner.

1.1.2 If Owner's Project Criteria have not been developed prior to the execution of this Agreement, Design-Builder will assist Owner in developing Owner's Project Criteria, with such service deemed to be an additional service for which additional compensation shall be paid by Owner to Design-Builder. If Owner has developed Owner's Project Criteria prior to executing this Agreement, Design-Builder shall review and prepare a written evaluation of such criteria, including recommendations to Owner for different and innovative approaches to the design and construction of the Project. The parties shall meet to discuss Design-Builder's written evaluation of Owner's Project Criteria and agree upon what revisions, if any, should be made to such criteria.

#### **1.2 Phased Services.**

1.2.1 Phase 1 Services. Design-Builder shall perform the services of design, pricing and other services for the Project based on Owner's Project Criteria, as may be revised in accordance with Section 1.1 hereof, as set forth in Exhibit B, Scope of Services. Design-Builder shall perform such services to the level of completion required for Design-Builder and Owner to establish the Contract Price for Phase 2, as set forth in Section 1.3 below. The Contract Price for Phase 2 shall be developed during Phase 1 on an "open-book" basis. Design-Builder's Compensation for Phase 1 Services is set forth in Section 6.0 herein. The level of completion required for Phase 1 Services is defined in Exhibit B, Scope of Services (either as a percentage of design completion or by defined deliverables).

1.2.2 Phase 2 Services. Design-Builder's Phase 2 services shall consist of the completion of design services for the Project, 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 the Contract Price Amendment. Upon receipt of Design-Builder's proposed Contract Price for Phase 2, Owner may proceed as set forth in Article 1.3.

1.3 Proposal. Upon completion of the Phase 1 Services and any other Basis of Design Documents upon which the parties may agree, Design-Builder shall submit a proposal to Owner (the "Proposal") for the completion of the design and construction for the Project for the Contract Price, which may be based on Lump Sum or Design-Builder's Fee and Cost of the Work with an option for a Guaranteed Maximum Price (GMP).

1.3.1 The Proposal shall include the following unless the parties mutually agree otherwise:

1.3.1.1 The Contract Price that may be based on a Lump Sum or Design-Builder's Fee and Cost of the Work, with an option for a GMP, which shall be the sum of:

- i Design-Builder's Fee as defined in Section 6.4.1 hereof;
- ii The estimated Cost of the Work as defined in Section 6.5 hereof, inclusive of any Design-Builder's Contingency as defined in Section 6.6.2 hereof; and



iii If applicable, any prices established under Section 6.1.3 hereof;

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

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

1.3.1.4 The Scheduled Substantial Completion Date upon which the Proposal is based, to the extent said date has not already been established under Section 5.2.1 hereof, and a schedule upon which the Scheduled Substantial Completion Date is based and a Project Schedule for the Work;

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

1.3.1.6 If applicable, a schedule of alternate prices;

1.3.1.7 If applicable, a schedule of unit prices;

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

1.3.1.9 If applicable, a Savings provision;

1.3.1.10 If applicable, Performance Incentives;

1.3.1.11 The time limit for acceptance of the Proposal; and

1.3.1.12 An Owner's permit list, a list detailing the permits and governmental approvals that Owner will bear responsibility to obtain.

### 1.3.2 Review and Adjustment to Proposal.

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

1.3.2.2 Acceptance of Proposal. If Owner accepts the Proposal, as may be amended by Design-Builder, the Contract Price and its basis shall be set forth in an amendment to this Agreement, when mutually agreed between the parties (Contract Price Amendment). Once the parties have agreed upon the Contract Price and Owner has issued a Notice to Proceed with Phase 2, Design-Builder shall perform the Phase 2 Services, all as further described in the Contract Price Amendment, as it may be revised.

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

- i Owner may suggest modifications to the Proposal, whereupon, if such modifications are accepted in writing by Design-Builder, the Proposal shall be deemed accepted and the parties shall proceed in accordance with Section 1.3.2.2 above;
- ii Owner may authorize Design-Builder to continue to proceed with the Work on the basis of reimbursement as provided in Section 6.1.2 hereof without a Contract Price, in which case all references in this Agreement to the Contract Price shall not be applicable; or
- iii Owner may terminate this Agreement for convenience in accordance with Article 8 hereof; provided, however, in this event, Design-Builder shall not be entitled to the payment provided for in Section 8.2 hereof.

If Owner fails to exercise any of the above options, Design-Builder shall have the right to (a) continue with the Work as if Owner had elected to proceed in accordance with Section 1.3.2.3 ii. above, and be paid by Owner accordingly, unless and until Owner notifies it in writing to stop the Work; (b) suspend performance of Work in accordance with Section 11.3.1 of the General Conditions of Contract, provided, however, that in such event Design-Builder shall not be entitled to the payment provided for in Section 8.2 hereof; or (c) may give written notice to Owner that it considers this Agreement completed. If Owner fails to exercise any of the options under Section 1.3.2.3 within ten (10) days of receipt of Design-Builder's notice, then this Agreement shall be deemed completed. If Owner terminates the relationship with Design-Builder under Section 1.3.2.3 iii, or if this Agreement is deemed completed under this paragraph, then Design-Builder shall have no further liability or obligations to Owner under this Agreement.

## **Article 2**

### **Contract Documents**

2.1 The Contract Documents are comprised of the following:

2.1.1 All written modifications, amendments, minor changes and Change Orders to this Agreement issued in accordance with DBIA Document No. 535, *Standard Form of General Conditions of Contract Agreement Between Owner and Design-Builder* (2022 Edition) ("General Conditions of Contract");

2.1.2 The Contract Price Amendment or the Proposal accepted by Owner in accordance with Section 1.3 above;

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

2.1.4 The General Conditions of Contract;

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

2.1.6 **Exhibit A, Owners Project Criteria**; Exhibit B, Scope of Services; and

2.1.7 The following other documents, if any: **Insurance Exhibit**

## **Article 3**

### **Interpretation and Intent**

3.1 Design-Builder and Owner, at the time of acceptance of the Proposal by Owner in accordance with Section 1.3 hereof, shall carefully review all the Contract Documents, including the various documents comprising the Basis of Design Documents for any conflicts or ambiguities. Design-Builder and Owner will discuss and resolve any identified conflicts or ambiguities prior to execution of the Agreement, or if applicable, prior to Owner's acceptance of the Proposal.

3.2 The Contract Documents are intended to permit the parties to complete the Work and all obligations required by the Contract Documents within the Contract Time(s) for the Contract Price. The Contract Documents are intended to be complementary and interpreted in harmony so as to avoid conflict, with words and phrases interpreted in a manner consistent with construction and design industry standards. In the event inconsistencies, conflicts or ambiguities between or among the Contract Documents are discovered after Owner's acceptance of the Proposal, Design-Builder and Owner shall attempt to resolve any ambiguity, conflict or inconsistency informally, recognizing that the Contract Documents shall take precedence in the order in which they are listed in Section 2.1 hereof. (Note, the parties are strongly encouraged to establish in the Contract Price Amendment or Proposal (as applicable) the priority of the various documents comprising such exhibit or proposal.)

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

3.4 If Owner's Project Criteria contain design specifications: (a) Design-Builder is entitled to reasonably rely on the accuracy of the information represented in the design specifications and their compatibility with other information set forth in Owner's Project Criteria, including any design performance specifications; and (b) Design-Builder shall be entitled to an adjustment in its Contract Price and/or Contract Time(s) to the extent Design-Builder's cost and/or time of performance have been adversely impacted by such inaccurate design specification.

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

## **Article 4**

### **Ownership of Work Product**

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

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

4.3 Owner's Limited License upon Owner's Termination for Convenience or Design-Builder's Election to Terminate. If Owner terminates this Agreement for its convenience as set forth in Article 8 hereof, or if

Design-Builder elects to terminate this Agreement in accordance with Section 11.4 of the General Conditions of Contract, Design-Builder shall, upon Owner's payment in full of the amounts due Design-Builder under the Contract Documents, grant Owner a limited license to use the Work Product to complete the Project and subsequently occupy the Project, and Owner shall thereafter have the same rights as set forth in Section 4.2 above, conditioned on the following:

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

4.3.2 Owner agrees to pay Design-Builder the additional sum of (N/A) as compensation for the right to use the Work Product to complete the Project and subsequently use the Work Product in accordance with Section 4.2 if Owner resumes the Project through its employees, agents or third parties.

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

4.5 Owner's Indemnification for Use of Work Product. Owner recognizes that in the event of an early termination of the Work, whether for convenience or for cause, Design-Builder will not have the opportunity to finish or to finalize its Work Product. Therefore, if Owner uses the Work Product, in whole or in part, or if Owner is required to indemnify any Indemnified Parties based on the use or alteration of the Work Product under any of the circumstances identified in this Article 4, Owner shall defend, indemnify and hold harmless the Indemnified Parties from and against any and all claims, damages, liabilities, losses and expenses, including attorneys' fees, arising out of or resulting from the use or alteration of the Work Product, to the fullest extent permitted by applicable law.

## **Article 5**

### **Contract Time**

5.1 Date of Commencement. The Phase 1 Services shall commence within five (5) days of Design-Builder's receipt of Owner's Notice to Proceed unless the parties mutually agree otherwise in writing. The Work shall commence within five (5) days of Design-Builder's receipt of Owner's Notice to Proceed for Phase 2 Services ("Date of Commencement") if the Proposal is accepted and the Contract Price Amendment is amended to this Agreement unless the parties mutually agree otherwise in writing.

5.2 Substantial Completion and Final Completion.

5.2.1 Substantial Completion of the entire Work shall be achieved no later than seven hundred thirty (730) calendar days after the Date of Commencement ("Scheduled Substantial Completion Date").

~~**[At the parties' option, the following supplemental language may be inserted at the end of Section 5.2.1.]**~~

~~**The parties agree that the definition for Substantial Completion set forth in Section 1.2.19 of the General Conditions of Contract is hereby modified to read as follows:**~~

~~**"Substantial Completion is the date on which the Work, or an agreed upon portion of the Work, is sufficiently complete in accordance with the Contract Documents so that Owner can occupy and**~~



use the Project or a portion thereof for its intended purposes, provided, however, that Substantial Completion shall be deemed to have been achieved no later than the date of issuance of a Temporary Certificate of Occupancy issued by the local building official, if a Temporary Certificate of Occupancy is applicable to the Project."

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

~~5.2.3 Final Completion of the Work or identified portions of the Work shall be achieved as expeditiously as reasonably practicable. Final Completion is the date when all Work is complete pursuant to the definition of Final Completion set forth in Section 1.2.8 of the General Conditions of Contract.~~

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

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

5.4 Liquidated Damages. Design-Builder understands that if Substantial Completion is not attained by the Scheduled Substantial Completion Date, Owner will suffer damages which are difficult to determine and accurately specify. Design-Builder agrees that if Substantial Completion is not attained by (730) days after the Scheduled Substantial Completion Date (the "LD Date"), Design-Builder shall pay Owner One Thousand Dollars (\$ 1,000.00 ) as liquidated damages for each day that Substantial Completion extends beyond the LD Date. *(If a GMP is not established upon execution of this Agreement, the parties should consider setting liquidated damages after GMP negotiations.)*

***[The parties may want to consider the following supplemental language within Section 5.4 if they want to assess liquidated damages for failing to meet Final Completion. In this case, the first sentence in Section 5.2.3 should be deleted and the language below should be checked and completed.]***

☒ Design-Builder understands that if Final Completion is not achieved within 60 days of Substantial Completion Date, Owner will suffer damages which are difficult to determine and accurately specify. Design-Builder agrees that if Final Completion is not achieved within sixty (60) days of Substantial Completion, Design-Builder shall pay to Owner One Thousand Dollars (\$1,000.00), as liquidated damages for each calendar day that Final Completion is delayed beyond the above-referenced number of days.

***[In lieu of the liquidated damages specified in Section 5.4 or the alternate provided herein, the Parties may decide that the Agreement will provide for actual damages in the event of Project delay, with Owner being cautioned that there is a waiver of consequential damages under Section 10.5.1 of the General Conditions of Contract. In this case, delete Sections 5.4 and 5.5 and insert the following.]***

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

5.5 Any liquidated damages assessed pursuant to this Agreement shall be in lieu of all liability for any and all extra costs, losses, expenses, claims, penalties and any other damages, whether special or

consequential, and of whatsoever nature, incurred by Owner which are occasioned by any delay in achieving Substantial Completion, Interim Milestone Dates (if any) or Final Completion.

~~[The Parties may also desire to cap the liquidated damages payable under this Agreement, in which case the following language should be included at the end of Section 5.5.]~~

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

5.6 Early Completion Bonus. If Substantial Completion is attained on or before **TBD in Contract Price Amendment (N/A)** days before the Scheduled Substantial Completion Date (the "Bonus Date"), Owner shall pay Design-Builder at the time of Final Payment under Section 7.4 hereof an early completion bonus of **TBD in Contract Price Amendment** Dollars (**\$N/A**) for each day that Substantial Completion is attained earlier than the Bonus Date. *(If a GMP is not established upon execution of this Agreement, the parties should consider setting the early completion bonus after GMP negotiations. If an early completion bonus is applicable to any dates set forth in Section 5.2.2 or 5.2.3 hereof, this Section 5.6 will need to be modified accordingly.)*

~~[The Parties may also desire to cap the early completion bonus payable under Section 5.6, in which case the following language should be included.]~~

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

***[The Parties may also desire to modify Section 8.2.2 of the General Conditions of Contract relative to compensability of delays that would cause the Contract Time(s) to be extended. In such case, the following option can be used.]***

☒ In addition to Design-Builder's right to a time extension for those events set forth in Section 8.2.1 of the General Conditions of Contract, Design-Builder shall also be entitled to an appropriate adjustment of the Contract Price for those events set forth in Section 8.2.1 of the General Conditions of Contract, provided, however, for Force Majeure Events, Design-Builder shall be entitled to an increase in the Contract Price providing that: (i) said events must exceed ten (10) cumulative days before Design-Builder is entitled to additional compensation; and (ii) said additional compensation shall be limited to:

***[Check one box only.]***

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

or

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

5.7 Owner's Review Time. The parties have established the following maximum and minimum amount of time for Owner to review Design Submissions and the Project Schedule or any updates thereto unless the parties agree in writing otherwise.

5.7.1 Owner shall have a minimum of fourteen (14) calendar days of receipt by Owner to review all Design Submissions, the Project Schedule, and any updates thereto.

5.7.2 Owner shall review and (if applicable) provide a response to Design-Builder on all Design Submissions, the Project Schedule and any updates thereto within fourteen (14) calendar days of receipt by Owner.



## Article 6

### **Contract Price**

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

6.1.1 Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract the sum of Three Million, Fifty Thousand Dollars (\$ 3,050,000.00) for the Phase 1 Services, subject to adjustments made in accordance with the General Conditions of Contract. Unless otherwise provided in the Contract Documents, the Phase 1 Services compensation is deemed to include all sales, use, consumer and other taxes mandated by applicable Legal Requirements.

6.1.2 For Phase 2 Services, Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract a contract price ("Contract Price") equal to the Lump Sum amount set forth in Section 6.2 hereof or in the Contract Price Amendment, or equal to Design-Builder's Fee (as defined in Section 6.4 hereof) plus the Cost of the Work (as defined in Section 6.5 hereof), subject to any GMP established in Section 6.6 hereof or as set forth in the Contract Price Amendment and any adjustments made in accordance with the General Conditions of Contract.

6.1.3 For the specific Work set forth below, Owner agrees to pay Design-Builder, as part of the Contract Price, on the following basis: *(This is an optional section intended to provide the parties with flexibility to identify and price limited services.)*

6.2 Lump Sum. Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract the sum of **TBD in Contract Price Amendment** ("Contract Price") for the Work for Phase 2 Services, subject to adjustments made in accordance with the General Conditions of Contract. Unless otherwise provided in the Contract Documents, the Contract Price is deemed to include all sales, use, consumer and other taxes mandated by applicable Legal Requirements.

6.3 Markups for Changes. If the Contract Price requires an adjustment due to changes in the Work, and the cost of such changes is determined under Section 9.4.1 of the General Conditions of Contract, the following markups shall be allowed on such changes:

6.3.1 For additive Change Orders, including additive Change Orders arising from both additive and deductive items, it is agreed that Design-Builder shall receive a Fee of ten percent (10 %) of the additional costs incurred for that Change Order, plus any other markups set forth at Exhibit [TBD] hereto.

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

#### ***[Check one box only.]***

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

or

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

6.4 Design-Builder's Fee - Phase 1

6.4.1 Design-Builder's Fee shall be:

**[Choose one of the following:]**

☒ Three million fifty thousand Dollars (\$ 3,050,000.00 ), as adjusted in accordance with Section 6.4.2 below.

or

☐ \_\_\_\_\_ percent ( \_\_\_\_\_ %) of the Cost of the Work, as adjusted in accordance with Section 6.4.2 below.

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

6.4.2.1 For additive Change Orders, including additive Change Orders arising from both additive and deductive items, it is agreed that Design-Builder shall receive a Fee of ten percent (10 %) of the additional Costs of the Work incurred for that Change Order, plus any other markups set forth at Exhibit B hereto.

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

**[Check one box only.]**

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

or

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

6.5 Cost of the Work.

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

6.5.1.1 Wages of direct employees of Design-Builder performing the Work at the Site or, with Owner's agreement, at locations off the Site, provided, however, that the costs for those employees of Design-Builder performing design services shall be calculated on the basis of prevailing market rates for design professionals performing such services or, if applicable, those rates set forth in an exhibit to this Agreement.

6.5.1.2 Wages or salaries of Design-Builder's supervisory and administrative personnel engaged in the performance of the Work and who are located at the Site or working off-Site to assist in the production or transportation of material and equipment necessary for the Work.

6.5.1.3 Wages or salaries of Design-Builder's personnel stationed at Design-Builder's principal or branch offices, but only to the extent said personnel are identified in Exhibit and performing the function set forth in said Exhibit. The reimbursable costs of personnel

stationed at Design-Builder's principal or branch offices shall include a zero percent (0%) markup to compensate Design-Builder for the Project-related overhead associated with such personnel.

6.5.1.4 Costs incurred by Design-Builder for employee benefits, premiums, taxes, insurance, contributions and assessments required by law, collective bargaining agreements or which are customarily paid by Design-Builder, to the extent such costs are based on wages and salaries paid to employees of Design-Builder covered under Sections 6.5.1.1 through 6.5.1.3 hereof.

*[In lieu of the language in Section 6.5.1.4 above, Design-Builder and Owner may want to include the following language:]*

☐ A multiplier of N/A percent (      %) shall be applied to the wages and salaries of the employees of Design-Builder covered under Sections 6.5.1.1 through 6.5.1.3 hereof.

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

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

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

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

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

6.5.1.10 Costs of removal of debris and waste from the Site.

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

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



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

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

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

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

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

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

6.5.1.19 Deposits which are lost, except to the extent caused by Design-Builder's negligence.

6.5.1.20 Costs incurred in preventing damage, injury or loss in case of an emergency affecting the safety of persons and property.

6.5.1.21 Accounting and data processing costs related to the Work.

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

***[Design-Builder and Owner may want to consider adding the following Section 6.5.1.23 to address the payment of warranty work:]***

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

6.5.2 Non-Reimbursable Costs. The following shall be excluded from the Cost of the Work:

6.5.2.1 Compensation for Design-Builder's personnel stationed at Design-Builder's principal or branch offices, except as provided for in Sections 6.5.1.1, 6.5.1.2 and 6.5.1.3 hereof.

6.5.2.2 Overhead and general expenses, except as provided for in Section 6.5.1 hereof, or which may be recoverable for changes to the Work.

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

6.5.2.4 If the parties have agreed on a GMP, costs that would cause the GMP, as adjusted in accordance with the Contract Documents, to be exceeded.

***[The parties shall comply with the following Section 6.6 based upon whether the GMP is agreed upon before the execution of this Agreement or will be developed and agreed upon after execution of this Agreement. If the parties do not use a GMP, this Section 6.5 shall be deemed inapplicable and compensation to Design-Builder shall be based on those fees and costs identified in the balance of this Article 6.]***

6.6 The Guaranteed Maximum Price.

6.6.1 Design-Builder guarantees that it shall not exceed the GMP of **TBD in Contract Price Amendment** Dollars (\$**N/A**). Documents used as a basis for the GMP shall be identified in the Contract Price 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. *(While the Contract Price Amendment will be developed in advance or concurrently with the execution of this Agreement, it is recommended that such exhibit include the items set forth in Section 1.3 above, to ensure that the basis for the GMP is well understood.)*

***[In lieu of Section 6.6.1, Owner and Design-Builder may want to include the following language.]***

☐ Design-Builder guarantees that it shall not exceed the GMP of \_\_\_\_\_ Dollars (\$\_\_\_\_\_). Documents used as basis for the GMP shall be identified as the Contract Price Amendment to this Agreement. Design-Builder does not guarantee any specific line item provided as part of the GMP, provided, however, that it does guarantee the line item for its general project management and general conditions costs, in the amount of \_\_\_\_\_ Dollars (\$\_\_\_\_\_), and as set forth in the Contract Price Amendment ("General Conditions Cap"). Design-Builder agrees that it will be responsible for paying the applicable general conditions costs in excess of the General Conditions Cap, as well as be responsible for all costs of completing the Work which exceed the GMP, as said general conditions line item and the GMP may be adjusted in accordance with the Contract Documents, including but not limited to the markups for Change Orders set forth in Section 6.3 herein.

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



### 6.6.3 Savings.

6.6.3.1 If the sum of the actual Cost of the Work and Design-Builder's Fee (and, if applicable, any prices established under Section 6.1.3 hereof) is less than the GMP, as such GMP may have been adjusted over the course of the Project, the difference ("Savings") shall be shared as follows:

**[Choose one of the following:]**

☒ Fifty percent (50%) to Design-Builder and fifty percent (50%) to Owner.

or

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

6.6.3.2 Savings shall be calculated and paid as part of Final Payment under Section 7.4 hereof, with the understanding that to the extent Design-Builder incurs costs after Final Completion which would have been payable to Design-Builder as a Cost of the Work, the parties shall recalculate the Savings in light of the costs so incurred, and Design-Builder shall be paid by Owner accordingly.

### 6.7 Allowance Items and Allowance Values.

6.7.1 Any and all Allowance Items, as well as their corresponding Allowance Values, are set forth in the Contract Price Amendment or the Proposal.

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

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

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

**~~[Alternatively, the parties may want to delete Section 6.7.4 and add the following provision:]~~**

☐ ~~In the event the actual direct cost of labor, materials, equipment, transportation, taxes and insurance associated with the applicable Allowance Item is \_\_\_\_\_ percent (\_\_\_\_%) greater than or less than the Allowance Value, Design-Builder and~~



~~Owner agree that Design-Builder's right to Fee and markup shall be determined in accordance with Section 6.4.~~

6.7.5 Whenever the actual costs for an Allowance Item is more than or less than the stated Allowance Value, the Contract Price shall be adjusted accordingly by Change Order, subject to Section 6.7.4. The amount of the Change Order shall reflect the difference between actual costs incurred by Design-Builder for the particular Allowance Item and the Allowance Value.

## 6.8 Performance Incentives.

6.8.1 Owner and Design-Builder have agreed to the performance incentive arrangements set forth in Exhibit TBD.

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

## **Article 7**

### **Procedure for Payment**

7.1 Payment for Preliminary Services. Design-Builder and Owner agree upon the following method for partial and final payment to Design-Builder for the services hereunder: *(Insert terms.)*

## 7.2 Contract Price Progress Payments.

7.2.1 Design-Builder shall submit to Owner on the tenth (10th) day of each month, beginning with the first month after the Date of Commencement, Design-Builder's Application for Payment in accordance with Article 6 of the General Conditions of Contract.

7.2.2 Owner shall make payment within (N/A) days after Owner's receipt of each properly submitted and accurate Application for Payment in accordance with Article 6 of the General Conditions of Contract, but in each case less the total of payments previously made, and less amounts properly withheld under Section 6.3 of the General Conditions of Contract.

7.2.3 If Design-Builder's Fee under Section 6.4 hereof is a fixed amount, the amount of Design-Builder's Fee to be included in Design-Builder's monthly Application for Payment and paid by Owner shall be proportional to the percentage of the Work completed, less payments previously made on account of Design-Builder's Fee.

## 7.3 Retainage on **Phase Two** Progress Payments.

7.3.1 Owner will retain ten percent (10%) of each Application for Payment provided, however, that when fifty percent (50%) of the Work has been satisfactorily completed by Design-Builder and Design-Builder is otherwise in compliance with its contractual obligations, Owner will not retain any additional retention amounts from Design-Builder's subsequent Applications for Payment. Owner will also reasonably consider reducing retainage for Work completed early in the Project.

***[Design-Builder and Owner may want to consider substituting the following retainage provision:]***

☐ Owner will retain N/A percent (      %) of the cost of Work, exclusive of general conditions costs, and any amounts paid to Design-Builder's Design Consultant, from each Application for Payment provided, however, that when fifty percent (50%) of the Work has been satisfactorily completed by Design-Builder and Design-Builder is otherwise in compliance with its contractual obligations, Owner will not retain any additional amounts from Design-Builder's

~~subsequent Applications for Payment. Owner will also reasonably consider reducing retainage for Work completed early in the Project.~~

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

***[For public projects, Design-Builder and Owner may want to consider substituting the following retainage provision.]***

☐ Owner will retain N/A percent (      %) from Design-Builder's Applications for Payment pursuant to applicable state law.

***[Design-Builder and Owner may want to consider substituting the following retainage provision.]***

~~Because Owner has obtained a performance bond and payment bond pursuant to Article 9 below, Owner will not retain retainage from Design-Builder on this Project.~~

***[If Owner and Design-Builder have established a warranty reserve pursuant to Section 6.5.1.23 above, the following provision should be included.]***

☐ ~~If a warranty reserve has been established pursuant to Section 6.5.1.23 above, Owner shall at the time of Substantial Completion retain the agreed-upon amounts and establish an escrow account as contemplated by Section 6.5.1.23 above.~~

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

7.5 Interest. Payments due and unpaid by Owner to Design-Builder, whether progress payments or final payment, shall bear interest commencing five (5) days after payment is due at the rate of one and one-half percent (1.5%) per month until paid.

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

## **Article 8**

### **Termination for Convenience**

8.1 If Design-Builder is terminated for convenience pursuant to Section 11.6 of the General Conditions of Contract, and the parties have agreed to a payment to Design-Builder in the case of such termination of convenience, Owner shall pay Design-Builder for the following in addition to the amount set forth in Section 11.6.1 of the General Conditions of Contract:

***[Choose one of the following:]***

☒ The fair and reasonable sums for overhead and profit on the sum of items set forth in Section 11.6.1 of the General Conditions of Contract.

or

☐ Overhead and profit in the amount of N/A percent (      %) on the sum of items set forth in Section 11.6.1 of the General Conditions of Contract.

8.2 In addition to the amounts set forth in Section 8.1 above and Section 11.6.1 of the General Conditions of Contract, Design-Builder shall be entitled to receive one of the following if the parties agree to an additional payment:

8.2.1 If Owner terminates this Agreement prior to commencement of construction, Design-Builder shall be paid zero percent (0%) of the remaining balance of the Contract Price or, if a GMP has not been established, the remaining balance of the most recent estimated Contract Price.

8.2.2 If Owner terminates this Agreement after commencement of construction, Design-Builder shall be paid zero percent (0%) of the remaining balance of the Contract Price or, if a GMP has not been established, the remaining balance of the most recent estimated Contract Price.

***[The following Article 9 should only be used if Owner and Design-Builder agree to establish their respective representatives at the time the Agreement is executed rather than during the performance of the Project.]***

## **Article 9**

### **Representatives of the Parties**

9.1 Owner's Representatives.

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

David Jurgens, Director of Public Utilities  
306 Cedar Road, Chesapeake, VA 23322  
(757) 382-6401

9.1.2 Owner designates the individual listed below as its Owner's Representative, which individual has the authority and responsibility set forth in Section 3.4 of the General Conditions of Contract:

Erin K. Trimyer, Deputy Director of Public Utilities  
306 Cedar Road, Chesapeake, VA 23322  
(757) 382-6529



## 9.2 Design-Builder's Representatives.

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

Jordan Carrier, Executive Vice President  
3959 Pender Drive, Suite 100  
Fairfax, VA 22030  
(703) 794-6190

9.2.2 Design-Builder designates the individual listed below as its Design-Builder's Representative, which individual has the authority and responsibility set forth in Section 2.1.1 of the General Conditions of Contract:

Dan Buckley  
Preconstruction Executive Mid-Atlantic  
277 Bendix Road, Suite 430  
Virginia Beach, VA 23452  
(703) 794-6195

## **Article 10**

### **Bonds and Insurance**

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

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

Performance Bond.

***[Check one box only. If no box is checked, then no bond is required.]***

☒ Required ☐ Not Required

Payment Bond.

***[Check one box only. If no box is checked, then no bond is required.]***

☒ Required ☐ Not Required

Other Performance Security.

***[Check one box only. If no box is checked, then no other performance security is required. If the "Required" box is checked, identify below the specific performance security that is being required and all salient commercial terms associated with that security.]***

☐ Required ☒ Not Required

## **Article 11**

### **Other Provisions**

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

11.2 Listing of Exhibits and documents incorporated herein:

Exhibit A – Owner's Project Criteria

Exhibit B – Scope of Services

Insurance Exhibit

DBIA Document No. 535, Standard Form of General Conditions of Contract Between Owner and Design-Builder (2022 Edition) ("General Conditions of Contract")

Amendment to DBIA Document No. 545 Progressive Design Build Agreement for Water and Wastewater Projects

Contract Price Amendment, if any.

***[In lieu of Sections 10.3.1 through 10.3.3 of the General Conditions of Contract, the Parties may want to delete such sections and include the following alternative disputes proceeding clause.]***

☒ Any claims, disputes or controversies between the parties arising out of or related to the Agreement, or the breach thereof, which have not been resolved in accordance with the procedures set forth in Section 10.2 of the General Conditions of Contract shall be resolved in a court of competent jurisdiction in the state in which the Project is located.

***[Section 2.9.1 of the General Conditions of Contract contains an option for the parties to establish a limited time frame for Design-Builder's warranty. If the parties agree to such a limited time frame, the parties may insert it below.]***

☐ ~~The parties have agreed to limit the time frame that Owner can make a claim pursuant to Section 2.9.1 of the General Conditions of Contract. Owner must make all claims pursuant to Section 2.9.1 of the General Conditions of Contract within \_\_\_\_\_ years of the date of Final Completion of the Project.~~

## **Article 12**

### **Limitation of Liability**

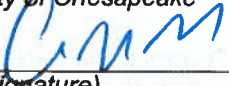
12.1 Limitation. To the fullest extent permitted by law, and notwithstanding any other provision of this Agreement, the total liability, in the aggregate, of Design-Builder, its Design Consultants, and Subcontractors, surety (if any) and their respective officers, directors, employees and agents, and any of them, to Owner and anyone claiming by, through or under Owner, for any and all claims, losses, liabilities, costs or damages whatsoever arising out of, resulting from or in any way related to the Project or this Agreement from any cause, including but not limited to the negligence, indemnity, professional errors or omissions, strict liability, breach of contract or warranty (express or implied), shall not exceed

**One hundred** percent (100%) of the Contract Price. The parties agree that specific consideration has been given by Design-Builder for this limitation and that it is deemed adequate.

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

**OWNER:**

City of Chesapeake  
City of Chesapeake

  
(Signature)

Christopher M. Price  
(Printed Name)

City Manager  
(Title)

Date: 12.30.24

**DESIGN-BUILDER:**

Garney Companies, Inc.  
Garney Companies, Inc.

  
(Signature)

Jordan Carrier  
(Printed Name)

Executive Vice President  
(Title)

Date: December 20, 2024

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

**APPROVED AS TO FORM:**

50.20 12/20/24  
Assistant City Attorney



## **Exhibit A**

### **Owner's Project Criteria**

## **Exhibit A**

### **Owner's Project Criteria**

#### **Sanitary Sewer Force Main and Optional Pump Station**

##### **Project Overview**

This document outlines the Owner's project criteria for the design, installation, and commissioning of a sanitary sewer force main and optional pump station for **the Public Safety Training Academy** (the "Project") for the City of Chesapeake, hereinafter referred to as the **Owner**. The project is intended to support efficient, reliable, and environmentally compliant sanitary sewer service for the **Project**.

##### **Project Description**

###### **1. Sanitary Sewer Force Main**

- Installation of a sanitary sewer force main approximately 4.9 miles in length to convey wastewater from the vicinity of Hillcrest Parkway to the Public Safety Training Academy site at the corner of St. Bride's Road West and South Battlefield Boulevard.
- The force main must be designed to meet all department, local, and state design and regulatory requirements.
- The force main will be constructed to handle anticipated wastewater flows, with final flow rate calculations to be provided after system modeling and consultation with the Owner.

###### **2. Optional Pump Station**

- The optional pump station is to be designed and installed to support the sanitary sewer force main, including all electrical, mechanical, and control systems.
- The pump station shall be designed with sufficient capacity to accommodate future expansion. Specific flow rates and capacity will be finalized once system modeling and flow analysis are completed.

###### **3. General Design Requirements**

- The design should minimize disruption to existing infrastructure and utilities.
- All work should adhere to the Owner's safety standards, environmental regulations, and local requirements.
- System Redundancy: Ensure redundancy in the pumping system for the optional pump station, including backup power and fail-safe systems.
- The system should be designed for easy maintenance and future scalability.

##### **Performance Criteria**

###### **1. Force Main Installation:**

- **Capacity:** The force main shall be designed to handle anticipated wastewater flows, with final flow rate calculations to be provided after system modeling and consultation with the Owner.

- **Hydraulic Design:** The pipeline's design should minimize friction losses, ensuring the pressure within the system meets the operational requirements.
  - **Pressure Testing:** A hydrostatic test will be conducted prior to system commissioning to ensure that the force main is leak-free.
  - **Alignment and Profile:** The force main alignment shall be determined to minimize the need for deep trenches, crossings, and easements, with a minimum depth of 3 feet.
- 2. Pump Station Design (Optional):**
- **Pumping Capacity:** The pump station shall be designed with sufficient capacity to handle wastewater flow, which will be finalized after system modeling and flow analysis.
  - **Pumps:** The system will include primary and backup pumps, each designed for appropriate flow rates and capable of continuous operation under specified head conditions. Final pump specifications will be confirmed based on the flow rate data.
  - **Electrical Power:** The station should have a reliable electrical system.
  - **Control Systems:** SCADA (Supervisory Control and Data Acquisition) systems for remote monitoring and control shall be incorporated.
- 3. Materials and Equipment:**
- The materials used in the force main installation (e.g., pipe, fittings, valves, etc.) must comply with applicable local standards.
  - All equipment must be rated for continuous operation in a wastewater environment.
  - Include corrosion protection for all exposed parts, such as coatings and cathodic protection, as necessary.

## **60% Design Submittals and Approvals**

- 1. Design Deliverables:**
- 60% design drawings, including the alignment of the force main, pump station layout, and any affected utilities.
  - Specifications for materials, equipment, and construction methods.
  - Detailed calculations, including hydraulic, structural, and electrical design for review.
  - Environmental impact assessments, as required by local regulations.
  - A phasing plan for construction.
- 2. Submittal Timeline:**
- 60% design documents to be submitted for review within six months from contract Notice to Proceed.
  - All submittals must comply with the Owner's review process, and any changes will be reviewed and approved by the Owner's designated representative.

## **Construction Requirements**

- 1. Scheduling:**

- The force main may be installed in phases to minimize disruption to existing utilities and the community.
- Construction should be substantially completed within 730 days of Notice to Proceed and finally complete within 790 days of Notice to Proceed.
- 2. Quality Control:**
  - The contractor shall implement a quality control plan to ensure the work complies with the design documents and meets industry standards.
  - Independent testing will be required for all critical components, including pressure testing for the force main and functional testing of the pump station.
- 3. Safety:**
  - All work shall adhere to the safety standards established by the Virginia Occupational Health and Safety Administration.
  - The contractor shall submit a safety plan prior to the start of work, including site-specific safety procedures, emergency response plans, and hazardous material handling.

## **Commissioning and Acceptance**

- 1. Testing:**
  - After installation, the force main shall undergo pressure testing, leak detection, and alignment verification.
  - For the pump station, functional testing shall be performed for all components, including pumps, controls, backup power, and alarms.
- 2. Training:**
  - The contractor shall provide training to the Owner's operations and maintenance personnel on the operation of the system, including the pump station, force main, and any control systems.
- 3. Final Acceptance:**
  - Upon successful commissioning, the system will be subject to a one-year warranty period during which any defects must be corrected at no additional cost to the Owner.

## **Special Considerations**

- 1. Environmental Considerations:**
  - The contractor must minimize environmental impact during construction, with particular attention to soil erosion, waterway protection, and waste disposal.
  - A Stormwater Pollution Prevention Plan (SWPPP) must be developed and followed during construction.
- 2. Ongoing Maintenance:**
  - Provide record drawings, detailed manuals and operational documentation for the force main and pump station systems.
  - Include recommended maintenance schedules, spare parts lists, and troubleshooting guidelines.

## **Conclusion**

This **Owner's Project Criteria** provides the foundational requirements and goals for the successful design, installation, and commissioning of the sanitary sewer force main (approximately 4.9 miles) from Hillcrest Parkway to the Public Safety Training Academy, and the optional pump station. All design-build team members must ensure compliance with these criteria and collaborate with the Owner to meet project objectives and timelines.

**Exhibit B**  
**Scope of Services**





277 Bendix Road, Suite 430, Virginia Beach, VA 23452  
Phone: 919.900.0517  
www.garney.com

David Jurgens  
Director of Public Utilities  
306 Cedar Road  
Chesapeake, VA 23323

November 30, 2024

**RE: Public Safety Training Academy (PSTA) Force Main Design Build Services**

Dear Mr. Jurgens,

Garney Companies, Inc. (Garney) is pleased to submit our Pre-Construction Phase 1 Scope and Fee for the PSTA Force Main Project.

Pre-Construction Phase services are intended to assist in design development of the following:

- The new sewer force main scope of work is expected to generally include:
  - Approximately 4.9 miles of 24-inch PVC sewer transmission piping and fittings
  - Optional new 1.5 MGD sewer pump station and associated piping near St. Brides Road and South Battlefield
  - Maintenance of Traffic plan
  - Supervisory Control and Data Acquisition (SCADA) System
  - Optional trenchless crossings involving horizontal directional drill and/or auger jack and bore crossings of wetlands and major intersections.

Services also include providing City of Chesapeake with a preliminary price at the 60% design milestone to include the Design Build fee, General Conditions, direct cost of work, insurance, bonds, contingencies, setting up allowances and related costs. The contractual guaranteed maximum price (GMP) will be developed at the 60% design milestone for the respective scope of work which Garney and the City of Chesapeake will negotiate prior to the beginning of any construction related activities.

The scope tasks associated with Pre-Construction Phase services are described below.

**SCOPE OF SERVICES – Pre-Construction Phase**

**TASK 1 – General Project Management and Meetings**

Garney will provide general project management throughout the duration of the pre-construction phase scope of services. General management activities will include developing and maintaining project controls related to, Garney's contract execution and invoices submitted to City of Chesapeake for review and approval on a monthly basis in electronic format. Following NTP, Garney will attend the project kickoff meeting to be held with City of Chesapeake, Owners Agents, and the design build team to discuss project goals, objectives, communication protocols, challenges and scope of services.

During the execution of the pre-construction phase services, Garney anticipates the following Task 1 meetings to occur over the anticipated 6-month duration through June 2025:

- 1 – Project kick-off meeting
  - Define project goals and owner expectations, collaborative partnering, review preliminary schedule, review permit application process, and establish community outreach plan
- 2 – Community Outreach Meetings (including easement/property owner specific meetings)
- 2 – Maintenance of Traffic operations planning workshop

- 2 – Maintenance of Utility operations planning workshop
- 24 – Conference Calls w/ design Engineer
- 4 – Design review meetings (50% & 60% for the sewer force main)
- 4 – Design review meetings (30% & 60% for the pump station design)
- 6 – Risk management workshops
- 2 – GMP Development Meetings
- 1 – Early procurement release of material and work packages
- 2 – Permitting/Agency workshops
- 3 – Schedule development meetings

## **TASK 2 – Develop and Maintain Project Schedule**

Garney will develop and update the project schedules from project inception through the completion of pre-construction services. A preliminary schedule will be developed within 30 days following receipt of the Design Engineer's schedule after NTP to detail design and pre-construction activities to be completed. This preliminary schedule will be cost loaded for the City of Chesapeake.

Based on the 50% design deliverables, Garney will develop a high-level schedule to verify project milestone dates and identify early work and procurement needs.

The initial baseline schedule depicting both design and construction activities will be updated after receipt of the 50% design deliverable and updated monthly during the pre-construction services phase. Additional detail will be added to the construction section after the 60% and 100% design review meetings. Hazen and Sawyer anticipated design tasks will be included in the schedule updates. Schedules will be provided in CPM format and compatible with Primavera P6 import capabilities (.xer file format). All schedule submissions will be provided in both native and PDF file format.

## **TASK 3 – Develop Work Packages**

Following the 50% design deliverable, Garney will begin identifying any potential early work packages for the project. Anticipated scope packages may include:

- Trenchless Installations
- Clearing
- Erosion Control
- Temporary Traffic Control
- Surface Restorations
- Pavement Resurfacing
- Concrete Restoration
- SCADA & Electrical at Pump Station
- Early Work/Material Procurement

Scope packages will include project documents, including construction plans and specifications developed to a 60

percent level, subcontract agreements, with applicable City of Chesapeake and HRSD standards and anticipated construction schedule.

Garney will collaborate and host a community outreach event for SWaM businesses to help perform scopes during construction phase. Scope packages will be utilized to solicit pricing from subcontractors and vendors at GMP milestone dates to provide accurate pricing and feedback.

- Identify project scopes aligned with certified SWaM firms
- Perform SWaM outreach via email, providing notice of upcoming work, anticipated schedule, subcontractor scopes, project contact information, and document access instructions

#### **TASK 4 – Design and Constructability**

Garney will do a cursory review of the Kimley Horn 50% design documents to provide a high-level schedule, identify material needs and long lead time items as well as any potential early work packages. Garney will thoroughly review design deliverables at 50%, 60% and 100% for each segment of work, providing feedback to City of Chesapeake and Hazen and Sawyer on constructability, coordination, site conditions and scope. At each milestone we will analyze the cost and schedule impacts of design alternatives being evaluated and provide that information for consideration. We will involve our Trenchless Technologies Specialist in analyzing the selected route and geotechnical information along with any design alternatives for constructability and concerns related to the feasibility of trenchless operations. Included in the review of the design deliverables will be attendance at design review meetings at 50%, 60% design.

If necessary, the design build team's subsurface utility exploration (SUE) subconsultant will perform SUE dependent on the route and number of potential alternatives. Additional SUE services are included in our scope of services to further refine the plan documents and may not be fully utilized dependent on the final route alignment and level of investigation previously performed.

#### **TASK 5 – Value Engineering**

After the 50% design deliverables have been issued, Garney will develop a list of value engineering (VE) items for City of Chesapeake consideration. VE items will be reviewed with City of Chesapeake and Hazen and Sawyer to determine whether the VE item shall be further pursued. If an item is selected by the team, Garney will investigate the VE item further and present the findings at a future meeting. The analysis will address cost savings, schedule savings and effects on pipe alignment, design, maintenance and permitting. A VE log will be maintained throughout pre-construction phase services to summarize the overall result of the VE process. During this time Garney will also be identifying items with long lead times or procurement constraints that may affect the project schedule. Garney can work with the design team to procure material items early if needed to take advantage of long lead times or pricing advantages that may be observed in the market during the pre-construction phase.

#### **TASK 6 – Guaranteed Maximum Price (GMP) Development**

Preliminary budget has already been developed and provided to City of Chesapeake. Garney will provide a preliminary opinion of cost based on the 50% design deliverable for the construction and lead a review workshop. The opinion of cost will be updated and reviewed again at 60% design along with any VE items agreed to by the Team at 60%. Garney will prepare the risk register for the project for use in developing the project contingencies, with input from the City of Chesapeake and Hazen and Sawyer. The GMP submittal will include a listing of documents (plans and specifications), assumptions and clarifications used as a basis of developing the GMP, as well as identify a time limit for acceptance of the proposal. The submittal will include a proposed schedule of values establishing design and construction components with sufficient detail to utilize for approximating progress billings.

#### **Pre-Construction Phase Fee**

The lump sum for Design Build pre-construction services for the force main design only is \$2,300,000.00. The lump

sum for Design Build pre-construction services for the force main and pump station design is \$3,050,000.00. A breakdown of the pre-construction fee for the work described in this proposal is included as **Exhibit A**. Garney will submit monthly invoices to City of Chesapeake based on a percent complete each month.

The Garney and Hazen and Sawyer team looks forward to working with the City of Chesapeake on this very important project. Should you have any questions or require additional information with this scope, do not hesitate to call me directly at 804.484.4553.

Sincerely,

GARNEY COMPANIES, INC.



Mark Peters  
Garney

Enclosures:

Exhibit A – Design Build Services Fee

---

CC:

Dan Buckley- Garney

Scott Morrow- Hazen and Sawyer



Exhibit A

Phase 1 - Design Build Services - Force Main Only				Phase 1 - Design Build Services - Pump Station Only			
Hazen Design Services	Item	Description	Total Value	Hazen Design Services	Item	Description	Total Value
	1	Project Management	\$250,000.00		1	Field Services (Survey, Geotech)	\$70,000.00
	2	Field Services (Geotech)	\$120,000.00		2	Permitting / Environmental Services	\$30,000.00
	3	Permitting / Environmental Services	\$80,000.00		3	30% Design	\$150,000.00
	4	60% Design	\$800,000.00		4	60% Design	\$300,000.00
SUBTOTAL=			\$1,250,000.00	SUBTOTAL=			\$550,000.00
Builder Support During Design	Item	Description	Total Value	Builder Support During Design	Item	Description	Total Value
	1	Project Management	\$475,000.00		1	Project Management	\$50,000.00
	2	60% Design Review	\$575,000.00		2	30% Design Review	\$75,000.00
SUBTOTAL=			\$1,050,000.00	SUBTOTAL=			\$200,000.00
DESIGN BUILD SERVICES FOR FORCE MAIN ONLY=			\$2,300,000.00	DESIGN BUILD SERVICES FOR PUMP STATION ONLY=			\$750,000.00

PHASE 1 DESIGNER TOTAL FOR FM AND PS = \$1,800,000.00

PHASE 1 BUILDER TOTAL FOR FM AND PS = \$1,250,000.00

COMBINED TOTAL FOR FM AND PS = \$3,050,000.00

**INSURANCE EXHIBIT -**  
**Progressive Design-Build Agreement for Water and Wastewater Projects**

Pursuant to Section 10.1 of the above-referenced Progressive Design-Build Agreement for Water and Wastewater Projects between the City of Chesapeake, Virginia and Garney Companies, Inc. (the "Agreement"), the parties agree as follows regarding their respective insurance obligations:

**1. Professional liability ("Phase 1" coverage).** Design-Builder shall obtain prior to executing the Agreement and shall continuously maintain at all times when delivering professional services (whether as part of Phase 1 or Phase 2 of the Agreement), professional liability insurance covering any architectural, engineering, and other professional services Design-Builder delivers under the Agreement. Such insurance must meet each of the following requirements:

- a. Minimum coverage limits:** \$2,000,000 per occurrence and \$6,000,000 in the aggregate.
- b. Additional insured.** Design-Builder shall cause the provider of such policy to name the City as additional insured as required by written contract.

**2. "Phase 2" coverage.** In addition to the foregoing, prior to physically performing or causing to be performed any services at the project site concerned in the Agreement (but in any case, no later than the execution of any Contract Price Amendment), Design-Builder shall obtain and maintain the following insurance coverages:

- a. Commercial General Liability ("CGL"):** Design-Builder shall obtain a commercial general liability insurance covering all its activities under the Agreement (except for professional services), which policy must meet the following requirements:
  - i. Required coverage:** The policy must include bodily injury and property damage, personal injury and advertising injury, products, and completed operations coverage.
  - ii. Minimum coverage limits:** \$1,000,000 per occurrence and \$2,000,000 in the aggregate.
  - iii. Additional insured.** Design-Builder shall cause the provider of such CGL policy to name the City as additional insured as required by written contract.
- b. Automobile liability.** Design-Builder shall obtain an automobile liability policy (including hired and non-owned automobiles) with a combined single limit of \$1,000,000.
- c. Worker's compensation and employer's liability.** Design-Builder shall obtain a worker's compensation liability policy meeting the minimum statutory requirements,

and an employer's liability policy in the minimum amount of \$100,000 for each injury, \$100,000 for each disease, and \$500,000 disease policy limit. Design-Builder shall cause its insurer to waive its right of subrogation against the City under such policy or policies.

- d. **Excess liability.** Design-Builder shall obtain an excess liability policy including (without limitation) employer's liability, automobile liability, and CGL coverage, in the minimum aggregate amount of \$5,000,000. Design-Builder shall cause the provider of such policy to name the City as an additional insured as required by written contract.

3. **General requirements for all policies.** Design-Builder shall ensure that all policies of insurance it is required to have under the Agreement meets each of the following requirements, as applicable:

- a. Design-Builder shall evidence its compliance with these requirements with one or more Acord™ Certificates of Insurance issued in accordance with Va. Code § 38.2-518.
- b. Design-Builder shall ensure all policies required by this Exhibit are made on an occurrence basis.
- c. Whenever Design-Builder is required to name the City as an additional insured under a policy, or to waive subrogation against the City under a policy, it shall so indicate on the applicable Certificate of Insurance but shall also submit to the City the operative policy endorsement effecting such modifications.
- d. All policies must be issued by companies authorized to sell insurance in the Commonwealth of Virginia by the Virginia State Corporation Commission.
- e. Design-Builder shall not allow any such policy to lapse or expire, nor shall it cancel such policy. In the event that any such policy expires, lapses, or is cancelled through no fault of Design-Builder, Design-Builder shall (i) provide the City notice thereof not less than 30 calendar days prior to such expiration, lapse, or cancellation becoming effective, and (ii) restore or replace said policy with a policy meeting the requirements of this Exhibit not less than 30 calendar days after such notice is issued.

4. **Sub Contractor requirements.** Design-Builder shall ensure that any sub-contractor it engages to perform work under Phase 2 of the Agreement shall also have worker's compensation and employer's liability coverage in accordance with Va. Code § 2.2-4332.

5. **Exceptions authorized by Risk Manager.** The City, acting through its Risk Manager or designee, may agree to reduce, waive, or modify (but not increase) Design-Builder's insurance requirements in their discretion.

6. **Builder's risk.** The parties agree that notwithstanding any provision of the Agreement to the contrary, Design-Builder is not obligated to obtain builder's risk coverage for the project.

**7. City self-insurance.** Notwithstanding any provision of the Agreement to the contrary, any obligation of the City under the Agreement to obtain insurance coverage may be met through its program of risk management in the nature of self-insurance.



Standard Form of  
General Conditions of  
Contract Between  
Owner and Design-  
Builder







## Design-Build Institute of America - Contract Documents

### LICENSE AGREEMENT

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

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

# INSTRUCTIONS

For DBIA Document No. 535 Standard Form of General Conditions of Contract Between Owner and Design-Builder (2022 Edition)

## General Instructions

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



## Specific Instructions

Section	Title	Instruction
General	Purpose of This Document	<p>The General Conditions of Contract provide the terms and conditions under which the Work of the Project will be performed.</p> <p>This document accompanies DBIA Document No. 525 and DBIA Document No. 530 (each referred to herein generally as "Agreement"). It may also be incorporated by reference into other related agreements, as between Design-Builder and Design Consultant, and Design-Builder and Subcontractor.</p>
General	Checklist	<p>The following Sections reference documents that are to be attached to the Agreement:</p> <p>Section 3.5.1 Owner's Permit List Article 5 Insurance and Bonds Section 9.4.2 Unit Prices</p>
2.1.3	Schedule	The parties are encouraged, if possible, to agree to a schedule for the execution of the Work upon execution of the Agreement or upon establishing the GMP.
2.2.1	Design Professional Services	The parties should be aware that in addition to requiring compliance with state licensing laws for design professionals, some states also require that the design professional have a corporate professional license.
2.3.1	Standard of Care for Design Professional's Services	Design-Builder's obligation is to deliver a design that meets prevailing industry standards. However, DBIA has provided the parties at Article 11 of the Agreement an optional provision whereby if Owner can identify specific performance standards that can be objectively measured, Design-Builder is obligated to design the Project to satisfy these standards if this optional provision is selected. To avoid any confusion and to ensure that the parties fully understand what their obligations are, the specific performance standards should be clearly identified and should be able to be objectively measured. Design-Builder should recognize that this is a heightened standard of care that has insurance ramifications that should be discussed with Design-Builder's insurance advisor.
3.5.1	Government Approvals and Permits	Design-Builder is responsible for obtaining all necessary permits, approvals, and licenses, except to the extent specific permits, approvals, and licenses are set forth in an Owner's Permit List, which must be attached as an exhibit to the Agreement. The parties, prior to execution of the Agreement, should discuss which permits, approvals and licenses need to be obtained for the Project and which party is in the best position to do so.
5.1.1	Design-Builder's Insurance Requirements	Design-Builder is obligated to provide insurance coverage from insurance carriers that meet the criteria set forth in the Insurance Exhibit attached to Section 10.1 of the Agreement.
5.1.2	Exclusions to Design-Build	Parties are advised that their standard insurance policies may contain exclusions for the design-build delivery method. This Section 5.1.2 requires that any such exclusions be deleted from the policy.
5.2	Owner's Insurance Requirements	Owner, in addition to providing the insurance set forth in this Section and Section 5.3, is also obligated to procure the insurance coverages for the amounts and consistent with the terms set forth in the Insurance Exhibit made part of the Agreement.
5.4	Bonds and Other Performance Security	Design-Builder is only obligated to provide bonds or other forms of performance security to the extent called for in Section 10.2 of the Agreement.

Section	Title	Instruction
8.2.2	Compensability for Force Majeure Events	The parties are provided the option in the Agreement of negotiating whether Design-Builder is entitled to compensation for Force Majeure Events.
9.4.1	Contract Price Adjustments	Unit prices, if established, shall be attached pursuant to Article 2 of the Agreement.
9.4.3	Payment/ Performance of Disputed Services	When Owner disputes Design-Builder's entitlement to a change order or disagrees with Design-Builder regarding the scope of Work, and nevertheless expects Design-Builder to perform the services, Design-Builder's cash flow and ability to complete the Work will be hampered if Owner fails to pay Design-Builder for the disputed services. This Section provides a balanced approach whereby Design-Builder is required to perform the services, but Owner is required to pay fifty percent (50%) of Design-Builder's reasonable estimated direct costs of performing such services until the dispute is settled. By so doing, Owner does not forfeit its right to deny total responsibility for payment, and Design-Builder does not give up its right to demand full payment. The dispute shall be resolved according to Article 10.
Article 10	Contract Adjustments and Disputes	DBIA endorses the use of partnering, negotiation, mediation and arbitration for the prevention and resolution of disputes. The General Conditions of Contract provides for the parties' Representatives and Senior Representatives to attempt to negotiate the dispute or disagreement. If this attempt fails, the dispute shall be submitted to mandatory, non-binding mediation. Any dispute that cannot be resolved by mediation shall then be submitted to binding arbitration, unless the parties elect in the Agreement to submit their dispute to a court of competent jurisdiction.
10.3.4	Arbitration	The prevailing party in any arbitration shall receive reasonable attorneys' fees from the other party. DBIA supports this "loser pays" provision to encourage parties to negotiate or mediate their differences and to minimize the number of frivolous disputes.
10.4	Duty to Continue Performance	Pending the resolution of any dispute or disagreement, both Owner and Design-Builder shall continue to perform their respective duties under the Contract Documents, unless the parties provide otherwise in the Contract Documents.
10.5	Consequential Damages	DBIA believes that it is inappropriate for either Owner or Design-Builder to be responsible to the other for consequential damages arising from the Project. This limitation on consequential damages in no way restricts, however, the payment of liquidated damages, if any, under Article 5 of the Agreement.
11.4	Design-Builder's Right to Terminate for Cause	If Design-Builder properly terminates the Agreement for cause, it shall recover from Owner in the same way as if Owner had terminated the Agreement for convenience under Section 11.6 of the General Conditions. Owner shall pay to Design-Builder its costs, reasonable overhead and profit on the costs, and an additional payment based on a percentage of the remaining balance of the Contract Price, all as set forth in Article 8 of the Agreement.
11.6.2	Termination for Convenience: Owner's Use of Work Product	Owner should not use the Termination for Convenience clause to obtain Design-Builder's valuable design concepts and then seek lower bids from another design-builder. If Owner terminates this Agreement for its own convenience, and chooses to proceed with the Project using Design-Builder's Work Product, Owner should pay an additional sum for the use of Design-Builder's Work Product pursuant to Section 4.3 of the Agreement.
Article 12	Electronic Data	Design-Builder and Owner shall agree on the software and format for the transmission of Electronic Data. Ownership of Work Product in electronic form is governed by Article 4 of the Agreement. The transmitting party disclaims all warranties with respect to the media transmitting the Electronic Data, but nothing in this Article is intended to negate duties with respect to the standard of care in creating the Electronic Data.

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# **Article 1**

## **General**

### **1.1 Mutual Obligations.**

**1.1.1** *Owner and Design-Builder* commit at all times to cooperate fully with each other and proceed on the basis of trust and good faith, to permit each party to realize the benefits afforded under the Contract Documents.

### **1.2 Basic Definitions.**

**1.2.1** *Agreement* refers to the executed contract between Owner and Design-Builder under either DBIA Document No. 525, *Standard Form of Agreement Between Owner and Design-Builder – Lump Sum* (2022 Edition); DBIA Document No. 530, *Standard Form of Agreement Between Owner and Design-Builder – Cost Plus Fee With an Option for a Guaranteed Maximum Price* (2022 Edition); DBIA Document No. 544, *Standard Form of Progressive Design-Build Agreement* (2022 Edition); or DBIA Document No. 545, *Standard Form of Progressive Design-Build Agreement for Water and Wastewater Projects* (2022 Edition).

**1.2.2** *Basis of Design Documents* are as follows: For DBIA Document No. 530, *Standard Form of Agreement Between Owner and Design-Builder – Cost Plus Fee With an Option for a Guaranteed Maximum Price*, the Basis of Design Documents are those documents specifically listed in, as applicable, the GMP Exhibit or GMP Proposal as being the "Basis of Design Documents." For DBIA Document No. 525, *Standard Form of Agreement Between Owner and Design-Builder – Lump Sum*, for DBIA Document No. 544, *Standard Form of Progressive Design-Build Agreement*, the Basis of Design Documents are Owner's Project Criteria, Design-Builder's Proposal, and the Deviation List, if any. For DBIA Document No. 545, *Standard Form of Progressive Design-Build Agreement for Water and Wastewater Projects*, the Basis of Design Documents are Owner's Project Criteria, Design-Builder's Proposal and the Deviation List, if any.

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

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

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

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

**1.2.7** *Design Submission* means any and all documents, shop drawings, electronic information, including computer programs and computer generated materials, data, plans, drawings, sketches, illustrations, specifications, descriptions, models, and other information developed, prepared, furnished, delivered or required to be delivered by, or for, Design-Builder.

**1.2.8** *Final Completion* is the date on which all Work is complete in accordance with the Contract Documents, including but not limited to, any items identified in the punch list prepared under

Section 6.6.1 and the submission of all documents set forth in Section 6.7.2.

**1.2.9** *Force Majeure Events* are those events that are beyond the control of both Design-Builder and Owner, including the events of war, floods, labor disputes, earthquakes, epidemics, adverse weather conditions not reasonably anticipated, and other acts of God.

**1.2.10** *General Conditions of Contract* refer to this DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (2022 Edition).

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

**1.2.12** *GMP Proposal or Proposal* means that proposal developed by Design-Builder in accordance with Section 6.6 of DBIA Document No. 530, *Standard Form of Agreement Between Owner and Design-Builder, Cost Plus Fee With an Option for a Guaranteed Maximum Price* or with Section 2.3 of DBIA Document No. 544, *Progressive Design-Build Agreement*, or DBIA Document No. 545, *Progressive Design-Build Agreement for Water and Wastewater Projects*.

**1.2.13** *Hazardous Conditions* are any materials, wastes, substances and chemicals deemed to be hazardous under applicable Legal Requirements, or the handling, storage, remediation, or disposal of which are regulated by applicable Legal Requirements.

**1.2.14** *Legal Requirements* are all applicable federal, state and local laws, codes, ordinances, rules, regulations, orders and decrees of any government or quasi-government entity having jurisdiction over the Project or Site, the practices involved in the Project or Site, or any Work.

**1.2.15** *Owner's Project Criteria* are developed by or for Owner to describe Owner's program requirements and objectives for the Project, including use, space, price, time, site and expandability requirements, as well as submittal requirements and other requirements governing Design-Builder's performance of the Work. Owner's Project Criteria may include conceptual documents, design criteria, design performance specifications, design specifications, and LEED® or other sustainable design criteria and other Project-specific technical materials and requirements.

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

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

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

**1.2.19** *Substantial Completion or Substantially Complete* means the date on which the Work, or an agreed upon portion of the Work, is sufficiently complete in accordance with the Contract Documents so that Owner can occupy and use the Project or a portion thereof for its intended purposes.

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



## **Article 2**

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

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

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

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

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

**2.1.4** The parties will meet within seven (7) days after execution of the Agreement to discuss issues affecting the administration of the Work and to implement the necessary procedures, including those relating to submittals and payment, to facilitate the ability of the parties to perform their obligations under the Contract Documents.

**2.1.5** Design-Builder shall, if requested by the Owner and mutually agreed upon, provide reasonable assistance to the Owner from time to time with regard to the Owner's efforts in obtaining appropriate financing for the Project. By way of example, such efforts may include identifying potential sources of funding or preparing grant applications. Notwithstanding the foregoing, Design-Builder's efforts to assist Owner in accordance with this Section 2.1.5 (i) shall not constitute professional services subject to an applicable standard of care; and (ii) under no circumstances shall Design-Builder be held liable or responsible to Owner in connection with Design-Builder's assistance to the Owner under this Section 2.1.5, including, but not limited to, any losses, claims, damages, liabilities or causes of action in connection with any failure or inability to obtain appropriate financing for the Project.

#### **2.2 Design Professional Services.**

**2.2.1** Design-Builder shall, consistent with applicable state licensing laws, provide through qualified, licensed design professionals employed by Design-Builder, or procured from qualified, independent licensed Design Consultants, the necessary design services, including architectural, engineering and other design professional services, for the preparation of the required drawings, specifications and other design submittals to permit Design-Builder to complete the Work consistent

with the Contract Documents. Nothing in the Contract Documents is intended or deemed to create any legal or contractual relationship between Owner and any Design Consultant.

**2.2.2** Design-Builder shall employ only Design Consultants and/or Design Subconsultants who are duly licensed and qualified to perform the Work consistent with the Contract Documents. Prior to the date that Design Consultants and/or Design Subconsultants perform Work on the Project, Design-Builder shall identify in writing to Owner all Design Consultants and Design Subconsultants. To the extent that Design-Builder has not selected a Design Consultant or Design Subconsultant prior to performing the Work, Design-Builder shall provide Owner in writing a list of any subsequently added Design Consultants and/or Design Subconsultants and their scope of Work prior to their performing Work on the Project. Owner may reasonably object to Design-Builder's selection of any Design Consultant or Design Subconsultant, provided that the Contract Price and/or Contract Time(s) shall be adjusted to the extent that Owner's decision impacts Design-Builder's cost and/or time of performance. Design-Builder shall not substitute a listed Design Consultant or Subconsultant without obtaining Owner's prior written consent; such consent shall not be unreasonably withheld. Nothing in the Contract Documents is intended or deemed to create any legal or contractual relationship between Owner and any Design Consultant or Design Subconsultant, including but not limited to any third-party beneficiary rights.

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

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

## **2.4 Design Development Services.**

**2.4.1** Design-Builder and Owner shall, consistent with any applicable provision of the Contract Documents, agree upon any interim Design Submissions that Owner may wish to review, which interim Design Submissions may include design criteria, drawings, diagrams and specifications setting forth the Project requirements.

**2.4.1.1** Design Submissions shall be consistent with the Owner's Project Criteria as well as the Basis of Design Documents, as the Basis of Design Documents may have been changed or supplemented through the design process set forth in this Section 2.4.1. By submitting Design Submissions, Design-Builder represents to the Owner that the Work depicted and otherwise shown, contained, or reflected in Design Submissions may be constructed in compliance with the then current Contract Price and Contract Time. Notwithstanding the above, Design-Builder may propose Design Submissions that may alter the Basis of Design Documents, the Contract Price and/or Contract Time; however, Design-Builder must provide notice thereof in accordance with Article 10 of the General Conditions and obtain a Change Order before such proposed Design Submissions are incorporated into the Construction Documents.

**2.4.1.2** On or about the time of the Design Submissions, Design-Builder and Owner shall meet and confer about the Design Submissions, with Design-Builder identifying during such meetings, among other things, the evolution of the design and any changes to the Basis of Design Documents, or, if applicable, previously submitted Design Submissions. Changes to the Basis of Design Documents, including those that are deemed minor changes under Section 9.3.1, shall be processed in accordance with Article 9. Minutes of the meetings, including a full listing of all changes, will be maintained by Design-Builder and provided to all attendees for review. Following the design review meeting, Owner shall review and approve the interim Design Submissions and meeting minutes in a time that is consistent with the turnaround times set forth in Design-Builder's schedule.

**2.4.1.3** Owner shall review and respond to Design Submissions, providing any comments and/or concerns about the Design Submissions. Owner shall provide all comments on the Design Submissions within the time provided by the Contract Documents. Design-Builder shall revise the Design Submissions (and any other deliverables) in response to Owner's comments and incorporate said responses into the next submission of Design Submissions.

**2.4.1.4** If incorporation of Owner's comments results in a design that is inconsistent with or otherwise gives rise to a change in Owner's Project Criteria, the Basis of Design Documents, the Contract Price and/or the Contract Time, Design-Builder shall provide notice thereof in accordance with Articles 9 and 10 of the General Conditions. Changes to the Basis of Design Documents, the Contract Price and/or the Contract Time, including those that are deemed minor changes, shall be processed in accordance with Article 9 of the General Conditions.

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

**2.4.3** Owner's review and approval of interim Design Submissions, meeting minutes, and the Construction Documents is for the purpose of mutually establishing a conformed set of Contract Documents compatible with the requirements of the Work. Neither Owner's review nor approval of any interim Design Submissions, meeting minutes, and Construction Documents shall be deemed to transfer any design liability from Design-Builder to Owner. Design-Builder shall provide Owner with sufficient time in the Project Schedule to review and approve the Design Submissions.

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

## **2.5 Legal Requirements.**

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

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

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

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

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

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

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

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

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

**2.7.3** Design-Builder shall employ only Subcontractors who are duly licensed and qualified to perform the Work consistent with the Contract Documents. Prior to the date that Subcontractors perform Work on the Project, Design-Builder shall identify in writing to Owner all Subcontractors. To the extent that Design-Builder has not selected a Subcontractor prior to performing the Work, Design-Builder shall provide Owner in writing a list of any subsequently added Subcontractors prior to their performing Work on the Project. Owner may reasonably object to Design-Builder's selection of any Subcontractor, provided that the Contract Price and/or Contract Time(s) shall be adjusted to the extent that Owner's decision impacts Design-Builder's cost and/or time of performance. Design-Builder may not substitute listed Subcontractors without Owner's prior written consent; such consent shall not be unreasonably withheld.

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

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

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

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

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

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

**2.8.3** Design-Builder's responsibility for safety under this Section 2.8 is not intended in any way

to relieve Subcontractors and Sub-Subcontractors of their own contractual and legal obligations and responsibility for (i) complying with all Legal Requirements, including those related to health and safety matters; and (ii) taking all necessary measures to implement and monitor all safety precautions and programs to guard against injuries, losses, damages or accidents resulting from their performance of the Work.

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

**2.9.1** Design-Builder warrants to Owner that the construction, including all materials and equipment furnished as part of the construction, shall be new unless otherwise specified in the Contract Documents, of good quality, in conformance with the Contract Documents and free of defects in materials and workmanship. If the parties have opted in Section 11.2 of the Agreement to establish a limited time frame for the warranty set forth in this Section, the warranty in this section shall be limited to the time frame set forth in Section 11.2 of the Agreement. Design-Builder's warranty obligation excludes defects caused by abuse, alterations, or failure to maintain the Work in a commercially reasonable manner. Nothing in this warranty is intended to limit any manufacturer's warranty which provides Owner with greater warranty rights than set forth in this Section 2.9 or the Contract Documents. Design-Builder will provide Owner with all manufacturers' warranties upon Substantial Completion.

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

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

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

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

# **Article 3**

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

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

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



Builder's performance of its obligations under the Contract Documents.

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

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

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

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

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

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

**3.2.1.3** Temporary and permanent easements, zoning and other requirements and encumbrances affecting land use, or necessary to permit the proper design and construction of the Project and enable Design-Builder to perform the Work;

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

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

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

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

## **3.3 Financial Information.**

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

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

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

**3.4.1** Owner's Representative shall be responsible for providing Owner-supplied information and approvals in a timely manner to permit Design-Builder to fulfill its obligations under the Contract

Documents. Owner's Representative shall also provide Design-Builder with prompt notice if it observes any failure on the part of Design-Builder to fulfill its contractual obligations, including any errors, omissions or defects in the performance of the Work. Owner's Representative shall communicate regularly with Design-Builder and shall be vested with the authority to act on behalf of Owner.

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

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

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

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

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

## **Article 4**

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

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

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

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

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

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

**4.1.5** To the fullest extent permitted by law, Owner shall indemnify, defend and hold harmless Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them, and their officers, directors, employees and agents, from and against any and all claims,

losses, damages, liabilities and expenses, including reasonable attorneys' fees and expenses, arising out of or resulting from the presence, removal or remediation of Hazardous Conditions at the Site.

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

## **4.2 Differing Site Conditions.**

**4.2.1** Concealed or latent physical conditions or subsurface conditions at the Site that (i) materially differ from the conditions indicated in the Contract Documents or (ii) are of an unusual nature, differing materially from the conditions ordinarily encountered and generally recognized as inherent in the Work, are collectively referred to herein as "Differing Site Conditions." If Design-Builder encounters a Differing Site Condition, Design-Builder will be entitled to an adjustment in the Contract Price and/or Contract Time(s) to the extent Design-Builder's cost and/or time of performance are adversely impacted by the Differing Site Condition.

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

# **Article 5**

## **Insurance and Bonds**

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

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

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

**5.1.3** Prior to commencing any construction services hereunder, Design-Builder shall provide Owner with certificates evidencing that (i) all insurance obligations required by the Contract Documents are in full force and in effect and will remain in effect for the duration required by the Contract Documents; and (ii) no insurance coverage will be canceled, renewal refused, or materially changed unless at least thirty (30) days' prior written notice is given to Owner. If any of the foregoing insurance coverages are required to remain in force after final payment is reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the Final Application for Payment. If any information concerning reduction of coverage is not furnished by the insurer, it shall be furnished by Design-Builder with reasonable promptness according to Design-Builder's information and belief.

### **5.2 Owner's Liability Insurance.**

**5.2.1** Owner shall procure and maintain from insurance companies authorized to do business in

the state in which the Project is located such liability insurance as set forth in the Insurance Exhibit to the Agreement to protect Owner from claims which may arise from the performance of Owner's obligations under the Contract Documents or Owner's conduct during the course of the Project.

**5.2.2** Notwithstanding any provision of the Agreement or the Contract Documents to the contrary, Owner may meet any insurance obligation required hereunder through a program of risk management in the nature of self-insurance.

### **5.3 Owner's Property Insurance.**

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

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

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

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

**5.3.5** Owner and Design-Builder waive against each other and Owner's separate contractors, Design Consultants, Subcontractors, agents and employees of each and all of them, all damages covered by property insurance provided herein, except such rights as they may have to the proceeds of such insurance. Design-Builder and Owner shall, where appropriate, require similar waivers of subrogation from Owner's separate contractors, Design Consultants and Subcontractors and shall require each of them to include similar waivers in their contracts. These waivers of subrogation shall not contain any restriction or limitation that will impair the full and complete extent of its applicability to any person or entity unless agreed to in writing prior to the execution of this Agreement.

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

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

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

## **Article 6**

### **Payment**

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

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

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

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

**6.2.1** On or before the date established in the Agreement, Design-Builder shall submit for Owner's review and approval its Application for Payment requesting payment for all Work performed as of the date of the Application for Payment. The Application for Payment shall be accompanied by all supporting documentation required by the Contract Documents and/or established at the meeting required by Section 2.1.4 hereof.

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

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

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

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

**6.3.1** On or before the date established in the Agreement, Owner shall pay Design-Builder all amounts properly due. If Owner determines that Design-Builder is not entitled to all or part of an Application for Payment as a result of Design-Builder's failure to meet its obligations hereunder, it will notify Design-Builder in writing at least five (5) days prior to the date payment is due. The notice shall indicate the specific amounts Owner intends to withhold, the reasons and contractual basis



for the withholding, and the specific measures Design-Builder must take to rectify Owner's concerns. Design-Builder and Owner will attempt to resolve Owner's concerns prior to the date payment is due. If the parties cannot resolve such concerns, Design-Builder may pursue its rights under the Contract Documents, including those under Article 10 hereof.

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

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

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

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

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

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

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

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

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

#### **6.7 Final Payment.**

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

## **Final Completion.**

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

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

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

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

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

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

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

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

## **Article 7**

### **Indemnification**

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

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

**7.1.2** If Owner is enjoined from the operation or use of the Work, or any part thereof, as the result of any patent or copyright suit, claim, or proceeding, Design-Builder shall at its sole expense take reasonable steps to procure the right to operate or use the Work. If Design-Builder cannot so procure such right within a reasonable time, Design-Builder shall promptly, at Design-Builder's

option and at Design-Builder's expense, (i) modify the Work so as to avoid infringement of any such patent or copyright; or (ii) replace said Work with Work that does not infringe or violate any such patent or copyright.

**7.1.3** Sections 7.1.1 and 7.1.2 above shall not be applicable to any suit, claim or proceeding based on infringement or violation of a patent or copyright (i) relating solely to a particular process or product of a particular manufacturer specified by Owner and not offered or recommended by Design-Builder to Owner; or (ii) arising from modifications to the Work by Owner or its agents after acceptance of the Work. If the suit, claim or proceeding is based upon events set forth in the preceding sentence, Owner shall defend, indemnify and hold harmless Design-Builder to the same extent Design-Builder is obligated to defend, indemnify and hold harmless Owner in Section 7.1.1 above.

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

## **7.2 Tax Claim Indemnification.**

**7.2.1** If, in accordance with Owner's direction, an exemption for all or part of the Work is claimed for taxes, Owner shall indemnify, defend and hold harmless Design-Builder from and against any liability, penalty, interest, fine, tax assessment, attorneys' fees or other expenses or costs incurred by Design-Builder as a result of any action taken by Design-Builder in accordance with Owner's directive. Owner shall furnish Design-Builder with any applicable tax exemption certificates necessary to obtain such exemption, upon which Design-Builder may rely.

## **7.3 Payment Claim Indemnification.**

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

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

**7.4.1** Except as set forth in Section 7.4.2 below, Design-Builder, to the fullest extent permitted by law, shall indemnify, hold harmless and defend Owner, its officers, directors, and employees from and against claims, losses, damages, liabilities, including attorneys' fees and expenses, for non-party bodily injury, sickness or death and non-party property damage or destruction (other than to the Work itself) but only to the extent resulting from the negligent acts or omissions of Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable.

**7.4.2** For indemnity obligations that arise from professional errors and omissions, Design-Builder, to the fullest extent permitted by law, shall indemnify Owner, its officers, directors, and employees from and against claims, losses, damages, liabilities, including attorneys' fees and expenses, for non-party bodily injury, sickness, or death and non-party property damage or destruction (other than to the Work itself) but only to the extent resulting from the negligent acts or omissions of Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable.

**7.4.3** If an employee of Design-Builder, Design Consultants, Subcontractors, anyone employed

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

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

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

**7.5.2** Notwithstanding any provision of the Agreement or the Contract Documents to the contrary, Owner's indemnity obligations to Design-Builder or any third party shall apply only to the extent permitted by the laws of the Commonwealth of Virginia, and in such cases, only as to such liability to which the City would not be immune under the doctrine of sovereign immunity.

## **7.6 Limited Recourse.**

**7.6.1** None of the obligations set forth in this Agreement (on behalf of any party) constitute personal obligations of any natural persons who are the officers, shareholders, members, partners, employees, or agents of any party unless the natural person is expressly identified as a contracting party. All Parties to this Agreement shall not seek recourse against any natural person described herein. This provision, however, shall not protect such natural persons from liability for willful misconduct, illegal acts or intentional violation of any duty of corporate loyalty.

# **Article 8**

## **Time**

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

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

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

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

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

## **Article 9**

### **Changes to the Contract Price and Time**

#### **9.1 Change Orders.**

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

**9.1.1.1** The scope of the change in the Work;

**9.1.1.2** The amount of the adjustment to the Contract Price; and

**9.1.1.3** The extent of the adjustment to the Contract Time(s).

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

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

#### **9.2 Work Change Directives.**

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

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

#### **9.3 Minor Changes in the Work.**

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

#### **9.4 Contract Price Adjustments.**

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

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

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

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



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

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

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

## **9.5 Emergencies.**

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

# **Article 10**

## **Contract Adjustments and Disputes**

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

**10.1.1** If either Design-Builder or Owner believes that it is entitled to relief against the other for any event arising out of or related to the Work or Project, such party shall provide written notice to the other party of the basis for its claim for relief. Such notice shall, if possible, be made prior to incurring any cost or expense and in accordance with any specific notice requirements contained in applicable sections of these General Conditions of Contract. In the absence of any specific notice requirement, written notice shall be given within a reasonable time, not to exceed twenty-one (21) days, after the occurrence giving rise to the claim for relief or after the claiming party reasonably should have recognized the event or condition giving rise to the request, whichever is later. The claimant shall provide more complete information with respect to the claim within fourteen (14) days of the initial notice. The more complete information shall include sufficient information to advise the other party of the circumstances giving rise to the claim for relief, the specific contractual adjustment or relief requested and the basis of such request.

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

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

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

**10.2.3** If a dispute or disagreement cannot be resolved through Design-Builder's Representative and Owner's Representative, Design-Builder's Senior Representative and Owner's Senior Representative, upon the request of either party, shall meet as soon as conveniently possible, but in no case later than thirty (30) days after such a request is made, to attempt to resolve such dispute or disagreement. Five (5) days prior to any meetings between the Senior Representatives, the parties will exchange relevant information that will assist the parties in resolving their dispute or disagreement.

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

## **10.3 Arbitration.**

**10.3.1** Any claims, disputes or controversies between the parties arising out of or relating to the Agreement, or the breach thereof, which have not been resolved in accordance with the procedures set forth in Section 10.2 above, may be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the AAA then in effect.

**10.3.2** If the parties mutually elect to decide any claim, dispute, or controversy through arbitration, the award of the arbitrator(s) shall be final and binding upon the parties without the right of appeal to the courts. Judgment may be entered upon it in accordance with applicable law by any court having jurisdiction thereof.

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

**10.3.4** The prevailing party in any arbitration, or any other final, binding dispute proceeding upon which the parties may agree, shall be entitled to recover from the other party reasonable attorneys' fees and expenses incurred by the prevailing party. The prevailing party, if any, shall be determined by the applicable binding dispute tribunal.

**10.3.5** Notwithstanding any provision of this Agreement or the Contract Documents to the contrary, Owner is not required to submit any claim arising out of the Agreement to arbitration.

**10.4 Duty to Continue Performance.**

**10.4.1** Unless provided to the contrary in the Contract Documents, Design-Builder shall continue to perform the Work and Owner shall continue to satisfy its payment obligations for undisputed amounts to Design-Builder as well as any further amounts pursuant to Section 9.4.3, pending the final resolution of any dispute or disagreement between Design-Builder and Owner.

**10.5 CONSEQUENTIAL DAMAGES.**

**10.5.1** NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY (EXCEPT AS SET FORTH IN SECTION 10.5.2 BELOW), NEITHER DESIGN-BUILDER NOR OWNER SHALL BE LIABLE TO THE OTHER FOR ANY CONSEQUENTIAL LOSSES OR DAMAGES, WHETHER ARISING IN CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, INCLUDING BUT NOT LIMITED TO LOSSES OF USE, PROFITS, BUSINESS, REPUTATION OR FINANCING.

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

## **Article 11**

### **Stop Work and Termination**

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

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

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

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

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

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

for default by providing written notice to Design-Builder of such declaration.

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

**11.2.4** If Owner improperly terminates the Agreement for cause, the termination for cause will be converted to a termination for convenience in accordance with the provisions of Section 11.6 hereof.

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

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

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

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

**11.3.2** Should any of the events set forth in Section 11.3.1 above occur, Design-Builder has the right to provide Owner with written notice that Design-Builder will stop the Work unless said event is cured within seven (7) days from Owner's receipt of Design-Builder's notice. Design-Builder shall not stop work unless it provides such written notice, and Owner has failed to cure the reason for default within the seven (7) day cure period. If Owner does not cure the problem within such seven (7) day period, Design-Builder may stop the Work. In such case, Design-Builder shall be entitled to make a claim for adjustment to the Contract Price and Contract Time(s) to the extent it has been adversely impacted by such stoppage.

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

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

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

**11.4.1.2** Owner's failure to provide Design-Builder with any information, permits or approvals that are Owner's responsibility under the Contract Documents which result in the Work being stopped for sixty (60) consecutive days, or more than ninety (90) days during

the duration of the Project, even though Owner has not ordered Design-Builder in writing to stop and suspend the Work pursuant to Section 11.1.1 hereof.

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

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

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

**11.5.1** If either Owner or Design-Builder institutes or has instituted against it a case under the United States Bankruptcy Code (such party being referred to as the "Bankrupt Party"), such event may impair or frustrate the Bankrupt Party's ability to perform its obligations under the Contract Documents. Accordingly, should such event occur:

**11.5.1.1** The Bankrupt Party, its trustee or other successor, shall furnish, upon request of the non-Bankrupt Party, adequate assurance of the ability of the Bankrupt Party to perform all future material obligations under the Contract Documents, which assurances shall be provided within ten (10) days after receiving notice of the request; and

**11.5.1.2** The Bankrupt Party shall file an appropriate action within the bankruptcy court to seek assumption or rejection of the Agreement within sixty (60) days of the institution of the bankruptcy filing and shall diligently prosecute such action.

If the Bankrupt Party fails to comply with its foregoing obligations, the non-Bankrupt Party shall be entitled to request the bankruptcy court to reject the Agreement, declare the Agreement terminated and pursue any other recourse available to the non-Bankrupt Party under this Article 11.

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

## **11.6 Termination for Convenience.**

**11.6.1** Upon ten (10) days' written notice to Design-Builder, Owner may, for its convenience and without cause, elect to terminate this Agreement. In such event, Owner shall pay Design-Builder for the following:

**11.6.1.1** All Work executed and for proven loss, cost or expense in connection with the Work (except for any loss of anticipated profits for Work not performed);

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

**11.6.1.3** The amount set forth in Article 8 of the Agreement.

**11.6.2** If Owner terminates this Agreement pursuant to Section 11.6.1 above and proceeds to design and construct the Project through its employees, agents or third parties, Owner's rights to use the Work Product shall be as set forth in Section 4.3 of the Agreement. Such rights may not be transferred or assigned to others without Design-Builder's express written consent and such third parties' agreement to the terms of Article 4 of the Agreement.

## **Article 12**

### **Electronic Data**

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

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

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

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

**12.2.2** Neither party makes any representations or warranties to the other with respect to the functionality of the software or computer program associated with the electronic transmission of Work Product. Unless specifically set forth in the Agreement, ownership of the Electronic Data does not include ownership of the software or computer program with which it is associated, transmitted, generated or interpreted.

**12.2.3** By transmitting Work Product in electronic form, the transmitting party does not transfer or assign its rights in the Work Product. The rights in the Electronic Data shall be as set forth in Article 4 of the Agreement. Under no circumstances shall the transfer of ownership of Electronic Data be deemed to be a sale by the transmitting party of tangible goods.

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

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

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

**12.3.3** The Electronic Data represents the information at a particular point in time and is subject to change. Therefore, the parties shall agree upon protocols for notification by the author to the recipient of any changes which may thereafter be made to the Electronic Data, which protocol shall



also address the duty, if any, to update such information, data or other information contained in the electronic media if such information changes prior to Final Completion of the Project.

**12.3.4** The transmitting party specifically disclaims all warranties, expressed or implied, including, but not limited to, implied warranties of merchantability and fitness for a particular purpose, with respect to the media transmitting the Electronic Data. However, transmission of the Electronic Data via electronic means shall not invalidate or negate any duties pursuant to the applicable standard of care with respect to the creation of the Electronic Data, unless such data is materially changed or altered after it is transmitted to the receiving party, and the transmitting party did not participate in such change or alteration.

## **Article 13**

### **Miscellaneous**

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

**13.1.1** Confidential Information is defined as information which is determined by the transmitting party to be of a confidential or proprietary nature and: (i) the transmitting party identifies as either confidential or proprietary; (ii) the transmitting party takes steps to maintain the confidential or proprietary nature of the information; and (iii) the document is not otherwise available in or considered to be in the public domain. The receiving party agrees to maintain the confidentiality of the Confidential Information and agrees to use the Confidential Information solely in connection with the Project.

#### **13.2 Assignment.**

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

#### **13.3 Successorship.**

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

#### **13.4 Governing Law.**

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

#### **13.5 Severability.**

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

#### **13.6 No Waiver.**

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

performance.

### **13.7 Headings.**

**13.7.1** The headings used in these General Conditions of Contract, or any other Contract Document, are for ease of reference only and shall not in any way be construed to limit or alter the meaning of any provision.

### **13.8 Notice.**

**13.8.1** Whenever the Contract Documents require that notice be provided to the other party, notice will be deemed to have been validly given (i) if delivered in person to the individual intended to receive such notice; (ii) four (4) days after being sent by registered or certified mail, postage prepaid to the address indicated in the Agreement; (iii) if transmitted by facsimile, by the time stated in a machine-generated confirmation that notice was received at the facsimile number of the intended recipient; or (iv) by electronic mail, by the time frame stated in the email-generated confirmation that notice was received by the email of the intended recipient.

### **13.9 Amendments.**

**13.9.1** The Contract Documents may not be changed, altered, or amended in any way except in writing signed by a duly authorized representative of each party.

**AMENDMENT TO PROGRESSIVE DESIGN-BUILD AGREEMENT FOR WATER AND  
WASTEWATER PROJECTS**

THIS AMENDMENT (this “Amendment”) is made on this \_\_\_\_ day of \_\_\_\_\_, 2024, by and between **GARNEY COMPANIES, INC., a Missouri stock corporation** (hereafter, the “**Design-Builder**”) and the **CITY OF CHESAPEAKE, VIRGINIA, a Virginia municipal corporation** (hereafter, the “**Owner**”).

**WHEREAS**, the parties to this Amendment desire to enter into a design-build construction contract using the standard form promulgated by the Design-Build Institute of America entitled “Progressive Design-Build Agreement for Water and Wastewater Projects,” revised 2024, also known as DBIA Document No. 545 ( hereafter the “**Agreement**”); and

**WHEREAS**, the parties desire to use the Agreement to memorialize their contract subject to certain amendments to the standard template Agreement form.

**NOW, THEREFORE**, for good and valuable consideration, the receipt and adequacy of which are acknowledged, and for the mutual promises contained herein, the Design-Builder and Owner agree to amend the Agreement as follows:

- 1. Insert Section 1.2.3.** The parties agree to amend the Agreement by inserting new Section 1.2.3 between existing Sections 1.2.2 and 1.3, which new Section 1.2.3 shall read as follows:

*1.2.3. The parties acknowledge that Design-Builder has proposed to complete the Project in up to five segments, with the latter four such segments being optional and described in the PPEA Proposal as Add Alternate Nos. 1 through 4 (each, an “Add Alternate”).*

*Owner and Design-Builder agree as follows as to the Add Alternates:*

*1.2.3.1. Design Builder will perform each Add Alternate only to the specific extent that Owner has elected to do so in writing signed by an agent of the Owner authorized to bind the Owner in contract.*

*1.2.3.2. Each Add Alternate which the City elects the Design-Builder to perform will be performed in phases as described in Section 1.2 above. The terms and conditions of the Contract Documents shall remain in full force and effect as to each such Add Alternate.*

- 2. Insert Section 2.1.7.1.** The parties agree to amend the Agreement by inserting new Section 2.1.7.1 between existing Sections 2.1.7 and 3.1, which new Section 2.1.7.1 shall read as follows:

2.1.7.1 That document titled "Proposal for: City of Chesapeake, VA Public Safety Training Academy Sewer Force Main Project – July 2024," Volumes 1 and 2 thereof, submitted to Owner by Design-Builder under the Virginia Public-Private Education Facilities and Infrastructure Act, Va. Code § 56-575.1 et seq., referred to herein as the "PPEA Proposal."

3. **Insert section 4.6.** The parties agree to amend the Agreement by deleting existing Article 4 in its entirety and replacing it with the following:

#### **Article 4**

##### ***Ownership of Work Product***

4.1 *Work Product.* Design-Builder agrees to convey all right, title, and ownership (including any intellectual property rights, copyrights, or patents) to all drawings, specifications and other documents and electronic data, including such documents identified in the General Conditions of Contract, furnished by Design-Builder to Owner under this Agreement ("Work Product") upon completion of 60% of the design services for the Project (including any Add Alternate), or otherwise upon Design-Builder's default pursuant to Section 11.2 of the General Conditions of Contract, subject to the provisions set forth in Sections 4.2 and 4.3 below.

4.2 *Owner's Limited License upon Owner's Termination for Convenience or Design-Builder's Election to Terminate.* If Owner terminates this Agreement for its convenience as set forth in Article 8 hereof, or if Design-Builder elects to terminate this Agreement in accordance with Section 11.4 of the General Conditions of Contract, and the design services are less than 60% complete as described in Section 4.1 above, then Design-Builder shall, upon Owner's payment in full of the amounts due Design-Builder under the Contract Documents, grant Owner a limited license to use the Work Product to complete the Project and subsequently occupy the Project; provided, however, that use of the Work Product is at Owner's sole risk without any liability or legal exposure to Design-Builder or anyone working by or through Design-Builder, including Design Consultants of any tier (collectively the "Indemnified Parties"), and on Owner's obligation to provide the indemnity set forth in Section 4.3 herein.

4.3 *Owner's Indemnification for the Work Product.* If Owner uses or alters the Work Product upon taking ownership as set forth in Section 4.1, or upon obtaining such license as set forth in Section 4.2 above, in whole or in part, then Owner shall defend, indemnify and hold harmless the Indemnified Parties from and against any and all claims, damages, liabilities, losses and expenses, including attorneys' fees, arising out of or resulting from the use or alteration of the Work Product, to the fullest extent permitted by applicable law.

4. **Amend Section 5.4.** The parties agree to amend the Agreement by adding the following language to the end of existing Section 5.4:

*The Parties agree that the liquidated damages rates applicable to Substantial Completion and Final Completion will not run concurrently. The liquidated damages applicable to the LD Date shall take precedence over the liquidated damages rate applicable to Final Completion until Substantial Completion is achieved. After Substantial Completion is achieved, the liquidated damages rate for Final Completion shall then apply.*

5. **Amend Section 5.5.** The parties agree to amend the Agreement by adding the following language to the end of existing Section 5.5:

*Notwithstanding any other language or provision to the contrary, it being agreed and acknowledged that this language and provision shall control and prevail, the sole and exclusive remedy available to the Owner for or connected with delay-related impacts and damages caused by Design-Builder which impact the critical path of the project shall be the liquidated damages set forth in section 5.4 of this Agreement. The Owner shall not be precluded from recovering actual direct damages caused by Design-Builder which do not consist of and are unrelated to delay-related impacts and damages the sole and exclusive remedy for which are liquidated damages.*

6. **Replace Section 7.2.2.** The parties agree to amend the Agreement by replacing the entirety of existing Section 7.2.2 with the following provisions:

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

*7.2.2.1 Within 20 days of receipt of Design-Builder's Application for Payment, Owner shall provide Design-Builder with notice that such Application for Payment is approved for payment or, if disputed, setting forth the reasons which the Application for Payment is not approved and, where applicable, the amount in dispute and the specific corrective actions Design-Builder must take to ensure its Application for Payment will be approved. Owner shall have 10 days to review and respond to any resubmitted Application for Payment. If Owner does not provide such notice to Design-Builder within the time periods set forth herein, such Application for Payment shall be deemed approved.*

7. **Delete Section 8.2.** The parties agree to amend the Agreement by deleting existing Section 8.2 in its entirety.

8. **Agreement remains in effect.** All provisions of the Agreement not amended by this Amendment shall remain in full force and effect unless further amended by another written instrument signed by Design-Builder and Owner.

**In execution hereof, witness the following signatures:**

**DESIGN-BUILDER:**

**Garney Companies, Inc., a Missouri stock corporation**

  
\_\_\_\_\_

By: Jordan Carver  
(printed name)

Its: Executive Vice President  
(signor)

Date: December 20, 2024

**OWNER: The City of Chesapeake, Virginia, a Virginia municipal corporation**

  
\_\_\_\_\_

By: Christopher M. Price  
City Manager

Date: 12.30.24

**Approved as to form on behalf of Owner:**

  
\_\_\_\_\_ 12/20/24  
Cory J. Wolfe, Assistant City Attorney