



MONTANA DEPARTMENT OF ADMINISTRATION

Architecture & Engineering Division

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ADDENDUM #3 TO THE RFQ DOCUMENT FOR DESIGN BUILD SERVICES

MSU GALLATIN COLLEGE

A/E#2025-07-05

Date: June 29, 2025

Changes to the RFQ document and answers to questions asked by firms are as follows:

Tracked changes versions of the DBIA 530 and 535.

Copies attached

In regards to Exhibit D, are the Site Visits listed under the Carpentry and Welding program requirements sites that Gallatin College has already visited, or still intend to visit during design?

Site visits will be done after the PDB team is selected and in collaboration with the selected PDB team.

Sections 4.3.3 and 5.3 define different structures for the Technical & Management Qualifications section of the RFQ response.

- **Section 4.3.3** requires:
 - Team Organization
 - Demonstrated History of Successful Projects Similar in Scope and Complexity
 - Achieving Innovation in Facility Functionality
 - Project Controls and Transparency
- **Section 5.3** requires:
 - Team Organization and Collaborative Process
 - Efficient Facility Design
 - Project Controls and Transparency
 - Efficient Scheduling, Sequencing, and Means & Methods

These do not directly align (e.g., 'efficient scheduling, sequencing, and means and methods' is not listed in 4.3, while 'demonstrated history of similar projects' is not a standalone section in 5.3).

Requested Clarification:

1. Should proposers structure the SOQ to follow Section 4.3.3 or Section 5.3?
The outline in Section 5.3 should be followed.
2. Confirm that "Demonstrated History of Successful Projects" should be addressed through 'Exhibit B Identification of Projects Form' rather than as a standalone section in the 'Technical & Management Qualifications' portion of the SOQ.
Address in Exhibit B

Article 4.1.1 refers to the State's file transfer service.

The link for this service is <https://transfer.mt.gov>

[END OF ADDENDUM #3]

NOTE: THE CONTRACT IS BASED ON A MODIFIED VERSION OF THE DBIA #530 AND #535 DOCUMENTS. A TRACKED CHANGES VERSION OF THE DOCUMENTS WILL BE MADE AVAILABLE TO PROPOSERS UPON WRITTEN REQUEST.

Standard Form of
Agreement Between
Owner and Design-
Builder – Cost Plus
Fee with an Option
for a Guaranteed
Maximum Price

Document No. 530

Third Edition, 2022

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Washington, D.C.



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Standard Form of Agreement Between Owner and Design-Builder – Cost Plus Fee with an Option for a Guaranteed Maximum Price

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

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

OWNER:

(Name and address)

State of Montana

DESIGN-BUILDER:

(Name and address)

PROJECT:

(Include Project name and location as it will appear in the Contract Documents)

MSU Gallatin College Progressive Design-Build Project

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

DRAFT

Article 1

Scope of Work

1.1 Design-Builder shall perform all design and construction services, and provide all material, equipment, tools and labor, necessary to complete the Work described in and reasonably inferable from the Contract Documents.

Article 2

Contract Documents

2.1 The Contract Documents are comprised of the following:

2.1.1 All written modifications, ~~amendments~~ Contract Amendments, minor changes and Change Orders to this Agreement issued in accordance with DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (2022 Edition, as amended) ("General Conditions of Contract";), including but not limited to the GMP Amendment in accordance with Section 6.6 herein, provided such Amendment is executed between the parties;

2.1.2 ~~The GMP Exhibit referenced in Section 6.6.1.1 herein or, if applicable, the GMP Proposal accepted by Owner in accordance with Section 6.6.2 herein;~~

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

- | | | | |
|------------------|-----------------------|--|-------------------------------------|
| 2.1.4 | .1 | Exhibit A: | Owner's Project Criteria |
| .2 | Exhibit B: | Insurance Exhibit – Design-Builder's Insurance Requirements | |
| .3 | Exhibit C: | Phase 1 and 2 Scope of Services | |
| .4 | Exhibit D: | Validation Period Level of Effort | |
| .5 | Exhibit E: | Hourly Rates, Unit Prices, and Allowance Items | |
| .6 | Exhibit F: | Contract Amendment Forms | |
| .7 | Exhibit G: | Change Order Forms | |

~~2.1.3~~ The General Conditions of Contract; and

~~2.1.5~~ Construction Documents ~~4~~ Submittals prepared and approved in accordance with Section 2.4 of the General Conditions of Contract and Exhibit C for the Project, the most recent approved documents governing over previously approved documents.

Article 3

Interpretation and Intent

3.1 Design-Builder and Owner, prior to execution of the Agreement ~~(and again, if applicable, at the time of acceptance of the GMP Proposal by Owner in accordance with Section 6.6.2 hereof),~~ shall carefully review all the Contract Documents, including but not limited to the various documents comprising the Basis of Design Documents Owner's Project Criteria, for any conflicts or ambiguities. Design-Builder and Owner

will discuss and resolve any identified conflicts or ambiguities prior to execution of the Agreement ~~or, if applicable, prior to Owner's acceptance of the GMP Proposal.~~

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

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

3.4 If Owner's Project Criteria contain design or prescriptive specifications: ~~(a) Design-Builder shall be entitled to reasonably rely on the accuracy of the information represented in such design or prescriptive specifications and their compatibility with other information set forth in Owner's Project Criteria, including any performance specifications; and (b) Design-Builder shall be entitled to an adjustment in the Contract Price and/or Contract Time(s), for the purposes of developing the Scope of Services for the Validation Period, the Validation Period Not to Exceed Amount, and the Design-Builder's Fee Percentage set forth in Design-Builder's Proposal. However, during the Validation Period in Phase 1, Design-Builder is required to perform an independent evaluation of all Owner Provided Information, including but not limited to any design or prescriptive specifications as required in Exhibit C. Further, regardless of the inclusion of design or prescriptive specifications or criteria, Design-Builder shall remain responsible for meeting the performance requirements of the Project, including but not limited to the requirements that the Project meet the Owner's Project Criteria, the Initial Project Scope, the Basis of Design Documents as well as all applicable Legal Requirements. Provided Design-Builder complies with other requirements set forth in this Agreement such as those regarding notice of claims to Owner and identification of differing site conditions, Design-Builder shall be entitled to an adjustment in the Scope of Services for the Validation Period Scope, the Validation Period Not to Exceed Amount and/or the Design-Builder's Fee Percentage, but only to the extent Design-Builder's cost and/or time of performance have been adversely impacted by such inaccurate design specification~~ or prescriptive specifications that are inconsistent with meeting the performance requirements.

3.5 The Contract Documents form the entire agreement between Owner and Design-Builder and by incorporation herein are as fully binding on the parties as if repeated herein. No oral representations or other agreements have been made by the parties except as specifically stated in the Contract Documents. The Contract Documents may not be changed, modified, or altered except in writing signed by the parties.

Article 4

Ownership of Work Product

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

4.2 Owner's Limited License upon Project Completion and Payment in Full to Design-Builder. Upon Owner's payment in full for all Work performed under the Contract Documents, Design-Builder shall

grant Owner ~~a limited~~ an unlimited license to use the Work Product in connection with Owner's occupancy of the Project or on other Projects, conditioned on Owner's express understanding that ~~its~~ Owner's use or alteration of the Work Product without the involvement of Design-Builder is at Owner's sole risk and without liability or legal exposure to Design-Builder or anyone working by or through Design-Builder, including Design Consultants of any tier (collectively the "Indemnified Parties"), and on Owner's obligation to provide the indemnity set forth in Section 4.5 below.

~~[At the parties' option, the following may be used in lieu of Section 4.2.]~~

~~□ Upon Owner's payment in full for all Work performed under the Contract Documents, Design-Builder: (a) grants Owner a limited license to use the Work Product in connection with Owner's occupancy of the Project; and (b) transfers all ownership and property interests, including but not limited to any intellectual property rights, copyrights and/or patents, in that portion of the Work Product that consists of architectural, engineering and other design elements and specifications that are unique to the Project. The parties shall specifically designate those portions of the Work Product for which ownership in the Work Product shall be transferred. Such grant and transfer are conditioned on Owner's express understanding that its alteration of the Work Product without the involvement of Design-Builder is at Owner's sole risk and without liability or legal exposure to Design-Builder or anyone working by or through Design-Builder, including Design Consultants of any tier (collectively the "Indemnified Parties"), and on Owner's obligation to provide the indemnity set forth in Section 4.5 below.~~

4.3 Owner's Limited License upon Owner's Termination for Convenience or Design-Builder's Election to Terminate. If Owner terminates this Agreement for its convenience as set forth in ~~Article 8 hereof~~ Section 11.6 of the General Conditions of Contract, or if Design-Builder elects to terminate this Agreement in accordance with Section 11.4 of the General Conditions of Contract, Design-Builder shall, upon Owner's payment in full of the amounts due Design-Builder under the Contract Documents, grant Owner a limited license to use the Work Product to complete the Project and subsequently occupy, maintain, and furnish the Project, and Owner shall thereafter have the same rights as set forth in Section 4.2 above, conditioned on the following:

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

4.3.2 Owner ~~agrees~~ shall not be required to pay Design-Builder ~~the additional sum of _____~~

Dollars (\$ _____) as compensation for the right to use the Work Product to complete the Project and subsequently use the Work Product in accordance with Section 4.2 if Owner resumes the Project through its employees, agents, or third parties.

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

4.5 Owner's Indemnification for Use of Work Product. If Owner is required to indemnify any Indemnified Parties based on the use or alteration of the Work Product under any of the circumstances identified in this Article 4, Owner shall defend, indemnify and hold harmless such Indemnified Parties from and against any and all claims, damages, liabilities, losses and expenses, including attorneys' fees, arising out of or resulting from the use or alteration of the Work Product.

Article 5

Contract Time

5.1 Date of Commencement. The Work shall commence within ~~five (5)~~ ten (10) days of Design-Builder's receipt of Owner's Notice to Proceed ("Date of Commencement") unless the parties mutually agree otherwise in writing.

5.2 Substantial Completion and Final Completion.

5.2.1 ~~Substantial~~The Validation Period for the Project shall be completed no later than _____ . The parties will establish a date for Phase 1 Completion Date at the conclusion of the Validation Period and for Substantial Completion of the entire Work shall be achieved no later than _____ (_____) calendar days after the Date of Commencement during Phase 1 of the Project and as part of the GMP Amendment ("Scheduled Substantial Completion Date").

[At the parties' option, the following supplemental language may be inserted at the end of Section 5.2.1 if the Project is subject to a Temporary Certificate of Occupancy.]

~~The parties agree that the definition for Substantial Completion set forth in Section 1.2.18 of the General Conditions of Contract is hereby modified to read as follows:~~

~~"Substantial Completion is the date on which the Work, or an agreed upon portion of the Work, is sufficiently complete in accordance with the Contract Documents so that Owner can occupy and use the Project or a portion thereof for its intended purposes, provided, however, that Substantial Completion shall be deemed to have been achieved no later than the date of issuance of a Temporary Certificate of Occupancy issued by the local building official."~~

5.2.2 ~~Interim milestones and/or Substantial Completion of identified portions of the Work ("Scheduled Interim Milestone Dates") shall be achieved as follows: (Insert any interim milestones for portions of the Work with different scheduled dates for Substantial Completion.)~~determined during Phase 1 of the Project. The Parties may establish separate Substantial Completion Dates for portions of the Project. To establish the Substantial Completion Date, the parties will comply with the process established in Section 6.6 of the General Conditions

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

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

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

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

the liquidated damages in the GMP Amendment. The parties may establish other liquidated remedies in the GMP Amendment, as applicable.

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

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

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

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

5.5 Any liquidated damages assessed pursuant to this Agreement shall be in lieu of all liability for any and all extra costs, losses, expenses, claims, penalties and any other damages, whether special or consequential, and of whatsoever nature, incurred by Owner which are occasioned by any delay in achieving the Contract Time(s-) for which liquidated damages are established.

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

Owner and Design Builder agree that the maximum aggregate liability Design Builder has for any liquidated damages that may be assessed under this Agreement for failure to achieve **5.6 Owner's Review Time**. Unless otherwise set forth in the Contract Time(s) shall be _____ Dollars (\$ _____):

5.6 Early Completion Bonus. If Substantial Completion is attained on or before _____ (_____) days before the Scheduled Substantial Completion Date (the "Bonus Date"), Owner shall pay Design Builder at the time of Final Payment under Section 7.3 hereof an early completion bonus of _____ Dollars (\$ _____) for each day that Substantial Completion is attained earlier than the Bonus Date. *(If a GMP is not established upon execution of this Agreement Documents, the parties should consider setting the early completion bonus after GMP negotiations. If an early completion bonus is applicable to any dates set forth in Section 5.2.2 or 5.2.3 hereof, this Section 5.6 will need to be modified accordingly.)*

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

Owner and Design Builder agree that the maximum aggregate amount that Design Builder shall receive as the early Completion Bonus is _____ Dollars (\$ _____):

~~5.7 [The Parties may also desire to modify Article 8.2.2 of the General Conditions of Contract relative to compensability of delays that would cause the Contract Time(s) to be extended. In such case, the following option can be used.]~~

~~In addition to Design-Builder's right to a time extension for those events set forth in Section 8.2.1 of the General Conditions of Contract, Design-Builder shall also be entitled to an appropriate adjustment of the Contract Price for those events set forth in Section 8.2.1 of the General Conditions of Contract, provided, however, for Force Majeure Events, Design-Builder shall only be entitled to an increase in the Contract Price if said events exceed _____ (_____) cumulative days. Said additional compensation shall be limited to:~~

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

~~_____ Dollars (\$_____) a day for each day work is delayed beyond the Scheduled Substantial Completion Date.~~

~~or~~

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

~~5.8 **Owner's Review Time.** The parties have established the following maximum and minimum amount of time for Owner to review Design SubmissionsSubmittals and the Project Schedule or any updates thereto unless the parties agree in writing otherwise.~~

~~5.86.1 Owner shall have a minimum of 14 days of receipt by Owner to review all Design Submissions, the Project ScheduleSubmittals and any updates thereto.~~

~~5.86.2 Owner shall make reasonable efforts to review and (if applicable) provide a response to Design-Builder on all Design Submissions, the Project ScheduleSubmittals and any updates thereto within 21 days of receipt by Owner. If Owner is unable to review and respond within the established timeline, Owner shall provide written notice to Design-Builder.~~

Article 6

Contract Price

6.1 Contract Price.

~~6.1.1 Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract a contract price ("Contract Price") equal to Design-Builder's Fee (as defined in Section 6.2 hereof) plus the Cost of the Work (as defined in Section 6.3 hereof), subject to any GMP established in Section 6.6 hereof and any adjustments made in set forth herein.~~

~~.1 Subject to the provisions of the Contract Documents, the Owner shall pay Design Builder for each Phase of the Project in accordance with the General Conditions of Contract, Section 6.6 of the Agreement. Design Builder's compensation shall be subject to the applicable Validation Period NTE, Phase 1 NTE and the GMP for the Project. The Validation Period NTE, Phase 1 NTE, and the GMP for the Project, shall be the maximum amount that the Design Builder may be compensated for the applicable Contract Phase, as amended pursuant to this Contract. The maximum amount that the Design Builder may be compensated pursuant to this Agreement for any given phase shall also be referred to as the Contract Price ("Contract Price"). The elements of the Design Builder's~~

compensation, subject to the Contract Price are set forth herein. If the sum of the Design-Builder's compensation is less than the Validation Period NTE, the Phase 1 NTE and/or the GMP for the Project, the savings shall go to the Owner.

~~6.1.2~~ For the specific Work set forth below, Owner agrees to pay Design-Builder, as part of the Contract Price, on the following basis: *(This is an optional section intended to provide the parties with flexibility to identify and price limited preliminary services, such as a lump sum or cost plus arrangement for preliminary design, programming or services necessary to enable Design-Builder to furnish Owner with a GMP before execution of this Agreement.)*

6.2 Design-Builder's Fee.

~~6.2.1~~ Design-Builder's Fee shall be:

[Choose one of the following.]

_____ Dollars (\$ _____), as adjusted in accordance with Section 6.2.2 below.

or

_____ percent (_____ %) of the Cost of the Work, as adjusted in accordance with Section 6.2.2 below.

~~6.2.2~~ Design-Builder's Fee will be adjusted as follows for any changes in the Work:

~~6.2.2.1~~ For additive Change Orders, including additive Change Orders arising from both additive and deductive items, it is agreed that Design-Builder shall receive a Fee of _____ percent (_____ %) of the additional Costs of the Work incurred for that Change Order, plus any other markups set forth in Exhibit _____ hereto.

~~6.2.2.2~~ For deductive Change Orders, including deductive Change Orders arising from both additive and deductive items, the deductive amounts shall include:

[Check one box only.]

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

or

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

~~6.2~~ The parties acknowledge that the scope of work for this Project is not fully developed at the time of execution of the Agreement. The Design-Builder shall develop the Basis of Design Documents and other deliverables in Exhibit C such that the total compensation to the Design-Builder shall not exceed the GMP, unless the parties agree in writing to increase the GMP or the Design-Builder is otherwise entitled to an increase to the GMP pursuant to the terms of the Contract Documents.

6.2 Design-Builder's Lump Sum Fee.

~~6.2.1~~ The Design-Builder shall receive a Lump Sum Fee for home office overhead and profit as set forth below:

- .1 The “Design-Builder’s Lump Sum Fee” shall include the following items, which shall not be charged as a Cost of the Work:
- a. All profit of the Design-Builder for the applicable Phase or Period of the Project;
 - b. All regional and home office overhead expenses, including labor and materials, phone, facsimile, postage, internet service, and other incidental office expenses attributed to the applicable Phase or Period of the Project; and
 - c. Any other cost or expense incurred by the Design-Builder on the applicable Phase or Period of the Project that is not expressly set forth as compensable under the Contract Documents.
- .2 Design-Builder’s Lump Sum Fee shall be calculated as a Lump Sum cost for each Period (Validation, Design Development, and Final Design and Construction) as set forth below and included in the Agreement or applicable Contract Amendment as a Lump Sum. The Design-Builder’s Lump Sum Fee shall be determined by multiplying the “Fee Percentage” that was included in the Price Proposal for this Project by the Cost of the Work; however, for the purposes of establishing the Lump Sum Fee, the Fee Percentage shall not be applied to the following costs:
- a. Fully Burdened Hourly Rates as set forth in Section 6.3;
 - b. Design-Builder’s Contingency set forth in Section 6.4.4.1.b,
 - c. Design-Builder’s Insurance and Bonding costs; or
 - d. Taxes or permits paid by the Design-Builder for the Project.
- .3 The Fee Percentage that will be used to develop the Lump Sum Fee for each Phase or Period of this Agreement is _____ percent (____ %).
- .4 The Lump Sum Fee in Phase 2 includes any overhead and profit on the Lump Sum General Conditions Amount.

6.2.2 The Lump Sum Fee will be earned and paid on a monthly basis following execution of the applicable Amendment on a percentage of completion basis pursuant to Section 6.4.3 of the Agreement.

6.3 Cost of the Work. The term Cost of the Work shall mean costs reasonably and ~~actually~~ necessarily incurred by Design-Builder in the proper performance of the Work. ~~The~~ Unless included in the Lump Sum General Conditions Costs established pursuant to Section 6.4.5 of the Agreement, the Cost of the Work shall include only the following:

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

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

6.3.3 Wages or salaries of Design-Builder’s personnel stationed at Design-Builder’s principal or branch offices, but only to the extent said personnel are identified in Exhibit _____ E and performing the function set forth in said Exhibit. ~~The reimbursable costs of personnel stationed at Design-Builder’s principal or branch offices shall include a _____~~

percent (____%) markup to compensate Design-Builder for the Project-related overhead associated with such personnel.

6.3.4 ~~Costs~~ Unless included in Lump Sum General Conditions, costs incurred by Design-Builder for employee benefits, premiums, taxes, insurance, contributions and assessments required by law, collective bargaining agreements, or which are customarily paid by Design-Builder, to the extent such costs are based on wages and salaries paid to employees of Design-Builder covered under Sections 6.3.1 through 6.3.3 hereof.

[In lieu of the language in Section 6.3.4 above, Design-Builder and Owner may want to include the following language.]

A multiplier of _____ percent (____%) shall be applied to the wages and salaries of the employees of Design-Builder covered under Sections ~~6.3.5~~ For personnel costs that are submitted as Fully Burdened Hourly Rates, the hourly rates must be “fully burdened”, meaning that the hourly rates include all profit, home office overhead, employee benefits, premiums, taxes, insurance, contributions and assessments required by law, collective bargaining agreement, or which are customarily provided paid by Design-Builder or any Consultant, Subconsultant or Subcontractor. Because Fully Burdened Hourly Rates include the Design-Builder’s home office overhead and profit, the Lump Sum Fee shall not be calculated based on Fully Burdened Hourly Rates.

~~6.3.4 through 6.3.3 hereof.~~

6.3.5—6 Unless included in the Lump Sum General Conditions, 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. 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, and with the written consent of the Owner as set forth below:

- i. Meals and Incidental Expenses: Meals and incidental expenses will be limited to the Federal Per Diem rate for meals and incidentals established for the location where lodging is obtained. Federal Per Diem guidelines which includes the meal breakdown and Federal Per Diem rates for other locations can be found at www.gsa.gov.
- ii. Lodging: Lodging will be billed at cost, including applicable taxes, not to exceed the Federal Per Diem maximum lodging rate for the location where the work is being performed.
- iii. Travel: Air travel (at coach class or equivalent), airport shuttles, etc. billed at cost. Ground transportation by privately owned vehicle, if utilized, billed at the United States Internal Revenue Service mileage rate for privately owned vehicles in effect at the time of travel. Expenses for a rental car (including fuel), at cost, in the ratio of one mid-size class rental car for the Contractor’s personnel directly engaged in performance of the work at the prevailing rental rates then in effect. Rental car options such as refueling fees, GPS, collision & liability insurance, etc. will not be reimbursed by the Owner unless such options are approved in advance by the Owner’s Representative. Appropriate insurance coverage should be included in the Contractor’s insurance policies.

6.3.67 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. Contracts with Subcontractors and Design-Consultants that are paid on the basis of a Lump Sum must be approved in advance by the Owner, such approval shall not be unreasonably withheld. Payments to Subcontractors and Design-Consultants shall be consistent with the hourly rates set forth in Exhibit E.

~~6.3.7~~ ~~Costs incurred by Design-Builder in repairing or correcting defective, damaged or nonconforming Work (including any warranty or corrective Work performed after Substantial Completion), provided that such Work was beyond the reasonable control of Design-Builder, or caused by the ordinary mistakes or inadvertence, and not the negligence, of Design-Builder or those working by or through Design-Builder. If the costs associated with such Work are recoverable from insurance, Subcontractors or Design Consultants, Design-Builder shall exercise its best efforts to obtain recovery from the appropriate source and provide a credit to Owner if recovery is obtained.~~

6.3.8 Costs, including transportation, inspection, testing, storage and handling, of materials, equipment and supplies incorporated or reasonably used in completing the Work. The material costs shall be based upon the net cost after all discounts or rebates, freight costs, express charges, or special delivery costs, when applicable. No lump sum costs will be allowed except when approved in writing in advance by the Owner. Discounts and rebates based on prompt payment need not be included, however, if the Design-Builder offered but the Owner declined the opportunity to take advantage of such discount or rebate.

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

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

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

6.3.12 Rental charges and the costs of transportation, installation, minor repairs and replacements, dismantling and removal of temporary facilities, machinery, equipment and hand tools not customarily owned by the workers, which are provided by Design-Builder at the Site, whether rented from Design-Builder or others, and incurred in the performance of the Work. The rental charge the applicable rental cost as established by the lower of the local prevailing rate published in EquipmentWatch (www.equipmentwatch.com) or the actual rate paid to an unrelated third party as evidenced by rental receipts. Rates and quantities of equipment rented that exceed the local fair market rental costs shall be subject to the Owner's prior written approval. Total rental charges for equipment or tools shall not exceed 75% of the fair market purchase value of the equipment or the tool (less costs for operations such as fuel, oil, lubrication, repairs, maintenance, and insurance). Actual, reasonable mobilization costs are permitted if the equipment is brought to the site solely for the change in the Work. The rental rates are the maximum rates allowable for equipment of modern design and in good working condition and include full compensation for furnishing all fuel, oil, lubrication, repairs, maintenance, and insurance. When rental rates payable do not include fuel, lubrication, maintenance, and servicing, as defined as operating costs in the Blue Book, such operating costs shall be reimbursed based on actual costs. Equipment not of modern design and/or not in good working condition will have lower rates. Hourly, weekly, and/or monthly rates, as appropriate, will be applied to yield the lowest total cost. The rate for equipment necessarily standing by for future use (and standing by for no longer than two (2) weeks) on the changed Work shall be 50% of the rate established above. The total cost of rental allowed shall not exceed the cost of purchasing the equipment outright. If equipment is required for which a rental rate is not established, the Rental Rate Blue Book, an agreed rental rate shall be established for the equipment, which rate and use must be approved by the Owner prior to performing the Work.

6.3.13 Premiums for insurance and bonds required by this Agreement or the performance of the Work are reimbursable; however, the Design-Builder's Fee Percentage shall not be applied to the cost for insurance and bond costs for the purposes of calculating the Lump Sum Fee.

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

6.3.15 Sales, use or similar taxes, tariffs or duties incurred in the performance of the Work; however, the Design-Builder's Fee Percentage shall not be applied to the cost for taxes for the purposes of calculating the Lump Sum Fee.

~~**6.3.16** Legal costs, court costs and costs of mediation and arbitration reasonably arising from Design-Builder's performance of the Work, provided such costs do not arise from disputes between Owner and Design-Builder.~~

~~**6.3.17** Costs for permits, royalties, licenses, tests and inspections incurred by Design-Builder as a requirement of the Contract Documents; however, the Design-Builder's Fee Percentage shall not be applied to the cost for permits for the purpose of calculating the Lump Sum Fee.~~

~~**6.3.18** The cost of defending suits or claims for infringement of patent rights arising from the use of a particular design, process or product required by Owner, paying legal judgments against Design-Builder resulting from such suits or claims, and paying settlements made with Owner's consent.~~

~~**6.3.19** Deposits which are lost, except to the extent caused by Design-Builder's negligence.~~

~~**6.3.20** Costs incurred in preventing damage, injury or loss in case of an emergency affecting the safety of persons and property.~~

~~**6.3.21** Accounting and data processing costs related to the Work.~~

~~**6.3.22** Fees paid by the Design-Builder for the approval of Statements of Intent to Pay Prevailing Wages and certification of Affidavits of Wages Paid by the industrial statistician of the State Department of Labor and Industries. The Design-Builder will remain responsible for the actual submittal of the documents to the industrial statistician and the determination of the locality of the work to confirm the appropriate classification of work. In order to receive this reimbursement, the Design-Builder will be required to submit to Owner a list of its subcontractors at all tiers and have their Statements of Intent to Pay Prevailing Wages on file with the Owner.~~

~~**6.3.23** Other costs reasonably and properly incurred in the performance of the Work to the extent approved in writing by Owner and not included in the Design-Builder's Contingency pursuant to Section 6.4.4.1.b.~~

~~**6.4 Other Methods of Compensation**~~

~~Within the Phase 1 NTE or the GMP, the parties may agree to the following **Section 6.3.23 to address the payment of warranty work.**~~

~~**6.3.23** Owner and Design-Builder agree that an escrow account in the amount of _____ Dollars (\$ _____) shall be established prior to Final Completion, which escrow shall be used to reimburse Design-Builder for the Costs of the Work incurred after Final Completion to perform warranty Work. The escrow agreement will provide that any sums not used at the expiration of the warranty period shall be returned to Owner, subject to any savings Design-Builder may be entitled to under this Agreement. In the event the warranty escrow account is exhausted, but funds remain under the GMP, Owner shall be obligated to pay Design-Builder the Costs of the Work incurred after Final Completion to perform warranty Work up to the GMP. pricing Design-Builder's compensation.~~

~~**6.4.1 Allowance Items and Allowance Values.**~~

6.4.1 Any and all Allowance Items, as well as their corresponding Allowance Values, are set forth in the ~~GMP Exhibit E~~ or ~~the GMP Proposal Amendment~~ and are included within any established NTE and the GMP, as applicable.

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

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

6.4.4 The Allowance Value for an Allowance Item includes the direct cost of labor, materials, equipment, transportation, taxes and insurance directly associated with the applicable Allowance Item. All other costs, including design fees, Design-Builder's overall project management and ~~general conditions costs, overhead and fee, Lump Sum General Conditions Costs, and Design-Builder's Lump Sum Fee~~ are deemed to be included in the original Contract Price, and are not subject to adjustment, regardless of the actual amount of the Allowance Item.

~~*[In the alternative, the parties may want to delete Section 6.4.4 and add the following provision.]*~~

~~In the event the actual direct cost of labor, materials, equipment, transportation, taxes and insurance associated with an Allowance Item is _____ percent (_____ %) greater than or less than the Allowance Value for such Allowance Item, Design-Builder and Owner agree that Design-Builder's right to Fee and markup shall be adjusted in accordance with Section 6.2.2.~~

6.4.5 Whenever the actual cost for an Allowance Item is more than or less than the stated Allowance Value, the Contract Price shall be adjusted accordingly by Change Order, subject to Section 6.4.4.1.4; however, Design-Builder must provide written notice of the difference between the actual cost and the Allowance Value pursuant to the Changes provisions in the General Conditions. The amount of the Change Order shall reflect the difference between actual costs incurred by Design-Builder for the particular Allowance Item and the Allowance Value.

~~6.5 Non Reimbursable Costs.~~

6.5.2 Not To Exceed Amounts

- ~~.1-~~ The following shall not be deemed as costs of the Work: Owner and Design Builder may establish Not to Exceed ("NTE") Amounts for specific scopes of the Work ("NTE Scopes"). Any such NTE Amount will be negotiated between the Owner and Design-Builder pursuant to Section 6.6.1.4 of the Agreement and memorialized through a either Contract Amendment in the form attached as Exhibit F or a Change Order.

~~**6.5.1.1** Compensation for Design Builder's personnel stationed at Design Builder's principal or branch offices, except as provided for in Sections 6.3.1, 6.3.2 and 6.3.3 hereof.~~

~~6.5.1.2 Overhead and general expenses, except as provided for in Section 6.3 hereof, or which may be recoverable for changes to the Work.~~

~~6.5.1.3 The cost of Design-Builder's capital used in the performance of the Work.~~

~~6.5.1.4 If the parties have agreed on a GMP, costs that would cause the GMP, as adjusted in accordance with the Contract Documents, to be exceeded.~~

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

6.6 The Guaranteed Maximum Price ("GMP").

6.6.1 GMP Established Upon Execution of this Agreement.

~~6.6.1.1 Design-Builder guarantees that it shall not exceed the GMP of _____ Dollars (\$_____). Documents used as a basis for the GMP shall be identified in an exhibit to this Agreement ("GMP Exhibit"). Design-Builder does not guarantee any specific line item provided as part of the GMP, and has the sole discretion to apply payment due to overruns in one line item to savings due to underruns in any other line item. Design-Builder agrees, however, that it will be responsible for paying all costs of completing the Work which exceed the GMP, as adjusted in accordance with the Contract Documents. *(While the GMP Exhibit will be developed in advance or concurrently with the execution of this Agreement, it is recommended that such exhibit include the items set forth in Section 6.6.2.1 below, to ensure that the basis for the GMP is well understood.)*~~

[In lieu of 6.6.1.1, Owner and Design-Builder may want to include the following language.]

~~Design-Builder guarantees that it shall not exceed the GMP of _____ Dollars (\$_____). Documents used as basis for the GMP shall be identified as an exhibit to this Agreement ("GMP Exhibit"). Design-Builder does not guarantee any specific line item provided as part of the GMP, provided, however, that it does guarantee the line item for its general project management and general conditions costs, in the amount of _____ Dollars (\$_____), and as set forth in the GMP Exhibit ("General Conditions Cap"). Design-Builder agrees that it will be responsible for paying the applicable general conditions costs in excess of the General Conditions Cap, as well as be responsible for all costs of completing the Work which exceed the GMP, as said General Conditions Cap and the GMP may be adjusted in accordance with the Contract Documents.~~

~~6.6.1.2 The GMP includes a Contingency in the amount of _____ Dollars (\$_____) which is available. 2 For each scope of work for which a NTE Amount has been established, the Design-Builder shall be reimbursed for the NTE Scope as a Cost of the Work; however, Design-Builder's compensation shall not exceed the NTE Amount without a written Change Order.~~

~~3 Design-Builder shall not request reimbursement for costs that are within the NTE Scope unless those costs are identified in the Payment Application as subject to the NTE Amount. Except as allowed in Section 6.4.4.1.b, costs that are within the NTE Scope that are in excess of the NTE Amount shall be the sole responsibility of the Design-Builder.~~

- .4 NTE Amounts and NTE Scopes may only be modified by Change Order pursuant to the General Conditions.

6.4.3 Lump Sums

- .1 The Owner and Design-Builder may establish Lump Sums for specific scopes of the Work. Any such Lump Sum will be negotiated between the Owner and Design-Builder. The Lump Sum agreed upon by the Parties shall be incorporated into the GMP Amendment or a Change Order, and the parties shall include the following information:
- a. A specific description of the scope of the Work that is subject to the Lump Sum "Lump Sum Scope";
 - b. An updated Schedule of Values that incorporates the Lump Sum; and
 - c. Any milestone dates associated with the with the Lump Sum Scope.
- .2 For each Lump Sum Scope the parties have established, the Design-Builder shall be compensated pursuant to the Schedule of Values set forth above based on the percentage of the Lump Sum Scope that has been completed, less the amount already paid to Design-Builder for the Work established in the Lump Sum.
- .3 Design-Builder shall not request reimbursement for costs that are within the Lump Sum Scope unless those costs are identified in the Payment Application as subject to the Lump Sum. Except as allowed in Section 6.4.4.1.b, costs that are within the Lump Sum Scope that are in excess of the Lump Sum shall be the sole responsibility of the Design-Builder.
- .4 Lump Sums may only be modified via Change Order pursuant to the General Conditions

6.4.4 Contingencies

- .1 The Parties shall establish, as part of any NTE and the GMP, the following Contingencies which are available for Design-Builder's exclusive use for the below described unanticipated costs it has incurred that are not the basis for a Change Order under the Contract Documents. ~~By way of example, and not as a limitation, such~~ (collectively "Contingency Items"). Contingency Items include the costs described below, which are subject to written approval by the Owner. The Owner may, in its discretion, approve other costs that may include: ~~(be reimbursed under a) trade~~ Contingency; however, in no case shall the Design-Builder be entitled to use the Contingency for payment of Liquidated Damages that it may be assessed pursuant to this Agreement.
- (a) Cost of the Work Contingency. The Cost of the Work Contingency is reimbursed as a Cost of the Work. The Cost of the Work Contingency is available to the Design-Builder for the following items:
 - (i) Trade buy-out differentials; ~~(b) overtime~~
 - (ii) Escalation of materials; and
 - (iii) Other direct Costs of the Work that are not included in the Design-Builder's Contingency, but only with the prior written consent of the Owner.

(b) Design-Builder's Contingency. The Design-Builder's Contingency is available to the Design-Builder for items that are not excluded by Section 6.5 hereof and include but are not limited to the following items:

(i) Overtime or acceleration; ~~(c) escalation of materials; (d) correction of~~

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

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

(iv) Subcontractor or other tier defaults; ~~or (f) those events under~~ to the extent not compensated by any surety or bond; or

(v) Costs that are in excess of an NTE Sum or Lump Sum.

.2 Except as set forth in Section 8.2.2 of the General Conditions of Contract that result in an extension of the Contract Time but do not result in an increase in the Contract Price. The Contingency is 6.4.4.3 below, the Design-Builder shall be reimbursed for Contingency Items in the same manner as set forth in Section 6.3 of the Agreement; however, Design-Builder's compensation for Contingency Items shall not cumulatively exceed the amount set forth as the Design-Builder's Contingency in the applicable NTE or GMP without a written Change Order.

.3 Design-Builder shall not be entitled to include the amount of the Design-Builder's Contingency pursuant to Section 6.4.4.1 in calculating the Lump Sum Fee.

.4 Prior to the final accounting, the Contingencies are not available to Owner for any reason, including, but not limited to, changes in scope or any other item which would enable Design-Builder to increase ~~the~~ an NTE or GMP under the Contract Documents.

.5 Design-Builder shall provide Owner notice of all anticipated charges against the ~~Contingency~~ Contingencies and shall provide Owner as part of the monthly status report required by ~~Section 2.1.2 of~~ the General Conditions of Contract an accounting of the Contingency, including all reasonably foreseen uses or potential uses of the Contingency in the upcoming three (3) months. Design-Builder agrees that with respect to any expenditure from ~~the~~ a Contingency relating to a Subcontractor default or an event for which insurance or bond may provide reimbursement, Design-Builder will in good faith exercise reasonable steps to obtain performance from the Subcontractor and/or recovery from any surety or insurance company. Design-Builder agrees that if Design-Builder is subsequently

reimbursed for said costs, then said recovery will be credited back to the Contingency.

6.6.2—4.5 Lump Sum General Conditions Costs

.1 If the Parties enter into the GMP ~~Established after Execution of~~ Amendment, the Parties may establish an amount for the Lump Sum General Conditions Costs. If the Parties decide to agree to Lump Sum General Conditions Costs, the Parties will determine the portions of the Cost of the Work set forth in Section 6.3 that are included in the Lump Sum General Conditions Costs, and the parties shall include a description of such costs in the GMP Amendment. Unless the Parties agree in writing otherwise, the costs that will be included in the Lump Sum General Conditions Costs are as follows:

- a. Wages or salaries of Design-Builder's supervisory and administrative personnel engaged in the performance of the Work and who are located at the Site or working off-Site to assist in the production or transportation of material and equipment necessary for the Work. Specifically, the following personnel are included in the Lump Sum General Conditions Amount:
 - i. Project Executive
 - ii. Project Manger
 - iii. Superintendent and/or Construction Manager
 - iv. Quality Control Manager
 - v. Project Field Engineer and/or Design Manager
 - vi. Project Controls
 - vii. Project Scheduler
 - viii. Safety Manager
- b. Wages or salaries of Design Builder's personnel stationed at Design Builder's principal or branch offices, but only to the extent said personnel are approved in advance of the performance of the Work in writing by the Owner.
- c. Costs incurred by Design-Builder for employee benefits, premiums, taxes, insurance, contributions and assessments required by law, collective bargaining agreements, or which are customarily paid by Design-Builder, to the extent such costs are based on wages and salaries paid to employees of Design-Builder covered under this Section.
- 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 and with the written consent of the Owner as set forth in Section 6.3.6 herein for the personnel listed in Section 6.4.5 herein.
- e. 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.
- f. Premiums for insurance and bonds required specifically by this Agreement or the performance of the Work by the Design Builder.
- g. Accounting and data processing costs related to the Work.
- h. General administrative costs not specifically listed in this subsection that shall be listed by the Parties if they agree to Lump Sum General Conditions Costs.

- .2 For the Costs of the Work that are included in the Lump Sum General Conditions Costs, the Design-Builder shall no longer be entitled to be reimbursed for such costs as part of the Cost of the Work, and the Design Builder's sole compensation for the costs set forth in the identified General Conditions shall be through the Lump Sum General Conditions Costs.
- .3 The Owner shall have the right to examine the back-up documentation establishing the Lump Sum General Conditions Costs, including but not limited to all estimates, proposals, contracts and other financial documentation on a transparent basis.
- .4 The Lump Sum General Conditions Costs shall only be modified if the Design-Builder is entitled to compensation for a delay pursuant to Section 8.2 of the General Conditions. Any modification to the Lump Sum General Conditions Costs shall be calculated as follows:
- a. The Design Builder shall be entitled to receive a liquidated daily rate for Extended General Conditions Costs ("Design-Builder's Delay Rate") for each day that the Contract Time for Substantial Completion is extended pursuant to Section 8.2 of the General Conditions.
- i. The Design-Builder's Delay Rate shall be calculated by dividing the Lump Sum General Conditions Costs by the number of days in the Contract Time set forth in the GMP Amendment for Phase 2.
- ii. Then, the Design-Builder's Delay Rate is multiplied by the number of days that the Contract Time is extended for Design-Builder's Delay, subject to a determination of entitlement pursuant to Article 8 of the General Conditions.
- iii. The result from the Design-Builder's Delay Rate multiplied by the number of days the project is delayed pursuant to Section 8.2 of the General Conditions is the Extended General Conditions Costs which shall be added to the Lump Sum General Conditions Costs by Change Order and paid to the Design Builder pursuant to the Schedule of Values, subject to a determination of entitlement pursuant to Article 8 of the General Conditions.
- b. The Design-Builder's Delay Rate shall not apply to delays occurring after Substantial Completion is achieved.
- c. The Parties agree that determining the Design Builder's damages for delay in Phase 2 would be extremely difficult or impracticable to determine and that the Design-Builder's Delay Rate, as calculated in this Section 6.4.5.4, is a reasonable estimate of and reasonable sum for such damages; therefore, the Design-Builder's Delay Rate shall be payable to the Design Builder as liquidated damages and not as a penalty.

6.4.6 Unit Prices and Hourly Rates

- .1 Any Unit Prices and Hourly Rates, including Fully Burdened Hourly Rates, shall be agreed upon in writing and set forth in Exhibit E to the Agreement. Design-Builder shall not charge more than a specified Unit Price or Hourly Rate than the amount set forth in Exhibit E, as modified through the Contract Documents.
- .2 Once established, Unit Prices and Hourly Rates, including Fully Burdened Hourly Rates, shall not be subject to audit and may only be changed by Change Order.

.3 Design-Builder must maintain a record of the number of Unit Prices and Hours billed using Hourly Rates, including Fully Burdened Hourly Rates, for review by Owner.

6.5 Non-Reimbursable Costs.

6.6-25.1 The following shall not be deemed as Costs of the Work:

.1 Compensation for Design-Builder's personnel stationed at Design-Builder's principal or branch offices, except as provided for in Sections 6.3.1, 6.3.2 and 6.3.3 hereof.

.2 Overhead and general expenses, except as provided for in Section 6.3 hereof, or which may be recoverable for changes to the Work.

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

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

6.6 Project Phases

6.6.1 Phase 1

.1 **Compensation.** During Phase 1 for the Project, the Design Builder shall be compensated for the following:

a. The Cost of the Work set forth in Section 6.3;

b. Design-Builder's Lump Sum Fee; and

c. Contingency Items charged under Section 6.4.4.1.b.

.2 **Validation Period.** At the beginning of the Project, Design-Builder shall engage in Validation of the Project information as set forth in Exhibit C, Section 2.02 (the "Validation Period").

a. **Validation Period Not to Exceed Amount.** The Validation Period Not to Exceed Amount is _____ dollars (\$_____). Design-Builder guarantees that its compensation during the Validation Period of Phase 1 Project shall not exceed the Validation Period Not to Exceed Amount ("Validation Period NTE") established by the Parties. Documents used as a basis for the Validation Period NTE shall be identified in an Exhibit. Design-Builder agrees that it will be responsible for paying all costs of completing the Work which exceed the applicable Validation Period NTE, as adjusted in accordance with the Contract Documents.

b. **Validation Period Completion Date.** The Validation Period Completion Date is _____.

c. **Development of Phase 1 Commercial Terms.** During the Validation Period, the parties will collaboratively develop the Phase 1 Not to Exceed Amount ("Phase 1 NTE"), Phase 1 Completion Date, the Phase 1 Scope of Work, a Target Budget, a Target Schedule, the Initial Project Scope, and other Submittals for the Project as set forth in Exhibit C. At the conclusion of the applicable Validation Period, provided the parties agree on the applicable terms, the parties shall enter

into a Contract Amendment to establish the Phase 1 NTE, the Phase 1 Completion Date, the Target Budget, the Target Schedule, and the Initial Project Scope and to finalize the other Submittals required by Exhibit C.

.3 Design Development Period. Provided the parties enter into a Contract Amendment establishing the Commercial Terms of the Design Development Period, Design-Builder shall engage in the remainder of the Phase 1 activities as set forth in the Contract Documents and the applicable Contract Amendment for the Project.

a. **Compensation during the Design Development Period.** Design-Builder shall be compensated during the Design Development Period in the same manner as the Validation Period set forth in Section 6.6.1.1 above. Design-Builder guarantees that its compensation for the remainder of Phase 1 shall not exceed the Phase 1 NTE in the applicable Contract Amendment. Documents used as a basis for a Phase 1 NTE shall be identified as an Exhibit to the Contract Amendment. Design-Builder agrees that it will be responsible for paying all costs of completing the Work which exceeds the applicable Phase 1 NTE, as adjusted in accordance with the Contract Documents.

b. **Development of the GMP Proposal.** If requested by Owner During the remainder of Phase 1, the parties will collaboratively develop the GMP Proposal for the Project pursuant to Exhibit C.

.4 GMP Proposal. On the date set forth in the Project Schedule, , Design-Builder shall submit a GMP Proposal to Owner for the Project which shall include the ~~following deliverables set forth in Exhibit C,~~ unless the parties mutually agree otherwise. The GMP Proposal shall include all Work necessary to complete the Project.

6.6.2.1.1 — A proposed GMP, which shall be the sum a. Submission of:

i. **the GMP Proposal.** Submission of the GMP Proposal constitutes Design-Builder's ~~Fee as~~ representation and agreement that it has adequately investigated the site and the project parameters, the Project is adequately defined in Section 6.2.1 hereof;

ii. ~~The~~ the estimated Cost of the Work as defined in Section 6.3 hereof, inclusive of any Design-Builder's Contingency as defined in Section 6.6.1.2 hereof; and

iii. If applicable, any prices established under Section 6.1.2 hereof.

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

6.6.2.1.3 — A list of ~~provide an accurate GMP and Project Schedule for the Project, and subject to the assumptions and clarifications made by in the GMP Proposal,~~ the Project is sufficiently clear and understandable for the Design-Builder in the preparation of the GMP Proposal, which list is intended to supplement the information contained in the drawings and specifications and is specifically included as part of the Basis of Design to perform the Work in accordance with the Contract Documents;

6.6.2.1.4 — The Scheduled Substantial Completion Date upon which the proposed GMP is based, to the extent said date has ~~for an amount that will not already been established under Section 5.2.1 hereof,~~ and a schedule upon which the Scheduled Substantial Completion Date is based;

~~6.6.2.1.5~~ If applicable, a list of Allowance Items, Allowance Values and a statement of their basis;

~~6.6.2.1.6~~ If applicable, a schedule of alternate prices;

~~6.6.2.1.7~~ If applicable, a schedule of unit prices;

~~6.6.2.1.8~~ If applicable, a statement of Additional Services which may be performed but which are not included in the GMP and which, if performed, shall be exceed the basis for an increase in Original GMP of the GMP and/or Contract Time(s); and

~~6.6.2.1.9~~ The time limit for acceptance of Project, except as amended pursuant to the GMP Proposal. Contract Documents.

6.6.2.2b. **Review and Adjustment to GMP Proposal.** After submission of the GMP Proposal, Design-Builder and Owner shall meet to discuss and review the GMP Proposal. If Owner has any comments regarding the GMP Proposal, or finds any inconsistencies or inaccuracies in the information presented, it shall promptly give written notice to Design-Builder of such comments or findings. If appropriate, Design-Builder shall, upon receipt of Owner's notice, make appropriate adjustments to the GMP Proposal. To assist in the Owner's review of the GMP Proposal, the Design Builder shall, upon the Owner's Request, provide all information, including but not limited to all data, reports, cost analysis, pricing, designs and specifications on which the Design Builder relied or used as a basis for the GMP Proposal. The Owner shall make its best efforts to review any revised GMP Proposal within thirty (30) days of receipt of the revised GMP Proposal.

6.6.2.3c. **Acceptance of GMP Proposal.** If Owner accepts the GMP Proposal, as may be amended by Design-Builder, the terms of the GMP and its basis Proposal shall be set forth in an amendment to this Agreement, the GMP Amendment. At the Owner's option, the GMP for the Project may be converted into a Lump Sum.

6.6.2.4d. **Failure to Accept the GMP Proposal.** If Owner rejects ~~the GMP Proposal, or fails to notify Design-Builder in writing on or before the date specified in the GMP Proposal that it accepts~~ the GMP Proposal, the GMP Proposal shall be deemed withdrawn and of no effect. In such event, Owner and Design-Builder shall meet and confer as to how the Project will proceed, with Owner having the following options:

6.6.2.4.1i. Owner may suggest modifications to the GMP Proposal, whereupon, if such modifications are accepted in writing by Design-Builder, the GMP Proposal shall be deemed accepted and the parties shall proceed in accordance with Section ~~6.6.2.31.4.c~~ 6.6.2.31.4.c above;

~~**6.6.2.4.2**—Owner may authorize Design-Builder to continue to proceed with the Work on the basis of reimbursement as provided in Section 6.1 hereof without a GMP, in which case all references in this Agreement to the GMP shall not be applicable; or~~

6.6.2.4.3ii. Owner may terminate this Agreement for convenience in accordance with Article 8 hereof; ~~provided, however, in this event and~~ Section 11.6 of the General Conditions.

e. **Performance of Work After Submission of GMP Proposal.** The Design-Builder shall not perform any Work after the submission of the GMP Proposal until the Owner has approved and signed the GMP Amendment unless the Design-Builder obtains the Owner's prior, written consent to perform such Work and only to the extent that such Work is expressly described in writing in such written consent. If Design-Builder performs such Work, Design-Builder shall not be entitled compensated pursuant to the payment provided written approval of the Owner.

.5 **Early GMPs.** The parties may agree to establish a GMP for portions of the Work prior to establishing the GMP for the entire Project "Early GMP".

a. For each Early GMP, the Design-Builder will follow the process set forth in 6.6.1.5 above to establish the Early GMP, the scope associated with the Early GMP (the "Early GMP Scope"), and the schedule associated with the Early GMP Scope ("the Early GMP Schedule").

b. For each Early GMP, the parties shall determine the deliverables applicable to each Early GMP Proposal prior to its submission.

c. Early GMPs will be established through an Early GMP Amendment, which shall follow the same form as Exhibit F.

6.6.2 Phase 2, Post GMP Period

.1 **Compensation.** During Phase 2 for the Project, the Design Builder shall be compensated for the following, all subject to the GMP for the Project:

a. The Cost of the Work set forth in Section ~~8.2~~ hereof, 6.3;

~~If Owner fails,~~ b. Design-Builder's Lump Sum Fee established pursuant to exercise any of Section 6.2.1;

c. Any additional Lump Sum amounts established pursuant to Section 6.4.3;

d. Contingency Items charged under Section 6.4.4.1.b;

e. Design-Builder's Lump Sum General Conditions Costs established pursuant to Section 6.4.5;

f. Any Allowances established by the ~~above options,~~ Parties in the GMP Amendment

g. Any Incentive payments established by the Parties in the GMP Amendment.

.2 **GMP** The Guaranteed Maximum Price ("GMP") is the total compensation to the Design-Builder as set forth in the GMP Amendment for the Project that shall have the right to (a) continue with the establish a binding GMP between the Parties for the Project. Design Builder agrees that it will be responsible for paying all costs of completing the Phase 2 Work as if Owner had elected to proceed for the Project which exceed the GMP for the Project, as adjusted in accordance with ~~Item 6.6.2.4.2 above,~~ the Contract Documents. Execution of a GMP Amendment constitutes Design Builder's representation and be paid by Owner accordingly, unless agreement to the following:

- a. The Project is adequately defined, that the Basis of Design Documents are sufficiently defined to provide an accurate GMP for the Project;
 - b. The Project is sufficiently clear and until Owner notifies it in writing to stop understandable for the Design Builder to perform the Work, or (b) suspend performance of Work in accordance with Section 11.3.1 of the General Conditions the Contract Documents for an amount that will not exceed the applicable GMP and within the Project Schedule; and
 - c. If the Work cannot be completed for the agreed GMP, any additional costs shall be the responsibility of Contract, provided, however, that in the Design Builder, and Design Builder hereby assumes liability for such event Design Builder shall not be entitled to the payment provided for in Section 8.2 hereof. costs without reimbursement by the Owner.
- .3 If the parties decide to convert any GMP into a Lump Sum, Design-Builder shall be compensated pursuant to Section 6.4.3 of the Agreement.

6.6.3 Savings and Incentives.

~~6.6.3.1~~ If the sum of the actual ~~Cost of the Work and Design-Builder's Fee (and, if applicable, any prices Compensation established under Section 6.1.2 hereof)~~ is less than the GMP, as such GMP may have been adjusted over the course of the Project, the difference ("Savings") shall ~~be shared as follows: go 100% to the Owner.~~

[Choose one of the following.]

_____ percent (_____%)² The Parties may establish Incentive payments to the Design-Builder and _____ percent (_____%) to Owner.

or

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

~~6.6.3.2~~ Savings shall be calculated and paid as part of Final Payment under Section 7.3 hereof, with the understanding that to the extent Design Builder incurs costs after Final Completion which would have been payable to Design Builder as a Cost of the Work, the parties shall recalculate the Savings in light of the costs so incurred, and Design-Builder shall be paid by Owner accordingly ~~the GMP Amendment.~~

6.7 Performance Incentives

~~6.7.1~~ Owner and Design-Builder have agreed to the performance incentive arrangements set forth in Exhibit _____.

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

Article 7

Procedure for Payment

7.1 Progress Payments.

7.1.1 Design-Builder shall submit to Owner on the _____ (~~fifteenth (15th)~~) day of each month, beginning with the first month after the Date of Commencement, Design-Builder's Application for Payment in accordance with Article 6 of the General Conditions of Contract.

7.1.2 Owner shall make payment within ~~ten (10)~~ thirty (30) days after Owner's receipt of each properly submitted and accurate Application for Payment in accordance with Article 6 of the General Conditions of Contract, but in each case less the total of payments previously made, and less amounts properly withheld under Section 6.3 of the General Conditions of Contract.

7.1.3 ~~If Design-Builder's Fee under the parties have established a Lump Sum, the Design-Builder shall be paid pursuant to Section 6.24.3.~~

~~7.1 hereof, 4 The Design-Builder is a fixed amount, the amount of Design-Builder's Fee to be included in Design-Builder's monthly Application fully aware that the Owner has established a billing cycle for Payment processing payments in Article 7 of the Agreement and paid by Owner shall be proportional Article 6 of the General Conditions. The Design-Builder and all Subcontractors are subject to the percentage all provisions of Title 28, Chapter 2, Part 21 MCA regarding all aspects of the Work completed, less payments previously made on account of Design-Builder's Fee.~~

7.2 Retainage on Progress Payments.

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

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

~~Owner will retain _____ percent (____%) of the cost of the Work, exclusive of general conditions costs, and any amounts paid to Design-Builder's Design Consultant, from each Application for Payment provided, however, that when fifty percent (50%) of the Work has been satisfactorily completed by Design-Builder and Design-Builder is otherwise in compliance with its contractual obligations, Owner will not retain any additional amounts from Design-Builder's subsequent Applications for Payment. Owner will also reasonably consider reducing retainage for Work completed early in the Project.~~

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

~~Owner will retain _____ percent (____%) from Design-Builder's Applications for Payment pursuant to applicable state law.~~

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

~~Because Owner has obtained a performance bond and payment bond pursuant to Article~~

~~10 below, Owner will not retain retainage from Design-Builder on this Project.~~

~~7.2.2 Within fifteen (15) days after Substantial Completion of the entire Work or, if applicable, any portion of the Work, pursuant to Section 6.6 of the General Conditions of Contract, Owner shall release to Design-Builder all retained amounts relating, as applicable, to the entire Work or completed portion of the Work, less an amount equal to: (a) the reasonable value of all remaining or incomplete items of Work as noted in the Certificate of Substantial Completion; and (b) all other amounts Owner is entitled to withhold pursuant to Section 6.3 of the General Conditions of Contract.~~

~~***[If Owner and Design-Builder have established a warranty reserve pursuant to Section 6.3.23 above, the following provision should be included.]***~~

~~If a warranty reserve has been established pursuant to Section 6.3.23 above, Owner shall at the time of Substantial Completion retain the agreed upon amounts and establish an escrow account as contemplated by Section 6.3.23 above.~~

~~7.2.1 The Owner will withhold and release retainage pursuant to Montana law~~

7.3 Final Payment. Design-Builder shall submit its Final Application for Payment to Owner in accordance with Section 6.7.8 of the General Conditions of Contract. Owner shall make payment on Design-Builder's properly submitted and accurate Final Application for Payment ~~(less any amount the parties may have agreed to set aside for warranty work)~~ within ten (10) days after Owner's receipt of the Final Application for Payment pursuant and subject to all applicable laws and regulations, provided that Design-Builder has satisfied the requirements for final payment set forth in Section 6.7.8.2 of the General Conditions of Contract.

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

7.5 Record Keeping and Finance Controls. Design-Builder acknowledges that this Agreement is to be administered on an "open book" arrangement Open Book Basis relative to Costs of the Work, and all other reimbursable costs set forth in the Agreement.

7.5.1 Design-Builder shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management, using accounting and control systems in accordance with generally accepted accounting principles and as may be provided in the Contract Documents. During the performance of the Work and for a period of ~~three (3)~~ six (6) years after Final Payment, Owner and Owner's accountants, the State Auditor, and other governmental agencies entitled to audit the records shall be afforded access to, and the right to audit from time to time, upon reasonable notice, Design-Builder's records, books, correspondence, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to the Work, all of which Design-Builder shall preserve for a period of ~~three (3)~~ six (6) years after Final Payment. Such inspection shall take place at Design-Builder's offices during normal business hours unless another location and time is agreed to by the parties. Any multipliers or markups agreed to by Owner and Design-Builder as part of this Agreement are only subject to audit to confirm that such multiplier or markup has been charged in accordance with this Agreement, with the composition of such multiplier or markup not being subject to audit.

7.6 Public Records Act. The Owner is subject to the disclosure obligations of the Montana State Public Records Act. Design-Builder expressly acknowledges and agrees that Submittals by the Design-Builder pursuant to the Contract Documents as well the Statement of Qualifications and Proposal and any information Design-Builder submits with its Statement of Qualifications and Proposal is subject to public disclosure pursuant to the Public Records Act or other applicable law and the Owner may disclose Design-Builder's Statement of Qualifications and Proposal and/or accompanying information at its sole discretion in accordance with its obligations under applicable law. If a public disclosure request pursuant to applicable

law is made to Owner requesting Confidential Information designated by the Design-Builder under Section 13.1.1 of the General Conditions, Owner will provide written notice to Design-Builder within five Days of receipt of such public disclosure request. Design-Builder will be provided the opportunity to review the public disclosure request and provide a defense to disclosure of any Confidential Information that is designated by Design-Builder. Design-Builder will provide the defense to such disclosure at its sole expense, including but not limited to all costs, attorneys' and expert witness fees, court costs and expenses, and any other cost associated with the defense of the disclosure of such Confidential Information. Design-Builder will be bound by any final determination made pursuant to applicable law regarding disclosure.

Article 8

Termination for Convenience

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

8.1.1 ~~*[Choose one of the following.]*~~

~~The fair and reasonable sums for overhead and profit The portion of Design-Builder's Lump Sum Fee earned based on the sum of items set forth in Section 11.6.1 of the General Conditions~~

or

~~Overhead and profit in the amount of _____ percent (_____%)
on the sum of items set forth in Section 11.6.1 of the General Conditions~~

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

~~**8.2.1** If Owner terminates this Agreement prior to commencement of construction, Design-Builder shall be paid _____ percent (_____%) of the remaining balance of the Contract Price, provided, however, that if a GMP has not been established, the above percentage shall be applied to the remaining balance of the most recent estimated Contract Price complete of the Work.~~

~~**8.2.2** If Owner terminates this Agreement after commencement of construction, Design-Builder shall be paid _____ percent (_____%) of the remaining balance of the Contract Price, provided, however, that if a GMP has not been established, the above percentage shall be applied to the remaining balance of the most recent estimated Contract Price.~~

~~**1.3** **8.1.2** The total amount to be paid to Design-Builder, exclusive of costs described in Section 11.6.1.2 of the General Conditions, shall not exceed the total GMP.~~

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

Article 9

Representatives of the Parties

9.1 Owner's Representatives.

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

9.1.2 Owner designates the individual listed below as its Owner's Representative, which individual has the authority and responsibility set forth in Section 3.4 of the General Conditions of Contract: *(Identify individual's name, title, address and telephone numbers.)*

9.2 Design-Builder's Representatives.

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

9.2.2 Design-Builder designates the individual listed below as its Design-Builder's Representative, which individual has the authority and responsibility set forth in Section 2.1.1 of the General Conditions of Contract: *(Identify individual's name, title, address and telephone numbers.)*

Article 10

Bonds and Insurance

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

10.2 Bonds and Other Performance Security. ~~Design-Builder shall provide the following performance bond and labor and material payment bond or other performance security: bonds pursuant to applicable law and below.~~

~~**Performance Bond.**~~

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

~~Required Not Required~~

~~**Payment Bond.**~~

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

~~Required Not Required~~

~~**Other Performance Security.**~~

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

Required Not Required

10.2.1 The Design-Builder shall furnish a Performance Bond in the amount of 100% of the contract price as security for the faithful performance of his contract (18-2-201 MCA). The Design-Builder shall also furnish a Labor and Material Payment Bond in the amount of 100% of the contract price as security for the payment of all persons performing labor and furnishing materials in connection therewith (18-2-201MCA). The bonds shall be executed on forms furnished by the Owner and no other forms or endorsements will be acceptable. The bonds shall be signed in compliance with state statutes (33-17-1111 MCA). Bonds shall be secured from a state licensed bonding company. Power of Attorney is required with each bond. Attorneys-in-fact who sign contract bonds must file with each bond a certified and effectively dated copy of their power of attorney:

10.2.1.1 one original copy shall be furnished with each set of bonds.

10.2.1.2 Others furnished with a set of bonds may be copies of that original.

10.2.3 The Owner reserves the right at any time during the performance of Work to require bonding of Subcontractors provided by the Design-Builder. Should this occur, the Owner will cover the direct cost. This shall not be construed as to in any way affect the relationship between the Design-Bilder and his Subcontractors.

10.2.4 Surety must have an endorsement stating that their guarantee of Design-Builder's performance automatically covers the additional contract time added to a Design-Builder's contract by Change Order.

10.2.5 A change in the Design-Builder's organization shall not constitute grounds for Surety to claim a discharge of their liability and requires an endorsement from Surety so stating.

10.2.6 Except as noted below, the Design-Builder is required to notify Surety of any increase in the contract amount resulting from a Change Order within 48 hours of signing and submitting a Change Order and shall submit a copy of Surety's written acknowledgment and consent to Owner before a Change Order can be approved. The Surety's written acknowledgment and consent on the Change Order form shall also satisfy this consent requirement.

10.2.7 Surety consent shall not be required on Change Order(s) which, in the aggregate total amount of all Changes Orders, increase the original contract amount by less than 10%. However, the Contractor is still required to notify Surety of any increase in contract amount resulting from a Change Order(s) within 48 hours of signing and submitting every Change Order.

10.2.7.1 Surety is fully obligated to the Owner for the full contract amount, inclusive of all Change Orders, regardless of whether or not written acknowledgement and consent is received and regardless of whether or not the aggregate total of all Change Orders is more or less than 10% of the original contract amount.

10.2.7.2 A fax with hard copy to follow of Surety's written acknowledgment and consent is acceptable. If hard copy is not received by Owner before Application for Payment on any portion or all of said Change Order, it will not be accepted by Owner for payment.

10.2.8 The Surety must take action within 30 days of notice of default on the part of the Contractor or of any claim on bonds made by the Owner or any Subcontractor or supplier.

Article 11

Other Provisions

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

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

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

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

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

11.2 Prevailing Wages and Montana Residents.

11.2.1 The Design-Builder and all subcontractors at any level or tier of the Work shall give preference to the employment of bona fide Montana residents in the performance of the Work and shall pay the standard prevailing rate of wages, including fringe benefits for health and welfare and pension contributions and travel allowance provisions in effect and applicable to the county or locality in which the work is being performed. (18-2-403, MCA)

11.2.1.1 At least 50% of the workers, as defined by the Department of Labor & Industry (DOLI), must be bona fide Montana residents. (18-2-401, 18-2-402, MCA)

11.2.1.2 Indian Employment Preference within the Boundaries of an Indian Reservation. All contractors that are awarded a state agency construction contract within the exterior boundaries of an Indian Reservation shall extend a hiring preference to qualified Indians as provided herein:

11.2.1.2.1 "State agency" means a department, office, board, bureau, commission, agency, or other instrumentality of the executive or judicial branches of the government of this State. "Indian" means a person who is enrolled or who is a lineal descendent of a person enrolled in an enrollment listing of the Bureau of Indian Affairs or in the enrollment listing of a recognized Indian tribe domiciled in the United States.

11.2.1.2.2 Qualified Indians – Employment Criteria: An Indian shall be qualified for employment in a permanent, temporary, or seasonal position if he or she has

substantially equal qualifications for any position and resides on the reservation where the construction contract is to be performed.

11.2.1.2.3 Non-Applicability: The Indian Employment Preference Policy does not apply to a project partially funded with federal-aid money from the United States Department of Transportation or when residency preference laws are specifically prohibited by federal law. It does not apply to independent contractors and their employees, student interns, elected officials, or appointed positions.

11.2.1.3 The Commissioner of The Montana Department of Labor and Industry (DOLI) has established the standard prevailing rate of wages in accordance with 18-2-401 and 18-2-402, MCA. A copy of the Rates entitled "State of Montana, Prevailing Wage Rates" are bound herein. The Commissioner of the Montana DOLI has established the resident requirements in accordance with 18-2-409, MCA. The Design-Builder and all subcontractors at any level or tier of the Work shall direct any and all questions concerning prevailing wage and Montana resident issues for all aspects of the Work to DOLI.

11.2.1.4 The Design-Builder and all subcontractors at any tier or level of the Work, and as determined by the Montana DOLI, shall classify all workers in the project in accordance with the State of Montana, Prevailing Wage Rates. In the event the Design-Builder is unable to classify a worker in accordance with these rates he shall contact DOLI for a determination of the classification and the prevailing wage rate to be paid.

11.2.1.5 The Design-Builder and all subcontractors at any tier or level of the Work shall be responsible for obtaining wage rates for all workers prior to their performing any work on the project. The Design-Builder is required to pay and insure that its subcontractors at any tier or level and others also pay the prevailing wage determined by the DOLI, insofar as required by Title 18 of the MCA and the pertinent rules and standards of DOLI.

11.2.1.6 It is not the responsibility of the Owner to determine who classifies as a subcontractor, sub-subcontractor, material man, supplier, or any other person involved in any aspect of the Work at any tier or level. All such determinations shall be the sole responsibility of the Design-Builder, subcontractors, sub-subcontractors, material men, suppliers and others involved in the project at any tier or level. The Design-Builder, subcontractors, sub-subcontractors, material men, suppliers and others involved in the project shall indemnify and hold harmless the Owner from all claims, attorneys' fees, damages and/or awards involving prevailing wage or Montana resident issues. Any changes to wages or penalties for failure to pay the correct wages will be the sole responsibility of the Design-Builder and/or his subcontractors and no further charges or claims shall be made to the Owner. If the parties mutually agree or an arbitrator or court determines that any change in wages is due and any part is attributable to the Owner, the Owner's sole liability shall be for the amount of wages ordered only and not for other expenses, charges, penalties, overhead, profit or other mark-ups.

11.2.1.7 In accordance with 18-2-422(1) MCA, each job classification's standard prevailing wage rate, including fringe benefits, that the contractors and employers shall pay during construction of the project is included herein by both reference to DOLI's "Building" or "Heavy/Highway" schedules and as part of these Contract Documents.

11.2.1.8 The Design-Builder and every employer, including all subcontractors at any tier or level, is required by 18-2-422(2) MCA to maintain payroll records in a manner readily capable of being certified for submission under 18-2-423 MCA, for a period of not less than 3 years after the Design-Builder's, subcontractor's, or employer's completion of work on the project or the Final Acceptance by the Owner, whichever is later.

11.2.1.9 The Design-Builder and each subcontractor is required by 18-2-422(3) MCA to post in a visible and accessible location a statement of all wages and fringe benefits in

compliance with 18-2-423.

11.2.1.10 The Design-Builder and all subcontractors are required by MCA 18-2-417 to make wage rate adjustments for projects with a construction duration exceeding 30 months.

11.3 Equal Opportunity

11.3.1 The Contractor and all Sub-contractors shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin or age and shall comply with all Federal and State laws concerning fair labor standards and hiring practices. The Contractor shall take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their race, religion, color, sex, national origin or age. Such action shall include, but not be limited to the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places available to employees and applicants for employment, notices setting forth the policies of non-discrimination.

11.3.2 The Contractor and all Sub-contractors shall, in all solicitations or advertisements for employees placed by them or on their behalf, state that all qualified applicants will receive consideration for employment without regard to race, religion, color, sex, national origin or age.

11.3.3 The contractor shall not have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association, and the Contractor shall not discriminate during the term of the contract against a firearm entity or firearm trade association. This section shall be construed in accordance with 30-20-301, MCA.

11.3.4 The provisions of 30-20-301, MCA apply only to a contract that:

11.3.4.1 is between a governmental entity and a company with at least 10 full-time employees; and

11.3.4.2 has a value of at least \$100,000 that is paid wholly or partly from public funds of the governmental entity

11.3.5 By the signing the contract, the Contractor certifies and affirms:

11.3.5.1 Contractor does not have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association during the term of this contract; and

11.3.5.2 Contractor will not discriminate against a firearm entity or firearm trade association during the term of this contract.

11.3.5.3 The contractor's certification is made in compliance with and in reference to 30-20-301, MCA, and the terms defined therein. If the contractor determines the provisions of 30-20-301, MCA don't apply to the contract, the Contractor shall submit a statement set forth in details the basis for such determination.

11.4 Taxes. In compliance with 15-50-206 MCA, the Design-Builder will have 1% of his gross receipts withheld by the Owner from all payments due and sent to the Montana Department of Revenue. Each subcontractor who performs work greater than \$80,000 shall have 1% of its gross receipts withheld by the Design-Builder and sent to the Montana Department of Revenue. The Design-Builder shall notify the Department of Revenue on the Department's prescribed form

11.5 Nondiscrimination. No individual shall be excluded from participation in, denied the benefit of, subjected to discrimination under, or denied employment in the administration of or in connection with this contract because of age, sex, race, color, religion, creed, marital status, familial status, sexual orientation,

national origin, honorably discharged veteran or military status, the presence of any sensory, mental or physical disability, or use of a service animal by a person with disabilities.

11.6 Business Registration Requirement. Design-Builder represents and warrants that it and all of its subconsultants, subcontractors and suppliers are properly licensed to perform the work for which they are contracted and have all applicable business licenses, including but not limited to any licenses or registrations required by the State of Montana and any other regulatory authority.

11.7 Contractor's Registration Requirement. Construction Contractor Registration: The Contractor is required to be registered with the Department of Labor and Industry under 39-9-201 and 39-9-204 MCA prior to the Contract being executed by the Owner. A bidder must demonstrate that it has registered or promises that it will register immediately upon notice of award and prior to the commencement of any work. If the prevailing bidder cannot or does not register in time for the Owner to execute the Contract within fifteen (15) days of the date on the notice of award, the Owner may award, at its sole discretion, to the next lowest responsible bidder who meets this requirement. The Owner will not execute a contract for construction nor issue a Notice to Proceed to a Contractor who is not registered per 39-9-401(a) MCA. It is solely the Contractor's responsibility to ensure that all Subcontractors are registered in accordance with Title 39, Chapter 9, MCA

11.8 No Party is Drafter. Each party has had an opportunity to negotiate the provisions of this Agreement and its Exhibits and attachments, and neither party shall be construed as the drafter.

11.11 Utilities

11.11.1 Underground Utilities: Buried utilities, including, but not limited to, electricity, gas, steam, air, water, telephone, sewer, irrigation, broadband coaxial computer cable, and fiber optic cables are very vulnerable and damage could result in loss of service. The telephone, broadband and fiber optic cables are especially sensitive and the slightest damage to these components will result in disruption of the operations of the campus.

11.11.2 "One Call" must be notified by phone and in writing at least 72 hours (3 business days) prior to digging to arrange and assist in the location of buried utilities in the field. (Dial 811). The Design-Builder shall mark the boundary of the work area. The boundary area shall be indicated with white paint and white flags. In winter, pink paint and flags will be accepted.

11.11.3 After buried utilities have been located, the Design-Builder shall be responsible for any utilities damaged while digging. Such responsibility shall include all necessary care including hand digging. Design-Builder's responsibility shall also include maintaining markings after initial locate. The area for such responsibility, unless otherwise indicated, shall extend 24 inches to either side of the marked center line of a buried utility line.

11.11.4 The Design-Builder's responsibility shall include repair or replacement of damaged utilities. The Design-Builder will also be responsible for all costs associated with reterminations and recertification.

11.11.5 Any buried utilities exposed by the operations of the Design-Builder shall be marked on the plans and adequately protected by the Design-Builder. If any buried utilities not located are exposed, the Design-Builder shall immediately contact the Owner and the Architect/Engineer. If, after exposing an unlocated buried utility, the Design-Builder continues digging without notifying Owner and Architect/Engineer and further damages the utility, the Design-Builder will be fully and solely responsible.

11.11.6 Damage to irrigation systems during seasons of no irrigation that are not immediately and adequately repaired and tested will require the Design-Builder to return when the system is in service to complete the repair.

11.11.7 In the event of a planned interruption of any existing utility service, the Design-Builder shall make arrangements with Owner at least 72 hours (3 business days) in advance. Shutdowns of the broadband or fiber optic cables will normally require 5 working days notice to the Owner. The Design-Builder shall bear all costs associated with the interruptions and restorations of service.

11.12 Vehicle Regulations

DRAFT

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

OWNER:

DESIGN-BUILDER:

(Name of Owner)

(Name of Design-Builder)

(Signature)

(Signature)

(Printed Name)

(Printed Name)

(Title)

(Title)

Date: _____

Date: _____

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NOTE: THE CONTRACT IS BASED ON A MODIFIED VERSION OF THE DBIA #530 AND #535 DOCUMENTS. A TRACKED CHANGES VERSION OF THE DOCUMENTS WILL BE MADE AVAILABLE TO PROPOSERS UPON WRITTEN REQUEST.

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

Document No. 535

Third Edition, 2022

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Washington, D.C.



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Article 1

General

1.1 Mutual Obligations.

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

1.2 Basic Definitions.

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

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

~~1.2.3~~ 1.2.3 Allowance Item is a description of the subject of an Allowance Value established pursuant to Section 6.4.1 of the Agreement.

1.2.4 Allowance Value is the amount established for an Allowance Item pursuant to Section 6.4.1 of the Agreement.

1.2.5 Application for Payment is the Submittal from the Design-Builder supporting payment pursuant to Article 7 of the Agreement.

1.2.6 Basis of Design Documents are the documents set forth in Section 3.04.F of Exhibit C.

1.2.7 Change Order is a written instrument issued after execution of the Agreement signed by Owner and design Builder pursuant to Article 9 of the General Conditions.

1.2.8 Commercial Terms are any documents that establish an agreement between the parties regarding a maximum cost, a scope of work, or a schedule, including but not limited to the GMP, an Early GMP, Not to Exceed Amount, Lump Sum, Hourly Rate, Contract Time, Target Budget, Target Schedule, Owner’s Project Criteria, Initial Project Scope, or Basis of Design Documents.

1.2.9 Contingencies are the amounts available for Design-Builder’s use and are defined in Section 6.4.4 of the Agreement. The Cost of the Work Contingency is defined in Section 6.4.4.a. The Design-Builder’s Contingency is defined in Section 6.4.4.b

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

1.2.41.2.11 *Contract Amendment* is a written amendment to the Contract Documents that incorporates additional terms into the Contract Documents. Later Contract Amendments govern over earlier Contract Amendments.

1.2.12 *Contract Price* shall mean the maximum amount that the Design-Builder may be compensated pursuant to this Agreement for any given phase.

1.2.13 *Contract Time* consists of the dates set forth in Article 5 of the Agreement.

1.2.14 *Date of Commencement* is the date set forth in Section 5.1 of the Agreement.

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

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

1.2.61.2.17 *Design-Builder's Delay Rate* is the amount established in Section 6.4.5.4 of the Agreement.

1.2.18 *Design-Builder's Fee Percentage* is the percentage set forth in Section 6.2.1 of the Agreement.

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

1.2.71.2.20 *Design Development Period* is the period in Phase 1 that is described in Section 6.6 of the Agreement.

1.2.21 *Design Submission* means any and all documents, shop drawings, electronic information, including computer programs and computer generated materials, data, plans, drawings, sketches, illustrations, specifications, descriptions, models, and other information developed, prepared, furnished, delivered or required to be delivered by, or for, Design-Builder (1) to the Owner under the Contract Documents; or (2) developed or prepared by or for the Design-Builder specifically to discharge its duties under the Contract Documents that are related to the design of the Project.

1.2.22 *Early GMP* is a GMP for a portion of the Work that is established prior to the establishment of the GMP for the entire Work as set forth in Section 6.6.1.5 of the Agreement.

1.2.23 *Early GMP Schedule* is the Schedule for progress and completion of an Early GMP Scope.

1.2.24 *Early GMP Scope* is the Scope of Work for an Early GMP.

1.2.25 *Extended General Conditions Costs* the result from the Design-Builder's Delay Rate multiplied by the number of days the project is delayed pursuant to Section 8.2 of the General

Conditions as set forth in Section 6.4.5.4 of the Agreement.

1.2.26 Final Completion is the date on which of the entire Project shall be deemed to have occurred when all Work is complete in accordance with the of the following have occurred:

(a) All requirements for Final Completion of the Project have been achieved and Punch List Completion has been fully satisfied;

(b) Owner shall have received and accepted a final certificate of occupancy allowing use and occupancy of the Project

(c) Owner shall have received and accepted all Construction Documents, Record Documents, as-built schedule, right-of-way record maps, surveys, test data and other deliverables required under the Contract Documents, including but;

(d) Design-Builder shall have delivered all operating manuals, warranties and other deliverables required by the Contract Documents;

(e) All special tools, equipment, furnishings and supplies purchased and/or used by Design-Builder as provided in this Contract have been delivered to Owner and all replacement spare parts shall have been purchased and delivered to Owner free and clear of Liens

(f) All of Design-Builder's obligations under the Contract Documents (other than obligations which by their nature are required to be performed after Final Completion) shall have been satisfied in full or waived in writing by Owner;

(g) Design-Builder shall have delivered to Owner a Notice of Final Completion for the Project; and

(i) All other conditions to Final Completion in this Contract shall have been satisfied.

.1 Owner will issue a Certificate of Final Acceptance to Design-Builder at such time as Owner determines that Final Acceptance has occurred.

.2 Final Completion will not limited to, prevent Owner from correcting any items identified in the punch list prepared under Section 6.6.1 and the submission of all documents set forth in Section 6.7.2-measurement, estimate or certificate made before or after completion of the Work, nor shall it prevent Owner from recovering from Design-Builder, its Surety(ies), or other provider of performance security or any combination of the foregoing, overpayment or other costs sustained for failure of Design-Builder to fulfill the obligations under the Contract Documents.

1.2.927 Force Majeure Events are those mean any of the following events that (provided such events are beyond the reasonable control of both Design-Builder and Owner, including the events of the Design-Builder, are not due to an act or omission of the Owner, and are not otherwise limited by Section 9.6 of the General Conditions) which materially and adversely affects the Design-Builder's obligations hereunder and which event (or the effects of which event) could not have been avoided by due diligence and use of reasonable efforts by the Design-Builder:

(a) Any earthquake exceeding 3.5 on the Richter scale epicentered within 25 miles of the specific location of damage on the Site, any earthquake exceeding 5.0 on the Richter scale epicentered within 50 miles from the specific location of damage on the Site, and any earthquake exceeding 6.5 on the Richter scale epicentered within 75 miles from the specific location of damage on the Site, based on the final determination regarding the location and magnitude of the earthquake published by the National Earthquake Information Center in Golden, Colorado;

- (b) Any blockade, rebellion, or war, floods;
- (c) Any riot, act of terrorism, or civil commotion in the Project location;
- (d) Any lawsuit seeking to restrain, enjoin, challenge or delay the construction of the Work or the granting of any Regulatory Approval of the Work;
- (e) The suspension of Work at the Site ordered by a Governmental Entity due to an epidemic or pandemic;
- (f) Unusually Adverse Weather; or
- (g) Industry wide strikes, labor disputes, earthquakes, epidemics, adverse weather conditions not reasonably anticipated, and other acts of God, work slowdowns, work stoppages, boycotts or other similar labor disruptions that are the not the result of Design-Builder's actions;

1.2.4028 General Conditions of Contract refer to this DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (2022 Edition, as revised).

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

1.2.29 GMP Amendment means an amendment to the Agreement entered into the parties at the conclusion of Phase 1 of the Project that establishes the Basis of Design Documents, the GMP, the Project Schedule and other terms agreed to by the parties

~~1.2.4230~~ GMP Proposal or Proposal means that proposal developed by Design-Builder in accordance with Section 6.6 of DBIA Document No. 530, *Standard Form of Agreement Between Owner and Design-Builder, Cost Plus Fee With an Option for a Guaranteed Maximum Price* or with Section 2.3 of DBIA Document No. 544, *Progressive Design-Build Agreement*, or DBIA Document No. 545, *Progressive Design-Build Agreement for Water and Wastewater Projects* the Agreement.

1.2.4331 Guaranteed Maximum Price (“GMP”) is the total compensation to the Design-Builder as set forth in the GMP Amendment that shall establish a binding GMP between the Parties for the Project pursuant to Section 6.1.1 of the Agreement.

1.2.32 Hazardous Conditions are any materials, wastes, ~~Materials~~, including “hazardous substances” and chemicals ~~deemed to be “hazardous under applicable Legal Requirements, waste,”~~ means any (a) substance, product, waste or the handling, storage, remediation, or disposal of other material of any nature whatsoever which are or becomes listed, regulated, or addressed pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, et seq. (“CERCLA”); the Hazardous Materials Transportation Act, 49 U.S.C. § 1801, et seq.; the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq. (“RCRA”); the Toxic Substances Control Act, 15 U.S.C. § 2601 et seq.; the Clean Water Act, 33 U.S.C. § 1251 et seq., each as amended, or any other federal, state or local statute, law, ordinance, resolution, code, rule, regulation, order or decree regulating, relating to, or imposing liability or standards of conduct concerning, any hazardous, toxic or dangerous waste, substance or material, as now or at any time hereafter in effect, (b) any substance, product, waste or other material of any nature whatsoever which may give rise to liability under any of the above statutes or under any statutory or common law theory based on negligence, trespass, intentional tort, nuisance or strict liability or under any reported decisions of a state or federal court, (c) petroleum or crude oil excluding de minimus amounts and excluding petroleum and petroleum products contained within regularly operated motor vehicles, and (d) asbestos or asbestos-containing materials in structures and or other improvements on or in the Site (other than mineral asbestos

naturally occurring in the ground).

1.2.33 Hourly Rates are the amounts per hour established pursuant to Section 6.4.6 of the Agreement. Fully Burdened Hourly Rates have the meaning set forth in Section 6.2.5 of the Agreement.

1.2.34 Initial Project Scope is the scope of the project that the parties collaboratively establish at the conclusion of the Validation Period that represents the parties' best determination of an achievable project scope within the Target Budget

1.2.35 Key Team Members mean those individuals and position descriptions identified by applicable Legal Requirements Design-Builder during the project procurement and other individuals identified as Key Team Members with the agreement of both parties, such agreement shall not be unreasonably withheld.

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

1.2.151.2.37 Liens mean any pledge, Lien, security interest, mortgage, deed of trust or other charge or encumbrance of any kind, or any other type of preferential arrangement (including any agreement to give any of the foregoing, any conditional sale or other title retention agreement, any lease in the nature of a security instrument and the filing of or agreement to file any financing statement or other instrument intended to perfect a security interest).

1.2.38 Lump Sum is the amount established by the Parties pursuant to Section 6.4.3 of the Agreement.

1.2.39 Lump Sum General Conditions Costs is the amount established by the Parties pursuant to Section 6.4.5 of the Agreement.

1.2.40 Lump Sum Scope is the description of the scope of the Work subject to the Lump Sum established pursuant to Section 6.4.3 of the Agreement.

1.2.41 Nonconforming Work is any Work that is found to not be in conformance with the Contract Documents.

1.2.42 Not to Exceed Amount is an amount that is established pursuant to Section 6.4.2 of the Agreement.

1.2.43 Not to Exceed Scope is the scope of Work subject to the Not to Exceed Amount established by the parties pursuant to Section 6.4.2 of the Agreement.

1.2.44 Open Book Basis means providing the Owner all underlying assumptions, price quotes and data associated with pricing or compensation (whether of the Design-Builder or the Owner) or adjustments thereto, including assumptions as to costs of the Work, schedule, composition of equipment spreads, equipment rates, labor rates, productivity, estimating factors, design and productivity allowance, contingency and indirect costs, risk pricing, discount rates, interest rates, and other items reasonably required by the Owner to satisfy itself as to the reasonableness of the amount.

1.2.45 Original GMP is the GMP set forth in the GMP Amendment

1.2.46 Owner's Budget is the amount of money set aside by the Owner for the Project.

1.2.47 Owner's Project Criteria are developed by or for Owner to describe Owner's program

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

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

~~1.2.17~~ **1.2.48** Owner Provided Information is any document or information provided by the Owner at any time, including but not limited to the Request for Qualifications, Request for Proposals, or Owner's Criteria.

1.2.49 Project Schedule is the schedule provided by the Design-Builder and approved by the Owner pursuant to the General Conditions and Exhibit C

1.2.50 Project is any portion of the Project that the parties determine will be scoped, priced, and constructed separately.

1.2.51 Reliable Decision is a decision, development, or election that refines the Owner's Project Criteria or Basis of Design Documents, that is approved by the Owner and that is set forth in the Reliable Decision Log. A Reliable Decision cannot change the Owner's Project Criteria or Basis of Design Documents but shall instead constitute a further development or refinement of the design for the Project with which all subsequent design, development and Construction Documents shall be consistent.

1.2.52 Reliable Decision Log is a log of Reliable Decisions agreed upon by the parties. The Reliable Decision Log supplements the Owner's Project Criteria, the Initial Project Scope, Basis of Design Documents, and any Commercial Term as applicable

1.2.53 Schedule of Values is the submission required pursuant to Section 6.1 of the General Conditions and Exhibit C.

1.2.54 Site are those areas designated in writing by the Owner for performance of the Work and such additional areas as may, from time to time, be designated in writing by the Owner for the Design-Builder's use in performance of the Work. For purposes of insurance (subject to any notification and other requirements imposed by the insurer(s) for approval), indemnification, safety and security requirements, the prevailing wage requirements, and payment for use of equipment, the term "Site" shall also include (a) the field office sites, (b) any property used for bonded storage of material for the Project approved by the Owner, (c) staging areas dedicated to the Project, and (d) areas where activities incidental to the Project are being performed by the Design-Builder or Subcontractors covered by the worker's compensation policy included in the insurance described in Exhibit B, but excluding any permanent locations of Design-Builder or such covered Subcontractors..

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

~~1.2.48~~ **56** Sub-Subcontractor is any person or entity retained by a Subcontractor as an independent contractor to perform any portion of a Subcontractor's Work and shall include Design Subconsultants, materialmen and suppliers.

~~1.2.49~~ **57** Submittal is any Design Submittal or other submission required by the Contract Documents.

1.2.58 Substantial Completion or Substantially Complete means ~~the date on which~~

(a) The Design-Builder has completed the Work, or an agreed-upon designated portion of the Work, is sufficiently complete in accordance with the Contract Documents so, such that Owner can occupy and use the Project or is in a condition that it can be used in a normal and safe manner, subject only to Punch List items and other Work that do not affect the ability to occupy the Project or designated portion thereof for such normal use and operation;

(b) The Project or designated portion thereof is sufficiently completed in accordance with the Contract, as modified by any executed Change Orders, so that it can be used for its intended purposes-purpose;

1.2.20(e) All conditions to acceptance by utility Owners have been satisfied or waived, and any waivers approved by the Owner, in its sole discretion;

(d) The Design-Builder has completed commissioning the Work or designated portion thereof in accordance with the commissioning requirements in the Contract Closeout Plan set forth in Section 3.12 of Exhibit C, and the commissioning tests have been successfully performed and satisfied (subject to such commissioning which is identified in the commissioning requirements to be conducted after Substantial Completion);

(e) To the extent applicable, all authorities having jurisdiction have confirmed and issued all pertinent approvals or other documents in respect thereof that the building and structures on the Site applicable to the portion of the Work for which Substantial Completion is sought are ready for occupancy; and

(f) All other conditions to Substantial Completion in the Contract shall have been satisfied.

1.2.59 Target Budget is the estimate for the GMP that is collaboratively established by the parties after the conclusion of the Validation Period that represents the parties' best determination of an achievable GMP.

1.2.60 Target Schedule is the estimated Project Schedule collaboratively established by the parties at the conclusion of the Validation Period that represents the parties' best determination of an achievable Schedule.

1.2.61 Trend is an issue identified in the Trend Log

1.2.62 Trend Log is a log of issues that have been identified by the Design-Builder or the Owner during the design process that may cause any Commercial Term to be modified or cause the Contract Time to be exceeded.

1.2.63 Unit Prices Are the prices established for specific units of Work as set forth in Section 6.4.6 of the Agreement.

1.2.64 Unusually Adverse Weather means weather that satisfies all of the following conditions:

(a) Unusually severe precipitation, sleet, snow, hail, heat, or cold conditions in excess of the norm for the location and time of year it occurred and could not have been reasonably anticipated, documented by 10-year climatological data obtained by the U.S. National Oceanic and Atmospheric Administration from the nearest nationally recognized reporting station to the Site;

(b) Unanticipated for the time of year;

(c) Occurring at the Site; and

(d) Having a materially adverse effect on the scheduled Work.

1.2.65 Validation Period is the time period established in Section 6.6 of the Agreement to accomplish the tasks set forth in Exhibit C, Section 2.02 for the Project.

1.2.66 Work is comprised of all Design-Builder's design, construction and other services required by the Contract Documents, including procuring and furnishing all materials, equipment, services, incidentals, and labor whether expressly required by or reasonably inferable from the Contract

Documents.

1.2.67 Work Group is a team of individuals with representatives from both the Owner and Design-Build Team that are responsible for developing Design Submissions, updated estimates, updated schedules and other required Submissions as required pursuant to Exhibit C.

Article 2

Design-Builder's Services and Responsibilities

2.1 General Services.

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

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

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

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

2.1.5 Representatives of the Design-Build Team, including at a minimum of the Design-Builder's Representative and a representative from the lead designer and lead constructor, shall meet with

the Owner at least on a weekly basis and shall provide to the Owner a written update regarding the status of the Project, including but not limited to the information required in Exhibit C and any issues that may have a material effect on the Project. The Design-Build Team shall issue meeting minutes within three days of meeting.

2.1.6 Design-Builder hereby assigns to Owner all its interest in first-tier subcontracts now or hereafter entered into by Design Builder for performance of any part of the Work. The assignment will be effective upon acceptance by Owner in writing and only as to those subcontracts which the Owner designates in writing. The Owner may accept said assignment at any time during the course of the Work and prior to Final Completion in the event of a suspension or termination of Design Builder's rights under the Contract Documents. Such assignment is part of the consideration to the Owner for entering into the Contract with Design Builder and may not be withdrawn prior to Final Completion.

2.1.7 Design-Builder was selected based in part on the qualifications of the Key Team Members identified in the Design-Builder's Statement of Qualifications and Proposals. Design-Builder may not substitute the identified Key Team Members without written permission from Owner, such permission shall not be unreasonably withheld. Any substituted Key Team Member must possess the same or better qualifications as the previously approved Key Team Member.

2.1.8 The Owner reserves the right to have the Design-Builder and/or subcontractors remove person(s) and/or personnel from any and all work on the project with cause but without cost to the Owner. Such requests from the Owner may be made verbally or in writing and may be done directly with the Design-Builder or indirectly through the Architect/Engineer. Cause may be, but not limited to, any of the following: incompetence, poor workmanship, poor scheduling abilities, poor coordination, disruption to the facility or others, poor management, causes delay or delays, disruption of the Project, will not strictly adhere to facility procedures and Project requirements either knowingly or unknowingly, insubordination, drug/alcohol use, possession of contraband, belligerent acts or actions, etc. The Design-Builder shall provide replacement person(s) and/or personnel acceptable to the Owner at no cost to the Owner.

2.1.8.1 Any issue or circumstance relating to or resulting out of this clause shall not be construed or interpreted to be interference with or impacting upon the Design-Builder's responsibilities and liabilities under the Contract Documents.

2.1.8.2 Person(s) and/or personnel who do not perform in accordance with the Contract Documents, shall be deemed to have provided the Owner with cause to have such persons removed from any and all involvement in the Work.

2.1.8.3 The Design-Builder agrees to indemnify and hold harmless the Owner from any and all causes of action, demands, claims, damages, awards, attorneys' fees, and other costs brought against the Owner by any and all person(s) or personnel as a result of actions under this clause.

2.1.9 The Design-Builder shall enforce strict discipline, appropriate behavior, and good order among the Design-Builder's employees, subcontractors at every tier and level, and other persons carrying out the Contract. The Design-Builder shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

2.1.8 Design-Builder shall develop and submit the following logs that will track the progress of the Project:

2.1.8.1 Reliable Decision Log. A Reliable Decision Log, including a full listing of Reliable Decisions and all changes to the Initial Project Scope and Basis of Design Documents and other Commercial Terms, will be maintained by the Design-Builder and provided to all attendees for review.

- a. Both parties must agree to include a Reliable Decision in the Reliable Decision Log.
- b. The Reliable Decision Log shall be updated after every Project Meeting, and in any case, on a weekly basis.
- c. Once a Reliable Decision in the Reliable Decision Log is approved in writing by the Owner, it shall be binding on the Design-Builder as if set forth in the Initial Project Scope, Basis of Design Documents, or other Commercial Terms.
- d. The Reliable Decision Log is for the sole purpose of tracking the development of the Design Submissions and other Commercial Terms.
- e. If a Reliable Decision will cause a change in the Owner's Project Criteria, the Initial Project Scope or Basis of Design Decisions, or any of the Commercial Terms, such changes must be processed pursuant to Articles 9 and 10.

2.1.8.2 Trend Log. If either party does not know the extent to which a Design Submission or other Submittal will alter a Commercial Term, either party may request in writing to identify a Trend in the Trend Log.

- a. The request to include a Trend in the Trend Log must include the following information:
 - i. Identification of the portion of the Design Submission or other Submittal for which the costs are uncertain and may cause any Commercial Term to be exceeded;
 - ii. The estimated change in the applicable Commercial Term; and
 - iii. Potential impacts or changes to the Initial Project Scope or Basis of Design Documents or other Commercial Term as a result of the Trend.
- b. Both parties must consent in writing to include the Trend in the Trend Log. The Design-Builder will track the Trend on the Trend Log, and the Trend Log shall be updated with the most recent information on a weekly basis.
- c. The parties will work collaboratively to resolve Trends in the Trend Log as quickly as possible. When a Trend in the Log is resolved and the resolution changes the Initial Project Scope, Basis of Design Documents and/or any Commercial Term, the resolution shall be memorialized in a Change Order. If the resolution does not change the Initial Project Scope, Basis of Design Documents and/or any Commercial Term, it shall be removed from the Trend Log.

2.2 Design Professional Services.

~~2.2.1—Design-Builder~~ **2.2.1** Owner does not intend to contract for, pay for, or receive any design services which are in violation of any professional licensing laws, and by execution of the Agreement, Design-Builder acknowledges that Owner has no such intent. Design-Builder shall, consistent with applicable state licensing laws, provide/furnish through qualified, licensed design professionals employed by Design-Builder, or procured from qualified, independent licensed Design Consultants, the necessary design services, including architectural, engineering and other design professional services, for the preparation of the required drawings, specifications and other design submittals to permit Design-Builder to complete the Work consistent with the Contract Documents. Nothing in the Contract Documents is intended or deemed to create any legal or contractual relationship between Owner and any Design Consultant.

2.2.2 Design-Builder shall employ only Design Consultants and/or Design Subconsultants who are duly licensed and qualified to perform the Work consistent with the Contract Documents. Prior to the date that Design Consultants and/or Design Subconsultants perform Work on the Project, Design-Builder shall identify in writing to Owner all Design Consultants and Design Subconsultants. To the extent that Design-Builder has not selected a Design Consultant or Design Subconsultant

prior to performing the Work, Design-Builder shall provide Owner in writing a list of any subsequently added Design Consultants and/or Design Subconsultants and their scope of Work prior to their performing Work on the Project. Owner may reasonably object to Design-Builder's selection of any Design Consultant or Design Subconsultant, provided that the Contract Price and/or Contract Time(s) shall be adjusted to the extent that Owner's decision impacts Design-Builder's cost and/or time of performance. Design-Builder shall not substitute a listed Design Consultant or Subconsultant without obtaining Owner's prior written consent; such consent shall not be unreasonably withheld. Nothing in the Contract Documents is intended or deemed to create any legal or contractual relationship between Owner and any Design Consultant or Design Subconsultant, including but not limited to any third-party beneficiary rights. Design-Builder assumes responsibility to Owner for the proper performance of the Work of the Design Consultants and any Sub-Consultant and any acts and omissions in connection with such performance.

2.2.3 Any references in the Contract Documents to Design-Builder's responsibilities or obligations to "perform" the design portions of the Work shall be deemed to mean that Design-Builder shall "furnish" the design for the Project.

2.3 Standard of Care for Design-Professional Services.

2.3.1 The standard of care for all ~~design~~ professional services performed to execute the Work shall be the care and skill ordinarily used by members of the applicable profession practicing under similar conditions at the same time and locality of the Project. The Design-Builder shall also perform the design and construction so that the Work meets or exceeds the performance requirements set forth in the Owner's Project Criteria, the Initial Project Scope and/or the Basis of Design Documents.

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

2.4 Design Development Services.

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

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

2.4.1.2 On or about the time of the Design Submissions, Design-Builder and Owner shall meet and confer about the Design Submissions, with Design-Builder identifying during such meetings, among other things, the evolution of the design and any changes to the Basis of Design Documents, or, if applicable, previously submitted Design Submissions. Changes to the Basis of Design Documents, including those that are deemed minor

changes under Section 9.3.1, shall be processed in accordance with Article 9. Minutes of the meetings, including a full listing of all changes, will be maintained by Design-Builder and provided to all attendees for review. Following the design review meeting, Owner shall review and approve the interim Design Submissions and meeting minutes in a time that is consistent with the turnaround times set forth in Design-Builder's schedule.

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

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

2.4.1.5 The Design-Builder shall provide an updated cost model for the Project periodically as required in Exhibit C. The Design-Builder shall also schedule and facilitate a one-day review meeting with the Owner to present and summarize changes in the Design Submission, changes to the scheduled Milestone dates and present an overview of cost model.

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

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

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

2.5 Legal Requirements.

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

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

2.6 Government Approvals and Permits.

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

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

2.7 Design-Builder's Construction ~~Phase~~ Services.

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

2.7.2 Design-Builder shall perform all construction activities efficiently and with the requisite expertise, skill and competence to satisfy the requirements of the Contract Documents. Design-Builder shall at all times exercise complete and exclusive control over the means, methods, sequences and techniques of construction.

~~2.7.3~~2.7.3 The Design-Builder shall assemble and install all equipment according to the applicable manufacturer's installation instructions. Work that does not conform to the applicable instructions and/or any resulting errors in assembly or installation shall be corrected by the Design-Builder. If the Owner determines that the Design-Builder has incorrectly assembled, installed and/or damaged any such equipment, the Design-Builder shall, at its own expense, furnish a competent manufacturer's representative to assist, instruct and approve the Design-Builder's corrected work.

2.7.4 If any materials or equipment are stored by Design-Builder, they shall be stored so as to ensure the preservation of their quality and fitness. Materials and equipment shall be placed on platforms or other hard, clean surfaces, and not on the ground, and shall be placed under cover and heated adequately to prevent condensation, oxidation or freezing. Stored materials and equipment shall be located so as to facilitate observation. The Design-Builder shall be responsible for all damage or loss that occurs as a result of its fault or negligence in connection with the care and protection of all materials and equipment until acceptance by the Owner.

2.7.5 Design-Builder is responsible for verifying that any equipment supplied by the Owner is in working order and sufficient for the purposes for which it was intended in the Project. If equipment furnished by Owner is not in working order or is not sufficient for the Project, Design-Builder shall notify Owner immediately, and Owner shall either repair or replace the equipment, at Owner's sole discretion. Design-Builder is responsible for the proper installation of the equipment furnished by Owner.

2.7.6 Design-Builder shall provide appropriate security for the Site and shall take all reasonable precautions and provide protection to prevent damage, injury, vandalism, theft, and loss to the

Work, equipment and materials used to perform the Work, real property within the Site, and other property at or on the Site, whether owned by Design-Builder, Owner, or any other third party.

2.7.7 Design-Builder shall maintain, rebuild, repair, restore or replace all Work (including plans and specifications, and materials, equipment, supplies and maintenance equipment which are purchased for permanent installation in, or for use during construction of, the Project, regardless of whether the Owner has title thereto) that is injured or damaged prior to Substantial Completion. Following Substantial Completion, Design-Builder shall continue to have responsibility to maintain, build, repair, restore or replace all Work not 100% completed at Substantial Completion, until Owner accepts maintenance responsibility with respect to such Work. Except as provided in Section 2.7.7.2, all remaining elements of the Project shall be considered accepted for maintenance purposes as of the Final Acceptance Date. Maintenance responsibility under this Section 2.7.7 includes rebuilding, repairing and restoring all other property at the Project Site whether owned by Design-Builder, Owner or any other Person.

.1 With respect to Work on property not owned by Owner, Design-Builder's obligations under this Section 2.7.7 shall terminate upon acceptance of such Work by the property owner and the Owner.

.2 During the period after Substantial Completion until Final Acceptance, the Owner may issue a Change Order under Article 9 requiring Design-Builder to continue to have responsibility for maintaining, rebuilding, repairing, restoring and replacing Work accepted by Owner, provided, however, no Change Order is required in connection with direction to proceed with Warranty Work.

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

2.7.9 Inspections. Design-Builder shall inform Owner of any part of the Work which is about to be covered and offer a full and adequate opportunity to Owner to inspect and test such part of the Work before it is covered. At all times before Final Completion, Design-Builder shall remove or uncover such portions of the finished construction Work as directed by Owner. After examination by the Owner Representative and any other Persons designated by Owner, Design-Builder shall restore the Work to the standard required by the Contract Documents. If the Work exposed or examined is not in conformance with the requirements of the Contract Documents, then uncovering, removing and restoring the Work and recovery of any delay to any Critical Path occasioned thereby shall be at Design-Builder's cost and Design-Builder shall not be entitled to any adjustment to the Contract Price or any time extension or any other relief. Furthermore, any Work done or materials used without adequate notice to and opportunity for prior inspection by Owner (if applicable) or without inspection in accordance with the Contract Documents may be ordered uncovered, removed or restored at Design-Builder's cost and without an adjustment to the Contract Price or a time extension, or any other relief, even if the Work proves acceptable after uncovering. Except with respect to Work done or materials used as described in the foregoing sentence, if Work exposed or examined under this Section 2.7.7 is in conformance with the requirements of the Contract Documents, then any delay in any Critical Path from uncovering, removing and restoring Work shall be considered an Owner-Caused Delay, and Design-Builder shall be entitled to a Change Order for the reasonable cost of such efforts and recovery of any delay to any Critical Path occasioned thereby.

2.7.10 Title. Design-Builder warrants that it owns, or will own, and has, or will have, good and marketable title to all materials, equipment, tools and supplies provided, or to be provided, by it and its Subcontractors that become part of the Project or are purchased for Owner for the operation, maintenance, rebuild, repair or replacement thereof, free and clear of all Liens.

.1. Title to all such materials, equipment, tools and supplies delivered to the Site shall pass to Owner, free and clear of all Liens, upon the sooner of (a) incorporation into the Project, or (b) payment by Owner to Design-Builder of invoiced amounts pertaining thereto.

.2 Notwithstanding any such passage of title, Design-Builder shall retain sole care, custody, and control of, and risk of loss with respect to, such materials, equipment, tools and supplies and shall exercise due care with respect thereto until Final Acceptance or until Design-Builder is removed from the Project.

2.7.11 Cutting and Patching. The Design-Builder shall be responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly. The Design-Builder shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or separate contractors by cutting, patching or otherwise altering such construction, or by excavation. The Design-Builder shall not cut or otherwise alter such construction by the Owner or a separate contractor except with written consent of the Owner and of such separate contractor; such consent shall not be unreasonably withheld. The Design-Builder shall not unreasonably withhold from the Owner or a separate contractor the Design-Builder's consent to cutting or otherwise altering the Work.

2.7.12 Use of Site. The Design-Builder shall confine operations at the site to areas permitted by law, ordinances, permits and the Contract Documents and shall not unreasonably encumber the site with materials or equipment. The Design-Builder shall not damage, endanger, compromise or destroy any part of the Project or the site, including but not limited to work performed by others, monuments, stakes, bench marks, survey points, utilities, existing features or structures. The Design-Builder shall be fully and exclusively responsible for and bare all costs and delays (including and costs of delay) for any damage, endangerment, compromise, or destruction of any part of the Project or site. The Design-Builder shall coordinate his operations with the Owner in order that the Owner will have maximum use of existing facilities surrounding the area of the Work, as agreed upon, at all times during normal working hours. Design-Builder further agrees to coordinate his operations so as to avoid interference with the Owner's normal operations to as great an extent as possible

2.8 Subcontractors and Labor

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

2.7-48.2 Design-Builder assumes responsibility to Owner for the proper performance of the Work of Subcontractors and any acts and omissions in connection with such performance. Nothing in the Contract Documents is intended or deemed to create any legal or contractual relationship between Owner and any Subcontractor or Sub-Subcontractor, including but not limited to any third-party beneficiary rights.

2.7-58.3 Design-Builder shall coordinate the activities of all Subcontractors. If Owner performs other work on the Project or at the Site with separate contractors under Owner's control, Design-Builder agrees to reasonably cooperate and coordinate its activities with those of such

separate contractors so that the Project can be completed in an orderly and coordinated manner without unreasonable disruption.

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

2.82.8.4 Design-BUILDER shall ensure that each Subcontract (at all tiers) shall include those terms that are specifically required by the Contract Documents to be included therein as well as such additional terms and conditions as are sufficient to ensure compliance by the Subcontractor with all applicable requirements of the Contract Documents, including but not limited to the following provisions:

.1 Effective procedures for timely resolution of claims and disputes, including an agreement by the Subcontractor to participate in any dispute proceeding pursuant to Article 10, if such participation is requested by Owner;

.2 A standard of professional responsibility or a standard for quality equal to or better than the requirements of the Contract Documents;

.3 A requirement to maintain usual and customary books and records for the type and scope of operations of the business in which the Subcontractor is engaged;

.4 A provision permitting audits to be conducted by the Design-BUILDER and Owner according to the terms of the Contract;

.5 A requirement to provide progress reports to the Design-BUILDER appropriate for the type and scope of Work performed and to meet the requirements of Exhibit C;

.6 A requirement that the Subcontractor maintain all appropriate licenses and registrations;

.7 A provision prohibiting assignment of the Subcontract without the Design-BUILDER's written consent;

.8 The following provision: "Nothing contained herein shall be deemed to create any privity of contract between Owner and the Subcontractor, nor does it create any duties, obligations, or liabilities on the part of Owner to the Subcontractor except those allowed under Montana law. In the event of any claim or dispute arising under the Subcontract and/or Design-BUILDER's contract with Owner, the Subcontractor shall look only to Design-BUILDER for any payment, redress, relief, or other satisfaction. The Subcontractor hereby waives any claim or cause of action against Owner arising out of the Subcontract or otherwise arising in connection with the Subcontractor's Work."; and

.9 Provisions in form and substance satisfactory to Owner, (a) Owner is a third party beneficiary of the Subcontract and shall have the right to enforce all of the terms of the Subcontract for its own benefit, and (b) all guarantees and warranties, express or implied, shall inure to the benefit of Owner, and its respective successors and assigns.

2.8.5 Construction Contractor Registration: All Subcontractors at any tier or level are required to be registered with the Department of Labor and Industry under 39-9-201 and 39-9-204 MCA prior to the Contract being executed by the Owner. Subcontractors shall demonstrate to the Design-BUILDER that it has registered or promises that it will register immediately upon notice of award and prior to

the commencement of any work.

2.9 Design-Builder's Responsibility for Project Safety.

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

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

2.89.3 Design-Builder's responsibility for safety under this Section 2.89 is not intended in any way to relieve Subcontractors and Sub-Subcontractors of their own contractual and legal obligations and responsibility for (i) complying with all Legal Requirements, including those related to health and safety matters; and (ii) taking all necessary measures to implement and monitor all safety precautions and programs to guard against injuries, losses, damages or accidents resulting from their performance of the Work.

2.910 Design-Builder's Warranty.

2.910.1 Design-Builder warrants to Owner that (i) the construction, including all materials and equipment furnished as part of the construction, shall be new unless otherwise specified in the Contract Documents, of good quality, in conformance with the Contract Documents and free of defects in materials and workmanship. If the parties have opted in Section _____ of the Agreement to establish a limited time frame for the warranty set forth in this Section, the warranty in this section shall be limited to the time frame set forth in Section _____ of the Agreement. (ii) the Project shall be fit for use for the purposes, objectives, functions, uses and requirements set out in or reasonably inferred from this Contract, and (iii) the Work shall meet all of the requirements of the Contract Documents. Design-Builder's warranty obligation excludes defects caused by abuse, alterations, or failure to maintain the Work in a commercially reasonable manner. Nothing in this warranty is intended to limit any manufacturer's warranty which provides Owner with greater warranty rights than set forth in this Section 2.910 or the Contract Documents. Design-Builder will provide Owner with all manufacturers' warranties upon Substantial Completion.

2.4011 Correction of Defective Work.

2.4011.1 Design-Builder agrees to correct any Work that is found to not be in conformance with the Contract Documents, ("Nonconforming Work"), including that part of the Work subject to Section 2.910 hereof, within a period of one year from the date of Substantial Completion of the Work or any portion of the Work, or within such longer period to the extent required by any specific warranty included in the Contract Documents.

2.4011.2 Nonconforming Work rejected by Owner shall be removed and replaced so as to

conform to the requirements of the Contract Documents, at Design-Builder's cost and without any adjustment to the Contract Price or time extension or any other relief; and Design-Builder shall promptly take all action necessary to prevent similar deficiencies from occurring in the future. The fact that Owner may not have discovered the Nonconforming Work shall not constitute an acceptance of such Nonconforming Work. Design-Builder shall, within seven (7) days of receipt of written notice from Owner that the Work is not in conformance with the Contract Documents, of Nonconforming Work, take meaningful steps to commence correction of such ~~nonconforming~~Nonconforming Work, including the correction, removal or replacement of the ~~nonconforming~~Nonconforming Work and any damage caused to other parts of the Work affected by the ~~nonconforming~~WorkNonconforming Work. If the correction of Nonconforming Work cannot be completed within such seven (7) day period, Design-Builder must (a) provide a schedule for correcting the Nonconforming Work and (b) commence and diligently prosecute such correction in accordance with the approved schedule to completion. If Design-Builder fails to commence the necessary steps within such seven (7) day period, Owner, in addition to any other remedies provided under the Contract Documents, may provide Design-Builder with written notice that Owner will commence correction of such ~~nonconforming~~Nonconforming Work with its own forces. If Owner does perform such corrective Work, Design-Builder shall be responsible for all reasonable costs incurred by Owner in performing such correction. If the ~~nonconforming~~Nonconforming Work creates an emergency requiring an immediate response, the seven (7) day period identified herein shall be deemed inapplicable.

~~2.10.3~~ The one-year period referenced in Section 2.10.1 above applies only to Design-Builder's obligation to correct ~~nonconforming~~2.11.3 Owner may agree to accept any Nonconforming Work without requiring it to be fully corrected. In such event, Owner shall be entitled to reimbursement of a portion of the Contract Price (which shall also reduce the GMP) in an amount equal to the greater of: (a) the amount deemed appropriate by Owner to provide compensation for future maintenance and/or other costs relating to the Nonconforming Work, or (b) 100% of Design-Builder's cost savings associated with its failure to perform the Work in accordance with Contract requirements. Such reimbursement (plus an administrative charge equal to 10% of the costs and expenses) shall be payable to Owner within ten days after Design-Builder's receipt of an invoice therefor. Alternatively, Owner may deduct the amount of such costs and expenses (plus an administrative charge equal to 10% of the costs and expenses) from any sums owed by Owner to Design-Builder pursuant to this Contract. Design-Builder acknowledges and agrees that Owner shall have sole discretion regarding acceptance or rejection of Nonconforming Work and the amount payable in connection therewith. Payment, reimbursement or deduction of the amounts owing to Owner under this Section 2.11.3 shall be a condition precedent to the acceptance of the applicable Nonconforming Work.

2.11.4 The one-year period referenced in Section 2.11.1 above applies only to Design-Builder's obligation to correct Nonconforming Work and is not intended to constitute a period of limitations for any other rights or remedies Owner may have regarding Design-Builder's other obligations under the Contract Documents.

2.12 Contract Phases

2.12.1 Phase 1. Phase 1 shall commence upon Notice to Proceed from the Owner and shall end on the Phase 1 Completion Date as set forth in the Target Schedule, collaboratively established pursuant to Exhibit C. The services provided by the Design-Builder during Phase 1 shall be established in Exhibit C.

.1 In Phase 1, the Design-Builder shall carefully and thoroughly examine the information set forth in Exhibit C, the existing site conditions, and any other information provided by the Owner with respect to the Project. Such information includes, but is not limited to, as-built drawings of the existing facilities; necessary testing of existing facilities; geotechnical and other site conditions; and legal, permitting, and regulatory requirements and restrictions

.2 The Design-Builder may not rely on information provided by the Owner and must validate all information provided by the Owner during Phase 1 as set forth in Exhibit C.

.3 The Design-Builder shall provide the submissions set forth in Exhibit C on an open book and transparent basis. In addition, the Design-Builder and the Owner shall, consistent with any applicable provision of the Contract Documents, agree upon the quantity and level of development for Design Submissions that the Owner may wish to review, which Design Submissions may include Milestone Design Submissions, design criteria, drawings, diagrams and specifications setting forth the Project requirements. Design Submissions shall be consistent with the Commercial Terms, as they may develop through the design process set forth in the Contract Documents.

.4 If the Design-Builder discovers or should have discovered with reasonable diligence Material Differences from the actual conditions at the Site or the Owner Provided Information, Design-Builder shall, upon discovery but no later than at the conclusion of Phase 1, provide Owner with written notice of any such Material Differences. A "Material Difference" is defined as one that would either a) impact the Owner's Project Criteria, the Initial Project Scope, the Design-Builder's Fee Percentage or a Commercial Term or b) be considered a Differing Site Condition. Design-Builder shall not be entitled to a Change Order for any Material Difference during Phase 2, including but not limited to for Differing Site Conditions, pursuant to Section 4.2.1 of the General Conditions, if the Material Difference could have been discovered, with reasonable diligence, during Phase 1 and was not disclosed pursuant to this Section.

2.12.2 Phase 2. Phase 2 is the final phase of each Project where the Design-Builder: (i) completes the design services and develops Construction Documents for the Project, (ii) performs the construction, start-up, testing and commissioning and closeout of the Project, (iii) undertakes any necessary warranty services for the Project, and (iv) performs other services as set forth in Exhibit C, the GMP Amendment and any Early GMP Amendment.

Article 3

Owner's Services and Responsibilities

3.1 Duty to Cooperate.

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

3.1.2 Owner shall provide timely reviews and approvals of ~~interim~~ Design Submissions and Construction Documents consistent with the turnaround times set forth in in the Contract, by agreement of the Owner and Design-Builder, or the approved Design-Builder's schedule, as applicable.

3.1.3 Owner shall give Design-Builder timely notice of any Work that Owner notices to be defective or not in compliance with the Contract Documents, provided, however, Owner shall have no liability to the Design-Builder for failure to notify the Design-Builder or failure to discover such defects or noncompliant Work.

3.2 Furnishing of Services and Information.

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

~~Design-Builder is entitled to rely upon in performing the Work:~~

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

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

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

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

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

~~3.2.1.6 To the extent available, environmental studies, reports and impact statements describing the environmental conditions, including Hazardous Conditions, in existence at the Site.~~ 3.2.1
The Owner's Project Criteria sets forth the information provided by the Owner.

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

3.3 Financial Information.

~~3.3.1~~ At 3.3.1 If Design-Builder has reasonable belief that Owner will not have sufficient funds to complete the Project, at Design-Builder's written request, Owner shall promptly furnish reasonable evidence satisfactory to Design-Builder that Owner has adequate funds available and committed to fulfill all of Owner's contractual obligations under the Contract Documents. If Owner fails to furnish such financial information in a timely manner, Design-Builder may stop Work under Section 11.3 hereof or exercise any other right permitted under the Contract Documents.

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

3.4 Owner's Representative.

3.4.1 Owner's Representative shall be responsible for providing Owner-supplied information and approvals in a timely manner to permit Design-Builder to fulfill its obligations under the Contract Documents. Owner's Representative shall also provide Design-Builder with prompt notice if it observes any failure on the part of Design-Builder to fulfill its contractual obligations, including any errors, omissions or defects in the performance of the Work. Owner's Representative shall communicate regularly with Design-Builder and shall be vested with the authority to act on behalf of Owner.

3.5 Government Approvals and Permits.

3.5.1 Owner shall obtain and pay for ~~all necessary those~~ permits, approvals, licenses, government charges and inspection fees set forth in ~~Owner's Permit List attached as an exhibit~~ the Permitting Strategy Plan established pursuant to the Agreement Section 3.09 of Exhibit C.

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

3.6 Owner's Separate Contractors.

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

Article 4

Hazardous ~~Conditions and Materials~~, Differing Site Conditions and Archaeological Resources

4.1 Hazardous ~~Conditions~~ Materials.

4.1.1 Unless otherwise expressly provided in the Contract Documents to be part of the Work, Design-Builder is not responsible for any Hazardous ~~Conditions~~ Materials encountered at the Site. ~~Upon that could have been reasonably discovered during the Validation Period. Unless working with Hazardous Materials is part of the scope of the Work, upon~~ encountering any Hazardous ~~Conditions~~ Materials, Design-Builder will stop Work immediately in the affected area and duly notify Owner ~~immediately thereof telephonically or in person, to be followed immediately by written notification~~, and, if required by Legal Requirements, all government or quasi-government entities with jurisdiction over the Project or Site.

4.1.2 Upon receiving notice of the presence of suspected Hazardous ~~Conditions~~ Materials that are not set forth as part of the Work or that could not have been reasonably discovered during the Validation Period, Owner shall take the necessary measures required to ensure that the Hazardous ~~Conditions~~ Materials are remediated or rendered harmless. Such necessary measures shall include Owner retaining qualified independent experts to (i) ascertain whether Hazardous ~~Conditions~~ Materials have actually been encountered, and, if they have been encountered, (ii) prescribe the remedial measures that Owner must take either to remove the Hazardous ~~Conditions~~ Materials or render the Hazardous ~~Conditions~~ Materials harmless.

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

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

4.1.5 To the fullest extent permitted by law, Owner shall indemnify, defend and hold harmless Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them, and their officers, directors, employees and agents, from and against any and all claims, losses, damages, liabilities and expenses, including reasonable attorneys' fees and expenses, arising out of or resulting from the presence, removal or remediation of Hazardous ~~Conditions~~ Materials at the Site pursuant to this Section.

4.1.6 Notwithstanding the preceding provisions of this Section 4.1, Owner is not responsible for any release or threatened release of a Hazardous ~~Conditions~~ Material (a) which was

brought onto the Site by any DB-Related Entity, or (ii) which was negligently removed or handled by the Design-Builder, Subcontractors or anyone for whose acts they may be liable. To the fullest extent permitted by law, regardless of the source, origin or method of deposit of such Hazardous Materials (“Design-Builder Release of Hazardous Materials”). Design-Builder shall indemnify, defend and hold harmless Owner and Owner’s officers, directors, employees and agents from and against all claims, losses, damages, liabilities and expenses, including attorneys’ fees and expenses, arising out of or resulting from those Hazardous Conditions introduced to the Site by Design-Builder, Subcontractors or anyone for whose acts they may be liable any such release or threatened release.

4.1.7 With respect to Hazardous Materials that are part of the Work, Design-Builder agrees to comply with all applicable regulatory authorities, including but not limited to any statute, regulation, or regulatory agency regarding such Hazardous Materials. Design-Builder agrees to work cooperatively with Owner and regulatory agencies with jurisdiction over the Project to properly handle, dispose of, and/or remediate any Hazardous Materials.

4.2 Differing Site Conditions.

4.2.1 Concealed or latent physical conditions or subsurface conditions at the Site that (i) materially differ from the conditions indicated in the ~~Contract Documents~~ Owner Provided Information in Exhibit C or (ii) are of an unusual nature, differing materially from the conditions ordinarily encountered and generally recognized as inherent in the Work, are collectively referred to herein as “Differing Site Conditions.” If Design-Builder encounters a Differing Site Condition, Design-Builder will be entitled to an adjustment in the Contract Price and/or Contract Time(s) to the extent Design-Builder’s cost and/or time of performance are adversely impacted by the Differing Site Condition. Notwithstanding the preceding, provided the parties sign the applicable GMP Amendment, Design-Builder shall not be entitled to a Change Order for Differing Site Conditions if the Differing Site Condition was discovered or could have been discovered, with reasonable diligence, during Phase 1.

4.2.2 Upon encountering a Differing Site Condition, Design-Builder ~~then~~ Design-Builder shall provide promptly immediately notify Owner thereof telephonically or in person, to be followed by written notice to Owner of such condition, which notice shall not be later than fourteen (14) ~~notification within five days after such condition has been encountered.~~ Design-Builder shall, to the extent reasonably possible, provide such notice before the Differing Site Condition has been substantially disturbed or altered. Design-Builder shall immediately stop Work in and secure the area pending further instructions.

4.2.3 If directed by Owner, Design-Builder shall promptly conduct such further investigation. If Design-Builder continues to believe that the material or condition falls within the scope of Section 4.2.1, Design-Builder shall at that time also advise Owner of any action recommended to be taken regarding the situation. Owner then will determine whether Design-Builder’s findings and proposed actions are acceptable and either approve, or require modification of, Design-Builder’s proposed actions. If the condition involves discovery of Hazardous Materials that are Owner’s responsibility under the Contract, Owner shall advise Design-Builder regarding its plans for Hazardous Materials Remediation and shall coordinate with Design-Builder in performance of such activities, in accordance with Section 4.1.

4.2.4 Owner shall have the right to require Design-Builder to recommence work in the area at any time, even though an investigation or other work may still be ongoing, so long as recommencing work would not violate any Legal Requirements. Design-Builder shall promptly recommence Work in the area upon receipt of notification from Owner to do so. On recommencing Work, Design-Builder shall follow all applicable procedures contained in the Contract Documents and all other Legal Requirements with respect to such work, consistent with Owner’s determination or preliminary determination regarding the nature of the material or condition.

4.3 Archaeological Resources

4.3.1 In the event the Design-Builder or any of its Subcontractors inadvertently discover any archaeological, paleontological, biological, cultural, or other resources at any time during the project, Design-Builder shall immediately notify the Owner telephonically and suspend all excavation activities at the site.

4.3.2 Design-Builder shall follow the procedures set forth in Section 4.2 with respect to addressing the discovery of and shall be entitled to a Change Order as set forth therein, provided, however, that the Design-Builder shall not be entitled to a Change Order if the archaeological, paleontological, biological, cultural, or other resource was discovered or could have been discovered, with reasonable diligence, during Phase 1.

4.3.3 "Archaeological Resource" shall mean any material remains of human life or activities which are of interest. This shall include all sites, objects, structures, artifacts, implements, and locations of prehistoric or archaeological interest, whether previously recorded or still unrecognized, including, but not limited to objects pertaining to prehistoric and historic American Indian or aboriginal burials, campsites, dwellings, and their habitation sites, including rock shelters and caves, their artifacts and implements of culture such as projectile points, arrowheads, skeletal remains, grave goods, basketry, pestles, mauls and grinding stones, knives scrapers, rock carvings and paintings, and other implements and artifacts of any material or form.

4.3.4 Any Archaeological Resources that may be discovered during progress of the Work shall, at Owner's sole discretion, be the property of Owner.

Article 5

Insurance and Bonds

5.1 Design-Builder's Insurance Requirements.

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

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

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

5.1.4 The Design-Builder's maintenance of insurance, its scope of coverage, and limits as required herein shall not be construed to limit the liability of the Design-Builder to the coverage provided by such insurance or otherwise limit the Owner's recourse to any remedy available at law or in equity. Design-Builder shall be financially responsible for all pertinent deductibles, self-insured retentions, and/or self-insurance. The Owner reserves the right to require complete copies of all

insurance policies at any time to verify coverage.

5.1.5 If Design-Builder maintains higher insurance limits than the minimums shown above, Owner shall be insured for the full available limits of commercial general and excess or umbrella liability maintained by Design-Builder, irrespective of whether such limits maintained by Design-Builder are greater than those required by this Agreement or whether any certificate of insurance furnished to the Owner evidences limits of liability lower than those maintained by Design-Builder.

5.1.6 Design-Builder's insurance coverage shall be primary insurance with respect to Owner. Any insurance, self-insurance, or insurance pool coverage maintained by Owner shall be excess of Design-Builder's insurance and shall not contribute with it.

5.1.7 Design-Builder shall cause each and every subcontractor to provide insurance coverage that complies with all applicable requirements of Design-Builder-provided insurance as set forth herein, except Design-Builder shall have sole responsibility for determining the limits of coverage required to be obtained by subcontractors. Design-Builder shall ensure that the Owner is an additional insured on each subcontractor's Commercial General liability insurance policy using an endorsement as least as broad as ISO CG 20 10 10 01 for ongoing operations and CG 20 37 10 01 for completed operations. The Design-Builder's policies

5.1.8 Failure on the part of the Design-Builder to maintain the insurance as required shall constitute a material breach of contract, upon which the Owner may, after giving as least five business days' notice to Design-Builder to correct the breach, immediately terminate the Agreement or, at its discretion, procure or renew such insurance and pay any and all premiums in connection therewith, with any sums so expended to be repaid to the Owner on demand, or at the sole discretion of the Owner, offset against funds due Design-Builder from the Owner.

5.2 Owner's Liability Insurance.

5.2.1 Owner shall procure and maintain from insurance companies authorized to do business in the state in which the Project is located such liability insurance ~~as set forth in the Insurance Exhibit to the Agreement~~ to protect Owner from claims which may arise from the performance of Owner's obligations under the Contract Documents or Owner's conduct during the course of the Project.

5.3 ~~Owner's Property~~Builder's Risk Insurance.

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

5.3.1.1 Loss or damage by fire and such other risks (including earthquake damage for those areas with a shaking level at 10g or above as indicated on the seismic map, <http://rmtd.mt.gov/aboutus/publications/files/NEHRP.pdf>) in an amount sufficient to permit

such insurance to be written at all times on a replacement cost basis. This may be insured against by attachment of standard form extended coverage endorsement to fire insurance policies. Certificates of Insurance MUST indicate earthquake coverage if coverage is required per the above referenced map

5.3.1.2 Loss or damage from leakage or sprinkler systems now or hereafter installed in any building on the premises

5.3.1.3 Loss or damage by explosion of steam boilers, pressure vessels, and oil or gasoline storage tanks, or similar apparatus now or hereafter installed in a building or buildings on the premises

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

5.3.3 Prior to Design-Builder commencing any Work, Owner shall provide Design-Builder with certificates evidencing that (i) all Owner's insurance obligations required by the Contract Documents are in full force and in effect and will remain in effect until Design-Builder has completed all of the Work and has received final payment from Owner; and (ii) no insurance coverage will be canceled, renewal refused, or materially changed unless at least thirty (30) days' prior written notice is given to Design-Builder. Owner's property insurance shall not lapse or be canceled if Owner occupies a portion of the Work pursuant to Section 6.6.32 hereof. Owner shall provide Design-Builder with the necessary endorsements from the insurance company prior to occupying a portion of the Work.

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

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

5.4 Asbestos Abatement Insurance

5.4.1 If Asbestos Abatement is identified as part of the Work under this contract, the Design-Builder or any subcontractor involved in asbestos abatement shall purchase and maintain **Asbestos Liability Insurance** for coverage of bodily injury, sickness, disease, death, damages, claims, errors or omissions regarding the asbestos portion of the work *in addition to* the CGL Insurance by reason of any negligence in part or in whole, error or omission committed or alleged to have been committed by the Design-Builder or anyone for whom the Design-Builder is legally liable.

5.4.2 Such insurance shall be in "per occurrence" form and shall clearly state on the certificate that asbestos work is included in the following limits: \$1,000,000 per occurrence; aggregate limit

of \$2,000,000.

5.4.3 Asbestos Liability Insurance as carried by the asbestos abatement subcontractor in these limits in lieu of the Design-Builder's coverage is acceptable provided the Contractor and the State of Montana are named as additional insureds and that the abatement subcontractor's insurance is PRIMARY as respects both the Owner and the Design-Builder. If the Design-Builder or any other subcontractor encounters asbestos, all operations shall be suspended until abatement with the associated air monitoring clearances are accomplished. The certificate of coverage shall be provided by the asbestos abatement subcontractor to both the Design-Builder and the Owner.

5.5 Bonds and Other Performance Security.

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

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

Article 6

Payment

6.1 Schedule of Values.

6.1.1 ~~Unless required by Owner upon execution of this Agreement, within ten (10) days of execution of the Agreement, Design-Builder shall submit for Owner's review and approval a schedule~~schedules of values for all of the Work, ~~as set forth in Exhibit C.~~ The Schedule of Values will (i) subdivide the Work into its respective parts; based on the project's Work Breakdown Structure (WBS); (ii) include values for all items comprising the Work; and (iii) serve as the basis for monthly progress payments made to Design-Builder throughout the Work. Design-Builder will furnish, as part of the Schedule of Values, adequate and reliable cost justification and documentation on an Open Book Basis so as to provide both Owner and Design Builder a transparent understanding of the cost data estimates and bids that comprise the initial baseline Schedule of Values as well as any updates thereto. Design-Builder will provide a final Schedule of Values with the GMP Proposal.

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

6.2 Monthly Progress Payments.

6.2.1 On or before the date established in the Agreement, Design-Builder shall submit for Owner's review and approval its Application for Payment requesting payment for all Work performed as of the date of the Application for Payment.

6.2.1.1 Periodic Estimates for Partial Payment shall be on a form provided by the Owner (Form 101) for payment by the Owner. Payment shall be requested for the labor and material incorporated in the work to date and for materials suitably stored, less the aggregate of previous payments, the retainage, and the 1% gross receipts tax.

6.2.1.2 The Design-Builder, by submission of any partial pay request, certifies that every request for partial payment is correct, true and just in all respects and that payment or credit had not previously been received. The Design-Builder further warrants and certifies, by submission of any partial pay request, that all previous work for which payment has been received is free and clear of all liens, disputes, claims, security interests, encumbrances, or causes of action of any type or kind in favor of the Design-Builder, subcontractors, material suppliers or other persons or entities and does release the Owner from such.

6.2.1.3 Progress payments do not constitute official acceptance of any portion of the work or materials whether stored on or off-site.

6.2.1.4 In compliance with state statutes (15-50-206 MCA), the Design-Builder will have the 1% Gross Receipts Tax withheld from all payments. Each "Public Contractor" includes all Subcontractors with contracts greater than \$80,000 each. The Design-Builder and all Subcontractors will withhold said 1% from payments made to all Subcontractors with contracts greater than \$80,000.00 and make it payable to the Montana Department of Revenue. The Design-Builder and all Subcontractors shall also submit documentation of all contracts greater than \$80,000.00 to the Montana Department of Revenue on the Department's prescribed form.

6.2.1.5 Until the work is complete, the Owner will pay 95% of the amount due the Design-Builder on account of progress payments.

6.2.1.6 If the Work and its progress are not in accordance with all or any part, piece, or portion of the Contract Documents, the Owner may, at its sole discretion and without claim by the Design-Builder, increase the amount held as retainage to whatever level deemed necessary to effectuate performance and progress of the Work, for anticipated repairs, warranties or completion of the Work by the Design-Builder or through the letting of other contracts. The Design-Builder will not be entitled to additional costs, expenses, fees, time, and such like, in the event the Owner increases the amount held as retainage due to non-compliance and/or non-performance with all or any part, piece, or portion of the Contract Documents.

6.2.1.7 The Design-Builder may submit obligations/securities in a form specified in 18-1-301 Montana Code Annotated (MCA) to be held by a Financial Institution in lieu of retainage by the Owner. The Owner will establish the amount that would otherwise be held as retainage. Should the Design-Builder choose to submit obligations/securities in lieu of retainage, the Owner will require the Financial Institution to execute the Owner's "Account Agreement for Deposit of Obligations Other Than Retainage" (Form 120) prior to submission of any obligations/securities in accordance with 18-1-302 MCA. The Design-Builder must extend the opportunity to participate in all obligations/securities in lieu of retainage on a pro rata basis to all subcontractors involved in the project and shall be solely responsible for the management and administration of same. The Owner assumes no liability or responsibility from or to the Design-Builder or Subcontractors regarding the latter's participation

6.2.2 Prior to submitting an invoice Design-Builder will provide to the Owner on the 10th day of each month a proposed progressed Primavera Schedule and progress reports for Owner's review for 1 week.

6.2.3 After the monthly Schedule progress and progress reports are reviewed and approved Design-Builder will provide to the Owner on the 25th day of each month an invoice and Schedule of

Values, along with the Primavera Schedule and progress reports provided fifteen (15) days prior. Invoices from the Design-Builder will be based on the actual time and reimbursable expenses incurred to complete the work for items included in the Cost of the Work. General Conditions will be invoiced as required pursuant to the Agreement. The Application for Payment shall be accompanied by all supporting documentation required by the Contract Documents and/or established at the meeting required by Section 2.1.4 hereof, shall be in a form acceptable to Owner, including but not limited to the following information:

.1 An Invoice Cover Sheet that will include the following items:

- a. Project name and title;
- b. Invoice number (numbered consecutively, starting with "1");
- c. Period covered by the invoice (specific beginning and ending calendar days);
- d. Total amount authorized;
- e. Total amount invoiced through last period;
- f. Current invoice amount;
- g. Total invoiced to-date;
- h. Percent invoiced;
- i. Remaining Contract Price (exclusive of the Allowance amounts), GMP, and remaining Allowance amounts;
- j. Retainage withheld;
- k. Net amount due Design-Builder
- l. Total amount earned to date for the Project as a whole;
- m. Authorized signature, title of signer and date of signature; and
- n. Signatures of Design-Builder and Design-Builder's Quality Control Manager

.2 An itemization of the costs incurred pursuant to the Contract, including but not limited to:

- a. The detailed amounts spend for the Cost of the Work under Section 6.23 of the Agreement incurred during the period of the Application for Payment and the back-up documentation for the Cost of the Work, including but not limited to timesheets, invoices, purchase orders, or any other document that evidences the Cost of the Work or any other cost for which Design-Builder requests reimbursement;
- b. The Design-Builder's Fee Percentage incurred;
- c. Allowance Items established under Section 6.4.1 of the Agreement;
- d. Not to Exceed Amounts established under Section 6.4.2 of the Agreement;
- e. _____
- f. Any Lump Sums established pursuant to Section 6.4.3 of the Agreement;
- g. Costs charged to Contingencies under Section 6.4.4. of the Agreement;
- h. Design-Builder's Lump Sum General Conditions Costs established under Section 6.4.5 of the Agreement, if applicable; and
- i. Unit Prices and Hourly Rates established under Section 6.4.6 of the Agreement, if applicable.

.3 The monthly periodic deliverables in Exhibit C for the relevant Phase of the Work;

.4 Certification by the Design-Builder's Quality Control Manager certifying that

- a. The Work has been performed in accordance with the approved quality

Control Program; and

b. the elements of the approved Quality Control Program and all the measures and procedures provided for therein are functioning properly and are being followed.

.5 A Conditional Waiver and Release on Progress Payment, in the statutory form, signed by Design-Builder and each Subcontractor or supplier that provided services, materials or equipment included in the invoice.

.6 An Unconditional Waiver and Release Upon Progress Payment, in the statutory form, signed by Design-Builder and each Subcontractor or supplier that provided materials or equipment included in any preceding invoice and for which Design-Builder received payment.

.7 Other supporting documents as requested by Owner to facilitate its determination of the amount payable including but not limited to:

a. Hours and rates for sole sourced work.

b. Material and equipment purchase orders and delivery backup.

c. Progressed CPM resource loaded Primavera project schedule.

d. Subcontractor invoices.

6.2.4 Cash Flow

.1 Along with the baseline CPM resource loaded schedule the Design-Builder will provide an overall anticipated monthly cash flow for the project. The format for this cash flow will follow the example set forth in Exhibit C.

.2 Every month the Design-Builder will update this cash flow with the following information

a. Baseline planned monthly costs

b. Actual monthly costs

c. Earned (Budgeted Work Completed) Monthly Costs

d. Forecast monthly costs to complete the project

6.2.5 The Application for Payment may request payment for equipment and/or materials ~~not yet incorporated into~~ delivered to the Project, provided that (i) Owner is satisfied that the equipment ~~Site~~ and materials are suitably stored at either the Site or another acceptable location; (ii) the equipment and materials are protected by, or for completed preparatory work. Payment may similarly be requested for material stored off Site, provided Design-Builder complies with or furnishes satisfactory evidence of the following:

.1 The material will be placed in a warehouse that is structurally sound, dry, lighted and suitable for the materials to be stored;

.2 The warehouse is located within a 10-mile radius of the Project. Other locations may be utilized, if approved in writing, by Owner;

.3 Only materials for the Project are stored within the warehouse (or a secure portion of a warehouse set aside for the Project);

.4 Design-Builder furnishes Owner a certificate of insurance; and (iii) upon extending Design-Builder's insurance coverage for damage, fire, and theft to cover the full value of all materials stored, or in transit;

.5 The warehouse (or secure portion thereof) is continuously under lock and key, and only Design-Builder's authorized personnel shall have access;

.6 Owner shall at all times have the right of access in the company of Design-Builder;

.7 Design-Builder and its surety assume total responsibility for the stored materials;

.8 Design-Builder furnishes to Owner certified lists of materials stored, bills of lading, invoices, and other information as may be required, and shall also furnish notice to Owner when materials are moved from storage to the Site; and

.9 Upon payment, Owner will receive the equipment and materials free and clear of all liens and encumbrances.

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

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

6.3 Withholding of Payments.

6.3.1 On or before the date established in the Agreement, Owner shall pay Design-Builder all amounts properly due. If Owner determines that Design-Builder is not entitled to all or part of an Application for Payment as a result of Design-Builder's failure to meet its obligations hereunder, it will notify Design-Builder in writing at least five (5) days prior to the date payment is due. The notice shall indicate the specific amounts Owner intends to withhold, the reasons and contractual basis for the withholding, and the specific measures Design-Builder must take to rectify Owner's concerns. Design-Builder and Owner will attempt to resolve Owner's concerns prior to the date payment is due. If the parties cannot resolve such concerns, Design-Builder may pursue its rights under the Contract Documents, including those under Article 10 hereof. When Design-Builder removes the grounds for withholding payment, Design-Builder shall provide written evidence thereof. If such evidence is satisfactory to Owner, Owner will include the amount so withheld in the next scheduled progress payment.

~~6.3.26.3.2~~ Specifically and without limitation, Owner may deduct from each payment the following:

.1 Claims against Design-Builder;

.2 Defective Work not remedied or Work not performed in accordance with the Contract Documents;

.3 Failure of Design-Builder to make proper payments to any of its Subcontractors;

.4 Failure to perform the Work in accordance with the Current Schedule;

.5 Damage to other work or property caused by Design-Builder or any entity for which Design-Builder is responsible;

.6 Damages owing to Owner under the terms of the Contract;

.7 Any and all other circumstances in which Owner determines that it is necessary to protect its interests.

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

6.4 Right to Stop Work and Interest.

6.4.1 If Owner fails to pay timely Design-Builder any undisputed amount that becomes due, Design-Builder, in addition to all other remedies provided in the Contract Documents, may stop Work pursuant to Section 11.3 hereof. ~~All payments due and unpaid shall bear interest at the rate set forth in the Agreement, provided Design-Builder gives Owner five business days' written notice of its intent to stop work and an opportunity to cure the late payment.~~

6.5 Design-Builder's Payment Obligations.

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

6.6 Substantial Completion.

6.6.1 Design-Builder shall notify Owner when it believes the Work, or to the extent permitted in the Contract Documents, a portion of the Work, ~~is Substantially Complete, representing an Interim Milestone, has achieved Substantial Completion.~~ Within five (5) days of Owner's receipt of Design-Builder's notice, Owner and Design-Builder will jointly inspect such Work to verify that ~~it is Substantially Complete in accordance with the requirements of the Contract Documents.~~ Design-Builder has achieved Substantial Completion in accordance with the requirements of the Contract Documents. Owner will conduct reasonable inspections, surveys and/or testing as Owner deems necessary. If such inspections, surveys and/or tests disclose that any Work does not meet the requirements of the Contract Documents, Owner will promptly advise Design-Builder as to any errors, omissions, deviations, defects, or deficiencies in the Work necessary to be corrected as a condition to Substantial Completion and as to any errors, omissions, deviations, defects or deficiencies which may be corrected as Punch List items. Upon correction of the errors, omissions, deviations, defects, or deficiencies identified as a prerequisite to Substantial Completion, Design-Builder shall provide written notification to Owner and Owner will conduct another round of inspections, surveys and/or tests. This procedure shall be repeated until Owner finds that all prerequisites to Substantial Completion have been met. If such Work is Substantially Complete, Owner shall prepare and issue a Certificate of Substantial Completion that will set forth (i) the date of Substantial Completion of the Work or portion thereof; (ii) the remaining items of Work that have to be completed before final payment; (iii) provisions (to the extent not already provided in the Contract Documents) establishing Owner's and Design-Builder's responsibility for the Project's security, maintenance, utilities and insurance pending final payment; and (iv) an acknowledgment that warranties commence to run on the date of Substantial Completion, except as may otherwise be noted in the Certificate of Substantial Completion.

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

~~**6.6.3**~~ **6.6.2** Owner, at its option, may use a portion of the Work which has been determined to be Substantially Complete, provided, however, that (i) a Certificate of Substantial Completion has been issued for the portion of Work addressing the items set forth in Section 6.6.1 above; (ii) Design-Builder and Owner have obtained the consent of their sureties and insurers, and to the extent applicable, the appropriate government authorities having jurisdiction over the Project; and (iii) Owner and Design-Builder agree that Owner's use or occupancy will not interfere with Design-Builder's completion of the remaining Work.

6.7 Final Payment-Completion

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

6.7.1 Design-Builder shall notify Owner when it believes the entire Work, or to the extent permitted in the Contract Documents a portion of the Work, has achieved Final Completion. Within five (5) days of Owner's receipt of Design-Builder's notice, Owner and Design-Builder will jointly inspect such Work to verify that Design-Builder has achieved Final Completion in accordance with the requirements of the Contract Documents. Owner will conduct reasonable inspections, surveys and/or testing as Owner deems necessary. If such inspections, surveys and/or tests disclose that any Work does not meet the requirements of the Contract Documents, Owner will promptly advise Design-Builder as to any errors, omissions, deviations, defects or deficiencies in the Work necessary to be corrected as a condition to Final Completion and as to any errors, omissions, deviations, defects or deficiencies which may be corrected as Punch List items. Upon correction of the errors, omissions, deviations, defects, or deficiencies identified as a prerequisite to Final Completion, Design-Builder shall provide written notification to Owner and Owner will conduct another round of inspections, surveys and/or tests. This procedure shall be repeated until Owner finds that all prerequisites to Final Completion have been met. If such Work is Substantially Complete, Owner shall prepare and issue a Certificate of Final Completion that will set forth the date of Final Completion of the Work or portion thereof.

6.78 Final Payment.

6.8.1 When the Design-Builder has completed all Work on all Projects in accordance with the terms of the Contract Documents and received a Certificate of Final Completion, the Design-Builder shall properly execute and submit a Final Application for Payment final invoice to Accounts Payable. Once the Final Application for Payment has been processed, the Owner's Procurement Department will issue the Certificate of Completion and Release to be executed by the Design-Builder and returned to the Procurement Officer. The Certificate of Completion and Release shall constitute a waiver of all claims by the Design-Builder except for unsettled claims specifically stated, if any. There will only be one Final Payment at the conclusion of all Projects.

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

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

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

6.7.2.1 The Certificate of Completion and Release which shall warrant that the Design-Builder has fully completed its work included in the Contract and has fully paid for labor, materials, equipment, services, taxes and all other costs and expenses of every nature and kind whatsoever resulting from this Contract. If any dispute exists between the Design-Builder and any person, firm or corporation to which Design-Builder might be obligated in connection with this Contract, the Design-Builder shall state the name of claimant and amount and general nature of claim against the Contractor. The Certificate of Completion and Release shall state the amount and nature of all present and future claims that the Design-Builder may have against the Owner relative to this Contract. The Contract work shall not be complete until after the Design-Builder has returned to the Procurement Officer a properly completed Certificate of Completion and Release. ;

.2 Unconditional Waiver and Release Upon Final Payment, in a form acceptable to Owner, from all Subcontractors.;

.3 Consent of Design-Builder's surety, if any, to ~~final payment~~Final Payment;

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

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

6.7.3.5 The OMWBE Design-Build Reporting Form as required in Exhibit C and as set forth in Exhibit H; and

.6 Any additional documents, certificates, records, plans, releases or other materials established in the Project Closeout Plan as required for Final Completion. .

6.8.3 Any retainage shall be released pursuant to State Law.

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

6.7.48.5 Deficiencies in the Work discovered after Substantial Completion, whether or not such deficiencies would have been included on the punch list if discovered earlier, shall be deemed warranty Work. Such deficiencies shall be corrected by Design-Builder under Sections 2.910 and 2.4011 herein and shall not be a reason to withhold final payment from Design-Builder, provided, however, that Owner shall be entitled to withhold from the Final Payment the reasonable value of completion of such deficient work until such work is completed.

Article 7

Indemnification

7.1 Patent and Copyright Infringement.

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

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

patent or copyright; or (ii) replace said Work with Work that does not infringe or violate any such patent or copyright.

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

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

7.2 Tax Claim Indemnification. Not Used

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

7.3 Payment Claim Indemnification.

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

7.4 Design-Builder's General Indemnification.

7.4.1 Except as set forth in Section 7.4.2 below, ~~the Design-Builder, to the fullest extent permitted by law, shall indemnify, hold harmless and protect, defend Owner, and save the state, its officers, directors, selected and appointed officials, agents, and employees, while acting within the scope of their duties as such, harmless from and against all claims, losses, damages, liabilities, demands, causes of action, and judgments whatsoever (including attorneys' the cost of defense and reasonable attorney fees and expenses, for non-party bodily):~~ 1) arising in favor of or asserted by ~~third parties on account of damage to property, personal injury, sickness or death and non-party property damage or destruction (other than to the Work itself) but only to the extent which injury, death, or damage; or,~~ 2) arising out of or resulting from ~~performance or failure to perform, or omissions of services, or in any way results from the negligent acts or omissions of the Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable, its agents, agents, or subcontractors.~~

7.4.2 For indemnity obligations that arise from professional errors and omissions, Design-Builder, to the fullest extent permitted by law, shall indemnify Owner, its officers, directors, and employees from and against claims, losses, damages, liabilities, including attorneys' fees and expenses, for ~~non-party~~ bodily injury, sickness, or death and ~~non-party~~ property damage or

destruction (other than to the Work itself) but only to the extent resulting from the negligent acts or omissions of Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable.

7.4.34 If an employee of Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable has a claim against Owner, its officers, directors, employees, or agents, Design-Builder's indemnity obligations set forth in ~~Sections 7.4.1 and 7.4.2~~ above shall not be limited by any limitation on the amount of damages, compensation or benefits payable by or for Design-Builder, Design Consultants, Subcontractors, or other entity under any employee benefit acts, including workers' compensation or disability acts. Solely for the purposes of the indemnification obligations under this Agreement, Design Builder specifically and expressly waives any immunity that may be granted it under any worker's compensation laws, provided that such waiver shall be expressly limited to Design-Builder's indemnity obligations herein and shall not be intended as a benefit to any third party. Further, the indemnification obligation under this Agreement shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable to or for any third party under workers compensation acts, disability benefits acts, or other employee benefits acts. This waiver was mutually negotiated.

7.4.6 No Effect on Other Rights. The obligations described in this Section 7.4 shall not be construed to limit rights and obligations provided by law or equity which would otherwise exist in favor of a Person indemnified hereunder.

7.4.7 Notification of Third Party Claim. Owner and Design-Builder shall each provide timely notification to the other party of the receipt of any third party claim relating to the Contract.

7.5 Owner's General Lower Tier Contractors Indemnification Obligations

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

~~7.6~~ **7.5.1** Design-Builder shall include in its contracts with all lower tier contractors, including but not limited to its Design Consultant, Subconsultants, and Subcontractors, the indemnification obligations set forth in this Agreement and the General Conditions and shall include Owner as an Indemnatee for all such indemnification provisions.

7.6 Survival

7.6.1 The Indemnification obligations in this Article shall survive the expiration or termination of this Agreement.

7.7 Limited Recourse.

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

Article 8
Time

Time

8.1 Obligation to Achieve the Contract Times.

8.1.1 Design-Builder agrees that it will commence performance of the Work and achieve the Contract Time(s) in accordance with Article 5 of the Agreement, a GMP Amendment, and any Early GMP Amendment.

8.2 Delays to the Work.

~~8.2.1~~ **8.2.1** Except as set forth in Section 9.6 below, if Design-Builder is delayed on the critical path in the performance of the Work due to acts, omissions, conditions, events, or circumstances beyond its control and due to no fault of its own or those for whom Design-Builder is responsible, the Contract Time(s) for performance shall be reasonably extended by Change Order-, but only to the extent that the critical path of the Contract Time has been impacted. By way of example, events that will entitle Design-Builder to an extension of the Contract Time(s) include acts or omissions of Owner or anyone under Owner's control (including separate contractors), changes in the Work, Differing Site Conditions, Hazardous ~~Conditions~~ Materials, and Force Majeure Events. Design-Builder shall provide notice and documentation of any delay pursuant to Article 10.

8.2.2 In addition to Design-Builder's right to a time extension for those events set forth in Section 8.2.1 above, Design-Builder shall also be entitled to an appropriate adjustment of the Contract Price provided, however, that the Contract Price shall not be adjusted for Force Majeure Events unless otherwise provided in the Agreement. The adjustment to the Contract Price for delay shall be limited to the Design-Builder's Delay Rate as set forth in Section 6.4.5.4 of the Agreement.

Article 9

Changes to the Contract Price and Time

9.1 Change Orders.

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

9.1.1.1 The scope of the change in the Work;

9.1.1.2 The amount of the adjustment to the Contract Price or any Commercial Term; and

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

9.1.2 All changes in the Work authorized by applicable Change Order shall be performed under the applicable conditions of the Contract Documents. Owner and Design-Builder shall negotiate in good faith and as expeditiously as possible the appropriate adjustments for such changes. Unless expressly set forth in the Change Order, Change Orders shall include all costs, including but not limited to all incidental and indirect costs and time extensions associated with the Change. Changes Orders will not be allowed unless there is an actual change to the Work.

9.1.3 If Owner requests a proposal for a change in the Work from Design-Builder and subsequently elects not to proceed with the change, a Change Order shall be issued to reimburse Design-Builder for reasonable costs incurred for estimating services, design services and services

involved in the preparation of proposed revisions to the Contract Documents.

9.1.4 Owner may make changes in the Project, including but not limited to adding and/or removing Work from the Project. In such case, Design-Builder shall work with the Owner to adjust the remaining Work to meet as many of Owner's Project changes as reasonably possible within the applicable Commercial Term. At Owner's sole discretion, it may remove Work from the Project rather than increase the applicable Commercial Term to equitably adjust for claims by Design-Builder pursuant to Article 10 or Differing Site Conditions pursuant to Section 4.2.

9.2 Work Change Directives.

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

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

9.3 Minor Changes in the Work.

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

9.4 Contract Price Adjustments.

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

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

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

9.4.1.3 ~~Costs,~~The Cost of the Work as well as fees and any other markups set forth in the Agreement; ~~or~~

9.4 The increase in the Lump Sum General Conditions as set forth in Section 6.4.15.4 of the Agreement; or

.5 If an increase or decrease cannot be agreed to as set forth in items 9.4.1.1 through 9.4.1.34 above and Owner issues a Work Change Directive, the cost of the change of the Work shall be determined by the reasonable expense and savings in the performance of the Work resulting from the change, including ~~a reasonable overhead and profit,~~the Design-Builder's Fee Percentage (if applicable), as may be set forth in the Agreement.

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

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

9.5 Emergencies.

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

9.6 Limitations on Changes to the Contract Time and Contract Price

Notwithstanding anything in Article 9, the risks arising from the following events or circumstances shall be borne exclusively by Design-Builder, shall not be the basis for any relief, changes in the Contract Price, changes in the Contract Time, or otherwise, to Design-Builder:

.1 Delays in obtaining or delivery of goods or services from any Subcontractor, unless Subcontractor's reason for delay arises from an event that would otherwise be excusable to Design-Builder under this Contract;

.2 Delays of common carriers unless the common carrier's reason for the delay arises from an event that would otherwise be excusable to Design-Builder under this Contract;

.3 General market and economic conditions affecting the availability, supply or cost of labor, equipment and materials, construction equipment and supplies, or commodities;

.4 Weather conditions, except conditions that are within the definition of a Force Majeure;

.5 Strikes, labor disputes, work slowdowns, work stoppages, boycotts or other similar labor disruptions that are the result of Design-Builder's actions;

.6 The suspension, termination, interruption, denial or failure to obtain or nonrenewal of any permit, license, consent, authorization or approval which is necessary for the performance of the Work or the operation or maintenance of the Work, except for any such matter involving an approval required or provided by Owner;

.7 Material Differences as defined in Section 2.12.1.4 that could have been discovered during Phase 1 and were not disclosed by Design-Builder during Phase 1; and

.8 Bankruptcy or insolvency of a Subcontractor or inability of a Subcontractor to perform, unless the underlying cause of such inability would otherwise be considered

grounds for an Excusable Delay hereunder.

Article 10

Contract Adjustments and Disputes

10.1 Requests for Contract Adjustments and Relief.

10.1.1 If either Design-Builder or Owner believes that it is entitled to relief against the other for any event arising out of or related to the Work or Project, such party shall provide an initial written notice to the other party of the basis for its claim for relief. ~~Such~~The initial written notice shall, if possible, be made prior to incurring any cost or expense and in accordance with any specific notice requirements contained in applicable sections of these General Conditions of Contract. In the absence of any specific notice requirement, the initial written notice shall be given within a reasonable time, in any case not to exceed twenty-one (21) days, after the occurrence giving rise to the claim for relief or after the claiming party reasonably should have recognized the event or condition giving rise to the request, whichever is later. Such written notice shall be separate from the Reliable Decision Log or Trend Log maintained by the Design-Builder, unless the parties specifically agree to allow the Reliable Decision Log or Trend Log to operate as such written notice of claims. The initial written notice shall include a description of the claim for relief requested, a description of the occurrence giving rise to the claim for relief, and a preliminary analysis of the cost and schedule impact of the claim for relief.

10.1.2 The claimant shall provide more complete information with respect to the claim within fourteen (14) days of the initial notice. The more complete information shall include sufficient information to advise the other party of the ~~circumstances giving rise to the claim for relief, the specific contractual adjustment or relief requested and the basis of such request following:~~

- .1 The circumstances giving rise to the claim for relief,
- .2 The specific contractual adjustment or relief requested;
- .3 The basis of the entitlement to the claim for relief;
- .4 The cost of the claim for relief, including an itemized description of the Cost of the Work associated with the claim for relief;
- .5 The impact of the claim for relief on the Project Schedule, including a proposed revised Project Schedule;
- .6 Proposed efforts to mitigate the impacts on the cost and schedule.

10.1.3 The failure to provide timely written notice of any claim for relief shall operate as a waiver of such claim, but only to the extent that the failure to provide timely written notice prejudices the position of the non-claiming party.

10.2 Dispute Avoidance and Resolution.

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

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

10.2.3 If a dispute or disagreement cannot be resolved through Design-Builder's Representative and Owner's Representative, Design-Builder's Senior Representative and Owner's Senior Representative, upon the request of either party, shall meet as soon as conveniently possible, but in no case later than thirty (30) days after such a request is made, to attempt to resolve such dispute or disagreement. ~~Five (5)~~ Ten (10) days prior to any meetings between the Senior Representatives, the parties will exchange relevant information that will assist the parties in resolving their dispute or disagreement.

10.2.4 If after meeting the Senior Representatives determine that the dispute or disagreement cannot be resolved on terms satisfactory to both parties, the parties shall submit within thirty (30) days of the conclusion of the meeting of Senior Representatives the dispute or disagreement to non-binding mediation. The mediation shall be conducted by a mutually agreeable impartial mediator, or if the parties cannot so agree, a mediator designated by the American Arbitration Association ("AAA") pursuant to its Construction Industry Mediation ~~Rules. Procedures then in effect. Construction Industry Mediation Rule M-2 (filing with the AAA) is void.~~ The mediation will be governed by and conducted pursuant to a mediation agreement negotiated by the parties or, if the parties cannot so agree, by procedures established by the mediator. Unless otherwise mutually agreed by Owner and Design-Builder and consistent with the mediator's schedule, the mediation shall commence within ninety (90) days of the submission of the dispute to mediation. Representatives of the parties with authority to resolve the dispute shall be present at any mediation. Good faith mediation is a condition precedent to proceeding with arbitration or other binding dispute resolution procedure. Representatives of the parties with authority to resolve the dispute shall be present at any 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 thereof.

10.3 Arbitration.

~~10.3.1 Any claims, disputes, controversy or controversies between the parties~~ Claim arising out of or ~~relating related to the Agreement, this Contract~~ or the breach thereof, ~~which have not been resolved in accordance with the procedures set forth in Section 10.2 above,~~ shall be ~~decided~~ settled by arbitration in accordance with the Montana Uniform Arbitration Act (MUAA). ~~To the extent it does not conflict with the MUAA, the Construction Industry Arbitration Rules of the AAA then in effect, unless the parties mutually agree otherwise.~~

~~10.3.2 American Arbitration Association shall apply except as modified herein. The award of the arbitrator(s) shall be final and binding upon the parties without the right of appeal parties to the courts. Judgment may be entered upon it in accordance with applicable law by any court having jurisdiction thereof.~~

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

~~10.3.4 The prevailing party in any arbitration, or any other final, binding dispute proceeding upon which the parties may agree, shall be entitled to recover from the other party reasonable attorneys' fees shall bear their own costs and expenses incurred by the prevailing party. The prevailing party, if any, for participating in the arbitration. Costs of the Arbitration panel shall~~

be determined by the applicable binding dispute tribunal, borne equally between the parties except those costs awarded by the Arbitration panel (including costs for the arbitration itself).

10.3.2 Prior to the arbitration hearing all parties to the arbitration may conduct discovery subject to the provisions of Montana Rules of Civil Procedure. The arbitration panel may award actual damages incurred if a party fails to provide full disclosure under any discovery request. If a party claims a right of information privilege protected by law, the party must submit that claim to the arbitration panel for a ruling, before failing to provide information requested under discovery or the arbitration panel may award actual damages.

10.3.3 The venue for all arbitration proceedings required by this Contract shall be the seat of the county in which the work occurs or the First Judicial District, Lewis & Clack County, as determined solely by the Owner. Arbitration shall be conducted by a panel comprised of three members with one selected by the Contractor, one selected by the Owner, and one selected by mutual agreement of the Owner and the Contractor.

10.3.4 A demand for arbitration shall be made thirty (30) days after the conclusion of any mediation or if the mediation has not concluded 90 days after submission of the Claim to mediation. In no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Section 10.6 below .

10.3.5 Limitation on Consolidation or Joinder. Arbitration arising out of or relating to the Contract may include by consolidation or joinder of other parties as set forth herein. No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner, Architect/Engineer, Design-Builder, a separate contractor as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No person or entity other than the Owner, Design-Builder or a separate contractor shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under the Legal Requirements in any court having jurisdiction thereof.

10.3.6 Claims and Timely Assertion of Claims. The party filing a demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

10.3.7 Judgment on Final Award. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with the Legal Requirements in any court having jurisdiction thereof. The parties agree that the costs of the arbitrator(s) compensation and expenses shall be borne equally. The parties further agree that the arbitrator(s) shall have authority to award to either party some or all of the costs and expenses involved, including attorney's fees.

10.4 Duty to Continue Performance.

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

10.5 CONSEQUENTIAL DAMAGES.

10.5.1 NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY (EXCEPT AS SET

FORTH IN ~~SECTION~~SECTIONS 10.5.2 AND 10.5.3 BELOW), NEITHER DESIGN-BUILDER NOR OWNER SHALL BE LIABLE TO THE OTHER FOR ANY CONSEQUENTIAL LOSSES OR DAMAGES, WHETHER ARISING IN CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, INCLUDING BUT NOT LIMITED TO LOSSES OF USE, PROFITS, BUSINESS, REPUTATION OR FINANCING.

10.5.2 ~~The limitations of liability for consequential damages limitation set forth in Section 10 under Section 10.5.1 above is shall not intended apply to affect the payment of liquidated damages or lost early completion bonus, if limit any, set forth in Article 5 right of recovery a party may have respecting the following:~~

- .1 Losses (including defense costs) to the Agreement, extent (i) the loss is covered by the proceeds of insurance required to be carried hereunder or for which both parties recognize has been established, in part, to reimburse Owner or reward Design-Builder for some damages that might otherwise be was required to provide insurance coverage, or (ii) Design-Builder is deemed to have self-insured the loss pursuant to the Contracts;
- .2 Losses in connection with any illegal activities, fraud, recklessness, criminal conduct, intentional misconduct, bad faith, or gross negligence;
- .3 Design-Builder's indemnities under Article 7 or elsewhere in this Contract;
- .4 Design-Builder obligation to pay liquidated damages under this Contract; and
- .5 Losses arising out of Design-Builder's Release of Hazardous Materials.

10.6 Commencement of Statutory Period

10.6.1 As between the Owner and Contractor:

10.6.1.1 Before Substantial Completion. As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be consequential deemed to have accrued in any and all events not later than such date of Substantial Completion;

10.6.1.2 Between Substantial Completion and Final Certificate for Payment. As to acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of issuance of the final Certificate for Payment; and,

10.6.1.3 After Final Payment. As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of any act or failure to act by the Contractor pursuant to any Warranty provided under Paragraph 3.5, the date of any correction of the Work or failure to correct the Work by the Contractor under Paragraph 12.2, or the date of actual commission of any other act or failure to perform any duty or obligation by the Contractor or Owner, whichever occurs last.

Article 11

Stop Work and Termination

11.1 Owner's Right to Stop Work.

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

11.1.2 Design-Builder is entitled to seek an adjustment of the Contract Price and/or Contract Time(s) if (i) its cost or time to perform the Work has been materially and adversely impacted by any suspension of stoppage of the Work by Owner, (ii) the Design-Builder is entitled to the adjustment pursuant to the other provisions of the Contract Documents, and (iii) the Design-Builder complies with all provisions of the Contract Documents regarding an adjustment to the Contract Price and/or Contract Time.

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

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

.1 Design-Builder (i) fails promptly to begin the Work under the Contract Documents, (ii) fails to perform the Work with sufficient resources (supervision, workers, equipment, and material) to assure timely completion of said Work, or (iii) fails to complete any Work by the relevant Scheduled Interim Milestone Dates or Substantial or Final Completion Dates;

.2 Design-Builder fails to perform the Work in accordance with the Contract Documents, including conforming to applicable standards set forth therein in constructing the Project, or refuses to remove and replace rejected materials or unacceptable Work;

.3 Design-Builder discontinues the prosecution of the Work (exclusive of work stoppage (i) due to termination of its performance by Owner, or (ii) due to and during the continuance of a Force Majeure event or suspension by Owner);

.4 Design-Builder fails to resume performance of Work which has been suspended or stopped, within a reasonable time after receipt of notice from Owner to do so or (if applicable) after cessation of the event preventing performance;

.5 Design-Builder shall have become insolvent, or generally does not pay its debts as they become due, or admits in writing its inability to pay its debts or makes an assignment for the benefit of creditors;

.6 Insolvency, receivership, reorganization or bankruptcy proceedings shall have been commenced by or against Design-Builder;

.7 Any material representation or warranty made by Design-Builder in the Contract Documents or any certificate, schedule, instrument or other document delivered by Design-Builder pursuant to the Contract Documents shall have been false or materially misleading when made;

.8 Design-Builder materially breaches any agreement, representation or warranty contained in the Contract Documents;

.9 Design-Builder assigned or transferred the Contract Documents or any right or interest herein, except as expressly permitted under Section 13.2.1; or

.10 Design-Builder fails to discharge or obtain a stay of any final judgment(s) or order for the payment of money against it in excess of \$100,000 in the aggregate arising out of the prosecution of the Work (provided that for purposes hereof posting of a bond in the amount of 125% of such judgment or order shall be deemed an effective stay);

.11 Design-Builder failed, absent a valid dispute, to make payment when due for labor, equipment or materials in accordance with its agreements with Subcontractors and applicable law, or failed reasonably to comply with the instructions of Owner consistent with the Contract Documents;

.12 Design-Builder violates any Legal Requirements in performance of the Work; or

.13 Design-Builder fails to provide and maintain the Performance and Payment Bonds and insurance as required hereunder.

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

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

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

11.3 Design-Builder's Right to Stop Work.

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

~~11.3.1.1~~ Owner's failure to provide financial assurances as required under Section

3.3 hereof; or

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

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

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

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

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

11.4.1.2 Owner's failure to provide Design-Builder with any information, permits or approvals that are Owner's responsibility under the Contract Documents which result in the Work being stopped for sixty (60) consecutive days, or more than ninety (90) days during the duration of the Project, even though Owner has not ordered Design-Builder in writing to stop and suspend the Work pursuant to Section 11.1.1 hereof.

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

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

11.5 Bankruptcy of Owner or Design-Builder.

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

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

~~11.5.4.2~~ The Bankrupt Party shall file an appropriate action within the bankruptcy court to seek assumption or rejection of the Agreement within sixty (60) days of the institution of the bankruptcy filing and shall diligently prosecute such action.

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

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

11.6 Termination for Convenience.

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

~~11.6.4.1~~ All Work executed and for proven loss, cost or expense in connection with the Work allowable pursuant to the Agreement;

~~11.6.4.2~~ The reasonable costs and expenses attributable to such termination, including demobilization costs and amounts due in settlement of terminated contracts with Subcontractors and Design Consultants; and

~~11.6.4.3~~ The amount set forth in Article 8 of the Agreement.

11.6.2 Notwithstanding anything to the contrary contained herein, if a termination occurs prior to execution of the applicable GMP Amendment, the amount payable to Design-Builder, inclusive of all payments previously made to Design-Builder and costs of demobilization, shall in no event exceed the applicable Not To Exceed Amount.

11.6.3 Under no circumstances is Design-Builder entitled to anticipatory or unearned profits or consequential or other damages as a result of a termination or partial termination under this Section 11.6 or Agreement Section 8. The payment to Design-Builder determined in accordance with this Section 11.6 and Agreement Section 8 constitutes Design-Builder's sole and exclusive remedy for a termination under this Section 11.6 and Agreement Section 8.

11.7. Rights and Obligations Upon Termination for Any Reason

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

11.7.2 After receipt of a Notice of Termination, and except as directed by Owner, Design-Builder shall immediately proceed as follows, regardless of any delay in determining or adjusting any amounts due under this Article 11:

- .1 Stop Work as specified in the notice;
- .2 Place no further Subcontracts or orders for materials, services or facilities relating to the Work terminated, except as necessary for mitigation of damages;
- .3 Unless instructed otherwise by Owner, terminate all Subcontracts to the extent they relate to the Work terminated;
- .4 Assign to Owner in the manner, at the times, and to the extent directed by Owner, all of the right, title, and interest of Design-Builder under the Subcontracts so terminated, in which case Owner will have the right, in its sole discretion, to accept performance, settle or pay any or all claims arising out of the termination of each such Subcontract;
- .5 Settle outstanding liabilities and claims arising out of such termination of Subcontracts, with, to the extent required by Owner, the approval or ratification of Owner, which approval or ratification shall be final;
- .6 Transfer title to and deliver to Owner, as directed by Owner, (i) the Work in process, completed Work, supplies and other material produced or acquired for the Work terminated, and (ii) the Construction Documents and all other completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, records, samples, information and other property which would have been required to be furnished to Owner if the Work had been completed, and (iii) all intellectual property (including documentation, disclosures and drafts), licenses and Data;
- .7 Complete performance in accordance with the Contract Documents of all Work not terminated;
- .8 Take all action which may be necessary, or Owner may direct, for the protection and preservation of the property related to the Contract Documents which is in the possession of Design-Builder and in which Owner has or may acquire an interest;
- .9 As authorized by Owner, use its best efforts to sell at reasonable prices any property of the types referred to in Section 11.7.2.6; provided, however, Design-Builder (i) is not required to extend credit to any purchaser, and (ii) may acquire such property under the conditions prescribed and at prices approved by Owner. Design-Builder shall apply the proceeds of any such sale or disposition to reduce any amounts owed by Owner under the Contract Documents, or if no amount is owing, Design-Builder shall apply such proceeds as directed by Owner; and
- .10 Upon receipt of request from Owner, submit to Owner a list of termination inventory not previously disposed of and excluding items authorized for disposition by Owner. Within 45 days of Owner's receipt of the list, Design-Builder shall deliver such inventory to Owner and Owner will accept title to such inventory as appropriate.

Article 12

Electronic Data

12.1 Electronic Data.

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

12.2 Transmission of Electronic Data.

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

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

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

12.3 Electronic Data Protocol.

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

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

12.3.3 The Electronic Data represents the information at a particular point in time and is subject to change. Therefore, the parties shall agree upon protocols for notification by the author to the recipient of any changes which may thereafter be made to the Electronic Data, which protocol shall also address the duty, if any, to update such information, data or other information contained in the electronic media if such information changes prior to Final Completion of the Project.

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

Article 13

Miscellaneous

13.1 Confidential Information.

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

13.1.2 A party receiving ~~party~~ Confidential Information agrees to maintain the confidentiality of the Confidential Information and agrees to use the Confidential Information solely in connection with the Project.

13.2 Assignment.

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

13.3 Successorship.

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

13.4 Governing Law.

13.4.1 The Agreement and all Contract Documents shall be governed by the laws of the ~~location~~ State of Montana and venue for all legal proceedings shall be the Project, without giving effect to its conflict of law principles 18th Judicial District, Gallatin County.

13.5 Severability.

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

13.6 No Waiver.

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

13.7 Headings.

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

13.8 Notice.

~~13.8.1 Whenever the Contract Documents require that notice be provided to the other party, notice~~
13.8.1 Any notice, demand, consent or other communication made pursuant to this Contract shall be in writing and shall be (a) delivered personally to the party to whom the same is directed, or (b) sent by facsimile, recognized courier service (e.g. Federal Express) or registered or certified mail, return receipt requested, postage prepaid; or (c) sent by electronic mail and in each case, addressed as follows:

If to Owner:

If to Design-Builder:

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

13.9 Amendments.

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

13.10 Survival.

13.10.1 The dispute resolution provisions contained in Section 10, and all other provisions which by their inherent character should survive termination of the Contract and/or Final Acceptance, shall survive the termination of the Contract and the date on which Final Acceptance occurs.

13.11 No Estoppel.

13.11.1 Owner shall not, nor shall any officer thereof, be precluded or estopped by any return or certificate made or given by any Owner representative or other officer, agent, or employee of Owner under any provisions of the Contract from at any time (either before or after the final completion and acceptance of the Work and payment therefor) pursuant to any such return or certificate showing the true and correct amount and character of the work done, and materials furnished by Design-Builder or any Person under the Contract or from showing at any time that any such return or certificate is untrue and incorrect, or improperly made in any particular, or that the work and materials, or any part thereof, do not in fact conform to the Contract Documents; and Owner shall not be precluded or estopped, notwithstanding any such return or certificate and payment in accordance therewith, from demanding and recovering from Design-Builder such damages as it may sustain by reason of Design-Builder's failure to comply with the Contract Documents.

13.12 Further Assurances.

Design-Builder shall promptly execute and deliver to Owner all such instruments and other documents and assurances as are reasonably requested by Owner to further evidence the obligations of Design-Builder hereunder, including assurances regarding assignments of Subcontracts contained herein.

13.13 Turn Over of Designs and Drawings

13.13.1 Upon final acceptance or termination of this Contract, the Owner shall be entitled to, and the Design-Builder shall turn over to the Owner, all such designs, drawings, tracings and the like prepared pursuant to this Contract, except for record copies, which the Design-Builder may use for its internal reference purposes subject to the nondisclosure provisions of this Contract, which shall survive the completion or termination hereof.

13.14 Limitation on Third Party Beneficiaries.

13.14.1 Except as expressly provided in this Contract (such as warranty and indemnity provisions), it is not intended by any of the provisions of this Contract to create any other third party beneficiary under this Contract or to authorize anyone not a Party to maintain a suit for personal injury or property damage pursuant to the terms or provisions hereof. Except as otherwise provided in this Section 13.14, the duties, obligations and responsibilities of the Parties pursuant to this Contract with respect to third parties shall remain as imposed by law.

13.15 Independent Contractor

13.15.1 Design-Builder is an independent contractor, and nothing contained in the Contract Documents shall be construed as constituting any relationship with Owner other than that of project owner and independent contractor. In no event shall the relationship between Owner and Design-Builder be construed as creating any relationship whatsoever between Owner and Design-Builder's employees. Neither Design-Builder nor any of its employees is or shall be deemed to be an employee of Owner. Except as otherwise specified in the Contract Documents, Design-Builder has sole authority and responsibility to employ, discharge and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Subcontractor and for all other Persons that Design-Builder or any Subcontractor hires to perform or assist in performing the Work.

13.16 Entire Agreement.

13.16.1 The Contract Documents contain the entire understanding of the parties with respect to the subject matter hereof and supersede all prior agreements, understandings, statements, representations and negotiations between the parties with respect to its subject matter.

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