

**CITY OF EL PASO, TEXAS
AGENDA ITEM
DEPARTMENT HEAD'S SUMMARY FORM**

DEPARTMENT: Capital Improvement

AGENDA DATE: January 22, 2018

CONTACT PERSON/PHONE: Bruce D. Collins, Purchasing Director, (915) 212-1181
Sam Rodriguez, City Engineer, (915) 212-1808

DISTRICT(S) AFFECTED: 5

STRATEGIC GOAL: No. 4 Enhance El Paso's Quality of Life through Recreational, Cultural and Educational Environments

SUBJECT:

Discussion and action that the City Manager is authorized to execute the Design-Build documents considered to be the agreement ("Contract") between the City of El Paso and SUNDT CONSTRUCTION, INC. ("Contractor"), an Arizona Corporation, for the project known as the Eastside Regional Park Phase II, Solicitation 2018-1288R in an initial amount of Five Hundred Thirty Seven Thousand Two Hundred Ninety Five and No/100 dollars (\$537,295.00) for preconstruction services; and that the City Engineer is authorized to approve additional preconstruction services in the amount of \$20,000.00 if the services are necessary for the proper execution of the project.

BACKGROUND / DISCUSSION:

The City of El Paso as part of the voter approved 2012 Quality of Life Bond initiative included The Master Plan of Eastside Regional Park. To ensure the site is developed in an orderly, efficient, and cost-effective manner, the park master plan includes 3 phases of development. The Capital Improvement Department recommended and City Council approved the solicitation of a Design Build delivery method to manage and complete construction of the project. Preconstruction services include coordination between design and construction to establish project plans and specifications with estimates and necessary bids toward a final Guaranteed Maximum Price for project work and to manage project construction through completion.

Eastside Regional Park-Phase II will develop approximately 26-acres and will include:

- 2 baseball diamonds fields in accordance with NCAA field regulations.
- 2 240'x360' natural turf Flat Fields.
- 1 240'x360' artificial turf Flat Field.
- Sports Courts including : Two (2) sand volleyball courts, Six (6) handball courts and One (1) multi-purpose court.
- Musco Lighting System throughout fields and sports courts.
- Wi-Fi access throughout Project site.
- Walking Trail around Project site.
- Playground area.
- Food Court area with covered seating.
- Public Parking.
- Public restrooms and family restrooms.
- Community Garden (1/8 acre).
- Skate/BMX Park (up to 50,000sf) that will include: parking, public restrooms, shade structures with sitting area.

SELECTION SUMMARY:

Solicitation was advertised on May 22, 2018 and May 29, 2018. The solicitation was posted on City website on May 22, 2018. The email (Purmail) notification was sent out on May 24, 2018. There were a total of one hundred four (104) viewers. Six (6) proposals were received, four (4) local vendors for the Request for Qualifications phase.

PROTEST

☐ No protest received for this requirement.

☐ Protest received.

COUNCIL REPRESENTATIVE BRIEFING:

Was a briefing provided? ☐ Yes or ☐ No (Routine Item)

If yes, select the applicable districts.

- ☐ District 1
- ☐ District 2
- ☐ District 3
- ☐ District 4
- ☒ District 5
- ☐ District 6
- ☐ District 7
- ☐ District 8
- ☐ All Districts

PRIOR COUNCIL ACTION:

On June 30, 2015- City Council approves Eastside Regional Master Plan
On March 22, 2016-City Council approves Phase 1 A/E consultant Agreement: Perkins + Will
On December 20, 2016-City Council approves Commissioning Services Agreement: PSC
On February 7, 2017-City Council approves additional Services for Perkins + Will
On September 19, 2017-City Council approves CMAR preconstruction services for SUNDT CONSTRUCTION, INC.
On July 24, 2018-City Council approves GMP to develop Phase I for SUNDT CONSTRUCTION, INC.

AMOUNT AND SOURCE OF FUNDING:

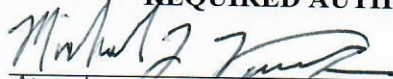
2012 Quality of Life Bond
190 – 4800 – 29010 – PCP13PRKA06

BOARD / COMMISSION ACTION:

N/A

*****REQUIRED AUTHORIZATION*****

DEPARTMENT HEAD:

 1/17/19
Michael Voras - E
For D.H.

**COUNCIL PROJECT FORM
(Design-Build)**

*******POSTING LANGUAGE BELOW*******

Please place the following item on the **REGULAR** agenda for the Council Meeting of **JANUARY 22, 2019**.

Strategic Goal No. 4: Enhance El Paso's Quality of Life through Recreational, Cultural and Educational Environments

Discussion and action that the City Manager is authorized to execute the Design-Build documents considered to be the agreement ("Contract") between the City of El Paso and SUNDT CONSTRUCTION, INC. ("Contractor"), an Arizona Corporation, for the project known as the Eastside Regional Park Phase II, Solicitation 2018-1288R in an initial amount of Five Hundred Thirty Seven Thousand Two Hundred Ninety Five and No/100 dollars (\$537,295.00) for preconstruction services; and that the City Engineer is authorized to approve additional preconstruction services in the amount of \$20,000.00 if the services are necessary for the proper execution of the project.

RESOLUTION

WHEREAS, on January 23, 2018, the City Council of the City of El Paso authorized through the use of the Design-Build alternative project delivery method for the Eastside Regional Park-Phase II construction project and approved for the Director of the Purchasing and Strategic Sourcing department to issue a solicitation using the Design-Build method for the Eastside Regional Park- Phase II construction project; and

WHEREAS, the City of El Paso ("City") issued a Request for Proposal as part of the construction manager-at risk project delivery method through Eastside Regional Park Phase II, Solicitation 2018- 1288 R; and

WHEREAS, SUNDT CONSTRUCTION, INC. ("Contractor"), an Arizona Corporation, submitted the proposal offering the best value for the City on the basis of the published selection criteria and on the ranking evaluations; and

WHEREAS, the City negotiated a contract with Contractor and desires to award the Eastside Regional Park Phase II, Solicitation 2018- 1288R for Contractor to be the Design-Builder of the Project; and

WHEREAS, the initial contract award will commence the preconstruction services and the parties understand that an amendment to establish the Guaranteed Maximum Price for the project will be subject to City Council approval.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

THAT the City Manager is authorized to execute the Design-Build documents considered to be the agreement ("Contract") between the City of El Paso and SUNDT CONSTRUCTION, INC. ("Contractor"), an Arizona Corporation, for the project known as the Eastside Regional Park Phase II, Solicitation 2018-1288R in an initial amount of Five Hundred Thirty Seven Thousand Two Hundred Ninety Five and No/100 dollars (\$537,295.00) for preconstruction services; and that the City Engineer is authorized to approve additional preconstruction services in the amount of \$20,000.00 if the services are necessary for the proper execution of the project.

Adopted this ____ day of _____, 2019.

(Signatures begin on the following page)

CITY OF EL PASO:

Dee Margo, Mayor

ATTEST:

Laura D. Prine,
City Clerk

APPROVED AS TO FORM:



Sol M. Cortez
Senior Assistant City Attorney

APPROVED AS TO CONTENT:

Sam Rodriguez, P.E., City Engineer
Capital Improvement Department

APPROVED AS TO CONTENT:



Bruce D. Collins, Director
Purchasing & Strategic Sourcing Dept.

RFP Scoresheet			
Design-Build Scoresheet for Request for Proposals			
PROJECT: 2018-1288R Eastside Regional Park – Phase II			
Evaluation of Submittal			
	<div>Jordan Foster Construction, LLC</div> <div>Sundt Construction, Inc.</div>		
MAX POINTS			
Summary of Project Approach Design and Construction			
<p>1. <u>Understanding and improvements</u>: Provide a summary of the respondent's team/team's understanding of the scope of the services and goals of the project. Identify any changes to the scope of services which may improve to enhance the cost or schedule efficiencies for the project.</p> <p>2. <u>Design Team Approach</u>: Provide the respondent team's approach to the successful completion of the Design activities and discuss the potential benefits from these activities to the overall project. Identify any specialized skills or special considerations necessary that respondent's team will provide.</p> <p>3. <u>Construction team approach</u>: Provide respondent team's approach to the successful completion of the construction of this project. Identify any specialized skills or special considerations necessary that respondent's team/team will provide.</p> <p>4. <u>Schedule approach and innovation</u>: Describe the respondent's team/team's approach to assure timely completion of the project, including how the respondent's team will cost-load the CPM-method schedule with the final schedule of values, and process for monthly status updating, revision and reporting, including methods for schedule recovery. Describe any potential alternative or innovative approaches to the schedule that would result in a more successful and timely completion of the project.</p> <p>5. <u>Cost Effective Design Schedule</u>: include a cost-effective schedule with this RFP.</p> <p>6. <u>Risk Identification, Assessment, Analysis and Mitigation Plan</u>: Provide an example of a Risk Management plan from a previous Design-Build project. Provide a summary of Respondent's team/team's approach to the Risk Management process to include identification, assessment, analysis and mitigation.</p> <p>7. <u>Permitting tracking and methodology</u>: Identify your team/team's approach to facilitating the permitting process, including local, state and federal agencies. Describe methods used for tracking and reporting on the permitting process.</p>	25	19.00	22.00
Guaranteed Maximum Price (GMP) Approach			
<p>1. Provide a summary of Respondent team's approach in general terms to develop a GMP for a project of this nature. <u>Do not include any fees or prices as part of this summary.</u></p> <p>2. Provide examples of Respondent's team/team's previous experience with similar projects that used DB delivery with GMP method, and include lessons learned.</p>	15	12.67	14.00
Fee for work prior to execution of the Design-Build Amendment			
<p>1. Provide a lump-sum fee for work prior to execution of the Design-Build Amendment, based upon the criteria in this RFP and the Design-Build Agreement. Breakdown of the fee should include;</p> <ul style="list-style-type: none"> a. Evaluation of the Owner's Criteria with Report b. Schematic Design (30% complete) c. Design Development Documents (60% DDs) d. Pre-construction Services e. Fully integrated BIM 	15	12.14	15.00
Recovery Schedule and Project Status Reports			
<p>1. <u>Recovery Schedule</u>: Provide an example of a previous instance where a recovery schedule was needed in pre-construction/design and an explanation of the implementation of the recovery process and provide an example of two (2) previous instances where a recovery schedule was needed during construction and an explanation of the recovery process.</p> <p>2. <u>Monthly Status Reports</u>: provide an example monthly project status report. The example should include an example of a schedule status summary.</p> <p>3. <u>Two-week Look-Ahead</u>: Provide an example of a two-week look-ahead. The example should include upcoming materials, deliveries and labor disciplines on site, completion percentage and indemnification of items that could possibly delay schedule.</p>	15	10.33	13.33



**CITY OF EL PASO
REQUEST FOR QUALIFICATIONS TABULATION FORM**



Bid Opening Date: JUNE 20, 2018

Solicitation #: 2018-1288R

Project Name: EASTSIDE REGIONAL PARK - PHASE II

Department: CAPITAL IMPROVEMENT

AZTEC CONTRACTORS, INC.	EL PASO, TX
BLACK STALLION CONTRACTORS, INC.	EL PASO, TX
DANTEX GENERAL CONTRACTORS, INC.	EL PASO, TX
HELLAS CONSTRUCTION, INC.	AUSTIN, TX
JORDAN FOSTER CONSTRUCTION, LLC	EL PASO, TX
SUNDT CONSTRUCTION, INC.	TUCSON, AZ

NOTE: The information contained in this RFQ tabulation is for information only and does not constitute actual award/execution of contract.

Approved: /s/

Date: 06/21/2018

2018-1288R EASTSIDE REGIONAL PARK - PHASE II

2018-1288R Eastside Regional Phase II

View List

<u>Name</u>	Company
1 Garcia, Alfonso	1988
2 DAVID, BAILEY	AAA 1 ELEVATOR LLC
3 Knapp, Ruth	Abacus Project Manag
4 Gallegos, Mari	Abescape
5 Counts, Tim	Accent Landscape Con
6 Ramiro, De Anda	ACO Remodel And Cons
7 Chacon, Salvador	Allied Paving Compan
8 Pena, Lorenzo	Alpine Electric
9 Rugh, John	AMTEK
10 Keim, David	Aquatic Development
11 Leanos, Nancy	Aztec Contractors, I
12 Simms, Barry	Barry Simms Inc.
13 Luna, Hector	Black Stallion Contr
14 Hudson, Jeff	Border Construction
15 Duffy, Brian	Brian Duffy And Asso
16 Hernandez, Wanda	California Commerica
17 Williamson, Wendy	Cambridge Systematic
18 Pamphile, Vernel	Caribe Solar Usa
19 Concha, David	CEA Group
20 Purcell, Matt	Cobb Mechanical
21 comaduran, richard	comaduran constructi
22 Kyle, Bellomy	ConstructConnect
23 Gibson, Patty	construction Bid Sou
24 Wood, Jayne	Construction Reporte
25 TYREE, BRUNO	CONTRACTOIRS & ENGIN
26 Deg, Maria	Contractors Register
27 Oney, Hilary	CSA Constructors
28 Mondello, Shannon	Dantex General Contr
29 Hudson, Brad	Direx Construction,
30 Dodge, Montana	Dodge data and analy
31 Gonzalez, Arturo	ECM International, I
32 Erick, Osorio	ecoReach, Inc.
33 Ortiz, Cano	El Paso A.R.C. Elect
34 Pina, Grace	El Paso JAG, Inc.
35 Giehl, Mike	fun abounds
36 Salazar, Victor	GCC Sun City Materia
37 Archie, Banks	Globe Builders, LLC

2018-1288R Eastside Regional Phase II

View List

<u>Name</u>	Company
38 Gorham, Rita	Gorham Electric, Inc
39 Haldeman, Stacy	Graber Manufacturing
40 Jorge, Ojeda	HAWK Construction
41 Armando, Armando	Hellas Construction,
42 Wilson, Yvonne	Hendee Enterprises I
43 Mejia, Saul	Horizone Constructio
44 Gilcrease, Paul	HUB International
45 morgan, terry	hunter knepshield of
46 Hernandez, Juan	Hydrozone Landscape
47 Jeffreys, Stephen	Independent Mfrs Rep
48 Avila, Michael	J. Carrizal General
49 Rosales, Angelica	J.A.R. Construction
50 Hibbs, Johnny	Jacobs
51 Paredes, Raul	Jobe Materials
52 Darag, Merrill	JunRo Contracting Se
53 Andrea, Klinefelter	Kimley-Horn
54 Belz, James	LerXCorp
55 Wormley, Randy	Majesty Maint And Cl
56 galindo, jose alberto	maril enterprise
57 Martinez, Heriberto	Martinez Bros. Contr
58 martinez, avelardo	martinez irrigation
59 Fraire, Julio	MFH Environmental Co
60 Hernandez, Michael	Mirador Enterprises
61 matthews, jennifer	MNK Architects
62 Cardenas, Jose	Moreno Cardenas Inc
63 Esparza, Francisco	Moss and Associates
64 DIAZ, RIBERTO	MRD LANDSCAPING
65 Ramos, Angel	New Republic Archite
66 Curl, William	Nine Degrees Archite
67 Soileau, Carmen	No Fault Sport Group
68 Benson, M. R	Number One Marketing
69 onvia, onvia	onvia
70 GUTIERREZ, SANDRA	PARKHILL SMITH And C
71 Felix, Lupe	Prime Irrigation And
72 mena, Robert	RAndD Property Servi
73 Morris, Bryan	RBM Engineering, Inc
74 Hardin, Crystal	Restroom Facilities

2018-1288R Eastside Regional Phase II
View List

<u>Name</u>	Company
75 Gribler, Amber	Rummel Construction,
76 Iverson, Jeffrey	Shasta Industries, I
77 Sanchez, Martha	Sites Southwest
78 Thompson, Maria	Steel Specialties In
79 Riccillo, Joseph	Sundt Construction
80 Francis, Kenneth	Surroundings
81 Hernandez, Cecilia	The PlanIt Room
82 Plummer, Trey	Triple-S Janitorial
83 Alejandra, Maynez	VEMAC
84 Ruiz, Erika	Vertex Contractors,
85 Rivera, Delia	Vistacon Ventures
86 Silva, Basilio	Vistacon Ventures
87 David, Stone	Vistex Graphics, LLC
88 Olguin, Jeannette	Vitual Builders Exch
89 VOLTER, Electrical Construction Corp	VOLTER
90 Austin, Fork	Wayne Enterprises
91 Rice, Kelley	Winstead PC
92 Johnson, Kesha	WTAGC
93 Joaquin, Royo	ZTEX
94 Tarin, Manuel	Ztex Construction
95 Figueroa, Joseph	
96 acosta, german	
97 Cruz, Luis	
98 Ponto, Michelle	
99 SOTO, KARLA	
100 Watson, Frank	
101 Banquil, Lovely	
102 lopz, isai	
103 MARTINEZ, ALONSO	
104 James, Hardison	

STANDARD GENERAL CONDITIONS OF THE CONSTRUCTION CONTRACT

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Definitions and Terminology

1.01 *Defined Terms*

- A. Wherever used in the Bidding Requirements or Contract Documents, a term printed with initial capital letters, including the term's singular and plural forms, will have the meaning indicated in the definitions below. In addition to terms specifically defined, terms with initial capital letters in the Contract Documents include references to identified articles and paragraphs, and the titles of other documents or forms.
1. *Addenda*—Written or graphic instruments issued prior to the opening of Bids which clarify, correct, or change the Bidding Requirements or the proposed Contract Documents.
 2. *Agreement*—The written instrument, executed by Owner and Contractor, that sets forth the Contract Price and Contract Times, identifies the parties and the Engineer, and designates the specific items that are Contract Documents.
 3. *Application for Payment*—The form acceptable to Engineer which is to be used by Contractor during the course of the Work in requesting progress or final payments and which is to be accompanied by such supporting documentation as is required by the Contract Documents.
 4. *Bid*—The offer of a Bidder submitted on the prescribed form setting forth the prices for the Work to be performed.
 5. *Bidder*—An individual or entity that submits a Bid to Owner.
 6. *Bidding Documents*—The Bidding Requirements, the proposed Contract Documents, and all Addenda.
 7. *Bidding Requirements*—The advertisement or invitation to bid, Instructions to Bidders, Bid Bond or other Bid security, if any, the Bid Form, and the Bid with any attachments.
 8. *Change Order*—A document which is signed by Contractor and Owner and authorizes an addition, deletion, or revision in the Work or an adjustment in the Contract Price or the Contract Times, or other revision to the Contract, issued on or after the Effective Date of the Contract.
 9. *Change Proposal*—A written request by Contractor, duly submitted in compliance with the procedural requirements set forth herein, seeking an adjustment in Contract Price or Contract Times, or both.
 10. *Claim*—(a) A demand or assertion by Contractor directly to Owner, duly submitted in compliance with the procedural requirements set forth herein: seeking an adjustment of Contract Price or Contract Times, or both; contesting an initial decision by Engineer concerning the requirements of the Contract Documents or the acceptability of Work under the Contract Documents; contesting Owner's decision regarding a Change Proposal; seeking resolution of a contractual issue that Owner has declined to address; or seeking other relief with respect to the terms of the Contract. A demand for money or services by a third party is not a Claim.

11. *Constituent of Concern*—Asbestos, petroleum, radioactive materials, polychlorinated biphenyls (PCBs), hazardous waste, and any substance, product, waste, or other material of any nature whatsoever that is or becomes listed, regulated, or addressed pursuant to (a) the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§9601 et seq. (“CERCLA”); (b) the Hazardous Materials Transportation Act, 49 U.S.C. §§5501 et seq.; (c) the Resource Conservation and Recovery Act, 42 U.S.C. §§6901 et seq. (“RCRA”); (d) the Toxic Substances Control Act, 15 U.S.C. §§2601 et seq.; (e) the Clean Water Act, 33 U.S.C. §§1251 et seq.; (f) the Clean Air Act, 42 U.S.C. §§7401 et seq.; or (g) any other federal, state, or local statute, law, rule, regulation, ordinance, resolution, code, order, or decree regulating, relating to, or imposing liability or standards of conduct concerning, any hazardous, toxic, or dangerous waste, substance, or material.
12. *Construction Documents* - The documents, consisting of Drawings and Specifications, to be prepared or assembled by the Design Consultant consistent with the Basis of Design Documents unless a deviation from the Basis of Design Documents is specifically set forth in a Change Order executed by both the Owner and Design-Builder, as part of the design review process contemplated by these General Conditions of Contract.
13. *Contract*—The entire and integrated written contract between the Owner and Contractor concerning the Work.
14. *Contract Documents*—Those items so designated in the Agreement, and which together comprise the Contract.
15. *Contract Price*—The money that Owner has agreed to pay Contractor for completion of the Work in accordance with the Contract Documents. .
16. *Contract Times*—The number of days or the dates by which Contractor shall: (a) achieve Milestones, if any; (b) achieve Substantial Completion; and (c) complete the Work.
17. *Contractor*—The individual or entity with which Owner has contracted for performance of the Work. If the Work is to be performed using a Design-Build project delivery method, then any reference to the Contractor herein, shall mean the Contractor, Architect or Engineer comprising the Design-Build Team. If the Work is to be performed using a Construction Manager At-Risk (CMAR) project delivery method, then any reference to the Contractor herein, shall mean the Construction Manager.
18. *Cost of the Work*—See Paragraph 13.01 for definition.
19. *Design-Build Team (if applicable)*— Group comprised of the Design-Builder, the Design Consultant, and key Subcontractors identified by the Design-Builder.
20. *Design Consultant (if applicable)*- 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 or Subcontractor, to furnish design services required under the Contract Documents.
21. *Drawings*—The part of the Contract that graphically shows the scope, extent, and character of the Work to be performed by Contractor.

22. *Effective Date of the Contract*—The date, indicated in the Agreement, on which the Contract becomes effective.
23. *Engineer*—The individual or entity named as such in the Agreement. The individual or entity may be an employee of Owner, whether that individual holds the title of City Engineer or is an individual within the City Engineer's department, or may be an independent design consultant retained by Owner for the Project. In any event, the Engineer will serve as Owner's agent during design and construction phases, and provide technical guidance and recommendations, subject to Owner's approval.
24. *Field Order*—A written order approved by Owner and issued by Engineer which requires minor changes in the Work but does not change the Contract Price or the Contract Times.
25. *Final Completion* - 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 in accordance with the General Conditions of Contract and the submission of all documents required by the General Conditions of Contract.
26. *Force Majeure Events* - Those events that are beyond the control of both Contractor and Owner, including the events of war, floods, labor disputes, earthquakes, epidemics, unusually severe weather conditions not reasonably anticipated, and other acts of God, not due to the negligence of the party claiming Force Majeure.
27. *GMP Exhibit* - That exhibit attached to the Agreement, which exhibit will have been agreed upon by Owner and Contractor prior to the execution of the Agreement. If the Work is to be performed using a Design-Build project delivery method, then the GMP Exhibit will be referred to as the Design-Build Amendment. If the Work is to be performed using a CMAR project delivery method, then this defined term will govern.
28. *GMP Proposal* - That proposal developed by Contractor in accordance with the Agreement Between Owner and Contractor with an option for a Guaranteed Maximum Price.
29. *Hazardous Environmental Condition*—The presence at the Site of Constituents of Concern in such quantities or circumstances that may present a danger to persons or property exposed thereto. The presence at the Site of materials that are necessary for the execution of the Work, or that are to be incorporated in the Work, and that are controlled and contained pursuant to industry practices, Laws and Regulations, and the requirements of the Contract, does not establish a Hazardous Environmental Condition.
30. *Laws and Regulations; Laws or Regulations*—Any and all applicable laws, statutes, rules, regulations, ordinances, codes, and orders of any and all governmental bodies, agencies, authorities, and courts having jurisdiction.
31. *Milestone*—A principal event in the performance of the Work that the Contract requires Contractor to achieve by an intermediate completion date or by a time prior to Substantial Completion of all the Work.

32. *Notice of Award*—The written notice by Owner to a Bidder of Owner's acceptance of the Bid.
33. *Notice to Proceed*—A written notice by Owner to Contractor fixing the date on which the Contract Times will commence to run and on which Contractor shall start to perform the Work.
34. *Owner*—The individual or entity with which Contractor has contracted regarding the Work, and which has agreed to pay Contractor for the performance of the Work, pursuant to the terms of the Contract.
35. *Owner's Project Criteria* – Criteria 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-Build Teams performance of the Work. Owner's Project Criteria may include conceptual documents, design criteria, performance requirements, prescriptive specifications, and LEED ® or other sustainable design criteria and other Project-specific technical materials and requirements.
36. *Progress Schedule*—A schedule, prepared and maintained by Contractor, describing the sequence and duration of the activities comprising the Contractor's plan to accomplish the Work within the Contract Times.
37. *Project*—The total undertaking to be accomplished for Owner by engineers, contractors, and others, including planning, study, design, construction, testing, commissioning, and start-up, and of which the Work to be performed under the Contract Documents is a part.
38. *Project Manual*—The written documents prepared for, or made available for, procuring and constructing the Work, including but not limited to the Bidding Documents or other construction procurement documents, geotechnical and existing conditions information, the Agreement, bond forms, General Conditions, Supplementary Conditions, and Specifications. The contents of the Project Manual may be bound in one or more volumes.
39. *Resident Project Representative*—The authorized representative of Owner assigned to assist Owner at the Site. As used herein, the term Resident Project Representative or "RPR" includes any assistants or field staff of Resident Project Representative. Owner's Resident Project Representative may be the Engineer or Architect if Owner so designates.
40. *Samples*—Physical examples of materials, equipment, or workmanship that are representative of some portion of the Work and that establish the standards by which such portion of the Work will be judged.
41. *Schedule of Submittals*—A schedule, prepared and maintained by Contractor, of required submittals and the time requirements for Engineer's review and Owner's approval of the submittals and the performance of related construction activities.
42. *Schedule of Values*—A schedule, prepared and maintained by Contractor, allocating portions of the Contract Price to various portions of the Work and used as the basis for reviewing Contractor's Applications for Payment.

43. *Shop Drawings*—All drawings, diagrams, illustrations, schedules, and other data or information that are specifically prepared or assembled by or for Contractor and submitted by Contractor to illustrate some portion of the Work. Shop Drawings, whether approved or not, are not Drawings and are not Contract Documents.
44. *Site*—Lands or areas indicated in the Contract Documents as being furnished by Owner upon which the Work is to be performed, including rights-of-way and easements, and such other lands furnished by Owner which are designated for the use of Contractor.
45. *Specifications*—The part of the Contract that consists of written requirements for materials, equipment, systems, standards, and workmanship as applied to the Work, and certain administrative requirements and procedural matters applicable to the Work.
46. *Subcontractor*—An individual or entity having a direct contract with Contractor or with any other Subcontractor for the performance of a part of the Work.
47. *Substantial Completion*—The time at which the Work (or a specified part thereof) has progressed to the point where, in the opinion of Engineer and subject to the Owner's approval, the Work (or a specified part thereof) is sufficiently complete, in accordance with the Contract Documents, so that the Work (or a specified part thereof) can be utilized for the purposes for which it is intended. The terms "substantially complete" and "substantially completed" as applied to all or part of the Work refer to Substantial Completion thereof.
48. *Successful Bidder*—The Bidder whose Bid the Owner accepts, and to which the Owner makes an award of contract, subject to stated conditions.
49. *Supplementary Conditions*—The part of the Contract that amends or supplements these General Conditions.
50. *Supplier*—A manufacturer, fabricator, supplier, distributor, materialman, or vendor having a direct contract with Contractor or with any Subcontractor to furnish materials or equipment to be incorporated in the Work by Contractor or a Subcontractor.
51. *Technical Data*—Those items expressly identified as Technical Data in the Supplementary Conditions, with respect to either (a) subsurface conditions at the Site, or physical conditions relating to existing surface or subsurface structures at the Site (except Underground Facilities) or (b) Hazardous Environmental Conditions at the Site. If no such express identifications of Technical Data have been made with respect to conditions at the Site, then the data contained in boring logs, recorded measurements of subsurface water levels, laboratory test results, and other factual, objective information regarding conditions at the Site that are set forth in any geotechnical or environmental report prepared for the Project and made available to Contractor are hereby defined as Technical Data with respect to conditions at the Site under Paragraphs 5.03, 5.04, and 5.06.
52. *Underground Facilities*—All underground pipelines, conduits, ducts, cables, wires, manholes, vaults, tanks, tunnels, or other such facilities or attachments, and any encasements containing such facilities, including but not limited to those that convey electricity, gases, steam, liquid petroleum products, telephone or other

communications, fiber optic transmissions, cable television, water, wastewater, storm water, other liquids or chemicals, or traffic or other control systems.

- 53. *Unit Price Work*—Work to be paid for on the basis of unit prices.
- 54. *Work*—The entire construction or the various separately identifiable parts thereof required to be provided under the Contract Documents. Work includes and is the result of performing or providing all labor, services, and documentation necessary to produce such construction; furnishing, installing, and incorporating all materials and equipment into such construction; and may include related services such as testing, start-up, and commissioning, all as required by the Contract Documents. If the Work is to be performed using a Design-Build project delivery method, then the Work also includes the design services required by the Contract Documents. If the Work is to be performed using a CMAR project delivery method, then the Work also includes the preconstruction services required by the Contract Documents.
- 55. *Work Change Directive*—A written directive to Contractor issued on or after the Effective Date of the Contract, signed by Owner and recommended by Engineer, ordering an addition, deletion, or revision in the Work.

1.02 *Terminology*

- A. The words and terms discussed in the following paragraphs are not defined but, when used in the Bidding Requirements or Contract Documents, have the indicated meaning.
- B. *Day*:
 - 1. The word “day” means a calendar day of 24 hours measured from midnight to the next midnight.
- C. *Defective*:
 - 1. The word “defective,” when modifying the word “Work,” refers to Work that is unsatisfactory, faulty, or deficient in that it:
 - a. does not conform to the Contract Documents; or
 - b. does not meet the requirements of any applicable inspection, reference standard, test, or approval referred to in the Contract Documents; or
 - c. has been damaged prior to Engineer’s recommendation of final payment unless responsibility for the protection thereof has been assumed by Owner at Substantial Completion.
- D. *Furnish, Install, Perform, Provide*:
 - 1. The word “furnish,” when used in connection with services, materials, or equipment, shall mean to supply and deliver said services, materials, or equipment to the Site (or some other specified location) ready for use or installation and in usable or operable condition.
 - 2. The word “install,” when used in connection with services, materials, or equipment, shall mean to put into use or place in final position said services, materials, or equipment complete and ready for intended use.

3. The words “perform” or “provide,” when used in connection with services, materials, or equipment, shall mean to furnish and install said services, materials, or equipment complete and ready for intended use.
4. If the Contract Documents establish an obligation of Contractor with respect to specific services, materials, or equipment, but do not expressly use any of the four words “furnish,” “install,” “perform,” or “provide,” then Contractor shall furnish and install said services, materials, or equipment complete and ready for intended use.
- E. Unless stated otherwise in the Contract Documents, words or phrases that have a well-known technical or construction industry or trade meaning are used in the Contract Documents in accordance with such recognized meaning.

ARTICLE 2 – PRELIMINARY MATTERS

2.01 *Delivery of Bonds and Evidence of Insurance*

- A. *Bonds:* When Contractor delivers the executed counterparts of the Agreement to Owner, Contractor shall also deliver to Owner such bonds as Contractor may be required to furnish.
- B. *Evidence of Contractor’s Insurance:* When Contractor delivers the executed counterparts of the Agreement to Owner, Contractor shall also deliver to Owner, with copies to each named insured and additional insured (as identified elsewhere in the Contract), the certificates and other evidence of insurance required to be provided by Contractor in accordance with Article 6.

2.02 *Copies of Documents*

- A. Owner shall furnish to Contractor four printed copies of the Contract (including one fully executed counterpart of the Agreement), and one copy in electronic portable document format (PDF). Additional printed copies will be furnished upon request at the cost of reproduction.
- B. Owner shall maintain and safeguard at least one original printed record version of the Contract, including Drawings and Specifications signed and sealed by Engineer and other design professionals.

2.03 *Before Starting Construction*

- A. *Preliminary Schedules:* Within 10 days after the Effective Date of the Contract (or as otherwise specifically required by the Contract Documents), Contractor shall submit for Engineer’s review and - Owner’s approval:
 1. a preliminary Progress Schedule indicating the times (numbers of days or dates) for starting and completing the various stages of the Work, including any Milestones specified in the Contract;
 2. a preliminary Schedule of Submittals; and
 3. a preliminary Schedule of Values for all of the Work which includes quantities and prices of items which when added together equal the Contract Price and subdivides the Work into component parts in sufficient detail to serve as the basis for progress

payments during performance of the Work. Such prices will include an appropriate amount of overhead and profit applicable to each item of Work.

2.04 *Preconstruction Conference*

- A. Before any Work at the Site is started, a conference attended by Owner, Contractor, Engineer, and others as appropriate will be held to establish a working understanding among the parties as to the Work and to discuss the schedules referred to in Paragraph 2.03.A, procedures for handling Shop Drawings, Samples, and other submittals, processing Applications for Payment, electronic or digital transmittals, and maintaining required records.
- B. Should the Contractor or Owner wish to establish any Milestones that will be subject to individual schedules and/or completion dates, these Milestones shall be established at this conference and any Change Orders or contract modifications relating to the establishment of Milestones will be presented to the Owner for acceptance and execution by the Parties in accordance with the terms and provisions contained herein.

2.05 *Initial Acceptance of Schedules*

- A. At least 10 days before submission of the first Application for Payment a conference, attended by Contractor, Engineer, Owner, and others as appropriate, will be held to review for acceptability to Owner as provided below the schedules submitted in accordance with Paragraph 2.03.A. Contractor shall have an additional 10 days to make corrections and adjustments and to complete and resubmit the schedules. No progress payment shall be made to Contractor until acceptable schedules are submitted to Engineer and approved by Owner based on Engineer's recommendations.
 - 1. The Progress Schedule will be acceptable to Engineer and Owner if it provides an orderly progression of the Work to completion within the Contract Times. Such acceptance will not impose on Engineer or Owner responsibility for the Progress Schedule, for sequencing, scheduling, or progress of the Work, nor interfere with or relieve Contractor from Contractor's full responsibility therefor.
 - 2. Contractor's Schedule of Submittals will be acceptable to Engineer and Owner if it provides a workable arrangement for reviewing and processing the required submittals.
 - 3. Contractor's Schedule of Values will be acceptable to Engineer and Owner as to form and substance if it provides a reasonable allocation of the Contract Price to the component parts of the Work.

2.06 *Electronic Transmittals*

- A. Except as otherwise stated elsewhere in the Contract, the Owner, Engineer, and Contractor may transmit, and shall accept, Project-related correspondence, text, data, documents, drawings, information, three-dimensional modeling (such as Building Information Models), and graphics, including but not limited to Shop Drawings and other submittals, in electronic media or digital format, either directly, or through access to a secure Project website.

- B. When transmitting items in electronic media or digital format, the transmitting party makes no representations as to long term compatibility, usability, or readability of the items resulting from the recipient's use of software application packages, operating systems, or computer hardware differing from those used in the drafting or transmittal of the items, or from those established in applicable transmittal protocols.

2.07 *Designation of Authorized Representatives*

- A. Prior to or within three (3) days of the Notice to Proceed, the Owner and Contractor shall designate, in writing, a specific individual to act as its authorized representative with respect to the services and responsibilities under the Contract. Subject to Owner's approval, such individuals shall have the authority to transmit and receive information, render decisions relative to the Contract, and otherwise act on behalf of each respective party.

ARTICLE 3 – DOCUMENTS: INTENT, REQUIREMENTS, REUSE

3.01 *Intent*

- A. The Contract Documents are complementary; what is required by one is as binding as if required by all.
- B. It is the intent of the Contract Documents to describe a functionally complete project (or part thereof) to be constructed in accordance with the Contract Documents.
- C. Unless otherwise stated in the Contract Documents, if there is a discrepancy between the electronic or digital versions of the Contract Documents (including any printed copies derived from such electronic or digital versions) and the printed record version, the printed record version shall govern.
- D. The Contract supersedes prior negotiations, representations, and agreements, whether written or oral.

3.02 *Reference Standards*

- A. Standards Specifications, Codes, Laws and Regulations
 - 1. Reference in the Contract Documents to standard specifications, manuals, reference standards, or codes of any technical society, organization, or association, or to Laws or Regulations, whether such reference be specific or by implication, shall mean the standard specification, manual, reference standard, code, or Laws or Regulations in effect at the time of opening of Bids (or on the Effective Date of the Contract if there were no Bids), except as may be otherwise specifically stated in the Contract Documents.
 - 2. No provision of any such standard specification, manual, reference standard, or code, or any instruction of a Supplier, shall be effective to change the duties or responsibilities of Owner, Contractor, or Engineer, or any of their subcontractors, consultants, agents, or employees, from those set forth in the part of the Contract Documents prepared by or for Engineer. No such provision or instruction shall be effective to assign to Owner, Engineer, or any of their officers, directors, members, partners, employees, agents, consultants, or subcontractors, any duty or authority to supervise or direct the performance of the Work or any duty or authority to

undertake responsibility inconsistent with the provisions of the part of the Contract Documents prepared by or for Engineer.

3.03 *Reporting and Resolving Discrepancies*

A. *Reporting Discrepancies:*

1. *Contractor's Verification of Figures and Field Measurements:* Before undertaking each part of the Work, Contractor shall carefully study the Contract Documents, and check and verify pertinent figures and dimensions therein, particularly with respect to applicable field measurements. If the Work is being performed using the CMAR project delivery method, then Contractor shall promptly report in writing to Engineer and Owner any conflict, error, ambiguity, or discrepancy that Contractor discovers, or has actual knowledge of, and shall not proceed with any Work affected thereby until the conflict, error, ambiguity, or discrepancy is resolved, by a clarification or interpretation by Engineer subject to Owner's approval, or by an amendment or supplement to the Contract Documents issued pursuant to Paragraph 11.01. If the Work is being performed using the Design-Build project delivery method, then Contractor shall promptly make such report to the Owner.
2. *Contractor's Review of Contract Documents:* If, before or during the performance of the Work, Contractor discovers any conflict, error, ambiguity, or discrepancy within the Contract Documents, or between the Contract Documents and (a) any applicable Law or Regulation, (b) actual field conditions, (c) any standard specification, manual, reference standard, or code, or (d) any instruction of any Supplier, then Contractor shall promptly report it to Engineer and Owner in writing. Contractor shall not proceed with the Work affected thereby (except in an emergency as required by Paragraph 7.15) until the conflict, error, ambiguity, or discrepancy is resolved, by a clarification or interpretation by Engineer subject to Owner's approval, or by an amendment or supplement to the Contract Documents issued pursuant to Paragraph 11.01.
3. Should Contractors perform the Work after discovery of such a conflict without reporting the conflict or before receipt of a clarification or interpretation by Engineer, Contractor will be solely liable for any correction or other measures that may be required to overcome the conflict or bring the Work into compliance with the Contract Documents.

B. *Resolving Discrepancies:*

1. Except as may be otherwise specifically stated in the Contract Documents, the provisions of the part of the Contract Documents prepared by or for Engineer shall take precedence in resolving any conflict, error, ambiguity, or discrepancy between such provisions of the Contract Documents and:
 - a. the provisions of any standard specification, manual, reference standard, or code, or the instruction of any Supplier (whether or not specifically incorporated by reference as a Contract Document); or
 - b. the provisions of any Laws or Regulations applicable to the performance of the Work (unless such an interpretation of the provisions of the Contract Documents would result in violation of such Law or Regulation).

3.04 *Requirements of the Contract Documents*

- A. During the performance of the Work and until final payment, Contractor and Owner shall submit to the Engineer all matters in question concerning the requirements of the Contract Documents (sometimes referred to as requests for information or interpretation—RFIs), or relating to the acceptability of the Work under the Contract Documents, as soon as possible after such matters arise. Engineer will be the initial interpreter of the requirements of the Contract Documents, and judge of the acceptability of the Work thereunder. The Engineer will provide a recommendation to Owner who will ultimately approve or disapprove such Work.
- B. Engineer will, with reasonable promptness and with Owner's prior written approval, render a written clarification, interpretation, or decision on the issue submitted, or initiate an amendment or supplement to the Contract Documents. Engineer's written clarification, interpretation, or decision will be final and binding on Contractor, unless it appeals by submitting a Change Proposal, and on Owner, unless it appeals by filing a Claim.
- C. If a submitted matter in question concerns terms and conditions of the Contract Documents that do not involve (1) the performance or acceptability of the Work under the Contract Documents, (2) the design (as set forth in the Drawings, Specifications, or otherwise), or (3) other engineering or technical matters, then Engineer will promptly give written notice to Owner and Contractor that Engineer is unable to provide a decision or interpretation. If Owner and Contractor are unable to agree on resolution of such a matter in question, either party may pursue resolution as provided in Article 12.

ARTICLE 4 – COMMENCEMENT AND PROGRESS OF THE WORK

4.01 *Commencement of Contract Times; Notice to Proceed*

- A. The Contract Times will commence upon issuance of notice to proceed.

4.02 *Commencement of Performance*

- A. No Work shall be done at the Site prior to such date. Contractor may commence performance upon receipt of the Notice to Proceed and in accordance with any terms and dates contained therein.

4.03 *Reference Points*

- A. Owner shall provide engineering surveys to establish reference points for construction which in Engineer's judgment are necessary to enable Contractor to proceed with the Work. Contractor shall be responsible for laying out the Work, shall protect and preserve the established reference points and property monuments, and shall make no changes or relocations without the prior written approval of Owner. Contractor shall report to Engineer whenever any reference point or property monument is lost or destroyed or requires relocation because of necessary changes in grades or locations, and shall be responsible for the accurate replacement or relocation of such reference points or property monuments by professionally qualified personnel.
- B. Contractor shall note the location of all reference points and controls on a set of red-lined drawings or exhibits to be maintained at all time on the jobsite.

4.04 *Progress Schedule*

- A. Contractor shall adhere to the Progress Schedule established in accordance with Paragraph 2.05 as it may be adjusted from time to time as provided below.
 - 1. Contractor shall submit for Engineer's review and Owner's approval (to the extent indicated in Paragraph 2.05) proposed adjustments in the Progress Schedule that will not result in changing the Contract Times.
 - 2. Contractor shall provide an updated schedule with each Pay Application for Owner's review. Extensions to the Project Schedule that propose to increase Contract Time must be submitted for the Owner's approval and such approval must be reflected and memorialized in a written Change Order.
 - 3. The Contractor shall maintain a current Progress Schedule at the Project site. The current Progress Schedule shall be displayed at the site and shall be available for use and reference by the Owner, Engineer, and Contractor. The Contractor shall have weekly meetings with the Owner where the current Progress Schedule is reviewed and evaluated based on work performed in the past week and planned work for the following week. Should the Progress Schedule require an update or amendment as a result of these meetings, the Progress Schedule provided with the subsequent Pay Application shall so indicate.
 - 4. Proposed adjustments in the Progress Schedule that will change the Contract Times shall be submitted in accordance with the requirements of Article 11.
- B. Contractor shall carry on the Work and adhere to the Progress Schedule during all disputes or disagreements with Owner. No Work shall be delayed or postponed pending resolution of any disputes or disagreements, or during any appeal process, except as permitted by Paragraph 16.04, or as Owner and Contractor may otherwise agree in writing.

4.05 *Delays in Contractor's Progress*

- A. If Owner, Engineer, or anyone for whom Owner is responsible, delays, disrupts, or interferes with the performance or progress of the Work, then Contractor shall be entitled to an equitable adjustment in the Contract Time. Contractor's entitlement to an adjustment of the Contract Times is conditioned on such adjustment being essential to Contractor's ability to complete the Work within the Contract Times.
- B. Contractor shall not be entitled to an adjustment in Contract Price or Contract Times for delay, disruption, or interference caused by or within the control of Contractor. Delay, disruption, and interference attributable to and within the control of a Subcontractor or Supplier shall be deemed to be within the control of Contractor.
- C. If Contractor's performance or progress is delayed, disrupted, or interfered with by unanticipated causes not the fault of and beyond the control of Owner, Contractor, and those for which they are responsible, then Contractor shall be entitled to an equitable adjustment in Contract Times. Contractor's entitlement to an adjustment of the Contract Times is conditioned on such adjustment being essential to Contractor's ability to complete the Work within the Contract Times. Such an adjustment shall be Contractor's sole and exclusive remedy for the delays, disruption, and interference described in this

paragraph. Causes of delay, disruption, or interference that may give rise to an adjustment in Contract Times under this paragraph include but are not limited to the following:

1. severe and unavoidable natural catastrophes such as fires, floods, epidemics, and earthquakes;
 2. abnormal weather conditions;
 3. acts or failures to act of utility owners (other than those performing other work at or adjacent to the Site by arrangement with the Owner, as contemplated in Article 8); and
 4. acts of war or terrorism.
- D. Delays, disruption, and interference to the performance or progress of the Work resulting from the existence of a differing subsurface or physical condition, an Underground Facility that was not shown or indicated by the Contract Documents, or not shown or indicated with reasonable accuracy, and those resulting from Hazardous Environmental Conditions, are governed by Article 5.
- E. Paragraph 8.03 governs delays, disruption, and interference to the performance or progress of the Work resulting from the performance of certain other work at or adjacent to the Site.
- F. Contractor shall not be entitled to an adjustment in Contract Price or Contract Times for any delay, disruption, or interference if such delay is concurrent with a delay, disruption, or interference caused by or within the control of Contractor.
- G. Contractor must submit any Change Proposal seeking an adjustment in Contract Times under this paragraph within 30 days of the commencement of the delaying, disrupting, or interfering event.

ARTICLE 5 – AVAILABILITY OF LANDS; SUBSURFACE AND PHYSICAL CONDITIONS; HAZARDOUS ENVIRONMENTAL CONDITIONS

5.01 *Availability of Lands*

- A. Owner shall furnish the Site. Owner shall notify Contractor of any encumbrances or restrictions not of general application but specifically related to use of the Site with which Contractor must comply in performing the Work.
- B. Upon reasonable written request, Owner shall furnish Contractor with a current statement of record legal title and legal description of the lands upon which permanent improvements are to be made and Owner's interest therein as necessary for giving notice of or filing a mechanic's or construction lien against such lands in accordance with applicable Laws and Regulations.
- C. Contractor shall provide for all additional lands and access thereto that may be required for temporary construction facilities or storage of materials and equipment.

5.02 *Use of Site and Other Areas*

- A. *Limitation on Use of Site and Other Areas.*
 1. Contractor shall confine construction equipment, temporary construction facilities, the storage of materials and equipment, and the operations of workers to the Site,

adjacent areas that Contractor has arranged to use through construction easements or otherwise, and other adjacent areas permitted by Laws and Regulations, and shall not unreasonably encumber the Site and such other adjacent areas with construction equipment or other materials or equipment. Contractor shall assume full responsibility for (a) damage to the Site; (b) damage to any such other adjacent areas used for Contractor's operations; (c) damage to any other adjacent land or areas; and (d) for injuries and losses sustained by the owners or occupants of any such land or areas; provided that such damage or injuries result from the performance of the Work or from other actions or conduct of the Contractor or those for which Contractor is responsible.

2. If a damage or injury claim is made by the owner or occupant of any such land or area because of the performance of the Work, or because of other actions or conduct of the Contractor or those for which Contractor is responsible, Contractor shall (a) take immediate corrective or remedial action as required by Paragraph 7.12, or otherwise; (b) promptly attempt to settle the claim as to all parties through negotiations with such owner or occupant, or otherwise resolve the claim by arbitration or other dispute resolution proceeding, or at law; and (c) TO THE FULLEST EXTENT PERMITTED BY LAWS AND REGULATIONS, INDEMNIFY AND HOLD HARMLESS OWNER, ITS OFFICERS, DIRECTORS, MEMBERS, PARTNERS, EMPLOYEES, AGENTS, CONSULTANTS AND SUBCONTRACTORS FROM AND AGAINST ANY SUCH CLAIM, AND AGAINST ALL COSTS, LOSSES, AND DAMAGES (INCLUDING BUT NOT LIMITED TO ALL FEES AND CHARGES OF ENGINEERS, ARCHITECTS, ATTORNEYS, AND OTHER PROFESSIONALS AND ALL COURT OR ARBITRATION OR OTHER DISPUTE RESOLUTION COSTS) ARISING OUT OF OR RELATING TO ANY CLAIM OR ACTION, LEGAL OR EQUITABLE, BROUGHT BY ANY SUCH OWNER OR OCCUPANT AGAINST OWNER OR ANY OTHER PARTY INDEMNIFIED HEREUNDER TO THE EXTENT CAUSED DIRECTLY OR INDIRECTLY, IN WHOLE OR IN PART BY, OR BASED UPON, CONTRACTOR'S PERFORMANCE OF THE WORK, OR BECAUSE OF OTHER ACTIONS OR CONDUCT OF THE CONTRACTOR OR THOSE FOR WHICH CONTRACTOR IS RESPONSIBLE.
- B. *Removal of Debris During Performance of the Work:* During the progress of the Work the Contractor shall keep the Site and other adjacent areas free from accumulations of waste materials, rubbish, and other debris. Removal and disposal of such waste materials, rubbish, and other debris shall conform to applicable Laws and Regulations. If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and Owner shall be entitled to reimbursement from the Contractor.
- C. *Cleaning:* Prior to Substantial Completion of the Work Contractor shall clean the Site and the Work and make it ready for utilization by Owner. At the completion of the Work Contractor shall remove from the Site and adjacent areas all tools, appliances, construction equipment and machinery, and surplus materials and shall restore to original condition all property not designated for alteration by the Contract Documents.
- D. *Loading of Structures:* Contractor shall not load nor permit any part of any structure to be loaded in any manner that will endanger the structure, nor shall Contractor subject any

part of the Work or adjacent structures or land to stresses or pressures that will endanger them.

5.03 *Subsurface and Physical Conditions*

- A. Contractor accepts the responsibility to satisfy itself as to the soil conditions and nature and type of geological formations in and through which this Project will be constructed. Such information as may be obtained from the test borings and accompanying notations shown on the plans is merely for the guidance of the Contractor and is not to be construed in any manner as a guarantee by the Owner that such conditions of sub-surface strata are infallible.
- B. Contractor waives any and all rights to make a claim against Owner relating to representations related to geotechnical data provided in the contract documents, plans and specifications. The locations of the test holes, if applicable, are shown in the Geotechnical Report. Logs of these test holes are included in the Geotechnical Report. Test holes information represents subsurface characteristics to the extent indicated and only for the point location of the test hole. Contractor shall make its own interpretation of the character and condition of the materials, which will be encountered. Contractor may, at its own expense, make additional surveys and investigations as it may deem necessary to determine conditions, which will affect performance of the Work.
- C. *Reports and Drawings:* Owner will identify to the Contractor:
 - 1. any reports known to Owner of explorations and tests of subsurface conditions at or adjacent to the Site;
 - 2. any drawings known to Owner of physical conditions relating to existing surface or subsurface structures at the Site (except Underground Facilities); and
 - 3. Technical Data contained in such reports and drawings.
- D. *Reliance by Contractor on Technical Data Authorized:* Contractor may rely upon the accuracy of the Technical Data expressly identified by Owner with respect to such reports and drawings, but such reports and drawings are not Contract Documents. If no such express identification has been made, then Contractor may rely upon the accuracy of the Technical Data (as defined in Article 1) contained in any geotechnical or environmental report prepared for the Project and made available to Contractor. Except for such reliance on Technical Data, Contractor may not rely upon or make any claim against Owner with respect to:
 - 1. the completeness of such reports and drawings for Contractor's purposes, including, but not limited to, any aspects of the means, methods, techniques, sequences, and procedures of construction to be employed by Contractor, and safety precautions and programs incident thereto; or
 - 2. other data, interpretations, opinions, and information contained in such reports or shown or indicated in such drawings; or
 - 3. any Contractor interpretation of or conclusion drawn from any Technical Data or any such other data, interpretations, opinions, or information.

5.04 *Differing Subsurface or Physical Conditions*

- A. *Notice by Contractor:* If Contractor believes that any subsurface or physical condition that is uncovered or revealed at the Site either:
1. is of such a nature as to establish that any Technical Data on which Contractor is entitled to rely as provided in Paragraph 5.03 is materially inaccurate; or
 2. is of such a nature as to require a change in the Drawings or Specifications; or
 3. differs materially from that shown or indicated in the Contract Documents; or
 4. is of an unusual nature, and differs materially from conditions ordinarily encountered and generally recognized as inherent in work of the character provided for in the Contract Documents;

NOTE(S) TO USER: then Contractor shall, promptly after becoming aware thereof and before further disturbing the subsurface or physical conditions or performing any Work in connection therewith (except in an emergency as required by Paragraph 7.15), notify Owner and Engineer in writing about such condition. Contractor shall not further disturb such condition or perform any Work in connection therewith (except with respect to an emergency) until receipt of a written statement permitting Contractor to do so.

- B. *Engineer's Review:* After receipt of written notice as required by the preceding paragraph, Engineer will promptly review the subsurface or physical condition in question; conclude whether the condition falls within any one or more of the differing site condition categories in Paragraph 5.04.A above; obtain any pertinent cost or schedule information from Contractor; prepare recommendations to Owner regarding the Contractor's resumption of Work in connection with the subsurface or physical condition in question and the need for any change in the Drawings or Specifications; and advise Owner in writing of Engineer's findings, conclusions, and recommendations.
- C. *Owner's Statement to Contractor Regarding Site Condition:* After receipt of Engineer's written findings, conclusions, and recommendations, Owner shall issue a written statement to Contractor (with a copy to Engineer) regarding the subsurface or physical condition in question, addressing the resumption of Work in connection with such condition, indicating whether any change in the Drawings or Specifications will be made, and adopting or rejecting Engineer's written findings, conclusions, and recommendations, in whole or in part.
- D. *Possible Price and Times Adjustments:*
1. Contractor shall be entitled to an equitable adjustment in Contract Times to the extent that the existence of a differing subsurface or physical condition, or any related delay, disruption, or interference, causes an increase or decrease in Contractor's time required for performance of the Work; subject, however, to the following:
 - a. such condition must fall within any one or more of the categories described in Paragraph 5.04.A;
 - b. Contractor's entitlement to an adjustment of the Contract Times is conditioned on such adjustment being essential to Contractor's ability to complete the Work within the Contract Times.

2. Contractor shall not be entitled to any adjustment in the Contract Times with respect to a subsurface or physical condition if:
 - c. Contractor knew of the existence of such condition at the time Contractor submitted its Bid or entered into the Agreement with Owner for the Project; or
 - d. the existence of such condition reasonably could have been discovered or revealed as a result of any examination, investigation, exploration, test, or study of the Site and contiguous areas expressly required by the Bidding Requirements or Contract Documents to be conducted by or for Contractor prior to Contractor's making such commitment; or
 - e. Contractor failed to give the written notice as required by Paragraph 5.04.A.
3. If Owner and Contractor agree regarding Contractor's entitlement to and the amount or extent of any adjustment in the Contract Times, then any such adjustment shall be set forth in a Change Order.
4. Contractor may submit a Change Proposal regarding its entitlement to or the amount or extent of any adjustment in the Contract Times, no later than 30 days after Owner's issuance of the Owner's written statement to Contractor regarding the subsurface or physical condition in question.

5.05 *Underground Facilities*

- A. *Contractor's Responsibilities.* The information and data shown or indicated in the Contract Documents with respect to existing Underground Facilities at or adjacent to the Site is based on information and data furnished to Owner or Engineer by the owners of such Underground Facilities, including Owner, or by others. Unless it is otherwise expressly provided in the Contract Documents:
 1. Owner and Engineer do not warrant or guarantee the accuracy or completeness of any such information or data provided by others; and
 2. the cost of all of the following will be included in the Contract Price, and Contractor shall have full responsibility for:
 - a. reviewing and checking all information and data regarding existing Underground Facilities at the Site;
 - b. locating all Underground Facilities shown or indicated in the Contract Documents as being at the Site;
 - c. coordination of the Work with the owners (including Owner) of such Underground Facilities, during construction; and
 - d. the safety and protection of all existing Underground Facilities at the Site, and repairing any damage thereto resulting from the Work.
- B. *Notice by Contractor.* If Contractor believes that an Underground Facility that is uncovered or revealed at the Site was not shown or indicated in the Contract Documents, or was not shown or indicated with reasonable accuracy, then Contractor shall, promptly after becoming aware thereof and before further disturbing conditions affected thereby or performing any Work in connection therewith (except in an emergency as required by

Paragraph 7.15), identify the owner of such Underground Facility and give written notice to that owner and to Owner and Engineer.

- C. *Engineer's Review.* Engineer will promptly review the Underground Facility and conclude whether such Underground Facility was not shown or indicated in the Contract Documents, or was not shown or indicated with reasonable accuracy; obtain any pertinent cost or schedule information from Contractor; prepare recommendations to Owner regarding the Contractor's resumption of Work in connection with the Underground Facility in question; determine the extent, if any, to which a change is required in the Drawings or Specifications to reflect and document the consequences of the existence or location of the Underground Facility; and advise Owner in writing of Engineer's findings, conclusions, and recommendations. During such time, Contractor shall be responsible for the safety and protection of such Underground Facility.
- D. *Owner's Statement to Contractor Regarding Underground Facility.* After receipt of Engineer's written findings, conclusions, and recommendations, Owner shall issue a written statement to Contractor (with a copy to Engineer) regarding the Underground Facility in question, addressing the resumption of Work in connection with such Underground Facility, indicating whether any change in the Drawings or Specifications will be made, and adopting or rejecting Engineer's written findings, conclusions, and recommendations in whole or in part.
- E. *Possible Times Adjustments.*
 - 1. Contractor shall be entitled to an equitable adjustment in the Contract Times, to the extent that any existing Underground Facility at the Site that was not shown or indicated in the Contract Documents, or was not shown or indicated with reasonable accuracy, or any related delay, disruption, or interference, causes an increase or decrease in Contractor's time required for, performance of the Work; subject, however, to the following:
 - a. Contractor did not know of and could not reasonably have been expected to be aware of or to have anticipated the existence or actual location of the Underground Facility in question;
 - b. Contractor's entitlement to an adjustment of the Contract Times is conditioned on such adjustment being essential to Contractor's ability to complete the Work within the Contract Times; and
 - c. Contractor gave the notice required in Paragraph 5.05.B.
 - 2. If Owner and Contractor agree regarding Contractor's entitlement to and the amount or extent of any adjustment in the Contract Times then any such adjustment shall be set forth in a Change Order.
 - 3. Contractor may submit a Change Proposal regarding its entitlement to or the amount or extent of any adjustment in the Contract Times no later than 30 days after Owner's issuance of the Owner's written statement to Contractor regarding the Underground Facility in question.

5.06 *Hazardous Environmental Conditions at Site*

- A. Contractor shall be responsible for removing or remediating any Hazardous Environmental Condition encountered, uncovered, or revealed at the Site regardless of

whether such removal or remediation is expressly identified in the Contract Documents to be within the scope of the Work.

- B. Contractor shall be responsible for controlling, containing, and duly removing all Constituents of Concern brought to the Site by Contractor, Subcontractors, Suppliers, or anyone else for whom Contractor is responsible, and for any associated costs; and for the costs of removing and remediating any Hazardous Environmental Condition created by the presence of any such Constituents of Concern.
- C. If Contractor encounters, uncovers, or reveals a Hazardous Environmental Condition whose removal or remediation is not expressly identified in the Contract Documents as being within the scope of the Work, or if Contractor or anyone for whom Contractor is responsible creates a Hazardous Environmental Condition, then Contractor shall immediately: (1) secure or otherwise isolate such condition; (2) stop all Work in connection with such condition and in any area affected thereby (except in an emergency as required by Paragraph 7.15); and (3) notify Owner and Engineer (and promptly thereafter confirm such notice in writing). Owner shall promptly consult with Engineer concerning the necessity for Owner to retain a qualified expert to evaluate such condition or take corrective action, if any. Promptly after consulting with Engineer, Owner shall take such actions as are necessary to permit Owner to timely obtain required permits and provide Contractor the written notice required by Paragraph 5.06.F. If Contractor or anyone for whom Contractor is responsible created the Hazardous Environmental Condition in question, then Owner may remove and remediate the Hazardous Environmental Condition, and deduct all costs incurred from the contract balance or if no contract balance, may file a claim for costs.
- D. Contractor shall not resume Work in connection with such Hazardous Environmental Condition or in any affected area until after Owner has obtained any required permits related thereto, and delivered written notice to Contractor either (1) specifying that such condition and any affected area is or has been rendered safe for the resumption of Work, or (2) specifying any special conditions under which such Work may be resumed safely.
- E. If Owner and Contractor cannot agree as to entitlement to or on the amount or extent, if any, of any adjustment in Contract Price or Contract Times, or both, as a result of such Work stoppage or such special conditions under which Work is agreed to be resumed by Contractor, then within 30 days of Owner's written notice regarding the resumption of Work, Contractor may submit a Change Proposal, or Owner may impose a set-off.
- F. If after receipt of such written notice Contractor does not agree to resume such Work based on a reasonable belief it is unsafe, or does not agree to resume such Work under such special conditions, then Owner may order the portion of the Work that is in the area affected by such condition to be deleted from the Work, following the contractual change procedures in Article 11. Owner may have such deleted portion of the Work performed by Owner's own forces or others in accordance with Article 8.
- G. TO THE FULLEST EXTENT PERMITTED BY LAWS AND REGULATIONS, CONTRACTOR ~~SHALL~~ INDEMNIFY AND HOLD HARMLESS OWNER AND ITS OFFICERS, DIRECTORS, MEMBERS, PARTNERS, EMPLOYEES, AGENTS, AND CONSULTANTS FROM AND AGAINST ALL CLAIMS, COSTS, LOSSES, AND DAMAGES (INCLUDING BUT NOT LIMITED TO ALL FEES AND CHARGES OF ENGINEERS, ARCHITECTS, ATTORNEYS, AND OTHER

PROFESSIONALS AND ALL COURT OR ARBITRATION OR OTHER DISPUTE RESOLUTION COSTS) ARISING OUT OF OR RELATING TO THE FAILURE TO CONTROL, CONTAIN, OR REMOVE A CONSTITUENT OF CONCERN BROUGHT TO THE SITE BY CONTRACTOR OR BY ANYONE FOR WHOM CONTRACTOR IS RESPONSIBLE, OR TO A HAZARDOUS ENVIRONMENTAL CONDITION CREATED BY CONTRACTOR OR BY ANYONE FOR WHOM CONTRACTOR IS RESPONSIBLE.

- H. The provisions of Paragraphs 5.03, 5.04, and 5.05 do not apply to the presence of Constituents of Concern or to a Hazardous Environmental Condition uncovered or revealed at the Site.

ARTICLE 6 – BONDS AND INSURANCE

6.01 *Performance, Payment, and Other Bonds*

- A. Contractor shall furnish a performance bond and a payment bond in accordance with chapter 2253 of the Texas Government Code. Contractor shall also furnish such other bonds as are required by other specific provisions of the Contract.
- B. A bond signed by an agent or attorney-in-fact must be accompanied by a certified copy of that individual's authority to bind the surety. The evidence of authority shall show that it is effective on the date the agent or attorney-in-fact signed the accompanying bond.
- C. Contractor shall obtain the required bonds in a form acceptable to Owner. The surety on the bonds must be duly licensed or authorized in the jurisdiction in which the Project is located to issue bonds in the required amounts.
- D. If the surety on a bond furnished by Contractor is declared bankrupt or becomes insolvent, or its right to do business is terminated in Texas, or the surety ceases to meet the requirements above, then Contractor shall promptly notify Owner and Engineer and shall, within 20 days after the event giving rise to such notification, provide bonds from another surety, all of which shall comply with the requirements above.
- E. If Contractor has failed to obtain a required bond, Owner may exclude the Contractor from the Site and exercise Owner's termination rights under Article 16.

6.02 *Insurance—General Provisions*

- A. Owner is self-insured as a municipality of the State of Texas.
- B. Contractor shall provide all insurance with required by Exhibit A to these General Conditions, Owner's Insurance Requirements.

ARTICLE 7 – CONTRACTOR'S RESPONSIBILITIES

7.01 *Supervision and Superintendence*

- A. Contractor shall supervise, inspect, and direct the Work competently and efficiently, devoting such attention thereto and applying such skills and expertise as may be necessary to perform the Work in accordance with the Contract Documents. Contractor shall be solely responsible for the means, methods, techniques, sequences, and procedures of

construction, unless the Contract Documents give other specific instructions concerning these matters.

- B. The Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work.
- C. At all times during the progress of the Work, Contractor shall assign a competent resident superintendent who shall not be replaced without written consent of Owner. Such consent shall not be unreasonably withheld.

7.02 *Labor; Working Hours*

- A. Contractor shall provide competent, suitably qualified personnel to survey and lay out the Work and perform construction as required by the Contract Documents. Contractor shall at all times maintain good discipline and order at the Site.
- B. Except as otherwise required for the safety or protection of persons or the Work or property at the Site or adjacent thereto, and except as otherwise stated in the Contract Documents, all Work at the Site shall be performed during regular working hours, Monday through Friday. Contractor will not perform Work on a Saturday, Sunday, or any legal holiday. Contractor may perform Work outside regular working hours or on Saturdays, Sundays, or legal holidays only with Owner's written consent, which will not be unreasonably withheld.
- C. Prevailing Wages must be paid to all laborers on the Project. Contractor shall provide and pay for labor in accordance with the prevailing wage in the locality and shall not pay less than the prevailing wage. The City of El Paso has performed and requires the use of its Wage Rate Determination. Such wage rate determination is available to Contractor and shall be the basis of any bids and payments to labor for the Project. If the Project involves federal funding, the Contractor is required to pay the higher wage as between the El Paso wage rate determination and the rates published by the U.S. Department of Labor pursuant to the Davis-Bacon Act.
- D. Certified payrolls demonstrating compliance with the prevailing wage requirements shall be maintained by the Contractor and all Subcontractors performing the Work. The Contractor is required to submit to the Owner a copy of all certified payrolls for any pay period with each Pay Application. Pursuant to Chapter 2258, Texas Government Codes, the Contractor shall forfeit as a penalty to the City of El Paso sixty dollars (\$60.00) for each laborer, workman or mechanic employed, for each calendar day, or portion thereof such laborer, workman or mechanic is paid less than the said stipulated rates for any work done under this contract, by him, or by any subcontractor under him. Furthermore, failure to provide certified payrolls may be grounds for withholding of funds and default as provided in sections 15.01 and 15.06 herein.

7.03 *Services, Materials, and Equipment*

- A. Unless otherwise specified in the Contract Documents, Contractor shall provide and assume full responsibility for all services, materials, equipment, labor, transportation, construction equipment and machinery, tools, appliances, fuel, power, light, heat, telephone, water, sanitary facilities, temporary facilities, and all other facilities and incidentals necessary for the performance, testing, start up, and completion of the Work, whether or not such items are specifically called for in the Contract Documents.

- B. All materials and equipment incorporated into the Work shall be of good quality and new, except as otherwise provided in the Contract Documents. All special warranties and guarantees required by the Specifications shall expressly run to the benefit of Owner. If required by Engineer or Owner, Contractor shall furnish satisfactory evidence (including reports of required tests) as to the source, kind, and quality of materials and equipment.
- C. All materials and equipment shall be stored, applied, installed, connected, erected, protected, used, cleaned, and conditioned in accordance with instructions of the applicable Supplier, except as otherwise may be provided in the Contract Documents.

7.04 "Or Equals"

- A. Whenever an item of material or equipment is specified or described in the Contract Documents by using the name of a proprietary item or the name of a particular Supplier, the Contract Price has been based upon Contractor furnishing such item as specified. The specification or description of such an item is intended to establish the type, function, appearance, and quality required. Unless the specification or description contains or is followed by words reading that no like, equivalent, or "or equal" item is permitted, Contractor may request that Engineer recommend the use of other items of material or equipment, or items from other proposed suppliers under the circumstances described below and subject to written approval by Owner.
 - 1. If Engineer in its discretion determines that an item of material or equipment proposed by Contractor is functionally equal to that named and sufficiently similar so that no change in related Work will be required, and provided Owner has authorized such determination, Engineer shall deem it an "or equal" item. For the purposes of this paragraph, a proposed item of material or equipment will be considered functionally equal to an item so named if:
 - a. in the exercise of reasonable judgment Engineer determines that:
 - 1) it is at least equal in materials of construction, quality, durability, appearance, strength, and design characteristics;
 - 2) it will reliably perform at least equally well the function and achieve the results imposed by the design concept of the completed Project as a functioning whole;
 - 3) it has a proven record of performance and availability of responsive service; and
 - 4) it is not objectionable to Owner.
 - b. Contractor certifies that, if approved and incorporated into the Work:
 - 1) there will be no increase in cost to the Owner or increase in Contract Times; and
 - 2) it will conform substantially to the detailed requirements of the item named in the Contract Documents.
- B. *Contractor's Expense*: Contractor shall provide all data in support of any proposed "or equal" item at Contractor's expense.

- C. *Engineer's Evaluation and Determination:* Engineer will be allowed a reasonable time to evaluate each "or-equal" request. Engineer may require Contractor to furnish additional data about the proposed "or-equal" item. Engineer will be the judge of acceptability, subject to Owner's approval. No "or-equal" item will be ordered, furnished, installed, or utilized until Engineer's review is complete and Engineer determines that the proposed item is an "or-equal", which will be evidenced by an approved Shop Drawing or other written communication. Engineer will advise Contractor in writing of any negative determination. Use of an unapproved "or-equal" item will render such Work defective and will be subject to Article 14 provisions.
- D. *Effect of Engineer's Determination:* Neither approval nor denial of an "or-equal" request shall result in any change in Contract Price. The Engineer's denial of an "or-equal" request shall be final and binding, and may not be reversed through an appeal under any provision of the Contract Documents.
- E. *Treatment as a Substitution Request:* If Engineer determines that an item of material or equipment proposed by Contractor does not qualify as an "or-equal" item, Contractor may request that Engineer consider the proposed item as a substitute pursuant to Paragraph 7.05.

7.05 *Substitutes*

- A. Unless the specification or description of an item of material or equipment required to be furnished under the Contract Documents contains or is followed by words reading that no substitution is permitted, Contractor may request that Engineer, with Owner's approval, authorize the use of other items of material or equipment under the circumstances described below. To the extent possible such requests shall be made before commencement of related construction at the Site.
 - 1. Contractor shall submit sufficient information as provided below to allow Engineer to determine if the item of material or equipment proposed is functionally equivalent to that named and an acceptable substitute therefor. Engineer will not accept requests for review of proposed substitute items of material or equipment from anyone other than Contractor.
 - 2. The requirements for review by Engineer will be as set forth in Paragraph 7.05.B, as supplemented by the Specifications, and as Engineer may decide is appropriate under the circumstances.
 - 3. Contractor shall make written application to Engineer for review of a proposed substitute item of material or equipment that Contractor seeks to furnish or use. The application:
 - a. shall certify that the proposed substitute item will:
 - 1) perform adequately the functions and achieve the results called for by the general design,
 - 2) be similar in substance to that specified, and
 - 3) be suited to the same use as that specified.

- b. will state:
 - 1) the extent, if any, to which the use of the proposed substitute item will necessitate a change in Contract Times,
 - 2) whether use of the proposed substitute item in the Work will require a change in any of the Contract Documents (or in the provisions of any other direct contract with Owner for other work on the Project) to adapt the design to the proposed substitute item, and
 - 3) whether incorporation or use of the proposed substitute item in connection with the Work is subject to payment of any license fee or royalty.
 - c. will identify:
 - 1) all variations of the proposed substitute item from that specified, and
 - 2) available engineering, sales, maintenance, repair, and replacement services.
 - d. shall contain an itemized estimate of all costs or credits that will result directly or indirectly from use of such substitute item, including but not limited to changes in Contract Price, shared savings, costs of redesign, and claims of other contractors affected by any resulting change.
- B. *Engineer's Evaluation and Determination:* Engineer will be allowed a reasonable time to evaluate each substitute request, and to obtain comments and direction from Owner. Engineer will be the judge of acceptability. Subject to Owner's approval, no substitute will be ordered, furnished, installed, or utilized until Engineer's review is complete and Engineer determines that the proposed item is an acceptable substitute. Engineer's determination will be evidenced by a Field Order or a proposed Change Order accounting for the substitution itself and all related impacts, including changes in Contract Price or Contract Times. Engineer will advise Contractor in writing of any negative determination.
- C. *Special Guarantee:* Owner may require Contractor to furnish at Contractor's expense a special performance guarantee or other surety with respect to any substitute.
- D. *Contractor's Expense:* Contractor shall provide all data in support of any proposed substitute at Contractor's expense.
- E. *Effect of Engineer's Determination:* If Engineer and Owner approve the substitution request, Contractor shall execute the proposed Change Order and proceed with the substitution. The Engineer's denial of a substitution request shall be final and binding, and may not be reversed through an appeal under any provision of the Contract Documents.
- 7.06 *Concerning Subcontractors, Suppliers, and Others*
- A. Prior to entry into any binding subcontract or purchase order, Contractor shall submit to Owner the identity of the proposed Subcontractor or Supplier (unless Owner has already deemed such proposed Subcontractor or Supplier acceptable, during the bidding process or otherwise). Such proposed Subcontractor or Supplier shall be deemed acceptable to Owner unless Owner raises a substantive, reasonable objection within five days.
 - B. No acceptance by Owner of any such Subcontractor, Supplier, or other individual or entity, whether initially or as a replacement, shall constitute a waiver of the right of Owner to the completion of the Work in accordance with the Contract Documents.

- C. On a monthly basis Contractor shall submit to Engineer a complete list of all Subcontractors and Suppliers having a direct contract with Contractor, and of all other Subcontractors and Suppliers known to Contractor at the time of submittal.
- D. Contractor shall be fully responsible to Owner and Engineer for all acts and omissions of the Subcontractors, Suppliers, and other individuals or entities performing or furnishing any of the Work just as Contractor is responsible for Contractor's own acts and omissions.
- E. Contractor shall be solely responsible for scheduling and coordinating the work of Subcontractors, Suppliers, and all other individuals or entities performing or furnishing any of the Work.
- F. Contractor shall restrict all Subcontractors, Suppliers, and such other individuals or entities performing or furnishing any of the Work from communicating with Engineer or Owner, except through Contractor or in case of an emergency, or as otherwise expressly allowed herein.
- G. The divisions and sections of the Specifications and the identifications of any Drawings shall not control Contractor in dividing the Work among Subcontractors or Suppliers or delineating the Work to be performed by any specific trade.
- H. All Work performed for Contractor by a Subcontractor or Supplier shall be pursuant to an appropriate contractual agreement that specifically binds the Subcontractor or Supplier to the applicable terms and conditions of the Contract Documents for the benefit of Owner.
- I. Owner may furnish to any Subcontractor or Supplier, to the extent practicable, information about amounts paid to Contractor on account of Work performed for Contractor by the particular Subcontractor or Supplier.

7.07 *Patent Fees and Royalties*

- A. Contractor shall pay all license fees and royalties and assume all costs incident to the use in the performance of the Work or the incorporation in the Work of any invention, design, process, product, or device which is the subject of patent rights or copyrights held by others. If a particular invention, design, process, product, or device is specified in the Contract Documents for use in the performance of the Work and if, to the actual knowledge of Owner or Engineer, its use is subject to patent rights or copyrights calling for the payment of any license fee or royalty to others, the existence of such rights shall be disclosed by Owner in the Contract Documents. However, if the Contractor has reason to believe that the design, process or product required by the Owner is an infringement of a copyright or a patent, the Contractor shall be responsible for such any loss on account thereof, inunless such information is promptly furnished to the Owner. If the Owner receives notice from a patent or copyright owner of an alleged violation of a patent or copyright, attributable to the Contractor, the Owner shall give prompt written notice to the Contractor.
- B. TO THE FULLEST EXTENT PERMITTED BY LAWS AND REGULATIONS, CONTRACTOR SHALL INDEMNIFY AND HOLD HARMLESS OWNER, ITS OFFICERS, DIRECTORS, MEMBERS, PARTNERS, EMPLOYEES, AGENTS, AND CONSULTANTS OF EACH AND ANY OF THEM FROM AND AGAINST ALL CLAIMS, COSTS, LOSSES, AND DAMAGES (INCLUDING BUT NOT

LIMITED TO ALL FEES AND CHARGES OF ENGINEERS, ARCHITECTS, ATTORNEYS, AND OTHER PROFESSIONALS AND ALL COURT OR ARBITRATION OR OTHER DISPUTE RESOLUTION COSTS) ARISING OUT OF OR RELATING TO ANY INFRINGEMENT OF PATENT RIGHTS OR COPYRIGHTS INCIDENT TO THE USE IN THE PERFORMANCE OF THE WORK OR RESULTING FROM THE INCORPORATION IN THE WORK OF ANY INVENTION, DESIGN, PROCESS, PRODUCT, OR DEVICE NOT SPECIFIED IN THE CONTRACT DOCUMENTS.

7.08 *Permits*

- A. Unless otherwise provided in the Contract Documents, Contractor shall obtain and pay for all construction permits, licenses, fees, and inspections by government agencies, necessary for proper execution of the Work and Substantial Completion of the Project.

7.09 *Taxes*

- A. The Owner enjoys tax-exempt status as a municipality. To enjoy the cost-savings benefits of its tax-exempt status, the Owner will provide a Tax Exemption Certificate to the Contractor for use on the Project. The Contractor shall use that certificate to exempt any purchases made for the Work from taxes. All savings for the tax-exempt status will be passed on to the Owner by the Contractor. The Contractor agrees to bind all Subcontractors of any tier to the obligation to present and use the Tax Exemption Certificate and pass all savings to the Owner.

7.10 *Laws and Regulations*

- A. Contractor shall give all notices required by and shall comply with all Laws and Regulations applicable to the performance of the Work. Except where otherwise expressly required by applicable Laws and Regulations, neither Owner nor Engineer shall be responsible for monitoring Contractor's compliance with any Laws or Regulations.
- B. If Contractor performs any Work or takes any other action knowing or having reason to know that it is contrary to Laws or Regulations, Contractor shall bear all resulting costs and losses. However, Contractor has no responsibility or liability for determining whether the Work as described in the Contract Documents complies with applicable Laws or Regulations.

7.11 *Record Documents*

- A. Contractor shall maintain in a safe place at the Site one printed record copy of all Drawings, Specifications, Schedules, Addenda, Change Orders, Work Change Directives, Field Orders, written interpretations and clarifications, and approved Shop Drawings. Contractor shall keep such record documents in good order and annotate them to show changes made during construction. These record documents, together with all approved Samples, will be available to Engineer and Owner for reference. Upon completion of the Work, Contractor shall deliver these record documents to Owner. Delivery of a complete set of record documents to Owner is a condition precedent to Final Completion.

7.12 *Safety and Protection*

- A. Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the Work. Contractor shall comply with all

Laws and Regulations regarding safety and shall take all necessary precautions for the safety of, and shall provide the necessary protection to prevent damage, injury, or loss to:

1. all persons on the Site or who may be affected by the Work;
 2. all the Work and materials and equipment to be incorporated therein, whether in storage on or off the Site; and
 3. other property at the Site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures, other work in progress, utilities, and Underground Facilities not designated for removal, relocation, or replacement in the course of construction.
- B. Contractor shall notify Owner; the owners of adjacent property, Underground Facilities, and other utilities; and other contractors and utility owners performing work at or adjacent to the Site, when prosecution of the Work may affect them, and shall cooperate with them in the protection, removal, relocation, and replacement of their property or work in progress.
- C. Contractor shall comply with the applicable requirements of Owner's safety programs, if any.
- D. Contractor shall inform Owner and Engineer of the specific requirements of Contractor's safety program with which Owner's and Engineer's employees and representatives must comply while at the Site.
- E. All damage, injury, or loss to any property referred to in Paragraph 7.12.A.2 or 7.12.A.3 caused, directly or indirectly, in whole or in part, by Contractor, any Subcontractor, Supplier, or any other individual or entity directly or indirectly employed by any of them to perform any of the Work, or anyone for whose acts any of them may be liable, shall be remedied by Contractor at its expense (except damage or loss attributable to the fault of Drawings or Specifications or to the acts or omissions of Owner or Engineer or anyone employed by any of them, or anyone for whose acts any of them may be liable, and not attributable, directly or indirectly, in whole or in part, to the fault or negligence of Contractor or any Subcontractor, Supplier, or other individual or entity directly or indirectly employed by any of them).
- F. Contractor's duties and responsibilities for safety and protection shall continue until such time as all the Work is completed and Engineer has issued a notice to Owner and Contractor in accordance with Paragraph 15.06.B that the Work is acceptable (except as otherwise expressly provided in connection with Substantial Completion).
- G. Contractor's duties and responsibilities for safety and protection shall resume whenever Contractor or any Subcontractor or Supplier returns to the Site to fulfill warranty or correction obligations, or to conduct other tasks arising from the Contract Documents.

7.13 *Safety Representative*

- A. Contractor shall designate a qualified and experienced safety representative at the Site whose duties and responsibilities shall be the prevention of accidents and the maintaining and supervising of safety precautions and programs.

7.14 *Hazard Communication Programs*

- A. Contractor shall be responsible for coordinating any exchange of material safety data sheets or other hazard communication information required to be made available to or exchanged between or among employers at the Site in accordance with Laws or Regulations.

7.15 *Emergencies*

- A. In emergencies affecting the safety or protection of persons or the Work or property at the Site or adjacent thereto, Contractor is obligated to act to prevent threatened damage, injury, or loss. Contractor shall give Owner prompt written notice if Contractor believes that any significant changes in the Work or variations from the Contract Documents have been caused thereby or are required as a result thereof. Upon recommendation provided by Engineer, if Owner determines that a change in the Contract Documents is required because of the action taken by Contractor in response to such an emergency, a Work Change Directive or Change Order will be issued.
- B. In the event there is an accident involving injury to any individual on or near the Work, the Contractor shall notify Owner's Representative within twenty-four (24) hours of the event and shall be responsible for recording the location of the event and the circumstances surrounding the event through photographs, interviewing witnesses, obtaining medical reports and other documentation that describes the event. Copies of such documentation shall be provided to Owner, for the Owner's and Engineer's records, within forty-eight (48) hours of the event. Nothing in this section will relieve Contractor of its obligations and responsibilities with respect to an injury under any state and federal laws and regulations.

7.16 *Shop Drawings, Samples, and Other Submittals*

A. *Shop Drawing and Sample Submittal Requirements:*

1. Before submitting a Shop Drawing or Sample, Contractor shall have:
 - a. reviewed and coordinated the Shop Drawing or Sample with other Shop Drawings and Samples and with the requirements of the Work and the Contract Documents;
 - b. determined and verified all field measurements, quantities, dimensions, specified performance and design criteria, installation requirements, materials, catalog numbers, and similar information with respect thereto;
 - c. determined and verified the suitability of all materials and equipment offered with respect to the indicated application, fabrication, shipping, handling, storage, assembly, and installation pertaining to the performance of the Work; and
 - d. determined and verified all information relative to Contractor's responsibilities for means, methods, techniques, sequences, and procedures of construction, and safety precautions and programs incident thereto.
2. Each submittal shall bear a stamp or specific written certification that Contractor has satisfied Contractor's obligations under the Contract Documents with respect to Contractor's review of that submittal, and that Contractor approves the submittal.

3. With each submittal, Contractor shall give Engineer specific written notice of any variations that the Shop Drawing or Sample may have from the requirements of the Contract Documents. This notice shall be set forth in a written communication separate from the Shop Drawings or Sample submittal; and, in addition, in the case of Shop Drawings by a specific notation made on each Shop Drawing submitted to Engineer for review and approval of each such variation.
- B. *Submittal Procedures for Shop Drawings and Samples:* Contractor shall submit Shop Drawings and Samples to Engineer for review and Owner's approval in accordance with the accepted Schedule of Submittals. Each submittal will be identified as Engineer may require.
 1. *Shop Drawings:*
 - a. Contractor shall submit the number of copies required in the Specifications.
 - b. Data shown on the Shop Drawings will be complete with respect to quantities, dimensions, specified performance and design criteria, materials, and similar data to show Engineer the services, materials, and equipment Contractor proposes to provide and to enable Engineer to review the information for the limited purposes required by Paragraph 7.16.D.
 2. *Samples:*
 - c. Contractor shall submit the number of Samples required in the Specifications.
 - d. Contractor shall clearly identify each Sample as to material, Supplier, pertinent data such as catalog numbers, the use for which intended and other data as Engineer may require to enable Engineer to review the submittal for the limited purposes required by Paragraph 7.16.D.
 3. Where a Shop Drawing or Sample is required by the Contract Documents or the Schedule of Submittals, any related Work performed prior to Engineer's and Owner's review and approval of the pertinent submittal will be at the sole expense and responsibility of Contractor.
- C. *Other Submittals:* Contractor shall submit other submittals to Engineer in accordance with the accepted Schedule of Submittals, and pursuant to the applicable terms of the Specifications.
- D. *Engineer's Review:*
 1. Engineer will provide timely review of Shop Drawings and Samples in accordance with the Schedule of Submittals acceptable to Engineer and Owner. Engineer's review and approval will be only to determine if the items covered by the submittals will, after installation or incorporation in the Work, conform to the information given in the Contract Documents and be compatible with the design concept of the completed Project as a functioning whole as indicated by the Contract Documents.
 2. Engineer's and Owner's review and approval of a Shop Drawing or Sample shall not relieve Contractor from responsibility for any variation from the requirements of the Contract Documents unless Contractor has complied with the requirements of Paragraph 7.16.A.3 and Engineer has given written approval of each such variation by specific written notation thereof incorporated in or accompanying the Shop

Drawing or Sample. Engineer will document any such approved variation from the requirements of the Contract Documents in a Field Order.

3. Engineer's review and approval of a Shop Drawing or Sample, or of a variation from the requirements of the Contract Documents, shall not, under any circumstances, change the Contract Times or Contract Price, unless such changes are included in a Change Order.
4. Neither Engineer's receipt, review, acceptance or approval of a Shop Drawing, Sample, or other submittal shall result in such item becoming a Contract Document.
5. Contractor shall perform the Work in compliance with the requirements and commitments set forth in approved Shop Drawings and Samples, subject to the provisions of Paragraph 7.16.D.4.

E. *Resubmittal Procedures:*

1. Contractor shall make corrections required by Engineer or Owner and shall return the required number of corrected copies of Shop Drawings and submit, as required, new Samples for review and approval. Contractor shall direct specific attention in writing to revisions other than the corrections called for by Engineer on previous submittals.
2. Contractor shall furnish required submittals with sufficient information and accuracy to obtain required approval of an item with no more than three submittals. Engineer will record Engineer's time for reviewing a fourth or subsequent submittal of a Shop Drawings, sample, or other item requiring approval, and Contractor shall be responsible for Engineer's charges to Owner for such time. Owner may impose a set-off against payments due to Contractor to secure reimbursement for such charges.
3. If Contractor requests a change of a previously approved submittal item, Contractor shall be responsible for Engineer's charges to Owner for its review time, and Owner may impose a set-off against payments due to Contractor to secure reimbursement for such charges, unless the need for such change is beyond the control of Contractor.

7.17 *Contractor's General Warranty and Guarantee*

- A. The Contractor warrants to the Owner that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Owner, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.
- B. The Contractor warrants and guarantees for one (1) year from Final Completion, or for a longer period if expressly stated in the Contract Documents, the Work. This includes a

Warranty and Guarantee against any and all defects. The Contractor must correct any and all defects in material and/or workmanship which may appear during the Warranty and Guarantee period, or any defects that occur within one (1) year of Final Completion even if discovered more than one (1) year after Final Completion, by repairing (or replacing with new items or new materials, if necessary) any such defect at no cost to the Owner, within a reasonable period of time, and to the Owner's satisfaction.

- C. Contractor's warranty and guarantee hereunder excludes defects or damage caused by:
 - 1. abuse, modification, or improper maintenance or operation by persons other than Contractor, Subcontractors, Suppliers, or any other individual or entity for whom Contractor is responsible; or
 - 2. normal wear and tear under normal usage.
- D. Contractor's obligation to perform and complete the Work in accordance with the Contract Documents shall be absolute. None of the following will constitute an acceptance of Work that is not in accordance with the Contract Documents or a release of Contractor's obligation to perform the Work in accordance with the Contract Documents:
 - 1. observations by Engineer;
 - 2. recommendation by Engineer or payment by Owner of any progress or final payment;
 - 3. the issuance of a certificate of Substantial Completion by Engineer or any payment related thereto by Owner;
 - 4. use or occupancy of the Work or any part thereof by Owner;
 - 5. any review and approval of a Shop Drawing or Sample submittal;
 - 6. the issuance of a notice of acceptability by Engineer;
 - 7. any inspection, test, or approval by others; or
 - 8. any correction of defective Work by Owner.
- E. The Design-Builder must furnish all special warranties required by the Design-Build Documents to the Owner no later than Final Completion. The Owner may require additional special warranties in connection with the approval of "Or-Equals" or Substitutions, Allowance items, Work which is defective or nonconforming, or the acceptance of nonconforming Work.
- F. The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual completion of that portion of the Work.
- G. The Contractor shall remove from the site portions of the Work that are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.
- H. The Contractor shall bear the cost of correcting destroyed or damaged construction of the Owner or separate contractors, whether completed or partially completed, caused by the Contractor's correction or removal of Work that is not in accordance with the requirements of the Contract Documents.

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

7.18 Indemnification

- A. **TO THE FULLEST EXTENT PERMITTED BY LAW, AND IN ADDITION TO ANY OTHER OBLIGATIONS OF CONTRACTOR UNDER THE CONTRACT OR OTHERWISE, CONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS OWNER, ITS OFFICERS, DIRECTORS, MEMBERS, PARTNERS, EMPLOYEES, AGENTS, AND CONSULTANTS FROM AND AGAINST ALL CLAIMS, COSTS, LOSSES, AND DAMAGES (INCLUDING BUT NOT LIMITED TO ALL FEES AND CHARGES OF ENGINEERS, ARCHITECTS, ATTORNEYS, AND OTHER PROFESSIONALS AND ALL COURT OR ARBITRATION OR OTHER DISPUTE RESOLUTION COSTS) ARISING OUT OF OR RELATING TO THE PERFORMANCE OF THE WORK, EVEN WHERE ANY SUCH CLAIM, COST, LOSS, OR DAMAGE IS ATTRIBUTABLE TO BODILY INJURY, SICKNESS, DISEASE, OR DEATH, OR TO INJURY TO OR DESTRUCTION OF TANGIBLE PROPERTY (OTHER THAN THE WORK ITSELF), INCLUDING THE LOSS OF USE RESULTING FROM THE NEGLIGENCE OR ALLEGATIONS OF NEGLIGENCE ON THE PART OF THE CITY, ITS OFFICERS, AGENTS, OR EMPLOYEES AND BY ANY NEGLIGENT ACT OR OMISSION OF CONTRACTOR, ANY DESIGN CONSULTANT, ANY SUBCONTRACTOR, ANY SUPPLIER, OR ANY INDIVIDUAL OR ENTITY DIRECTLY OR INDIRECTLY EMPLOYED BY ANY OF THEM TO PERFORM ANY OF THE WORK OR ANYONE FOR WHOSE ACTS ANY OF THEM MAY BE LIABLE.**
- B. **CONTRACTOR 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 PATENT (ENFORCEABLE IN THE UNITED STATES), COPYRIGHT, TRADEMARK, TRADE SECRET OR OTHER INTELLECTUAL PROPERTY RIGHT NOW OR HEREAFTER ISSUED ("IP RIGHT"). CONTRACTOR 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 CONTRACTOR IN ANY SUCH ACTION OR PROCEEDING. CONTRACTOR AGREES TO KEEP OWNER INFORMED OF ALL DEVELOPMENTS IN THE DEFENSE OF SUCH ACTIONS.**

- C. IF OWNER IS ENJOINED FROM THE OPERATION OR USE OF THE WORK, OR ANY PART THEREOF, AS THE RESULT OF ANY IP RIGHT SUIT, CLAIM, OR PROCEEDING, CONTRACTOR SHALL AT ITS SOLE EXPENSE TAKE REASONABLE STEPS TO PROCURE THE RIGHT TO OPERATE OR USE THE WORK WITH DUE CONSIDERATION OF THE MINIMIZING THE IMPACT ON OWNER'S OPERATIONS AND THE COST THEREOF. IF CONTRACTOR CANNOT SO PROCURE SUCH RIGHT WITHIN A REASONABLE TIME, CONTRACTOR SHALL PROMPTLY, AT CONTRACTOR'S OPTION AND AT CONTRACTOR'S EXPENSE, (I) MODIFY THE WORK SO AS TO AVOID INFRINGEMENT OF ANY SUCH IP RIGHT OR (II) REPLACE SAID WORK WITH WORK THAT DOES NOT INFRINGE OR VIOLATE ANY SUCH IP RIGHT.
- D. PROVIDED THAT OWNER IS NOT IN BREACH OF ITS CONTRACTUAL OBLIGATION TO MAKE PAYMENTS TO CONTRACTOR FOR UNDISPUTED AMOUNTS, CONTRACTOR SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS OWNER FROM ANY CLAIMS BROUGHT AGAINST OWNER OR AGAINST THE PROJECT AS A RESULT OF THE FAILURE OF CONTRACTOR, 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 HAS BEEN FILED, CONTRACTOR SHALL COMMENCE TO TAKE THE STEPS NECESSARY TO DISCHARGE SAID CLAIM, INCLUDING, IF NECESSARY, THE FURNISHING OF A PAYMENT BOND. IF CONTRACTOR FAILS TO DO SO, OWNER WILL HAVE THE RIGHT TO DISCHARGE THE CLAIM AND HOLD CONTRACTOR LIABLE FOR COSTS AND EXPENSES INCURRED, INCLUDING ATTORNEYS' FEES.

7.19 *Delegation of Professional Design Services*

- A. Contractor will not be required to provide professional design services unless such services are specifically required by the Contract Documents or unless such services are required to carry out Contractor's responsibilities for construction means, methods, techniques, sequences and procedures. Contractor shall not be required to provide professional services in violation of applicable Laws and Regulations.
- B. If professional design services or certifications by a design professional related to systems, materials, or equipment are specifically required of Contractor by the Contract Documents, Owner and Engineer will specify all performance and design criteria that such services must satisfy. Contractor shall cause such services or certifications to be provided by a properly licensed professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, and other submittals prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to Engineer.
- C. Owner shall be entitled to rely upon the adequacy, accuracy, and completeness of the services, certifications, or approvals performed by such design professionals, provided

Owner and Engineer have specified to Contractor all performance and design criteria that such services must satisfy.

- D. Pursuant to this paragraph, Engineer's and Owner's review and approval of design calculations and design drawings will be only for the limited purpose of checking for conformance with performance and design criteria given and the design concept expressed in the Contract Documents. Engineer's and Owner's review and approval of Shop Drawings and other submittals (except design calculations and design drawings) will be only for the purpose stated in Paragraph 7.16.D.1.

7.20 Contractor's Payment Obligations

- A. Contractor shall pay each Design Consultant, Subcontractor, and other person or entity providing services or work for the Contractor no later than the time period required by chapter 2251 of the Texas Government Code, and in accordance with its contractual obligations to such parties, all the amounts Contractor has received from Owner on account of their work. Contractor will impose similar requirements on Design Consultants and Subcontractors to pay those parties with whom they have contracted.

ARTICLE 8 – OTHER WORK AT THE SITE

8.01 Other Work

- A. In addition to and apart from the Work under the Contract Documents, the Owner may perform other work at or adjacent to the Site. Such other work may be performed by Owner's employees, or through contracts between the Owner and third parties. Owner may also arrange to have third-party utility owners perform work on their utilities and facilities at or adjacent to the Site.
- B. If Owner performs other work at or adjacent to the Site, then Owner shall give Contractor written notice thereof prior to starting any such other work. If Owner has advance information regarding the start of any utility work at or adjacent to the Site, Owner shall provide such information to Contractor.
- C. Contractor shall afford each other contractor that performs such other work, each utility owner performing other work, and Owner, if Owner is performing other work with Owner's employees, proper and safe access to the Site, and provide a reasonable opportunity for the introduction and storage of materials and equipment and the execution of such other work. Contractor shall do all cutting, fitting, and patching of the Work that may be required to properly connect or otherwise make its several parts come together and properly integrate with such other work. Contractor shall not endanger any work of others by cutting, excavating, or otherwise altering such work; provided, however, that Contractor may cut or alter others' work with the written consent of Engineer and the others whose work will be affected.
- D. If the proper execution or results of any part of Contractor's Work depends upon work performed by others under this Article 8, Contractor shall inspect such other work and promptly report to Engineer and Owner in writing any delays, defects, or deficiencies in such other work that render it unavailable or unsuitable for the proper execution and results of Contractor's Work. Contractor's failure to so report will constitute an acceptance of such other work as fit and proper for integration with Contractor's Work except for latent defects and deficiencies in such other work.

8.02 *Coordination*

- A. If Owner intends to contract with others for the performance of other work at or adjacent to the Site, to perform other work at or adjacent to the Site with Owner's employees, or to arrange to have utility owners perform work at or adjacent to the Site, the Owner must provide written notice to the Contractor of additional work that includes the scope of the work, general location, time-frame, and the identity of the party(ies) performing the work. Additionally, the Owner must provide or have provided to Contractor prior to the start of any such other work:
 - 1. the identity of the individual or entity that will have authority and responsibility on behalf of the Owner to address coordination of the activities among the various contractors;
 - 2. an itemization of the specific matters to be covered by such authority and responsibility; and
 - 3. the extent of such authority and responsibilities.
- B. Unless otherwise provided in writing, the Contractor shall have responsibility for coordination among other parties at and adjacent to the Project Site. The Contractor shall ensure through such coordination that neither its Work, nor any other parties' work is delayed or impeded because of a lack of such coordination.

8.03 *Legal Relationships*

- A. If, in the course of performing other work at or adjacent to the Site for Owner, the Owner's employees, any other contractor working for Owner, or any utility owner causes damage to the Work or to the property of Contractor or its Subcontractors, or delays, disrupts, interferes with, or increases the scope or cost of the performance of the Work, through actions or inaction, then Contractor shall be entitled to an equitable adjustment in the Contract Times. Contractor must submit any Change Proposal seeking an equitable adjustment in the Contract Times under this paragraph within 30 days of the damaging, delaying, disrupting, or interfering event. Contractor's entitlement to an adjustment of the Contract Times is conditioned on such adjustment being essential to Contractor's ability to complete the Work within the Contract Times and the Contractor performing its obligation pursuant to section 8.02.
- B. Contractor shall take reasonable and customary measures to avoid damaging, delaying, disrupting, or interfering with the work of Owner, any other contractor, or any utility owner performing other work at or adjacent to the Site. If Contractor fails to take such measures and as a result damages, delays, disrupts, or interferes with the work of any such other contractor or utility owner, then Owner may impose a set-off against payments due to Contractor.
- C. If Contractor damages, delays, disrupts, or interferes with the work of any other contractor, or any utility owner performing other work at or adjacent to the Site, through Contractor's failure to take reasonable and customary measures to avoid such impacts, or if any claim arising out of Contractor's actions, inactions, or negligence in performance of the Work at or adjacent to the Site is made by any such other contractor or utility owner against Contractor, Owner, or Engineer, then Contractor shall (1) promptly attempt to settle the claim as to all parties through negotiations with such other contractor or utility owner, or otherwise resolve the claim by arbitration or other dispute resolution

proceeding or at law, and (2) INDEMNIFY AND HOLD HARMLESS OWNER, ITS OFFICERS, DIRECTORS, MEMBERS, PARTNERS, EMPLOYEES, AGENTS, AND CONSULTANTS FROM AND AGAINST ANY SUCH CLAIMS, AND AGAINST ALL COSTS, LOSSES, AND DAMAGES (INCLUDING BUT NOT LIMITED TO ALL FEES AND CHARGES OF ENGINEERS, ARCHITECTS, ATTORNEYS, AND OTHER PROFESSIONALS AND ALL COURT OR ARBITRATION OR OTHER DISPUTE RESOLUTION COSTS) ARISING OUT OF OR RELATING TO SUCH DAMAGE, DELAY, DISRUPTION, OR INTERFERENCE.

ARTICLE 9 – OWNER’S RESPONSIBILITIES

9.01 *Communications to Contractor*

- A. For all Project and performance of Work matters, Owner will issue communications to Contractor through Engineer. However, Owner may, at its discretion, issue communications related to the Project directly to Contractor. In all such direct communications, Owner will endeavor to copy Engineer.

9.02 *Replacement of Engineer*

- A. Owner may at its discretion appoint an engineer to replace Engineer. The replacement engineer’s status under the Contract Documents shall be that of the former Engineer.

9.03 *Furnish Data*

- A. Owner shall promptly furnish the data required of Owner under the Contract Documents.

9.04 *Pay When Due*

- A. Owner shall make payments to Contractor when they are due in the manner and within the time limits proscribed by chapter 2251 of the Texas Government Code.

9.05 *Lands and Easements; Reports, Tests, and Drawings*

- A. Owner’s duties with respect to providing lands and easements are set forth in Paragraph 5.01.
- B. Owner’s duties with respect to providing engineering surveys to establish reference points are set forth in Paragraph 4.03.

9.06 *Limitations on Owner’s Responsibilities*

- A. The Owner shall not supervise, direct, or have control or authority over, nor be responsible for, Contractor’s means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, or for any failure of Contractor to comply with Laws and Regulations applicable to the performance of the Work. Owner will not be responsible for Contractor’s failure to perform the Work in accordance with the Contract Documents.

9.07 *Evidence of Financial Arrangements*

- A. Within Thirty (30) days of executing the Agreement, Contractor may request, and Owner shall furnish, reasonable evidence that financial arrangements have been made to satisfy Owner’s obligations under the Contract Documents.

9.08 *Safety Programs*

- A. While at the Site, Owner's employees and representatives shall comply with the specific applicable requirements of Contractor's safety programs of which Owner has been informed.
- B. Owner shall furnish copies of any applicable Owner safety programs to Contractor.

ARTICLE 10 – ENGINEER'S STATUS DURING CONSTRUCTION

10.01 *Owner's Representative*

- A. Engineer will act as the Owner's representative for Project administration during the construction period. Engineer shall not have the authority to bind the Owner as that authority lies with the Owner's designated representative, but Engineer may communicate on behalf of Owner in all Project matters.

10.02 *Visits to Site*

- A. Engineer will make visits to the Site at intervals appropriate to the various stages of construction as Engineer deems necessary in order to observe as an experienced and qualified design professional the progress that has been made and the quality of the various aspects of Contractor's executed Work. Based on information obtained during such visits and observations, Engineer, for the benefit of Owner, will determine, in general, if the Work is proceeding in accordance with the Contract Documents. Engineer's efforts will be directed toward providing for Owner a greater degree of confidence that the completed Work will conform generally to the Contract Documents. On the basis of such visits and observations, Engineer will keep Owner informed of the progress of the Work and will endeavor to guard Owner against defective Work.
- B. Engineer's visits and observations are subject to all the limitations on Engineer's authority and responsibility set forth in Paragraph 10.08. Particularly, but without limitation, during or as a result of Engineer's visits or observations of Contractor's Work, Engineer will not supervise, direct, control, or have authority over or be responsible for Contractor's means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, or for any failure of Contractor to comply with Laws and Regulations applicable to the performance of the Work.

10.03 *Project Representative*

- A. If Owner and Engineer have agreed that Engineer will furnish a Resident Project Representative to represent Engineer at the Site and assist Engineer in observing the progress and quality of the Work, then the authority and responsibilities of any such Resident Project Representative will be as provided in this article 10.

10.04 *Rejecting Defective Work*

- A. Engineer has the authority to reject Work in accordance with Article 14, subject to Owner's approval.

10.05 *Shop Drawings, Change Orders and Payments*

- A. Engineer's authority, and limitations thereof, as to Shop Drawings and Samples, are set forth in Paragraph 7.16.

- B. Engineer's authority, and limitations thereof, as to design calculations and design drawings submitted in response to a delegation of professional design services, if any, are set forth in Paragraph 7.19.
 - C. Engineer's authority as to Change Orders is set forth in Article 11.
 - D. Engineer's authority as to Applications for Payment is set forth in Article 15.
- 10.06 *Determinations for Unit Price Work*
- A. Engineer will determine the actual quantities and classifications of Unit Price Work performed by Contractor as set forth in Paragraph 13.03.
- 10.07 *Decisions on Requirements of Contract Documents and Acceptability of Work*
- A. Subject to Owner's approval, Engineer will render decisions regarding the requirements of the Contract Documents, and judge the acceptability of the Work, pursuant to the specific procedures set forth herein for initial interpretations, Change Proposals, and acceptance of the Work. In rendering such decisions and judgments, Engineer will not show partiality to Owner or Contractor.
- 10.08 *Limitations on Engineer's Authority and Responsibilities*
- A. Engineer's authority, responsibility and actions as Owner's representative shall not give rise to any liability to Contractor. Contractor expressly waives any claims it has against Engineer for the performance of its responsibilities as Owner's representative.
 - B. Engineer will not supervise, direct, control, or have authority over or be responsible for Contractor's means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto.
 - C. Engineer's review of the final Application for Payment and accompanying documentation and all maintenance and operating instructions, schedules, guarantees, bonds, certificates of inspection, tests and approvals, and other documentation required to be delivered by Paragraph 15.06.A will only be to determine generally that their content complies with the requirements of, and in the case of certificates of inspections, tests, and approvals, that the results certified indicate compliance with the Contract Documents.
 - D. The limitations upon authority and responsibility set forth in this Paragraph 10.08 shall also apply to the Resident Project Representative, if any.
- 10.09 *Compliance with Safety Program*
- A. While at the Site, Engineer's employees and representatives will comply with the specific applicable requirements of Owner's and Contractor's safety programs (if any) of which Engineer has been informed.

ARTICLE 11 – AMENDING THE CONTRACT DOCUMENTS; CHANGES IN THE WORK

11.01 *Amending and Supplementing Contract Documents*

- A. The Contract Documents may be amended or supplemented by a Change Order, a Work Change Directive, or a Field Order.

1. *Change Orders:*
 - a. A Change Order shall be used to amend or supplement the Contract Documents when the Parties agree to the amendment, supplement, modification to the scope of work, or change in the Contract Price or the Contract Times.
2. *Work Change Directives:* A Work Change Directive may be issued by the Owner if the Parties cannot agree on a Change Order. A Work Change Directive may also be issued if the Parties expect that the change ordered by a Work Change Directive will be incorporated in a subsequently issued Change Order following negotiations by the parties as to the Work Change Directive's effect, if any, on the Contract Price and Contract Times.
 - b. In the event the Owner has issued a Work Change Directive that the Parties subsequently agree shall be incorporated into a Change Order, the Contractor must submit its Change Proposal seeking an adjustment of the Contract Price or the Contract Times, or both, no later than 30 days after the completion of the Work set out in the Work Change Directive.
 - c. Adjustments to the Contract Price for Work performed pursuant to a Work Change Directive issued by the Owner without agreement of the Parties shall be governed by the provisions in section 11.04.
 - d. Upon receipt of a Change Directive, Contractor shall promptly proceed with the change in the Work involved.
3. *Field Orders:* Owner or Engineer (with Owner's approval) may authorize minor changes in the Work if the changes do not involve an adjustment in the Contract Price or the Contract Times and are compatible with the design concept of the completed Project as a functioning whole as indicated by the Contract Documents. Such changes will be accomplished by a Field Order and will be binding on Owner and also on Contractor, which shall perform the Work involved promptly. If Contractor believes that a Field Order justifies an adjustment in the Contract Price or Contract Times, or both, then before proceeding with the Work at issue, Contractor shall submit a Change Proposal as provided herein. Provided the Design-Build project delivery method is being used, subject to Owner's prior written approval, Contractor may make minor changes in the Work consistent with the intent of the Contract Documents, provided, however that Contractor shall promptly inform Owner and Engineer, in writing, of any such changes and record such changes on the documents maintained by Contractor.

11.02 *Owner-Authorized Changes in the Work*

- A. Without invalidating the Contract and without notice to any surety, Owner may, at any time or from time to time, order additions, deletions, or revisions in the Work. Such changes shall be supported by Engineer's recommendation, to the extent the change involves the design (as set forth in the Drawings, Specifications, or otherwise), or other engineering or technical matters. Such changes may be accomplished by a Change Order, if Owner and Contractor have agreed as to the effect, if any, of the changes on Contract Times or Contract Price; or by a Work Change Directive. Upon receipt of any such document, Contractor shall promptly proceed with the Work involved; or, in the case of a deletion in the Work, promptly cease construction activities with respect to such deleted

Work. Added or revised Work shall be performed under the applicable conditions of the Contract Documents. Nothing in this paragraph shall obligate Contractor to undertake work that Contractor reasonably concludes cannot be performed in a manner consistent with Contractor's safety obligations under the Contract Documents or Laws and Regulations.

11.03 *Unauthorized Changes in the Work*

- A. Contractor shall not be entitled to an increase in the Contract Price or an extension of the Contract Times with respect to any work performed that is not required by the Contract Documents, as amended, modified, or supplemented, except in the case of an emergency as provided in Paragraph 7.15 or in the case of uncovering Work as provided in Paragraph 14.05.

11.04 *Change of Contract Price*

- A. The Contract Price may only be changed by a Change Order or Work Change Directive. Any Change Proposal for an adjustment in the Contract Price shall comply with the provisions of Paragraph 11.06. Any Claim for an adjustment of Contract Price shall comply with the provisions of Article 12.
- B. An adjustment in the Contract Price will be determined as follows:
 - 1. where the Work involved is covered by unit prices contained in the Contract Documents, then by application of such unit prices to the quantities of the items involved (subject to the provisions of Paragraph 13.03); or
 - 2. where the Work involved is not covered by unit prices contained in the Contract Documents, then by a mutually agreed lump sum (which may include an allowance for overhead and profit not necessarily in accordance with Paragraph 11.04.C.2) properly itemized and supported by sufficient substantiating data to permit evaluation by the Owner; or
 - 3. where the Work involved is not covered by unit prices contained in the Contract Documents and the parties do not reach mutual agreement to a lump sum, then on the basis of the Cost of the Work (determined as provided in Paragraph 13.01) plus a Contractor's fee for overhead and profit (determined as provided in Paragraph 11.04.C).
- C. *Contractor's Fee.* When applicable, the Contractor's fee for overhead and profit shall be determined as follows:
 - 1. a mutually acceptable fixed fee; or
 - 2. if a fixed fee is not agreed upon, then a fee based on the following percentages of the various portions of the Cost of the Work:
 - a. for costs incurred under Paragraphs 13.01.B.1 and 13.01.B.2, the Contractor's fee shall be 15 percent;
 - b. for costs incurred under Paragraph 13.01.B.3, the Contractor's fee shall be five percent;
 - c. where one or more tiers of subcontracts are on the basis of Cost of the Work plus a fee and no fixed fee is agreed upon, the intent of Paragraphs 11.01.C.2.a

and 11.01.C.2.b is that the Contractor's fee shall be based on: (1) a fee of 15 percent of the costs incurred under Paragraphs 13.01.A.1 and 13.01.A.2 by the Subcontractor that actually performs the Work, at whatever tier, and (2) with respect to Contractor itself and to any Subcontractors of a tier higher than that of the Subcontractor that actually performs the Work, a fee of five percent of the amount (fee plus underlying costs incurred) attributable to the next lower tier Subcontractor; provided, however, that for any such subcontracted work the maximum total fee to be paid by Owner shall be no greater than 27 percent of the costs incurred by the Subcontractor that actually performs the work;

- d. no fee shall be payable on the basis of costs itemized under Paragraphs 13.01.B.4, 13.01.B.5, and 13.01.C;
- e. the amount of credit to be allowed by Contractor to Owner for any change which results in a net decrease in cost will be the amount of the actual net decrease in cost plus a deduction in Contractor's fee by an amount equal to five percent of such net decrease; and
- f. when both additions and credits are involved in any one change, the adjustment in Contractor's fee shall be computed on the basis of the net change in accordance with Paragraphs 11.04.C.2.a through 11.04.C.2.e, inclusive.

11.05 *Change of Contract Times*

- A. The Contract Times may only be changed by a Change Order or Work Change Directive. Any Change Proposal for an adjustment in the Contract Times shall comply with the provisions of Paragraph 11.06. Any Claim for an adjustment in the Contract Times shall comply with the provisions of Article 12.
- B. An adjustment of the Contract Times shall be subject to the limitations set forth in Paragraph 4.05, concerning delays in Contractor's progress.

11.06 *Change Proposals*

- A. Contractor shall submit a Change Proposal to Engineer and Owner to request an adjustment in the Contract Times or Contract Price; appeal an initial decision by Engineer concerning the requirements of the Contract Documents or relating to the acceptability of the Work under the Contract Documents; contest a set-off against payment due; or seek other relief under the Contract. The Change Proposal shall specify any proposed change in Contract Times or Contract Price, or both, or other proposed relief, and explain the reason for the proposed change, with citations to any governing or applicable provisions of the Contract Documents.
 - 1. *Procedures.* Contractor shall submit each Change Proposal to Engineer and Owner promptly (but in no event later than 30 days) after the start of the event giving rise thereto, or after such initial decision. The Contractor shall submit supporting data, including the proposed change in Contract Price or Contract Time (if any), to the Engineer and Owner within 15 days after the submittal of the Change Proposal. The supporting data shall be accompanied by a written statement that the supporting data are accurate and complete, and that any requested time or price adjustment is the entire adjustment to which Contractor believes it is entitled as a result of said event. Engineer will advise Owner regarding the Change Proposal, and consider any comments or response from Owner regarding the Change Proposal. Failure by

Contractor to comply with this submittal procedure will constitute an express waiver of any Claim for relief.

2. *Engineer's Action:* Engineer will review each Change Proposal with Owner and, within 30 days after receipt of the Contractor's supporting data, either deny the Change Proposal in whole, approve it in whole, or deny it in part and approve it in part. Engineer's action on a Change Proposal will not have the effect of adjusting the Contract Time or Contract Price without express written approval of Owner and a memorialization of Engineer's Action in a Change Order. Such actions shall be in writing, with a copy provided to Owner and Contractor. If Engineer does not take action on the Change Proposal within 30 days, then either Owner or Contractor may at any time thereafter submit a letter to the other party indicating that as a result of Engineer's inaction the Change Proposal is deemed denied, thereby commencing the time for appeal of the denial under Article 12.
 3. *Binding Decision:* Engineer's decision will be final and binding upon Contractor, unless Contractor appeals the decision by filing a Claim under Article 12.
- B. *Resolution of Certain Change Proposals:* If the Change Proposal does not involve the design (as set forth in the Drawings, Specifications, or otherwise), the acceptability of the Work, or other engineering or technical matters, then Engineer will notify the parties that the Engineer is unable to resolve the Change Proposal. For purposes of further resolution of such a Change Proposal, such notice shall be deemed a denial, and Contractor may choose to seek resolution under the terms of Article 12.

11.07 *Execution of Change Orders*

- A. Owner and Contractor shall execute appropriate Change Orders covering:
1. changes in the Contract Price or Contract Times which are agreed to by the parties, including any undisputed sum or amount of time for Work actually performed in accordance with a Work Change Directive;
 2. changes in Contract Price resulting from an Owner set-off, unless Contractor has duly contested such set-off;
 3. changes in the Work which are: (a) ordered by Owner pursuant to Paragraph 11.02, (b) required because of Owner's acceptance of defective Work under Paragraph 14.04 or Owner's correction of defective Work under Paragraph 14.07; and
 4. changes in the Contract Price or Contract Times, or other changes, which embody the substance of any final and binding results under Paragraph 11.06, or Article 12.

11.08 *Notification to Surety*

- A. If the provisions of any bond require notice to be given to a surety of any change affecting the general scope of the Work or the provisions of the Contract Documents (including, but not limited to, Contract Price or Contract Times), the giving of any such notice will be Contractor's responsibility. The amount of each applicable bond will be adjusted to reflect the effect of any such change.

ARTICLE 12 – CLAIMS

12.01 *Claims*

- A. The following disputes between Owner and Contractor shall be submitted to the Claims process set forth in this Article:
 - 1. Appeals by Owner or Contractor of Engineer's decisions regarding Change Proposals;
 - 2. Owner demands for adjustments in the Contract Price or Contract Times, or other relief under the Contract Documents; and
 - 3. Disputes that Engineer has been unable to address because they do not involve the design (as set forth in the Drawings, Specifications, or otherwise), the acceptability of the Work, or other engineering or technical matters.
- B. *Submittal of Claim:* The party submitting a Claim shall deliver written notice directly to the other party to the Contract promptly (but in no event later than 30 days) after the start of the event 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. In the case of appeals regarding Change Proposals within 30 days of the decision under appeal. The responsibility to substantiate a Claim shall rest with the party making the Claim. Such notice shall include sufficient information to advise the other party of the circumstances giving rise to the claim for relief, the specific contractual adjustment or relief requested and the basis of such request.
- C. *Review and Resolution:* The party receiving a Claim shall review it thoroughly, giving full consideration to its merits. The two parties shall seek to resolve the Claim through the exchange of information and direct negotiations. The parties may extend the time for resolving the Claim by mutual agreement. All actions taken on a Claim shall be stated in writing and submitted to the other party, with a copy to Engineer.
- D. *Mediation:*
 - 1. At any time after initiation of a Claim, Owner and Contractor may mutually agree to mediation of the underlying dispute. The agreement to mediate shall stay the Claim submittal and response process.
 - 2. If Owner and Contractor agree to mediation, the mediation shall occur within 60 days of the agreement to mediate. However, the mediation may be stayed and its scope and schedule may be amended, provided that the mediation occur no later than 60 days following Final Completion. 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.
 - 3. Owner and Contractor shall each pay one-half of the mediator's fees and costs.
 - 4. Mediation is a condition precedent to litigation before a court of competent jurisdiction or tribunal.
- E. *Denial of Claim:* If efforts to resolve a Claim are not successful, the party receiving the Claim may deny it by giving written notice of denial to the other party.

- F. *Final and Binding Results:* If the parties reach a mutual agreement regarding a Claim, whether through approval of the Claim, direct negotiations, mediation, or otherwise, that agreement should be memorialized in a Change Order if the Project is ongoing at the time of resolution and the agreement affects the Contract scope, price, or time.
- G. *Duty to Continue Performance:* Unless provided to the contrary in the Contract Documents, Contractor shall continue to perform the Work pending the final resolution of any dispute or disagreement between Contractor and Owner.
- H. The Contractor shall commence all claims and causes of action, whether in contract, tort, breach of warranty or otherwise arising out of or related to the Contract in accordance with the requirements of this article 12, the dispute resolution provisions of article 17 and within the time period specified by applicable law. The Contractor waives all claims and causes of action not commenced in strict accordance with this Article.
- I. *Claims Arising After Final Payment:* If the Contractor intends to make a Claim for an increase in the Contract Price or Contract Time, written notice as provided herein shall be given before proceeding to execute the portion of the Work that relates to the Claim. Prior notice is not required for Claims relating to an emergency endangering life or property. Failure to provide written notice of a Claim in accordance with this Article and other applicable provisions of the Contract Documents constitutes an express waiver by the Contractor of any right of recovery on such Claim.

ARTICLE 13 – COST OF THE WORK; ALLOWANCES; UNIT PRICE WORK

13.01 *Cost of the Work*

- A. *Purposes for Determination of Cost of the Work:* The term Cost of the Work means the sum of all costs necessary for the proper performance of the Work at issue, as further defined below. The provisions of this Paragraph 13.01 are used for two distinct purposes:
 - 1. To determine Cost of the Work when Cost of the Work is a component of the Contract Price, under cost-plus-fee, time-and-materials, or other cost-based terms; or
 - 2. To determine the value of a Change Order, Change Proposal, Claim, set-off, or other adjustment in Contract Price. When the value of any such adjustment is determined on the basis of Cost of the Work, Contractor is entitled only to those additional or incremental costs required because of the change in the Work or because of the event giving rise to the adjustment.
- B. *Costs Included:* Except as otherwise may be agreed to in writing by Owner, costs included in the Cost of the Work shall be in amounts no higher than those prevailing in the locality of the Project, shall not include any of the costs itemized in Paragraph 13.01.C, and shall include only the following items:
 - 1. Payroll costs for employees in the employ of Contractor in the direct performance of the Work. Such employees shall include, without limitation, superintendents, foremen, and other personnel employed full time. Payroll costs shall include, but not be limited to, salaries and wages plus the cost of fringe benefits, which shall include social security contributions, unemployment, excise, and payroll taxes, workers' compensation and health and retirement benefits applicable thereto.

2. Cost of all materials and equipment furnished and incorporated in the Work, including costs of transportation and storage thereof, and Suppliers' field services required in connection therewith. All cash discounts shall accrue to Contractor unless Owner deposits funds with Contractor with which to make payments, in which case the cash discounts shall accrue to Owner, and Contractor shall make provisions so that they may be obtained.
 3. Payments made by Contractor to Subcontractors for Work performed by Subcontractors. If any subcontract provides that the Subcontractor is to be paid on the basis of Cost of the Work plus a fee, the Subcontractor's Cost of the Work and fee shall be determined in the same manner as Contractor's Cost of the Work and fee as provided in this Paragraph 13.01.
 4. Costs of special consultants (including but not limited to engineers, architects, testing laboratories, surveyors, attorneys, and accountants) employed for services specifically related to the Work.
 5. Supplemental costs including the following:
 - a. The proportion of necessary transportation, travel, and subsistence expenses of Contractor's employees incurred in discharge of duties connected with the Work.
 - b. Cost, including transportation and maintenance, of all materials, supplies, equipment, machinery, appliances, office, and temporary facilities at the Site, and hand tools not owned by the workers, which are consumed in the performance of the Work, and cost, less market value, of such items used but not consumed which remain the property of Contractor.
 - c. Rentals of all construction equipment and machinery, and the parts thereof, approved by Owner, and the costs of transportation, loading, unloading, assembly, dismantling, and removal thereof. All such costs shall be in accordance with the terms of said rental agreements. The rental of any such equipment, machinery, or parts shall cease when the use thereof is no longer necessary for the Work.
 - d. The cost of utilities, fuel, and sanitary facilities at the Site.
 - e. The costs of premiums for all bonds and insurance that Contractor is required by the Contract Documents to purchase and maintain.
- C. *Costs Excluded:* The term Cost of the Work shall not include any of the following items:
1. Payroll costs and other compensation of Contractor's employees, agents and other personnel not included in Paragraph 13.01.B, whether at the Site or in Contractor's principal or branch office for general administration of the Work. The payroll costs and other compensation excluded here are to be considered administrative costs covered by the Contractor's fee.
 2. Expenses of Contractor's principal and branch offices other than Contractor's office at the Site.
 3. Any part of Contractor's capital expenses, including interest on Contractor's capital employed for the Work and charges against Contractor for delinquent payments.

4. Other overhead or general expense costs of any kind and the costs of any item not specifically and expressly included in Paragraph 13.01.B.
- D. *Contractor's Fee:* When the Work as a whole is performed on the basis of cost-plus, Contractor's fee shall be determined as set forth in the Agreement. When the value of any Work covered by a Change Order, Change Proposal, Claim, set-off, or other adjustment in Contract Price is determined on the basis of Cost of the Work, Contractor's fee shall be determined as set forth in Paragraph 11.04.C.
- E. *Documentation:* Whenever the Cost of the Work for any purpose is to be determined pursuant to this Article 13, Contractor will establish and maintain records thereof in accordance with generally accepted accounting practices and submit in a form acceptable to Engineer an itemized cost breakdown together with supporting data.

13.02 *Unit Price Work*

- A. Where the Contract Documents provide that all or part of the Work is to be Unit Price Work, initially the Contract Price will be deemed to include for all Unit Price Work an amount equal to the sum of the unit price for each separately identified item of Unit Price Work times the estimated quantity of each item as indicated in the Agreement.
- B. The estimated quantities of items of Unit Price Work are not guaranteed and are solely for the purpose of comparison of Bids and determining an initial Contract Price. Payments to Contractor for Unit Price Work will be based on actual quantities.
- C. Each unit price will be deemed to include an amount considered by Contractor to be adequate to cover Contractor's overhead and profit for each separately identified item.
- D. Engineer will determine the actual quantities and classifications of Unit Price Work performed by Contractor. Engineer will review with Contractor and Owner the Engineer's preliminary determinations on such matters before rendering a written decision thereon (by recommendation of an Application for Payment or otherwise). Provided the Owner has approved such decision, Engineer's written decision thereon will be final and binding (except as modified by Engineer to reflect changed factual conditions or more accurate data) upon Owner and Contractor, subject to the provisions of the following paragraph.
- E. Within 30 days of Engineer's written decision under the preceding paragraph, Contractor may submit a Change Proposal, or Owner may file a Claim, seeking an adjustment in the Contract Price if:
 1. the quantity of any item of Unit Price Work performed by Contractor differs materially and significantly from the estimated quantity of such item indicated in the Agreement;
 2. there is no corresponding adjustment with respect to any other item of Work; and
 3. Contractor believes that it is entitled to an increase in Contract Price as a result of having incurred additional expense or Owner believes that Owner is entitled to a decrease in Contract Price, and the parties are unable to agree as to the amount of any such increase or decrease.

ARTICLE 14 – TESTS AND INSPECTIONS; CORRECTION, REMOVAL OR ACCEPTANCE OF DEFECTIVE WORK

14.01 *Access to Work*

- A. Owner, Engineer, their consultants and other representatives and personnel of Owner, independent testing laboratories, and authorities having jurisdiction will have access to the Site and the Work at reasonable times for their observation, inspection, and testing. Contractor shall provide them proper and safe conditions for such access and advise them of Contractor's safety procedures and programs so that they may comply therewith as applicable.

14.02 *Tests, Inspections, and Approvals*

- A. Contractor shall give Engineer and Owner timely notice of readiness of the Work (or specific parts thereof) for all required inspections and tests, and shall cooperate with inspection and testing personnel to facilitate required inspections and tests.
- B. Owner shall be responsible for providing the services of an independent inspection and testing lab if the Contract Documents and Specifications so require.
- C. Contractor shall be responsible for arranging, obtaining, and paying for all inspections and tests required:
 - 1. by the Contract Documents, unless the Contract Documents expressly allocate responsibility for a specific inspection or test to Owner;
 - 2. to attain Owner's and Engineer's acceptance of materials or equipment to be incorporated in the Work;
 - 3. by manufacturers of equipment furnished under the Contract Documents;
 - 4. for testing, adjusting, and balancing of mechanical, electrical, and other equipment to be incorporated into the Work; and
 - 5. for acceptance of materials, mix designs, or equipment submitted for approval prior to Contractor's purchase thereof for incorporation in the Work.

NOTE(S) TO USER: Such inspections and tests shall be performed by independent inspectors, testing laboratories, or other qualified individuals or entities acceptable to Owner.

- D. If the Contract Documents require the Work (or part thereof) to be approved by Owner, Engineer, or another designated individual or entity, then Contractor shall assume full responsibility for arranging and obtaining such approvals.
- E. If any Work (or the work of others) that is to be inspected, tested, or approved is covered by Contractor without written concurrence of Engineer, Contractor shall, if requested by Engineer, uncover such Work for observation. Such uncovering shall be at Contractor's expense unless Contractor had given Engineer timely notice of Contractor's intention to cover the same and Engineer had not acted with reasonable promptness in response to such notice.

14.03 *Defective Work*

- A. *Contractor's Obligation:* It is Contractor's obligation to assure that the Work is not defective.

- B. *Engineer's Authority*: Engineer has the authority to determine whether Work is defective, and to reject defective Work, subject to Owner's approval.
- C. *Notice of Defects*: Prompt notice of all defective Work of which Owner or Engineer has actual knowledge will be given to Contractor.
- D. *Correction, or Removal and Replacement*: Promptly after receipt of written notice of defective Work, Contractor shall correct all such defective Work, whether or not fabricated, installed, or completed, or, if Engineer has rejected the defective Work, remove it from the Project and replace it with Work that is not defective.
- E. *Preservation of Warranties*: When correcting defective Work, Contractor shall take no action that would void or otherwise impair Owner's special warranty and guarantee, if any, on said Work.
- F. *Costs and Damages*: Contractor shall pay all claims, costs, losses, and damages arising out of or relating to defective Work, including but not limited to the cost of the inspection, testing, correction, removal, replacement, or reconstruction of such defective Work, and the costs of repair or replacement of work of others resulting from defective Work. Prior to final payment, if Owner and Contractor are unable to agree as to the measure of such claims, costs, losses, and damages resulting from defective Work, then Owner may impose a reasonable set-off against payments due under Article 15.

14.04 *Acceptance of Defective Work*

- A. If, instead of requiring correction or removal and replacement of defective Work, Owner prefers to accept it, Owner may do so. Contractor shall pay all claims, costs, losses, and damages attributable to Owner's evaluation of and determination to accept such defective Work. If any such acceptance occurs prior to final payment, the necessary revisions in the Contract Documents with respect to the Work shall be incorporated in a Change Order. If the parties are unable to agree as to the decrease in the Contract Price, reflecting the diminished value of Work so accepted, then Owner may impose a reasonable set-off against payments due under Article 15. If the acceptance of defective Work occurs after final payment, Contractor shall pay an appropriate amount to Owner.

14.05 *Uncovering Work*

- A. Subject to Owner's prior written approval, Engineer has the authority to require special inspection or testing of the Work, whether or not the Work is fabricated, installed, or completed.
- B. If any Work is covered contrary to the written request of Engineer or Owner, then Contractor shall, if requested by Engineer, uncover such Work for Engineer's observation, and then replace the covering, all at Contractor's expense.
- C. If Engineer considers it necessary or advisable that covered Work be observed by Engineer or inspected or tested by others, then Contractor, upon Owner's approval and Engineer's request, shall uncover, expose, or otherwise make available for observation, inspection, or testing as Engineer may require, that portion of the Work in question, and provide all necessary labor, material, and equipment.
- 6. If it is found that the uncovered Work is defective, Contractor shall be responsible for all claims, costs, losses, and damages arising out of or relating to such uncovering, exposure, observation, inspection, and testing, and of satisfactory replacement or

reconstruction (including but not limited to all costs of repair or replacement of work of others); and pending Contractor's full discharge of this responsibility the Owner shall be entitled to impose a reasonable set-off against payments due under Article 15.

7. If the uncovered Work is not found to be defective, Contractor shall be allowed an increase in the Contract Price or an extension of the Contract Times, or both, directly attributable to such uncovering, exposure, observation, inspection, testing, replacement, and reconstruction. If the parties are unable to agree as to the amount or extent thereof, then Contractor may submit a Change Proposal within 30 days of the determination that the Work is not defective.

14.06 *Owner May Stop the Work*

- A. If the Work is defective, or Contractor fails to supply sufficient skilled workers or suitable materials or equipment, or fails to perform the Work in such a way that the completed Work will conform to the Contract Documents, then Owner may order Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated.

14.07 *Owner May Correct Defective Work*

- A. If Contractor fails within a reasonable time after written notice from Engineer or Owner to correct defective Work, or to remove and replace rejected Work as required by the Owner, or if Contractor fails to perform the Work in accordance with the Contract Documents, or if Contractor fails to comply with any other provision of the Contract Documents, then Owner may, after seven days written notice to Contractor, correct or remedy any such deficiency.
- B. In exercising the rights and remedies under this Paragraph 14.07, Owner shall proceed expeditiously. In connection with such corrective or remedial action, Owner may exclude Contractor from all or part of the Site, take possession of all or part of the Work and suspend Contractor's services related thereto, and incorporate in the Work all materials and equipment stored at the Site or for which Owner has paid Contractor but which are stored elsewhere. Contractor shall allow Owner, Owner's representatives, agents and employees, Owner's other contractors, and Engineer and Engineer's consultants access to the Site to enable Owner to exercise the rights and remedies under this paragraph.
- C. All claims, costs, losses, and damages incurred or sustained by Owner in exercising the rights and remedies under this Paragraph 14.07 will be charged against Contractor as set-offs against payments due under Article 15. Such claims, costs, losses and damages will include but not be limited to all costs of repair, or replacement of work of others destroyed or damaged by correction, removal, or replacement of Contractor's defective Work. If no payments are due to the Contractor or insufficient funds remain as part of the Contract Price then unpaid to the Contractor, the Contractor shall be liable to the Owner and shall promptly reimburse the Owner for all costs following written notice of the amount due to the Owner.
- D. Contractor shall not be allowed an extension of the Contract Times because of any delay in the performance of the Work attributable to the exercise by Owner of Owner's rights and remedies under this Paragraph 14.07.

ARTICLE 15 – PAYMENTS TO CONTRACTOR; SET-OFFS; COMPLETION; CORRECTION PERIOD

15.01 *Progress Payments*

- A. *Basis for Progress Payments:* The Schedule of Values established as provided in Article 2 will serve as the basis for progress payments and will be incorporated into a form of Application for Payment acceptable to Engineer and Owner. Progress payments on account of Unit Price Work will be based on the number of units completed during the pay period, as determined under the provisions of Paragraph 13.03. Progress payments for cost-based Work will be based on Cost of the Work completed by Contractor during the pay period.
- B. *Applications for Payments:*
1. At least 25 days before the date established in the Agreement for each progress payment (but not more often than once a month), Contractor shall submit to Engineer and Owner for review an Application for Payment filled out and signed by Contractor covering the Work completed as of the date of the Application and accompanied by such supporting documentation as is required by the Contract Documents. If payment is requested on the basis of materials and equipment not incorporated in the Work but delivered and suitably stored at the Site or at another location agreed to in writing, the Application for Payment shall also be accompanied by a bill of sale, invoice, or other documentation warranting that Owner has received the materials and equipment free and clear of all Liens, and evidence that the materials and equipment are covered by appropriate property insurance, a warehouse bond, or other arrangements to protect Owner's interest therein, all of which must be satisfactory to Owner.
 2. Beginning with the second Application for Payment, each Application shall include an affidavit of Contractor stating that all previous progress payments received on account of the Work have been applied on account to discharge Contractor's legitimate obligations associated with prior Applications for Payment.
 3. The amount of retainage with respect to progress payments will be as stipulated in the Agreement.
- C. *Review of Applications:*
1. Engineer will, within 10 days after receipt of each Application for Payment, including each resubmittal, either indicate in writing a recommendation of payment and present the Application to Owner, or return the Application to Contractor indicating in writing Engineer's reasons for refusing to recommend payment. In the latter case, Contractor may make the necessary corrections and resubmit the Application.
 2. Engineer's recommendation of any payment requested in an Application for Payment will constitute a representation by Engineer to Owner, based on Engineer's observations of the executed Work as an experienced and qualified design professional, and on Engineer's review of the Application for Payment and the accompanying data and schedules, that to the best of Engineer's knowledge, information and belief:
 - a. the Work has progressed to the point indicated;

- b. the quality of the Work is generally in accordance with the Contract Documents; and
 - c. the conditions precedent to Contractor's being entitled to such payment appear to have been fulfilled in so far as it is Engineer's responsibility to observe the Work.
 - 3. By recommending any such payment Engineer will not thereby be deemed to have represented that:
 - d. inspections made to check the quality or the quantity of the Work as it has been performed have been exhaustive, extended to every aspect of the Work in progress, or involved detailed inspections of the Work beyond the responsibilities specifically assigned to Engineer in the Contract; or
 - e. there may not be other matters or issues between the parties that might entitle Contractor to be paid additionally by Owner or entitle Owner to withhold payment to Contractor.
 - 4. Engineer will recommend reductions in payment (set-offs) necessary in Engineer's opinion to protect Owner from loss because:
 - f. the Work is defective, requiring correction or replacement;
 - g. the Contract Price has been reduced by Change Orders;
 - h. Owner has been required to correct defective Work in accordance with Paragraph 14.07, or has accepted defective Work pursuant to Paragraph 14.04;
 - i. Owner has been required to remove or remediate a Hazardous Environmental Condition for which Contractor is responsible; or
 - j. Engineer has actual knowledge of the occurrence of any of the events that would constitute a default by Contractor and therefore justify termination for cause under the Contract Documents.
- D. *Reductions in Payment by Owner:*
- 1. In addition to any reductions in payment (set-offs) recommended by Engineer, Owner is entitled to impose a set-off against payment based on any of the following:
 - a. claims have been made against Owner on account of Contractor's conduct in the performance or furnishing of the Work, or Owner has incurred costs, losses, or damages on account of Contractor's conduct in the performance or furnishing of the Work;
 - b. Contractor has failed to take reasonable and customary measures to avoid damage, delay, disruption, and interference with other work at or adjacent to the Site;
 - c. Contractor has failed to provide and maintain required certified payrolls, bonds or insurance;
 - d. Owner has been required to remove or remediate a Hazardous Environmental Condition for which Contractor is responsible;

- e. Owner has incurred extra charges or engineering costs related to submittal reviews, evaluations of proposed substitutes, tests and inspections, or return visits to manufacturing or assembly facilities;
 - f. the Work is defective, requiring correction or replacement;
 - g. liquidated damages, if applicable, or other damages resulting from delay have accrued as a result of Contractor's failure to achieve Milestones, Substantial Completion, or final completion of the Work;
 - h. there are other items entitling Owner to a set off against the amount recommended.
2. If Owner imposes any set-off against payment, whether based on its own knowledge or on the written recommendations of Engineer, Owner will give Contractor immediate written notice (with a copy to Engineer) stating the reasons for such action and the specific amount of the reduction, and promptly pay Contractor any amount remaining after deduction of the amount so withheld. Owner shall promptly pay Contractor the amount so withheld, or any adjustment thereto agreed to by Owner and Contractor, if Contractor remedies the reasons for such action. The reduction imposed shall be binding on Contractor unless it duly submits a Change Proposal contesting the reduction.

15.02 *Contractor's Warranty of Title*

- A. Contractor warrants and guarantees that title to all Work, materials, services, and equipment furnished under the Contract will pass to Owner free and clear of (1) all Liens, claims, security interests, encumbrances, and other title defects, and (2) all patent, licensing, copyright, or royalty obligations, no later than seven days after the time of payment by Owner.

15.03 *Substantial Completion*

- A. When Contractor considers the entire Work ready for its intended use Contractor shall notify Owner and Engineer in writing that the entire Work is substantially complete and request that Engineer issue a certificate of Substantial Completion. Contractor shall at the same time submit to Owner and Engineer an initial draft of punch list items to be completed or corrected before final payment. If the Agreement calls for a Design-Build project delivery method, the Contractor shall issue a certificate of Substantial Completion to the Owner.
- B. Promptly after Contractor's notification, Owner, Contractor, and Engineer shall make an inspection of the Work to determine the status of completion. At that inspection, Owner and Engineer will review, supplement, and edit the initial punch list prepared by Contractor or prepare an additional punch list if Contractor has not yet provided a punch list. If Owner or Engineer does not consider the Work substantially complete, Engineer will notify Contractor in writing giving the reasons therefor.
- C. If Owner and Engineer consider the Work substantially complete, Engineer will deliver to Owner a preliminary certificate of Substantial Completion which shall set forth (i) the date of Substantial Completion, (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 Contractor'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. Engineer shall attach to the certificate a punch list of items to be completed or corrected before final payment. If Owner and Engineer do not consider the Work substantially complete, the Engineer shall notify Contractor of such, in writing, with a specific explanation of those portions of the Work that are the basis for determining the Work is not substantially complete. If the Agreement calls for a Design-Build project delivery method, the Contractor shall submit a preliminary certificate of Substantial Completion to the Owner.

- D. After Substantial Completion the Contractor shall promptly begin work on the punch list of items to be completed or corrected prior to final payment. In appropriate cases Contractor may submit monthly Applications for Payment for completed punch list items, following the progress payment procedures set forth above.

15.04 *Partial Use or Occupancy*

- A. Prior to Substantial Completion of all the Work, Owner may use or occupy any substantially completed part of the Work which has specifically been identified in the Contract Documents, or which Owner, Engineer, and Contractor agree constitutes a separately functioning and usable part of the Work that can be used by Owner for its intended purpose without significant interference with Contractor's performance of the remainder of the Work, subject to the following conditions:
 - 1. At any time Owner may request in writing that Contractor permit Owner to use or occupy any such part of the Work that Owner believes to be substantially complete. If and when Contractor agrees that such part of the Work is substantially complete, Contractor, Owner, and Engineer will follow the procedures of Paragraph 15.03 for that part of the Work.
 - 2. At any time Contractor may notify Owner and Engineer in writing that Contractor considers any such part of the Work substantially complete and request Engineer to issue a certificate of Substantial Completion for that part of the Work.
 - 3. Within a reasonable time after either such request, Owner, Contractor, and Engineer shall make an inspection of that part of the Work to determine its status of completion. If Owner or Engineer does not consider that part of the Work to be substantially complete, Engineer will notify Owner and Contractor in writing giving the reasons therefor. If Owner or Engineer considers that part of the Work to be substantially complete, the provisions of Paragraph 15.03 will apply with respect to certification of Substantial Completion of that part of the Work.
 - 4. No use or occupancy or separate operation of part of the Work by Owner will relieve Contractor of its insurance obligations under these Contract Documents.
- B. The Owner, at the Owner's sole option, shall have the right to take possession of and use any completed or partially completed portion of the Work regardless of the time for completing the entire Work. The Owner's exercise of such use and possession shall not be construed to mean that the Owner acknowledges that any part of the Work so possessed and used is substantially complete or that it is accepted by Owner, and the Owner's exercise of such use and possession shall not relieve the Contractor of its responsibility to complete all Work in accordance with the Contract Documents.

15.05 *Final Inspection*

- A. Upon written notice from Contractor that the entire Work or an agreed portion thereof is complete, Engineer will promptly make a final inspection with Owner and Contractor and will notify Contractor in writing of all particulars in which this inspection reveals that the Work, or agreed portion thereof, is incomplete or defective. Contractor shall immediately take such measures as are necessary to complete such Work or remedy such deficiencies. In such case, Contractor must bear the cost of any additional Work or services of the Owner until the Work is determined to be finally complete.

15.06 *Final Payment*

A. *Application for Payment:*

1. After Contractor has, in the opinion of Engineer and Owner, satisfactorily completed all corrections identified during the final inspection and has delivered, in accordance with the Contract Documents, all maintenance and operating instructions, schedules, guarantees, bonds, certificates or other evidence of insurance, certificates of inspection, annotated record documents (as provided in Paragraph 7.11), and other documents, Contractor may make application for final payment.
2. The final Application for Payment shall be accompanied (except as previously delivered) by:
 - a. all documentation called for in the Contract Documents;
 - b. consent of the surety, if any, to final payment;
 - c. satisfactory evidence that all title issues have been resolved such that title to all Work, materials, and equipment has passed to Owner free and clear of any Liens or other title defects, or will so pass upon final payment.
 - d. a list of all disputes that Contractor believes are unsettled;
 - e. complete and legally effective releases or waivers (satisfactory to Owner) of all Lien rights or claims arising out of the Work, and of Liens or claims filed in connection with the Work; and
 - f. a general release executed by Contractor waiving, upon receipt of final payment by Contractor, all claims, except those claims previously made in writing to Owner and remaining unsettled at the time of final payment
3. In lieu of the releases or waivers of Liens specified in Paragraph 15.06.A.2 and as approved by Owner, Contractor may furnish receipts or releases in full and an affidavit of Contractor that: (a) the releases and receipts include all labor, services, material, and equipment for which a Lien or claim could be filed; and (b) all payrolls, material and equipment bills, and other indebtedness connected with the Work for which Owner might in any way be responsible, or which might in any way result in claims, have been paid or otherwise satisfied. If any Subcontractor or Supplier fails to furnish such a release or receipt in full, Contractor may furnish a bond or other collateral satisfactory to Owner to indemnify Owner against any Lien or claim, or Owner at its option may issue joint checks payable to Contractor and specified Subcontractors and Suppliers.

B. *Engineer's Review of Application and Acceptance:*

1. If, on the basis of Engineer's observation of the Work during construction and final inspection, and Engineer's review of the final Application for Payment and accompanying documentation as required by the Contract Documents, Engineer is satisfied that the Work has been completed and Contractor's other obligations under the Contract have been fulfilled, Engineer will, within ten days after receipt of the final Application for Payment, indicate in writing Engineer's recommendation of final payment and present the Application for Payment to Owner for payment. Such recommendation shall account for any set-offs against payment that are necessary to protect Owner from loss for the reasons stated above with respect to progress payments. Otherwise, Engineer will return the Application for Payment to Contractor, indicating in writing the reasons for refusing to recommend final payment, in which case Contractor shall make the necessary corrections and resubmit the Application for Payment.
- C. *Completion of Work:* The Work is complete (subject to surviving obligations) when it is ready for final payment as established by the Engineer's written recommendation of final payment.
- D. *Payment Becomes Due:* Thirty days after the presentation to Owner of the final Application for Payment and accompanying documentation, the amount recommended by Engineer (less any further sum Owner is entitled to set off) will become due and shall be paid by Owner to Contractor.

15.07 *Waiver of Claims*

- A. The making of final payment will not constitute a waiver by Owner of claims or rights against Contractor. Owner expressly reserves claims and rights arising from defective Work appearing after final inspection, from Contractor's failure to comply with the Contract Documents or the terms of any special guarantees specified therein, from outstanding Claims by Owner, or from Contractor's continuing obligations under the Contract Documents.
- B. The acceptance of final payment by Contractor will constitute a waiver by Contractor of all claims and rights against Owner other than those pending matters that have been duly submitted, expressly reserved, or appealed under the provisions of Article 17.

15.08 *Correction Period*

- A. If within one year after the date of Substantial Completion (or such longer period of time as may be prescribed by the terms of any applicable special guarantee required by the Contract Documents, or by any specific provision of the Contract Documents), any Work is in need of repair, adjustment, modification, correction, or found to be defective, or if the repair of any damages to the Site, adjacent areas that Contractor has arranged to use through construction easements or otherwise, and other adjacent areas used by Contractor as permitted by Laws and Regulations, is found to be defective, then Contractor shall promptly, without cost to Owner and in accordance with Owner's written instructions:
 1. correct the defective repairs to the Site or such other adjacent areas;
 2. correct such defective Work;

3. if the defective Work has been rejected by Owner, remove it from the Project and replace it with Work that is not defective, and
 4. satisfactorily correct or repair or remove and replace any damage to other Work, to the work of others, or to other land or areas resulting therefrom.
- B. If Contractor does not promptly comply with the terms of Owner's written instructions, or in an emergency where delay would cause serious risk of loss or damage, Owner may have the defective Work corrected or repaired or may have the rejected Work removed and replaced. Contractor shall pay all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to such correction or repair or such removal and replacement (including but not limited to all costs of repair or replacement of work of others).
 - C. In special circumstances where a particular item of equipment is placed in continuous service before Substantial Completion of all the Work, the correction period for that item may start to run from an earlier date if so provided in the Specifications.
 - D. Where defective Work (and damage to other Work resulting therefrom) has been corrected or removed and replaced under this paragraph, the correction period hereunder with respect to such Work will be extended for an additional period of one year after such correction or removal and replacement has been satisfactorily completed.
 - E. Contractor's obligations under this paragraph are in addition to all other obligations and warranties. The provisions of this paragraph shall not be construed as a substitute for, or a waiver of, the provisions of any applicable statute of limitation or repose.

ARTICLE 16 – SUSPENSION OF WORK AND TERMINATION

16.01 *Owner May Suspend Work*

- A. At any time and without cause, Owner may suspend the Work or any portion thereof by written notice to Contractor and Engineer. Such notice will fix the date on which Work will be resumed. Contractor shall resume the Work on the date so fixed. Contractor shall be entitled to an adjustment in the Contract Price or an extension of the Contract Times, or both, directly attributable to any such suspension. Any Change Proposal seeking such adjustments shall be submitted no later than 30 days after the date fixed for resumption of Work.

16.02 *Owner May Terminate for Cause*

- A. The occurrence of any one or more of the following events will constitute a default by Contractor and justify termination for cause:
 1. Contractor's persistent failure to perform the Work in accordance with the Contract Documents (including, but not limited to, failure to supply an Architect, Engineer, or sufficient skilled workers or suitable materials or equipment or failure to adhere to the Progress Schedule);

2. Fails to make payment to the Consultants, Contractors, Subcontractors, or Suppliers for services, materials or labor in accordance with their respective agreements with the Contractor;
 3. Repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority;
 4. Failure of Contractor to perform or otherwise to comply with a material term of the Contract Documents; or
 5. Contractor's repeated disregard of the authority of Owner or Engineer.
- B. If one or more of the events identified in Paragraph 16.02.A occurs, then after giving Contractor and the Contractor's surety, if any, ten (10) days written notice that Owner is considering a declaration that Contractor is in default and termination of the contract, Owner may proceed to:
1. declare Contractor to be in default,
 2. exercise any rights afforded to it under the Contract Documents,
 3. give Contractor notice that the Contract is terminated; and/or
 4. enforce the rights available to Owner under any applicable performance bond.
- C. If Owner has terminated the Contract for cause, Owner may exclude Contractor from the Site, take possession of the Work, incorporate in the Work all materials and equipment stored at the Site or for which Owner has paid Contractor but which are stored elsewhere, and complete the Work as Owner may deem expedient. If Owner chooses to complete the Work in accordance with this provision, Owner and Contractor expressly agree that Owner shall be exempt from publicly bidding the completion work pursuant to Sections 252.021 and 252.022 of the Texas Local Government Code.
- D. Owner may not proceed with termination of the Contract under Paragraph 16.02.B if Contractor within the ten (10) day cure period begins to correct its failure to perform and proceeds diligently to cure such failure.
- E. If Owner proceeds to complete the Work and/or correct the default, Contractor shall not be entitled to receive any further payment until the Work is completed. If the unpaid balance of the Contract Price exceeds the cost to complete the Work, including all related claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals) sustained by Owner, such excess will be paid to Contractor. Notwithstanding the preceding sentence, if the Agreement establishes a Guaranteed Maximum Price, Contractor will only be entitled to be paid for Work performed prior to its default. If the cost to complete the Work including such related claims, costs, losses, and damages exceeds such unpaid balance, Contractor shall pay the difference to Owner. Such costs shall include not only the cost of completing the Work, but also losses, damages, costs and expense, including attorneys' fees and expenses, incurred by Owner in connection with the procurement and defense of claims arising from Contractor's default.
- F. Where Contractor's services have been so terminated by Owner, the termination will not affect any rights or remedies of Owner against Contractor then existing or which may thereafter accrue, or any rights or remedies of Owner against Contractor or any surety.

- G. 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 Paragraph 16.03 of the Agreement.

16.03 *Owner May Terminate For Convenience*

- A. Upon seven (7) days written notice to Contractor, Owner may, without cause and without prejudice to any other right or remedy of Owner, terminate the Contract. In such case, Contractor shall be paid (subject to the GMP) for:
 - 1. completed and acceptable Work executed in accordance with the Contract Documents prior to the effective date of termination;
 - 2. expenses sustained prior to the effective date of termination in performing services and furnishing labor, materials, or equipment as required by the Contract Documents in connection with uncompleted Work; and
 - 3. demobilization expenses.
- B. Contractor shall not be paid for any economic loss arising out of or resulting from such termination, except for those costs expressly identified above.
- C. Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Contractor shall:
 - 1. cease operations as directed by the Owner in the notice and, if required by the Owner, participate in an inspection of the Work with the Owner to record the extent of completion thereof, to identify the Work remaining to be completed or corrected, and to determine what temporary facilities, tools, equipment and construction machinery are to remain at the Site pending completion of the Work;
 - 2. take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
 - 3. except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing Project agreements, including agreements with the Architect, Consultants, Contractors, and purchase orders, and enter into no further Project agreements and purchase orders.
- D. If Owner terminates the contract for convenience 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 the Contract Documents.

16.04 *Contractor May Stop Work or Terminate*

- A. If, through no act or fault of Contractor, (1) the Work is suspended for more than 180 consecutive days by Owner or under an order of court or other public authority, or (2) Engineer fails to act on any Application for Payment within 30 days after it is submitted, or (3) Owner fails for 60 days to pay Contractor any sum finally determined to be due, then Contractor may, upon seven days written notice to Owner and Engineer, and provided Owner or Engineer do not remedy such suspension or failure within that time, terminate the contract and recover from Owner payment on the same terms as provided in Paragraph 16.03.

- B. In lieu of terminating the Contract and without prejudice to any other right or remedy, if Engineer has failed to act on an Application for Payment within 30 days after it is submitted, or Owner has failed for 60 days to pay Contractor any sum finally determined to be due, Contractor may, seven (7) days after written notice to Owner and Engineer, stop the Work until payment is made of all such amounts due Contractor. The provisions of this paragraph are not intended to preclude Contractor from submitting a Change Proposal for an adjustment in Contract Price or Contract Times or otherwise for expenses or damage directly attributable to Contractor's stopping the Work as permitted by this paragraph.

ARTICLE 17 – FINAL RESOLUTION OF DISPUTES

17.01 *Methods and Procedures*

- A. *Disputes Subject to Final Resolution:* The following disputed matters are subject to final resolution under the provisions of this Article:
1. A timely appeal of an approval in part and denial in part of a Claim, or of a denial in full; and
 2. Disputes between Owner and Contractor concerning the Work or obligations under the Contract Documents, and arising after final payment has been made.
 3. Reserved claims of Owner or Contractor under these Control Documents, including Article 12.
- B. *Final Resolution of Disputes:*
1. For any disputes subject to this article, Owner and Contractor shall endeavor to resolve their Claims by mediation. The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction. Mediation is a condition precedent to litigation before a court of competent jurisdiction.
 2. For any claim not resolved by mediation, the parties agree to submit such claims to the jurisdiction of the District Court of El Paso County, Texas for final dispute resolution.

ARTICLE 18 – MISCELLANEOUS

18.01 *Giving Notice*

- A. Whenever any provision of the Contract Documents requires the giving of written notice, it will be deemed to have been validly given if:
1. delivered in person, by a commercial courier service or otherwise, to the individual or to a member of the firm or to an officer of the corporation for which it is intended;
 2. delivered at or sent by registered or certified mail, postage prepaid, to the last business address known to the sender of the notice; or

3. delivered by electronic means with a corresponding confirmation of delivery or read receipt.

18.02 *Computation of Times*

- A. When any period of time is referred to in the Contract by days, it will be computed to exclude the first and include the last day of such period. If the last day of any such period falls on a Saturday, Sunday or a legal holiday, the computation of time will conclude on the next business day.

18.03 *Cumulative Remedies*

- A. The duties and obligations imposed by these General Conditions and the rights and remedies available hereunder to the parties hereto are in addition to, and are not to be construed in any way as a limitation of, any rights and remedies available to any or all of them which are otherwise imposed or available, by special warranty or guarantee, or by other provisions of the Contract.

18.04 *Limitation of Damages*

- A. The Contractor and Owner waive claims against each other for the following damages arising out of or relating to this Contract. This mutual waiver includes:
 1. damages incurred by the Owner for loss of financing, business opportunity and reputation, and for loss of management or employee productivity or of the services of such persons; and
 2. damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, bonding capacity, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.
- B. The damages limitation set forth in Paragraph 18.04.A above is not intended to affect the payment of liquidated damages, if applicable, or delay damages which both parties recognize has been established, in part, to reimburse Owner for some damages that might otherwise be deemed to be incidental to the Work.

18.05 *No Waiver*

- A. A party's non-enforcement of any provision shall not constitute a waiver of that provision, nor shall it affect the enforceability of that provision or of the remainder of this Contract.

18.06 *Survival of Obligations*

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

18.07 *Controlling Law*

- A. This Contract is to be governed by the law of the state of Texas. However, the laws of the state in which Project is located, including applicable federal laws and governmental authorizations and permits issued with respect to the Work pursuant to

state or federal law, shall pertain as to the duty of Contractor to construct the Work in compliance with legal requirements.

18.08 *Headings*

- A. Article and paragraph headings are inserted for convenience only and do not constitute parts of these General Conditions, and shall not in any way be construed to limit or alter the meaning of any provision.

18.09 *Prevailing Wage*

- A. Contractor shall provide and pay for labor in accordance with the prevailing wage in the locality and shall not pay less than the prevailing wage.

18.10 *Right to Audit:*

- A. Whenever the Owner enters into any type of contractual arrangement with the Contractor, then the Contractor's "records" shall upon reasonable notice be open to inspection and subject to audit and/or reproduction during normal business working hours. The Owner's representative, or an outside representative engaged by the Owner, may perform such audits. The Contractor shall maintain all records relating to this Agreement for four (4) years from the date of final payment under this Agreement.
- B. The Owner shall have the exclusive right to examine the records of the Contractor. The term "records" as referred to herein shall include any and all information, materials and data of every kind and character, including without limitation records, books, papers, documents, contracts, schedules, commitments, arrangements, notes, daily diaries, reports, drawings, receipts, vouchers and memoranda, and any and all other agreements, sources of information and matters that may, in the Owner's judgment, have any bearing on or pertain to any matters, rights, duties or obligations under or covered by any contract document. Such records shall include (hard copy, as well as computer-readable data if it can be made available), written policies and procedures, time sheets, payroll registers, cancelled checks, personnel file data, correspondence, general ledger entries, and any other record in the Contractor's possession which may have a bearing on matters of interest to the Owner in connection with the Contractor's dealings with the Owner (all of the foregoing are hereinafter referred to as "records"). In addition, the Contractor shall permit interviews of employees as well as agents, representatives, vendors, subcontractors and other third parties paid by the Contractor to the extent necessary to adequately permit evaluation and verification of the following:
 - 1. The Contractor's compliance with contract requirements;
 - 2. The Contractor's compliance with the Owner's business ethics policies; and
 - 3. If necessary, the extent of the Work performed by the Contractor at the time of contract termination.
- C. The Contractor shall require all payees (examples of payees include subcontractors, insurance agents, material suppliers, etc.) to comply with the provisions of this Article 18.10 by securing the requirements hereof in a written agreement between the Contractor and payee. Such requirements include a flow-down right of audit provision in contracts with payees that also apply to subcontractors and sub-subcontractors, material suppliers, etc. The Contractor shall cooperate fully and shall require Related Parties and all of the Contractor's subcontractors to cooperate fully in furnishing or in making

available to the Owner from time to time whenever requested, in an expeditious manner, any and all such information, materials, and data.

- D. The Owner's authorized representative or designee shall have reasonable access to the Contractor's facilities, shall be allowed to interview all current or former employees to discuss matters pertinent to the performance of this Agreement, and shall be provided adequate and appropriate work space in order to conduct audits in compliance with this Article 18.10.
- E. If an audit inspection or examination in accordance with this Article 18.10 discloses overpricing or overcharges of any nature by the Contractor to the Owner in excess of one-half of one percent (.5%) of the total contract billings, then the reasonable actual cost of the Owner's audit shall be reimbursed to the Owner by the Contractor. Any adjustments and/or payments, which must be made as a result of any such audit or inspection of the Contractor's invoices and/or records, shall be made within a reasonable amount of time (not to exceed 90 days) from presentation of the Owner's findings to the Contractor.

18.11 *Trust Funds*

- A. This Project is subject to the Texas Trust Fund Statute, chapter 162 of the Texas Property Code, and the Parties acknowledge that the payment obligations contained herein for the Contractor to receive funds from the Owner and then use those funds to pay such Subcontractors, Suppliers, Vendors, Consultants, and the like, are subject to the Trust Fund Statute and the Owner's audit rights outline in this article 18.

18.12 *Severability*

- A. 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.

18.13 *Amendments*

- A. 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.

18.14 *Assignment*

- A. Contractor shall not, without the written consent of the Owner assign, transfer or sublet any portion or part of the Work or the obligations required by the Contract Documents, other than to an affiliate. An assignment to an affiliate shall not relieve the assignor of its obligations under this Agreement.

18.15 *Confidential Information*

- A. Confidential Information is defined as information which is determined by the transmitting party to be of a confidential or proprietary nature and: (a) the transmitting party identifies as either confidential or proprietary; (b) the transmitting party takes steps

to maintain the confidential or proprietary nature of the information; and (c) 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.

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

18.16 *Public Art Component*

- A. This Project is subject to the Owner's Public Art initiative and, as such, two percent (2%) of the Project budget, through separate funds, are devoted to the commission or acquisition and installation of a public art work. The Contractor expressly acknowledges that the Public Art component is part of the Work. The Contractor agrees to coordinate with the Owner and the artist for installation of the art work at the direction of the artist and the Owner. The cost of such coordination, direction and installation shall be born by Contractor and are part of the Contract Price.

18.17 *Open Records Act/Texas Public Information Act Requests*

- A. The Contractor recognizes that this Project is publicly owned and the Owner is subject to the disclosure requirements of the Texas Public Information Act ("TPIA"). As part of its obligations within the Contract Documents, the Contractor agrees, at no additional cost to the Owner, to cooperate with the Owner for any particular needs or obligations arising out of the Owner's obligations under the TPIA. This acknowledgement and obligation are in addition to and complimentary to the Owner's audit rights in section 18.10.

**STANDARD FORM OF AGREEMENT
BETWEEN OWNER AND DESIGN-BUILDER**

This Agreement is made and entered into as of the ____ day of _____, 2019 by and between the:

“Owner”

The City of El Paso
300 N. Campbell
El Paso, Texas 79901
915.212.0000 t

and

“Design-Builder”

SUNDT CONSTRUCTION, INC.
909 Texas Avenue
El Paso, Texas 79901

for the following Project:

Eastside Regional Park- Phase II

ARTICLE 1 - GENERAL PROVISIONS

1.01 *Owner's Criteria:*

A. This Agreement is based on the Owner's Criteria set forth in this Section 1.01.

B. *The Owner's program for the Project:*

The Project is comprised of improvements in approximately 26-acres that will serve seniors, adults, teens, and families of all abilities. The basic layout drawing is based on the project outlined in the 2012 Quality of Life Bond, stakeholder meetings within City of El Paso, and include the following:

- Public restrooms and family restrooms
- IT server/control desk within room in public restrooms
- Custodial equipment and storage space(s) within public restrooms.
- Two (2) baseball diamonds in accordance with NCAA field regulations, including a 325-ft outfield depth, natural turf outfields, dirt infields, backstop, 4' fence in outfield, and covered team benches (dugouts)
- Two (2) 240'x360' natural turf Flat Fields (laser leveled)
- One (1) 240'x360' artificial turf Flat Field (laser leveled)
- Sports Courts including; Two (2) sand volleyball courts, Six (6) handball courts, and One (1) multi-purpose court
- Musco Lighting System throughout fields and sports courts
- Wi-Fi access throughout Project site
- Walking Trail around Project site (10' wide asphalt with header curb)
- Two (2) Playground areas to serve ages 2-12 years old, including swings at both locations
- Food Truck parking near Food Court area, including electric hookups
- Food Court area with covered seating
- Trash receptacles to be placed in strategic locations in the park as well as in the parking lot and other public places.
- Public Parking
- Community Garden (1/8 acre)
- FF&E coordination (Contractor Purchased, Contractor installed)
- Skate/BMX Park (up to 50,000 sf)
 - Skate/BMX Park parking (60 stalls minimum)
 - Public Restroom building and equipment
 - Shade structures with sitting area
 - Required landscaping

C. *The Owner's design requirements for the Project and related documentation:*

The scope of services and work will include the planning, development, design, engineering, and construction of the site work, facilities, parking, roadways, and related

improvements for the Project, including but not limited to all architect, engineering, construction, and other services necessary for the successful development, execution and completion of the Project. The Design Build Team shall perform all services and work necessary to complete and deliver the Turn-Key Project in accordance with the terms of the Design Criteria Package.

D. *The Project's physical characteristics*

To the extent available, the Owner has provided Design-Builder all geotechnical and other survey data in its possession. If no geotechnical data is available and provide to the Design-Builder, Design-Builder shall be required to retain a geotechnical engineer to perform geotechnical analysis. If geotechnical data is available and provided to the Design-Builder by Owner, the Design-Builder may, at its election, retain its own geotechnical firm and a registered professional land surveyor to generate any data that Design-Builder will require for the performance of its work. Costs for such consultants may be included in the Cost of the Work as described herein.

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

F. The Owner's budget for the Work to be provided by the Design-Builder is \$9,250,000.00.

G. The Owner's design and construction milestone dates:

1. Design phase milestone dates :

Evaluation of Owner's Criteria	15 calendar days
Preliminary Design	60 calendar days at which time a final GMP will be negotiated between the Design-Build Team and the City.

2. Submission of Design-Builder Proposal and GMP May 15, 2019

3. Design-Build Amendment TBD

4. Construction Phase NTP TBD

5. Substantial Completion date TBD

6. Final Completion TBD

- H. The Owner requires the Design-Builder to retain the following Architect, Consultants and Contractors at the Design-Builder's cost:
1. Architect: Landscape Architect, Architect
 2. Consultants: Civil Engineer, Electrical Engineer, Mechanical/Plumbing Engineer, Registered Engineer, and Surveyor, Licensed Irrigator.
 3. Contractors: Site work, electrical, mechanical/plumbing.
- I. Additional Owner's Criteria upon which the Agreement is based: N/A
- J. The Design-Builder shall confirm that the information included in the Owner's Criteria complies with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities.
- K. If the Owner's Criteria conflicts with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Design-Builder shall notify the Owner of the conflict.
- L. If there is a change in the Owner's Criteria, the Owner and the Design-Builder shall execute a Modification in accordance with Article 6.
- M. If the Owner and Design-Builder intend to transmit Instruments of Service or any other information or documentation in digital form, they shall endeavor to establish necessary protocols governing such transmissions.

1.02 ***Project Team***

- A. The Owner identifies the following representative in accordance with this agreement:
City Engineer or Designee
- B. The persons or entities, in addition to the Owner's representative, who are required to review the Design-Builder's Submittals are as follows:
City Engineer or Designee
- C. The Owner will retain the following consultants and separate contractors:
- D. The Design-Builder identifies the following representative in accordance with this agreement:
- E. Neither the Owner's nor the Design-Builder's representative shall be changed without ten days' written notice to the other party. The Design-Builder's representative may be

replaced only with Owner's approval, but such approval shall not be unreasonably withheld, delayed or conditioned.

1.03 *Binding Dispute Resolution*

Disputes will be resolved in accordance with the General Conditions.

1.04 *Prevailing Wage Rates*

Design-Builder and any subcontractor shall pay not less than the general prevailing wage rates contained herein in Exhibit 4, to all laborers, workmen and mechanics employed by them in the execution of this contract in accordance with Section 7.02 of the General Conditions.

1.05 *Definitions*

Unless otherwise stated in this Section, the Terms used in this Agreement will have the meanings indicated in the General Conditions.

A. *Design-Build Documents*

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

B. *The Contract*

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

C. *The Work*

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

D. *The Project*

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

E. *Instruments of Service*

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

F. *Submittals*

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

G. *Cost Effective Schedule*

A construction schedule developed by the prime contractor which takes into account coordination with suppliers/vendors and subcontractors. The cost-effective schedule will serve as a tool to identify issues with delivery dates, availability of special equipment, materials, and manpower in order to mitigate cost and time growth.

H. *Owner*

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

I. *Design-Builder*

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

J. *Consultant*

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

K. *Architect*

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

L. *Contractor*

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

M. *Engineer*

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

N. *Schematic Design Documents (30% SDs)*

Documents developed during the first phase of design and submitted to Owner for review and approval prior to proceeding with the work for the Design Development Documents.

O. *Design Development Documents (60% DDs)*

Drawings and Specifications that include developing structural, layout, grading, utilities, mechanical, and electrical drawings and specifying materials and the probable cost of construction.

P. *Pre-Construction Services*

Including but not limited to;

- a. Conceptual schedules and budgets
- b. Possible early grading permit to meet sod placement season
- c. Evaluation of design professionals
- d. Risk identification and mitigation
- e. Constructability assessments
- f. Project phasing assessments
- g. Reviews of drawings and specifications
- h. Value engineering
- i. Monitoring of the design process
- j. Develop a GMP that meets budget restraints

Q. *Building Information Modeling (BIM)*

A digital representation of physical and functional characteristics of a facility. A BIM is a shared knowledge resource for information about a facility forming a reliable basis for decisions during its life-cycle; defined as existing from earliest conception to demolition.

R. *Design-Build Amendment*

The Design-Build Amendment is executed after the Design-Builder completes the design phase of services and provides the Owner with a Design-Build Proposal. Upon agreement to a proposal, the Owner and Design-Builder are required to execute the Design-Build Amendment, which becomes a part of the Agreement. The Design-Build Amendment establishes the Contract Sum and Contract Time and sets forth the agreed upon design documents and other information upon which the Contract Sum and Contract Time are based. In establishing the Contract Sum, the parties can choose a Stipulated Sum or Cost of the Work (with or without a GMP). If the parties choose Cost of the Work, the Amendment establishes the items included within the Cost of the Work.

ARTICLE 2 -THE WORK OF THIS CONTRACT

- 2.01 Design-Builder shall perform all design, engineering, procurement, construction, start-up and performance testing services, and provide all material, equipment, tools and labor, necessary to complete the Project, including all the work described in and reasonably inferable from the Contract Documents. All performance items described herein shall be referred to as the "Work".

The Contract Documents for this Project include this Standard Form of Agreement and the following documents, if applicable:

Addenda issued by Design-Builder
General Conditions
Performance and Payment Bonds
Insurance Rider
Request for Qualifications (RFQ) 2018-1288R and Statement of Qualifications
Request for Proposals (RFP) 2018-1288R and Proposal
Technical Specifications
Drawings

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

3.01 *General*

- A. The Design-Builder shall comply with any applicable licensing requirements in the jurisdiction where the Project is located.
- B. The Design-Builder shall designate in writing a representative who is authorized to act on the Design-Builder's behalf with respect to the Project.
- C. The Design-Builder shall perform the Work in strict accordance with the Design-Build Documents. This obligation shall be absolute. The Design-Builder shall not be relieved

of the obligation to perform the Work in accordance with the Design-Build Documents by the activities, tests, inspections or approvals of the Owner.

1. The Design-Builder shall perform the Work in compliance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities. If the Design-Builder performs Work contrary to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities, the Design-Builder shall assume responsibility for such Work and shall bear the costs attributable to correction.
 2. Neither the Design-Builder nor any Contractor, Consultant, Engineer or Architect shall be obligated to perform any act which they believe will violate any applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities. If the Design-Builder determines that implementation of any instruction received from the Owner, including those in the Owner's Criteria, would cause a violation of any applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Design-Builder shall notify the Owner in writing. Upon verification by the Owner that a change to the Owner's Criteria is required to remedy the violation, the Owner and the Design-Builder shall execute a Modification in accordance with Article 6.
- D. The Design-Builder shall be responsible to the Owner for acts and omissions of the Design-Builder's employees, Engineer, Architect, Consultants, Contractors, and their agents and employees, and other persons or entities performing portions of the Work.
- E. ***General Consultation***
The Design-Builder shall schedule and conduct progress meetings with the Owner, on a weekly basis, to review matters such as procedures, progress in design and/or construction, coordination (Design-Builder shall be responsible for all utilities cost and coordination), and scheduling of the Work.
- F. When applicable law requires that services be performed by licensed professionals, the Design-Builder shall provide those services through qualified, licensed professionals in accordance with the Texas Occupations Code and all applicable legal standards of care applicable to design professionals.
- G. The Design-Builder, with the assistance of the Owner, shall prepare and file documents required to obtain necessary approvals of governmental authorities having jurisdiction over the Project.
- H. ***Progress Reports***
1. The Design-Builder shall keep the Owner informed of the progress and quality of the Work. On a monthly basis, or otherwise as agreed to by the Owner and Design-Builder, the Design-Builder shall submit written progress reports to the

Owner, showing estimated percentages of completion and other information identified below:

- a. Work completed for the period;
 - b. Project schedule status;
 - c. Submittal schedule and status report, including a summary of outstanding Submittals;
 - d. Responses to requests for information to be provided by the Owner;
 - e. Approved Change Orders and Change Directives;
 - f. Pending Change Order and Change Directive status reports;
 - g. Tests and inspection reports;
 - h. Status report of Work rejected by the Owner;
 - i. Status of Claims previously submitted in accordance with Article 14;
 - j. Cumulative total of the Cost of the Work to date including the Design-Builder's compensation and Reimbursable Expenses, if any;
 - k. Current Project cash-flow and forecast reports; and
 - l. Additional information as agreed to by the Owner and Design-Builder.
2. In addition, where the Contract Price is the Cost of the Work with a Guaranteed Maximum Price, the Design-Builder shall include the following additional information in its progress reports:
- a. Design-Builder's work force report;
 - b. Equipment utilization report;
 - c. Cost summary, comparing actual costs to updated cost estimates.
 - d. Constructability report, and
 - e. Value Engineering

I. *Design-Builder's Schedules*

The Design-Builder, promptly after execution of this Agreement, shall prepare and submit for the Owner's information and approval a schedule for the Work. The schedule, including the time required for design and construction, shall not exceed time limits current under the Design-Build Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project, shall provide for expeditious and practicable execution of the Work, and shall include allowances for periods of time required for the Owner's review and for approval of submissions by authorities having jurisdiction over the Project. In no circumstance shall the preparation and presentation of a schedule extending the completion beyond the time limits contained in the Design-Build Documents entitle the Design-Builder to an extension of time absent a fully executed change order extending such contract time.

The Design-Builder shall perform the Work in general accordance with the most recent schedules submitted to the Owner. The schedule shall be updated regularly and in advance of periodic Project meetings with the Owner and Owner's Engineer. Such

schedules shall be posted at the Project meetings in a convenient location for review and approval by the Owner.

J. *Certifications*

Upon the Owner's written request, the Design-Builder shall obtain from the Architect, Engineer, Consultants, and Contractors, and furnish to the Owner, certifications with respect to the documents and services provided by the Architect, Engineer, Consultants, and Contractors (a) that, to the best of their knowledge, information and belief, the documents or services to which the certifications relate (i) are consistent with the Design-Build Documents, except to the extent specifically identified in the certificate, and (ii) comply with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities governing the design of the Project; and (b) that the Owner and its consultants shall be entitled to rely upon the accuracy of the representations and statements contained in the certifications.

K. *Design-Builder's Submittals*

1. Prior to submission of any Submittals, the Design-Builder shall prepare a Submittal schedule, and shall submit the schedule for the Owner's approval. The Owner's approval shall not unreasonably be delayed or withheld. The Submittal schedule shall (1) be coordinated with the Design-Builder's schedule provided in this Section, (2) allow the Owner reasonable time to review Submittals, and (3) be periodically updated to reflect the progress of the Work. If the Design-Builder fails to submit a Submittal schedule, the Design-Builder shall not be entitled to any increase in Contract Price or extension of Contract Time based on the time required for review of Submittals.
2. By providing Submittals the Design-Builder represents to the Owner that it has (1) reviewed and approved them, (2) determined and verified materials, field measurements and field construction criteria related thereto, and (3) checked and coordinated the information contained within such Submittals with the requirements of the Work and of the Design-Build Documents.
3. The Design-Builder shall perform no portion of the Work for which the Design-Build Documents require Submittals until the Owner has approved the respective Submittal.
4. The Work shall be in accordance with approved Submittals. Work done in compliance of an approved Submittal does not relieve the Design-Builder of its responsibility to perform the Work consistent with the requirements of the Design-Build Documents and the design intent if the Work subject to an approved Submittal fails or is deemed defective by the Owner. The Work may deviate from the Design-Build Documents only if the Design-Builder has notified the Owner in writing of a deviation from the Design-Build Documents at the time of the Submittal and a Modification is executed authorizing the

identified deviation. The Design-Builder shall not be relieved of responsibility for errors or omissions in Submittals or by the Owner's approval of the Submittals.

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

L. *Warranty*

The Design-Builder's warranty obligations shall be governed in accordance with Paragraph 7.17 of the General Conditions.

M. *Royalties, Patents and Copyrights*

The Design-Builder's royalty, patent, and copyright obligations shall be governed in accordance with Paragraph 7.07 of the General Conditions.

N. *Indemnification*

The Design-Builder's indemnify obligations shall be governed in accordance with the General Conditions.

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

4.01 *General*

- A. Any information submitted by the Design-Builder, and any interim decisions made by the Owner, shall be for the purpose of facilitating the design process and shall not modify the Owner's Criteria unless the Owner and Design-Builder execute a Modification.
- B. The Design-Builder shall advise the Owner on proposed site use and improvements, selection of materials, and building systems and equipment. The Design-Builder shall also provide the Owner with recommendations, consistent with the Owner's Criteria, on constructability; availability of materials and labor; time requirements for procurement, installation and construction; conceptual schedules and budgets, evaluation of design professionals, risk identification and mitigation, constructability assessments, project phasing assessments, reviews of drawings and specifications, monitoring of the design process, develop a Guaranteed Maximum Price that meets budget restraints and factors

related to construction cost including, but not limited to, costs of alternative designs or materials, preliminary budgets, life-cycle data, and possible cost reductions.

4.02 *Evaluation of the Owner's Criteria*

- A. The Design-Builder shall schedule and conduct meetings with the Owner, Owner's Program Manager and any other necessary individuals or entities to discuss and review the Owner's Criteria. The Design-Builder shall thereafter again meet with the Owner to discuss a preliminary evaluation of the Owner's Criteria. The preliminary evaluation shall address possible alternative approaches to design and construction of the Project and include the Design-Builder's recommendations, if any, with regard to accelerated or fast-track scheduling, procurement, or phased construction. The preliminary evaluation shall consider cost information, constructability, and procurement and construction scheduling issues. Consideration of fast-track and phased construction shall be addressed by Design-Builder due to Owner's specific concerns relating to Project delivery and schedule constraints for the end-users of the Project.
- B. After the Design-Builder meets with the Owner and presents the preliminary evaluation, the Design-Builder shall provide a written report to the Owner, summarizing the Design-Builder's evaluation of the Owner's Criteria. The report shall also include:
 - 1. allocations of program functions, detailing each function and their square foot areas;
 - 2. a preliminary estimate of the Cost of the Work, and, if necessary, recommendations to adjust the Owner's Criteria to conform to the Owner's budget;
 - 3. a preliminary schedule, which shall include proposed design milestones; dates for receiving additional information from, or for work to be completed by, the Owner; anticipated date for the Design-Builder's Proposal; and dates of periodic design review sessions with the Owner.
- C. The Owner shall review the Design-Builder's written report and, if acceptable, provide the Design-Builder with written consent to proceed to the development of the Design Development Documents. The consent to proceed shall not be understood to modify the Owner's Criteria unless the Owner and Design-Builder execute a Modification.

4.03 Schematic Design Documents (30% SDs) and *Design Development Documents (60% DDs)*

A. Upon the Owner's issuance of a written consent to proceed, the Design- Builder shall prepare and submit Schematic Design Document to the Owner as described in the RFQ. The Schematic Design Document shall include the following:

1. Coversheet (80% complete)
2. Architectural plans and details (30% complete)
3. Updated park elevations renderings - presentation quality for community meetings
4. Presentation files for community meetings (PowerPoint or similar)
5. Electrical plans and details (30% complete)
6. Mechanical plans and details (30% complete)
7. Plumbing plans and details (30% complete)
8. Civil Engineering plans (30% complete)
9. Construction notes (30% complete)
10. Storm water pollution prevention plan (50% complete)
11. Construction details (30% complete)
12. Landscape plans (30% complete)
13. Landscape details (35% complete)
14. Irrigation plan (30% complete)
15. Irrigation details (30% complete)
16. Outline of specifications - table of contents (80% complete)

Completion of Schematic Design is anticipated to be 30 days after the preconstruction phase notice to proceed is issued. Design-Builder shall submit two (2) copies of the Schematic Design Documents for review and comments and upload pdf of submittals into CID PMWeb web-based software.

Design-Builder shall meet with owner to review the constructability program to identify and document project cost and schedule savings opportunities.

B. The Owner shall review the Schematic Design Documents and, if acceptable, provide the Design-Builder with written consent to proceed to development of the Design Development Documents.

C. Upon the Owner's issuance of a written consent to proceed, the Design-Builder shall prepare and submit Design Development Documents to the Owner as described in the RFQ. The Design Development Documents shall include a report identifying any deviations from the Owner's Criteria, and shall include the following:

1. Confirmation of the allocations of program functions;
2. Site plan;
3. Building plans, sections and elevations;

4. Structural system;
5. Selections of major building systems, including but not limited to mechanical, electrical and plumbing systems; and
6. Outline specifications or sufficient drawing notes describing construction materials.

The Design Development Documents should include some combination of physical study models, perspective sketches, renderings or digital modeling.

- D. The Owner shall review the Design Development Documents and, if acceptable, provide the Design-Builder with written consent to proceed to development of the Design-Builder's Proposal. The Design Development Documents shall not modify the Owner's Criteria unless the Owner and Design-Builder execute a Modification.

4.04 *Pre-Construction Services.*

- A. The Design-Builder shall execute Pre-Construction Services, as defined in this agreement throughout work prior to execution of the Design-Build Amendment and prior to construction commencing.
- B. A fully integrated Building Information Modeling ("BIM"), shall be used by Design-Builder throughout the entirety of the design and construction of the project. The parties to this agreement will use and rely the Models developed and transmitted by Design-Builder. The extent of the use of BIM in the Project shall be at the Owner's discretion.

4.05 *Design-Builder's Proposal*

- A. Upon the Owner's issuance of a written consent to proceed, the Design-Builder shall prepare and submit the Design-Builder's Proposal to the Owner. The Design-Builder's Proposal shall include the following:
 1. A list of the Design Development Documents (60%) and other information, including the Design-Builder's clarifications, assumptions and deviations from the Owner's Criteria, upon which the Design-Builder's Proposal is based;
 2. The proposed Guaranteed Maximum Price (GMP), including the compensation method and, if based upon the Cost of the Work plus a fee, a written statement of estimated cost organized by trade categories, allowances, contingencies, Design-Builder's Fee, and other items that comprise the Contract Price;
 3. The proposed date the Design-Builder shall achieve Substantial Completion;
 4. An enumeration of any qualifications and exclusions, if applicable;
 5. A list of the Design-Builder's key personnel, Contractors and suppliers; and
 6. The date on which the Design-Builder's Proposal expires.
- B. Submission of the Design-Builder's Proposal shall constitute a representation by the Design-Builder that it has visited the site, evaluated the conditions and features of the

site, made determinations relevant to design and construction relating to such evaluations, and become familiar with local conditions under which the Work is to be completed.

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

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

5.01 *General*

Unless otherwise specified herein, all work performed pursuant to this Article shall be governed in accordance with the General Conditions.

5.02 *Construction Documents*

- A. Upon the execution of the Design-Build Amendment, the Design-Builder shall prepare Construction Documents through 100% design and permitting. The Construction Documents shall establish the quality levels of materials and systems required. The Construction Documents shall be consistent with the Design-Build Documents.
- B. The Design-Builder shall provide the Construction Documents to the Owner for the Owner's information and approval. If the Design-Builder has included any deviations between the Construction Documents and the Design-Build Documents, the Design-Builder shall notify the Owner of such deviations in writing. The Construction Documents shall not modify the Design-Build Documents unless the Owner and Design-Builder execute a Modification. The failure to notify the Owner of any such deviations shall not relieve the Design-Builder of the obligation to perform the Work in accordance with the Design-Build Documents.

5.03 *Construction*

- A. **Commencement.** Except as otherwise permitted in this Section, construction shall not commence prior to execution of the Design-Build Amendment.
- B. If the Owner and Design-Builder agree in writing, construction may proceed prior to the execution of the Design-Build Amendment. However, such authorization shall not waive the Owner's right to reject the Design-Builder's Proposal.

ARTICLE 6 - CHANGES IN THE WORK

6.01 *General*

A Change Order or Change Directive may accomplish a change or Modification in the Work after execution of the Contract, and without invalidating the Contract, subject to the limitations stated in the General Conditions.

ARTICLE 7 - OWNER'S RESPONSIBILITIES

7.01 *General*

The Owner's responsibilities shall be governed in accordance with the General Conditions.

ARTICLE 8 - CONTRACT TIME AND COMPLETION

8.01 *General*

The Design-Builder's obligations with respect to the Contract Time shall be governed in accordance with the General Conditions, unless otherwise stated in this Article.

- A. Time limits stated in the Design-Build Documents are of the essence of the Contract. In all aspects of the Work, time is of the essence of the Contract. Additionally, time limits stated in the Design-Build Documents are of the essence. By executing the Design-Build Amendment the Design-Builder confirms that the Contract Time is a reasonable period for performing the Work.
- B. The Design-Builder shall not, except by agreement of the Owner in writing, commence the Work prior to the effective date of insurance, other than property insurance, required by this Contract. The Contract Time shall not be adjusted as a result of the Design-Builder's failure to obtain insurance required under this Contract.
- C. The Design-Builder shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.
- D. The date of commencement of the Work shall be stated in a Notice to Proceed issued by the Owner.
- E. The Contract Time shall be measured from the date of commencement.
- F. ***Substantial Completion.*** The Design-Builder shall achieve Substantial Completion of the entire Work not later than TBD calendar days from the date of commencement subject to and adjustments of this Contract Time as provided in the Contract Documents and Changer Orders modifying and extending this Agreement. It is specifically understood and agreed to by and between Owner and Design-Builder that time is of the essence in the substantial completion of the Work, and that failure to substantially

complete the Work within the designated period, or as it may be extended, shall be construed as a breach of this Agreement.

G. Final Completion. The Design-Builder shall achieve Final Completion of the entire Work not later than **TBD** calendar days from the date of commencement subject to and adjustments of this Contract Time as provided in the Contract Documents and Changer Orders modifying and extending this Agreement. It is specifically understood and agreed to by and between Owner and Design-Builder that time is of the essence in the substantial completion of the Work, and that failure to substantially complete the Work within the designated period, or as it may be extended, shall be construed as a breach of this Agreement.

H. Utility transfer to the City of El Paso shall not take place until *Final Completion*.

8.02 Delays and Extensions of Time: Unless otherwise set forth in this Section, Project delays shall be governed in accordance with the General Conditions.

A. Claims relating to time shall be made in accordance with applicable provisions of Article 12 of the General Conditions.

B. This Section 8.02 does not preclude recovery of damages for delay by Owner under other provisions of the Design-Build Documents.

C. Should the Design-Builder default on its obligations to make progress and complete the Work on time, as allowed in the Contract Documents, the Owner may withhold or deduct all costs and damages for compensable delay caused by the Design-Builder from the Contract Price. Such costs shall include any attorney's fees, and all other costs, expenses, and damages actually incurred by the Owner as a result of such delay. Owner's delay damages, may be incidental to and not directly associated with the Project.

D. The Design-Builder shall receive no financial compensation for delay or hindrance of the Work. In no event shall the Owner be liable to the Design-Builder for any damages arising out of or associated with any delay or hindrance to the Work, regardless of the source of the delay or hindrance. The Design-Builder's sole remedy for delay or hindrance shall be an extension of time, provided the delay must be beyond the control and without the fault of negligence of the Design-Builder.

E. The procedure for the determination of time extensions for unusually severe weather. In order for the Owner to award a time extension under this clause, the following conditions must be satisfied.

1. The weather experienced at the Project site during the Contract period must be found to be unusually severe, that is, more severe than the adverse weather anticipated for the Project location during any given month.

2. The unusually severe weather must actually cause a delay to the completion of the Project.

- F. The following schedule of monthly anticipated adverse weather delays is based on National Oceanic and Atmospheric Administration (NOAA) or similar data for the Project location and will constitute the base line for monthly weather time evaluations. The Design-Builder's activity durations provided in the progress schedule must reflect these anticipated adverse weather delays in all-weather dependent activities.

**MONTHLY ANTICIPATED ADVERSE WEATHER DELAY
WORK DAYS BASED ON FIVE (5) DAY WORK WEEK**

JAN	FEB	MAR	APR	MAY	JUNE	JULY	AUG	SEPT	OCT	NOV	DEC
(1)	(3)	(0)	(1)	(1)	(2)	(0)	(8)	(5)	(1)	(1)	(2)

- G. For the duration of the Contract, the Design-Builder shall maintain in its daily reports an accurate and contemporaneous record of the occurrence of adverse weather and resultant impact to normally scheduled Work. Delay from adverse weather unless Work on the overall Project's critical activities is prevented for 50 percent or more of the Design-Builder's scheduled work day. The number of actual adverse weather days shall be calculated monthly. If the number of actual adverse weather delay days in a month exceed the number of days for that month as referenced above, the Owner upon notification by the Design-Builder, will convert any qualifying delays to calendar days, giving full consideration for equivalent fair-weather work days, and a modification shall be issued in accordance with the Contract.

H *Liquidated Damages (TBD)*

The Design-Builder acknowledges and recognizes that the Owner is entitled to full and beneficial occupancy and use of the completed work following expiration of the Contract Time. The Design-Builder further acknowledges and agrees that, if the Design-Builder fails to meet the Substantial Completion or Final Completion dates for the completion of any portion of the Work within the Contract time, the Owner will sustain actual damages as a result of such failure. The exact amount of such damages will be difficult to ascertain. Therefore, the Owner and Design Builder agree that, if the Design-Builder shall neglect, fail, or refuse to achieve substantial completion of the Work by the Substantial Completion or Final Completion date, subject to proper extension granted by the Owner, then the Design-Builder agrees to pay the Owner the sum stipulated herein for each day in which such Work is not completed, not as penalty, but as liquidated damages, for the damages ("Liquidated Damages") that would be suffered by Owner as a result of delay for each and every calendar day that the Design-Builder shall have failed to have completed the Work as required herein. The Liquidated Damages shall be in lieu

of any and all other damages which may be incurred by Owner as a result of the failure of Design-Builder to complete within the Contract Time.

1. Design-Builder agrees to pay, as liquidated damages, the sum of TBD for each consecutive calendar day after the date of Substantial Completion.
2. Design Builder agrees to pay, as liquidated damages, the sum of TBD for each consecutive calendar day after the date of Final completion.

ARTICLE 9 – CONTRACT PRICE

9.01 *General*

Owner shall pay Design-Builder in accordance with the General Conditions a Contract Price equal to Design-Builder's Fee (as defined in this Article) plus the Cost of the Work (as defined in this Article), subject to the GMP established in Section 9.05 hereof and any adjustments made in accordance with the General Conditions.

9.02 *Design-Builder's Fee*

A. Design-Builder's Fee shall be **TBD** percent (____%) of the Cost of the Work, as adjusted in accordance with Section 9.02.B below. Such Fee shall not be earned with respect to Design-Builder's in-house personnel Soft Costs and travelling and lodging expenses and bonding and insurance cost as set forth in the Proposal of Design-Builder attached hereto. Such Soft Costs include (i) lead engineer, (ii) applications engineer, (iii) project manager, (iv) process engineer, (v) accounting personnel and services, (vi) electrical engineers, (vii) construction supervisor, (viii) travel and out-of-office living expenses, including airfare, lodging, food, ground transportation, (ix) administrative or overhead costs and expenses related to insurance and bonding not specifically required by the Contract Documents.

B. Design-Builder's Fee will be adjusted as follows for any Change Orders approved by Owner:

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 **TBD** percent (____%) of the additional Costs of the Work incurred for that Change Order, exclusive of Design-Builder's Soft Costs as defined in Section 9.02.A.
2. For deductive Change Orders, including deductive Change Orders arising from both additive and deductive items, Design Builder shall receive no fee on that portion of the Cost of Work that is eliminated by any deductive Change Order.

9.03 *Cost of the Work*

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:

- A. Fees for direct employees of Design-Builder performing the Work at the Site or, with Owner's agreement, at locations off the Site, calculated on the basis of those rates set forth on Exhibit 1 to this Agreement, or, if no such rate is set forth on Exhibit 4, at prevailing rates for such personnel.
- B. Fees for 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 at the rates set forth on Exhibit 1 to this Agreement, or, if no such rate is set forth on Exhibit 4, at prevailing rates for such personnel.
- C. Fees for Design-Builder's personnel stationed at Design-Builder's principal offices, but only to the extent said personnel are identified in Exhibit 1 and performing the function set forth in said Exhibit and compensated in accordance with the rates set forth on Exhibit 4, or if no such rate is set forth on Exhibit 1, at prevailing rates for such personnel.
- D. 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.
- E. 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.
- F. Costs, including transportation, inspection, testing, storage and handling, of materials, equipment and supplies incorporated or reasonably used in completing the Work.
- G. 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.
- H. Costs of removal of debris and waste from the Site.
- I. 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.
- J. 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.

- K. Premiums for insurance and bonds purchased specifically for this Project as required by this Agreement or the performance of the Work.
- L. All fuel and utility costs incurred in the performance of the Work.
- M. Sales, use or similar taxes, tariffs or duties incurred in the performance of the Work. Provided that if the Owner is exempt from such taxes and provides a tax exemption certificate or certificates to Design-Builder that effect, no such taxes shall apply.
- N. Costs for permits, royalties, licenses, tests and inspections incurred by Design-Builder as a requirement of the Contract Documents.
- O. Deposits which are lost, except to the extent caused by Design-Builder's negligence or default under this Agreement.
- P. Costs incurred in preventing damage, injury or loss in case of an emergency affecting the safety of persons and property, except to the extent caused by Design-Builder or anyone performing Work on its behalf.
- R. Accounting and data processing costs related to the Work.
- S. Other costs reasonably and properly incurred in the performance of the Work to the extent approved in writing by Owner.
- T. Costs incurred by Design-Builder to provide the payment and performance bonds, warranties and guarantees with respect to the Work as provided herein.

9.04 *Non-Reimbursable Costs* The following shall be excluded from the Cost of the Work:

- A. Compensation for Design-Builder's personnel stationed at Design-Builder's principal or branch offices, except as provided for in Sections 9.03.A, 9.03.B and 9.03.C.
- B. Overhead and general expenses, except as provided for in Section 9.03 hereof, or which may be recoverable for changes to the Work.
- C. The cost of Design-Builder's capital used in the performance of the Work.
- D. 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.

- E. Any and all costs incurred by Design Builder, including but not limited to costs for project management and costs to comply with the General Conditions, to the extent that such costs would cause the GMP to be exceeded.

9.05 *The Guaranteed Maximum Price ("GMP")*

A. *GMP Established Upon Execution of this Agreement*

Design-Builder guarantees that the total charge to Owner for completion of all Work shall not exceed the GMP of **TBD Dollars (\$_____)**. Additional detail regarding the GMP is included in Exhibit 1 ("GMP Exhibit"). **Design-Builder agrees that it will be responsible for paying or absorbing all costs of completing the Work which exceed the GMP, as said GMP may be adjusted in accordance with the Contract Documents, including but not limited to the markups for Change Orders set forth herein.**

- B. It is the intent of the parties that the GMP will be increased or decreased by any additive or deductive Change Orders that change the scope of the Work with commensurate changes to the Design Fee and Cost of Work in accordance with Article 6.

ARTICLE 10 - COMPENSATION AND PROGRESS PAYMENTS

10.01 *General*

Payments to Design-Builder are governed in accordance with this Article and the General Conditions.

- A. Design-Builder shall submit to Owner on the twenty-fifth (25th) day of each month, beginning with the first month after the Date of Commencement, Design-Builder's Application for Payment in accordance with the General Conditions.
- B. Owner shall make payment within thirty (30) days after Owner's receipt of each properly submitted and accurate Application for Payment in accordance with the General Conditions, but in each case less the total of payments previously made, and less amounts properly withheld under the General Conditions.
- C. If Design-Builder's Fee under Section 6.02.A 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.
- D. All payments to Design-Builder exclusive of those made directly by Owner to any vendor to Design Builder will be made by electronic transfer to Design Builder's

bank account. Design- Builder shall promptly provide Owner with wire transfer instructions for the making of such wire transfers to Design-Builder's bank account.

10.02 *Retainage on Progress Payments*

Owner will retain five percent (5%) of each Application for Payment. Upon Substantial Completion of the Work, the retainage shall be reduced in accordance with the Design-Build Amendment.

10.03 *Interest*

Timeliness and interest due on payments to the Design-Builder are subject to and controlled by Chapter 2251 of the Texas Government Code.

10.04 *Compensation for Work Performed Prior To Execution of Design-Build Amendment*

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

B. The hourly billing rates for services of the Design-Builder and the Design-Builder's Architect, Consultants and Contractors, if any, are set forth in Exhibit 1.

C. Compensation for Reimbursable Expenses Prior To Execution of Design-Build Amendment

1. Reimbursable Expenses are in addition to compensation set forth in Section 10.04.A and 10.04.B and include expenses, directly related to the Project, incurred by the Design-Builder and the Design-Builder's Architect, Consultants, and Contractors, as follows:

- a.** Transportation and authorized out-of-town travel and subsistence;
- b.** Fees paid for securing approval of authorities having jurisdiction over the Project;
- c.** Printing, reproductions, plots, standard form documents;
- d.** Postage, handling and delivery;
- e.** Renderings, physical models, mock-ups, professional photography, and presentation materials requested by the Owner; and
- f.** Other Project-related expenditures, if authorized in advance by the Owner.

D. Payments to the Design-Builder Prior To Execution of Design-Build Amendment

1. Payments are due and payable thirty-days following presentation of the Design-Builder's invoice to the Owner.

2. Records of Reimbursable Expenses and services performed on the basis of hourly rates shall be provided to the Owner with each application for payment or invoice on which any charges for reimbursable expenses appears. Further, Design-Builder shall maintain, at its office, a complete record of all costs and accounting data generated in relation to Reimbursable Expenses and services performed for a period of five years following execution of the Design-Build Amendment or termination of this Agreement, whichever occurs first. Upon request of Owner, and within a reasonable time following such request, Design-Builder will make available for inspection and duplication all records required to be maintained by this section or elsewhere in the Design-Build Documents.

10.05 *Contract Price and Payment for Work Performed After Execution of Design-Build Amendment*

- A. For the Design-Builder's performance of the Work after execution of the Design-Build Amendment, the Owner shall pay to the Design-Builder the Contract Price in current funds as agreed in the Design-Build Amendment. Notwithstanding any terms to the contrary, the provisions of this Article and the General Conditions shall control the obligations of the Parties with respect to payments made pursuant to the Design-Build Documents.

10.05 *Construction Trust Funds*

- A. Contractor shall comply with the provisions of the Texas Trust Fund Act, Chapter 162 of the Texas Property Code. With respect to payments made by the Owner, such funds are considered Trust Funds and shall be safeguarded and used as represented by Design-Builder to pay any consultants and subcontractors that may be due payment pursuant to the schedule of values.

ARTICLE 11 - PAYMENT APPLICATIONS

- 11.01 After execution of the Design-Build Amendment this Article shall be governed by the General Conditions unless specified otherwise herein. To the extent there is a conflict between the terms of this Agreement and the terms of the General Conditions, this Agreement shall prevail.

11.02 *Contract Price*

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

11.03 *Applications for Payment*

Applications for Payment shall be governed in accordance with the General Conditions.

11.04 *Progress Payments*

Progress Payments shall be governed in accordance with the General Conditions.

- A. After the Owner has issued a Certificate for Payment, the Owner shall make payment in the manner and within the time limits required by the General Conditions.
- B. The Design-Builder shall pay each Architect, Consultant, Contractor, and other person or entity providing services or work for the Design-Builder no later than the time period required by the General Conditions.

11.06 *Failure of Payment*

Failure of payment by Owner within the time limits required by the General Conditions shall entitle the Contractor to the remedies contained in Article 16 of the General Conditions.

ARTICLE 12 - FINAL COMPLETION

12.01 Final completion shall be governed in accordance with the General Conditions, except as otherwise set forth in this Article.

- A. Timely final completion is an essential condition of this contract. Design-Builder agrees to achieve final completion of the Work within 30 days of the designated or extended substantial completion date. The date of Substantial Completion shall be fixed by this Agreement, unless modified by Change Order, and memorialized by a Certificate of Substantial Completion as provided in the General Conditions.

ARTICLE 13 - OWNERSHIP OF WORK PRODUCT, COPYRIGHTS AND LICENSES

13.01 General Drawings, specifications, and other documents furnished by the Design-Builder, including those in electronic form, are Instruments of Service. As part of the total compensation which Owner has agreed to pay Design-Builder for the professional services to be rendered under this Contract, Design-Builder agrees that all finished and unfinished "Instruments of Service" including but not limited to documents, data, studies, surveys, drawings, specifications, field notes, maps, models, photographs, preliminary reports, reports, bid packet/construction contract documents/advertisement for bids incorporating any Owner standard provisions provided by Design-Builder, all of which are produced by Design-Builder and paid for by Owner are, and will remain, the property of the Owner. Architect will furnish Owner with electronic copies in .PDF format, to the extent they are available, of all of the foregoing to facilitate coordination; however, ownership of the underlying work product shall remain the intellectual property of the Design-Builder. Design-Builder shall have the right to use such work products for Design-Builder's purposes on this Project. However, such documents are not intended to be suitable for reuse by Owner or others. The above notwithstanding, Design-Builder shall retain all rights in its standard drawing details, designs, specifications, databases, computer software and any other proprietary and intellectual property information provided pursuant to this Contract.

13.02 The Design-Builder and the Owner warrant that in transmitting Instruments of Service, or any other information, the transmitting party is the copyright owner of such information or has permission from the copyright owner to transmit such information for its use on the Project.

A. The Design-Builder shall obtain non-exclusive licenses from the Architect, Engineer, Consultants, and Contractors, that will allow the Design-Builder to satisfy its obligations to the Owner under this Article 13.

B. In the event the Owner alters the Instruments of Service without the author's written authorization, the Owner releases the Design-Builder, Architect, Engineer, Consultants, Contractors and any other person or entity providing services or work for any of them, from all claims and causes of action arising from to such alteration. The terms of this Section shall not apply if the Owner rightfully terminates this Agreement for cause

ARTICLE 14- CLAIMS AND DISPUTE RESOLUTION

14.01 General Claims and dispute resolution will be governed in accordance with the General Conditions.

ARTICLE 15 - BONDS AND INSURANCE

15.01 *Insurance*

Design-Builder and Owner shall procure the insurance coverages set forth in the Insurance Rider **Exhibit 3** attached hereto and in accordance with Article 6 of the General Conditions.

15.02 *Bonds and Other Performance Security*

A. In accordance with Article 6 of the General Conditions and Texas Government Code chapter 2253, Design-Builder shall provide performance bond and labor and material payment bonds.

ARTICLE 16 - MISCELLANEOUS PROVISIONS

16.01 *Governing Law*

The Contract shall be governed by the law of the state of Texas.

16.02 *Venue*

This Agreement is entered into and performed in El Paso County, Texas, and the Design-Builder and the Owner agree that mandatory venue for any legal action related to this contract shall be in the District Courts of El Paso County, Texas.

16.03 *Successors and Assigns*

The Owner and Design-Builder, respectively, bind themselves, their partners, successors, assigns and legal representatives to the covenants, agreements and obligations contained in the Design-Build Documents. Neither party to the Contract shall assign the Contract in whole or in part without the express written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract and the attempted assignment shall be of no legal force or effect as to the other party..

16.04 *Written Notice*

Written notice shall be deemed to have been duly served if delivered in person to the individual, to a member of the firm or entity, or to an officer of the corporation for which it was intended; or if delivered at, or sent by registered or certified mail or by courier service providing proof of delivery to, the last business address known to the party giving notice. Written notice sent or transmitted by electronic mail or facsimile must be actually received to be considered delivered and to comply with notice requirements herein. Transmission alone by electronic mail or facsimile does not constitute delivery.

16.05 *Rights and Remedies*

- A. Duties and obligations imposed by the Design-Build Documents, and rights and remedies available thereunder, shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.
- B. No action or failure to act by the Owner or Design-Builder shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

16.06 *Interpretation*

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

(Signatures Begin on the Following Page)

This Agreement is entered into as of the day and year written above ("The Date of Execution"):

OWNER

DESIGN-BUILDER

By: Tomás González
Title: City Manager

By: _____
Title: _____

Approved as to Content:

Sam Rodriguez, City Engineer
Capital Improvement Department

Approved as to Form:



Sol M. Cortez
Senior Assistant City Attorney

Exhibit 1 – Design Cost Detail and Schedule and Rates of Members of Design-Builder Team

Exhibit 2 – Forms of Payment Bond and Performance Bond

18-1004-843/PL#826321
Standard Form of Agreement
Eastside Regional Park-Phase II/SMC

Exhibit 3 – Insurance Rider

18-1004-843/PL#826321
Standard Form of Agreement
Eastside Regional Park-Phase II/SMC

Exhibit 4 – Prevailing Wage Rates