

**DESIGN-BUILD SERVICES FOR
THE FOURTH STREET 84-IN
INTERCEPTOR PHASE VI-A PROJECT**

DESIGN-BUILD CONTRACT

BETWEEN

THE CITY OF SAN JOSÉ

AND

STEVE P. RADOS, INC.

DESIGN-BUILD CONTRACT

Fourth Street 84-inch Interceptor Phase VI-A Project

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DESIGN-BUILD CONTRACT

Fourth Street 84-in Interceptor Phase VI-A Project

This Design-Build Contract ("Contract") is entered into by and between the City of San José, a municipal corporation ("City"), and Steve P. Rados, a corporation ("Design-Builder"), on _____, 2018 ("Effective Date"), with reference to the definitions contained in Appendix 1 hereto and the following facts:

- A. City issued a Request for Proposals (RFP) to select a design-builder to design, build, and deliver to City the Fourth Street 84-in Interceptor Phase VI-A Project (Project). The Project consists of the total design, construction, and furnishings of as described in, and in accordance with, the Project Technical Requirements, complete with all appurtenances necessary to produce such facilities.
- B. City has selected Design-Builder for the Project based on its response to the RFP.
- C. Design-Builder warrants that it is ready, willing and able to design and build the Project pursuant to the terms and conditions of the Contract.
- D. Design-Builder has the necessary professional expertise and skill to perform such services.
- E. In order to allow City to budget for the Project and to reduce the risk of cost overruns, the Contract includes restrictions affecting Design-Builder's ability to make claims for increases to the overall Contract Design-Build Lump Sum (Fixed) Price amount, and extensions of the Completion Deadlines. Design-Builder has agreed in the Contract to assume such responsibilities and risks, and the Contract Design-Build Lump Sum (Fixed) Price amount shall reflect the assumption of such responsibilities and risks.
- F. If Design-Builder fails to complete the Project in accordance with the time limitations set forth in the Contract Documents, then City and the members of the public represented by City will suffer substantial losses and damages. The Contract Documents provide that Design-Builder shall pay City substantial Liquidated Damages if such completion is delayed.

G. Following the completion and acceptance of the Project by City, City will own, operate and maintain sanitary sewers, storm drains, and other items installed during the Project.

NOW, THEREFORE, in consideration of the sums to be paid to Design-Builder by City, the foregoing premises and the covenants and agreements set forth herein, the parties hereby agree as follows:

**SECTION 1. CONTRACT COMPONENTS;
INTERPRETATION OF CONTRACT
DOCUMENTS**

1.1 Certain Definitions

Appendix 1 hereto contains the meaning of various terms used in the Contract Documents.

1.2 Contract Documents

The term "Contract Documents" shall mean the documents listed below and, should there be any contradiction between documents, in the order of precedence.

The Contract Documents are the following:

- a) Contract Amendments including Change Orders
- b) The Contract and all Appendices and Exhibits
- c) Supplementary or Special Conditions, if any
- d) The RFP, Volume II, Book 1 (Design Criteria and Performance Requirements), Book 2 (Technical Specifications), Book 4 (Exhibits, Reports, and Data) Exhibits A-T
- e) The Design Builder's Technical and Price Proposal
- f) Final Design Documents
- g) The agreed Schedule of Values and Project Schedule
- h) The Design Builder's design and construction documents, as issued for procurement and construction including all revisions.
- i) Bonds

1.3 Order of Precedence

Each of the Contract Documents is an essential part of the Contract, and a requirement occurring in one is as binding as though occurring in all. The Contract

Documents are intended to be complimentary and to describe and provide for a complete Contract. In the event of any conflict among the Contract Documents, the order of precedence shall be as set forth above in Section 1.2.

Background Documents are listed in Appendix 6 of the Contract for the purpose of defining the existing characteristics, circumstances, restrictions and limitations of the Work. They are not necessarily considered complete in all respects and are provided for references – only to the Design-Builder. The Design-Builder shall undertake any further investigations, studies, evaluations and analysis it deems appropriate to perform the Work in a quality, safe, cost-effective and timely manner to meet the requirements of the Contract Documents. The Background Documents shall be considered part of the Contract only to the extent they are referenced in Section 3.3.2. The referenced information shall be deemed incorporated in the Contract Documents to the extent that it is so referenced, with the same order of priority as the Contract Document in which the reference occurs.

If the DB identifies a conflict in the Contract Documents, the DB will notify the Owner and the Owner will advise, in its sole discretion, its determination of the intent of the Contract Documents. If the DB disagrees with such determination, it can pursue the provisions of the dispute resolution process within the contract Documents

1.4 Integration of Standard Specifications into Contract

If any question arises regarding whether any provision of the Standard Specifications is applicable to the Contract or how to apply such provision, City's interpretation regarding such matter shall control. City's interpretation shall be subject to dispute resolution in accordance with Section 19.

1.5 Interpretation of Contract Documents

In the Contract Documents, where appropriate: the singular includes the plural and vice versa; references to statutes or regulations include all statutory or regulatory provisions consolidating, amending or replacing the statute or regulation referred to; unless otherwise indicated references to Codes are to the codified laws of the State; the words "including," "includes" and "include" shall be deemed to be followed by the words "without limitation"; unless otherwise indicated references to sections, appendices or

schedules are to the Contract; words such as “herein,” “hereof” and “hereunder” shall refer to the entire document in which they are contained and not to any particular provision or section; words not otherwise defined which have well-known technical or construction industry meanings, are used in accordance with such recognized meanings; references to Persons include their respective permitted successors and assigns and, in the case of Governmental Persons, Persons succeeding to their respective functions and capacities; and words of any gender used herein shall include each other gender where appropriate. Unless otherwise specified, lists contained in the Contract Documents defining the Project or the Work shall not be deemed all-inclusive. Design-Builder acknowledges and agrees that the Contract Documents have been prepared jointly by the parties and have been the subject of arm’s length and careful negotiation. Design-Builder further acknowledges and agrees that it has independently reviewed the Contract Documents with legal counsel, and that it has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions of the Contract Documents. Accordingly, in the event of an ambiguity in or dispute regarding the interpretation of the Contract Documents, they shall not be interpreted or construed against the Person who prepared them. On plans, working drawings, and standard plans, calculated dimensions shall take precedence over scaled dimensions.

1.6 Referenced Standards and Specifications

1.6.1 Except as otherwise specified in the Contract Documents or otherwise directed by City, material and workmanship specified by the number, symbol or title of any standard established by reference to a described publication affecting any portion of the Project shall comply with the latest edition or revision thereof and amendments and supplements thereto in effect on the Effective Date.

1.6.2 In interpreting referenced standards, the following apply:

- (a) References to the project owner shall mean City.

References to the Engineer in the context of provider of compliance judgment may mean Design-Builder’s Quality Assurance Manager or it may mean a City representative, depending on the context, as determined by City in its sole discretion.

- (b) References to “Plan(s)” shall mean the Final Design Documents.
- (c) References to “Specification(s)” shall mean the Final Design Documents.
- (d) Cross-references to measurement and payment provisions contained in the referenced standard shall be deemed to refer to the measurement and payment provisions contained in the Contract Documents.

1.7 Explanations; Omissions and Misdescriptions

Design-Builder shall not take advantage of any apparent Error in the Contract Documents. Should it appear that the Work to be done or any matter relative thereto is not sufficiently detailed or explained in the Contract Documents other than the Final Design Documents, Design-Builder shall apply to City in writing for such further written explanations as may be necessary and shall conform to the explanation provided. Design-Builder shall promptly notify City of all Errors that it may discover in the Contract Documents, and shall obtain specific instructions in writing regarding any Error in the Contract Documents other than the Final Design Documents before proceeding with the Work affected thereby. The fact that the Contract Documents omit or misdescribe any details of any Work which are necessary to carry out the intent of the Contract Documents, or which are customarily performed, shall not relieve Design-Builder from performing such omitted Work, and they shall be performed as if fully and correctly set forth and described in the Contract Documents, without entitlement to a Change Order hereunder except as specifically allowed under Section 13.

1.8 Computation of Periods

References to “days” contained in the Contract Documents shall mean calendar days unless otherwise specified; provided that if the date to perform any act or give any notice specified in the Contract Documents (including the last date for performance or provision of notice “within” a specified time period) falls on a non-business day, such act or notice may be timely performed on the next succeeding day which is a business day. Notwithstanding the foregoing, requirements contained in the Contract Documents relating to actions to be taken in the event of an emergency,

requirements contained in Section 5.3.1, and other requirements for which it is clear that performance is intended to occur on a non-business day, shall be required to be performed as specified, even though the date in question may fall on a non-business day. The term “business days” shall mean days on which City is officially open for business.

1.9 Standard for Approvals

In all cases where approvals or consents are required to be provided by City or Design- Builder hereunder, such approvals or consents shall not be withheld unreasonably except in cases where a different standard (such as sole discretion) is specified. In cases where sole discretion is specified the decision shall not be subject to dispute resolution (or litigation) hereunder.

**SECTION 2. OBLIGATIONS OF CONTRACTOR;
REPRESENTATIONS, WARRANTIES AND COVENANTS;
DESIGN REQUIREMENTS**

2.1 Performance Requirements

2.1.1 Project General Description

The Project is located in San José, California, along North 4th Street between Commercial Street and Old Bayshore Road, north of U.S. Highway 101. The Project will require the installation of an approximately 4,500 feet of 84-inch diameter interceptor pipe along North 4th Street to convey the sewage from Structure G on Commercial Street to Structure E on Old Bayshore Road just north of US Highway 101. This Project will require crossing under U.S. Highway 101, Interstate Highway 880, several large storm pipes and existing utilities. Modification to existing junction structures, including Structure E and Structure G to accommodate the new interceptors will be required. Rerouting and diverting of existing sewage while maintaining sewer service will be needed. Some of the work will be performed within California's Department of Transportation (Caltrans) right of way and will require Caltrans' permits. The entire project is on a busy arterial roadway and fronting businesses, commercial buildings and residential buildings which are to remain open and accessible. An extensive Community Outreach Program and complex Traffic Management effort will be essential elements of the Project.

2.1.2 Contract

Design-Builder shall perform the Work for the Project as designated by City in this Contract, upon City's issuance of the Notice to Proceed directing Design-Builder to proceed with the Work defined in the Contract Documents. Subject to Section 13, Design-Builder shall complete all Work stated in the Contract by the applicable Completion Deadlines stated in Section 4.2.2.1. If the Notice to Proceed is not issued within 180 days from the date of the Contract, and the Contract is not otherwise terminated for convenience, the Contract and all Work shall be deemed a suspension for convenience and the City will issue a Change Order.

2.1.3 Performance of Work

The Work shall include the design, permitting, construction, installation, and any necessary management, integration, fabrication, assembly, and/or testing the work, of the Sanitary Sewer and Storm drain pipes, junction structures and other appurtenances installed as part of this Project in conformance with the Contract Documents. All materials, services and efforts necessary to achieve Project Completion on or before the applicable Completion Deadlines shall be Design-Builder's sole responsibility, except as otherwise specifically provided in the Contract Documents. Subject to the terms of Section 13, the costs of all such materials, services and efforts are included in the Contract.

2.1.4 Performance Standards

Design-Builder shall furnish the design of the Project and shall construct the Project in accordance with the Contract Documents, in accordance with all professional engineering principles and construction practices generally accepted as standards of the industry in the State, in a good and workmanlike manner, free from defects (except to the extent that such defects are inherent in prescriptive specifications included in the Contract Documents), and in accordance with the terms and conditions set forth in the Contract Documents.

2.1.5 Performance as Directed

Subject to Section 16.3, at all times during the term hereof, including during the course of, and notwithstanding the existence of, any dispute, Design-Builder shall perform in accordance with the Contract Documents in a diligent manner and without delay, shall abide by City's decision or order, and shall comply with all applicable provisions of the Contract Documents. If a dispute arises regarding such performance or direction, the dispute shall be resolved in accordance with Section 19.

2.2 General Obligations of Design-Builder

Design-Builder, in addition to performing all other requirements of the Contract Documents, shall:

2.2.1 Furnish all design, permitting, construction, testing and other related services, provide all materials and labor and undertake all efforts necessary or appropriate (excluding only those materials, services and efforts which the Contract

Documents specify will be undertaken by City or other Persons): (a) in accordance with the requirements of the Contract Documents, the approved Schedule, all Governmental Rules, all governmental approvals, the approved Quality Control Programs, the approved Design-Builder's Safety Program, the approved Construction Documents and all other applicable safety, environmental and other requirements, taking into account the Project Site limits and other constraints affecting the relevant Project, so as to achieve Project Completion by the applicable Completion Deadlines; and (b) otherwise to do everything required by and in accordance with the Contract Documents.

2.2.2 At all times provide a Project Executive approved by City who (a) will have full responsibility for the prosecution of the Work, (b) will act as agent and be a single point of contact in all matters on behalf of Design-Builder, (c) will be present (or its approved designee will be present) at the relevant Project Site at all times that Design-Build work is performed, and (d) will be available to execute instructions and directions from City or its authorized representatives.

2.2.3 Utilize the design firm or firms identified in Appendix 5 to perform the design services required by the Contract Documents (or other firms approved in writing by City, which approval shall not be withheld, provided that City shall first have determined that such firm has the demonstrated competence and professional qualifications necessary for the satisfactory performance of the required design services, and that the designated key personnel at such firm have sufficient experience with requirements applicable to the Project). Design-Builder shall not shift design Work from one design firm identified in Appendix 5 to another without the prior written approval of City.

2.2.4 Obtain all governmental approvals required in connection with the Project except for the City-Provided Approvals; and prior to beginning any construction activities in the field, furnish City with fully executed copies of all governmental approvals (other than the City-Provided Approvals obtained by City) required for the Project.

2.2.5 Comply with all conditions imposed by and undertake all actions required by and all actions necessary to maintain in full force and effect all governmental approvals.

2.2.6 Provide such assistance as is reasonably requested by City in dealing with any Governmental Person and/or in prosecuting and defending lawsuits in any and all matters relating to the Project. Such assistance may include providing information and reports regarding the Project as well as executing declarations and attending meetings and hearings. This provision is not intended to require Design-Builder to provide legal services for the benefit of City.

2.2.7 Comply with, and ensure that all Subcontractors comply with, all requirements of all applicable Governmental Rules, including:

(a) The Labor Code and implementing regulations, including requirements with respect to prevailing wages, non-discrimination and employment and training of apprentices, as more specifically described in Section 7;

(b) All Environmental Laws, including requirements regarding the handling, generation, treatment, storage, transportation and disposal of Hazardous Materials (subject to the provisions contained in Section 6.3.2 limiting Design-Builder's obligations to execute Hazardous Waste manifests as a "generator");

(c) The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq., including any amendments, as well as all applicable regulations and guidelines;

(d) The Nondiscrimination / Nonpreferential Treatment Requirements set forth in Appendices 7 and 8, incorporated herein, pursuant to Chapter 4.08 of the City of San José Municipal Code.

2.2.8 Cooperate with City, City's other consultants and Governmental Persons with jurisdiction over the Project in review and oversight of the design of the Project, performing oversight and conducting inspections during the construction of the Project and other matters relating to the Work.

2.2.9 Supervise and be responsible to City for acts and omissions of all Design-Builder-Related Entities.

2.2.10 Pay all applicable federal, State and local sales, consumer, use and similar taxes, property taxes and any other taxes, fees, charges or levies imposed by a Governmental Person, whether direct or indirect, relating to, or incurred in connection

with, the performance of the Work.

2.2.11 Mitigate delay to the Project and mitigate damages due to delay in all circumstances, to the extent possible, including by resequencing, reallocating, or redeploying Design-Builder's forces to other work, as appropriate.

2.3 Representations, Warranties and Covenants

Design-Builder represents, warrants and covenants that:

2.3.1 Design-Builder and its Subcontractor(s) and Subconsultant(s) have maintained, and throughout the term of the Contract shall maintain, all required authority, license status, professional ability, skills and capacity to perform the Work, and shall perform the Work in accordance with the requirements contained in the Contract Documents.

2.3.2 Design-Builder has evaluated the constraints affecting performance of the Work including, but not limited to, the design, permitting, and construction, and testing of the Project, including the Project Site limits and requirements of the Project Technical Requirements as well as the conditions of the City-Provided Approvals and has reasonable grounds for believing and does believe that the Project can be designed and built within such constraints.

2.3.3 Design-Builder has evaluated the feasibility of performing the Work within the time and for the amount specified therein, accounting for constraints affecting the Project and Design-Builder has reasonable grounds for believing and does believe that such performance (including achievement of the Project by the applicable Completion Deadlines, for the Lump Sum (Fixed) Price amount) is feasible and practical. Prior to execution of the Contract in developing its proposal in response to the RFP, Design-Builder shall evaluate the feasibility of performing the Work within the time and for the amount specified therein, accounting for constraints affecting the Project. Design-Builder has reasonable grounds to believe and will believe that such performance is feasible and practicable.

2.3.4 Design-Builder has, prior to execution of the Contract, in accordance with prudent and generally accepted engineering and construction practices, reviewed the Project Background Documents provided by City in the RFQ and RFP, inspected and examined the Project Site and surrounding locations and undertaken other appropriate

activities sufficient to familiarize itself with surface and subsurface conditions discernible from the surface affecting the Project, to the extent Design-Builder deemed necessary or advisable. As a result of such review, inspection, examination and other activities, Design-Builder is familiar with and accepts the physical characteristics of the Project Site. Design-Builder acknowledges and agrees that it has been afforded the opportunity to review information and documents and to conduct certain inspections and tests of the Project Site and surrounding locations as described above. Prior to execution of the Contract, Design-Builder shall conduct such reviews, inspections and other tests of the Project Site and surrounding locations as described above. Design-Builder further acknowledges and agrees that changes in conditions at the Project Site may occur after the date of the Contract, and that Design-Builder shall not be entitled to any Change Order in connection therewith except as specifically permitted under Section 13. Before commencing any Work on a particular aspect of a Project, Design-Builder shall verify all governing dimensions at the Project Site, and shall reasonably examine all adjoining work which may have an impact on such Work. Design-Builder shall ensure that the Design Documents and Construction Documents accurately depict all governing and adjoining dimensions and conditions, subject to Design-Builder's rights to a Change Order under Section 13.

2.3.5 Design-Builder acknowledges and agrees that it has familiarized itself with the requirements of any and all applicable Governmental Rules in effect as of the Effective Date of the Contract and the conditions of any required governmental approvals in effect as of the Effective Date of the Contract prior to entering into the Contract. Except as specifically permitted under Section 13, Design-Builder shall be responsible for complying with the foregoing at its sole cost and without any increase in the Contract Price or extension of any Completion Deadline on account of such compliance, regardless of whether such compliance would require additional time for performance or additional labor, equipment and/or materials not expressly provided for in the Contract Documents. Design-Builder has no reason to believe that any Governmental Approval required to be obtained by Design-Builder will not be granted in due course and thereafter remain in effect so as to enable the Work to proceed in accordance with the Contract Documents. If any governmental approvals required to be obtained by Design-

Builder must formally be issued in the name of City, Design-Builder shall undertake all efforts to obtain such approvals subject to City's reasonable cooperation with Design-Builder, including execution and delivery of appropriate applications and other documentation in form approved by City. Design-Builder shall obtain any Government Approvals which City may be obligated to obtain, including providing information requested by City and participating in meetings regarding such approvals.

2.3.6 All design and engineering Work furnished by Design-Builder shall be performed by or under the supervision of Persons licensed to practice architecture, engineering or surveying (as applicable) in the State, by personnel who are careful, skilled, experienced and competent in their respective trades or professions, who are professionally qualified to perform the Work in accordance with the Contract Documents and who shall assume professional responsibility for the accuracy and completeness of the Design Documents and Construction Documents prepared or checked by them.

2.3.7 Design-Builder shall at all times schedule and direct its Work to provide an orderly progression of the Work to achieve Project Completion by the applicable Completion Deadlines and in accordance the project's schedule, including furnishing such employees, materials, facilities and equipment and working such hours, extra shifts, overtime operations, Sundays and holidays as may be necessary to achieve such goal, all without adjustment to the Contract Price except as otherwise specifically provided in Section 13.

2.3.8 Design-Builder is a corporation duly organized and validly existing under the laws of the State of California and duly qualified to conduct business in the State, with all requisite power to own its properties and assets and carry on its business as now conducted or proposed to be conducted, and will remain in good standing and qualified to conduct business in the State throughout the term of the Contract and for as long thereafter as any obligations remain outstanding under the Contract Documents.

2.3.9 The execution, delivery and performance of the Contract have been duly authorized by all necessary action of Design-Builder and will not result in a breach of or a default under Design-Builder's organizational documents or any indenture or loan or credit agreement or other material agreement or instrument to which Design-Builder is

a party or by which its properties and assets may be bound or affected.

2.3.10 Design-Builder is aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and Design-Builder will comply with such provisions before commencing performance of the Work under the Contract Documents and at all times during the term hereof, whether by provision of its own insurance or self-insurance.

2.4 Ownership of Design

2.4.1 Design Documents

Design and other related Documents shall become City's property upon preparation; Construction Documents shall become City's property upon delivery to City; and other documents prepared or obtained by Design-Builder in connection with the performance of its obligations under the Contract, including studies, manuals, as-built drawings, technical and other reports and the like, shall become the property of City upon Design-Builder's preparation or receipt thereof, and payment by the City in accordance with the Contract. Copies of all Design Documents and Construction Documents shall be furnished to City upon preparation or receipt thereof by Design-Builder, and shall not be used by Design-Builder on other work. Design-Builder shall maintain all other documents described in this Section 2.4.1 in accordance with Section 21 and shall deliver copies to City as required by the Contract Documents or upon request if not otherwise required to be delivered, with an indexed set delivered to City as a condition to Project Acceptance or upon termination or completion of the Work hereunder. In the event City uses any drawings or specifications prepared by Design-Builder under the Contract on any other project, City shall not consider Design-Builder or the Engineer of Record to be the engineer of record for any such other project and any such use by City shall be at City's sole risk without liability to Design-Builder, City shall hold Design-Builder and its design Subcontractors harmless from any claims, or actions, arising from such use.

2.4.2 Copyright Ownership

2.4.2.1 Design-Builder and City intend that, to the extent permitted by Governmental Rules, the deliverables to be produced by Design-Builder at City's

instance and expense under the Contract are conclusively considered "works made for hire" within the meaning and purview of Section 101 of the United States Copyright Act, 17 U.S.C. §101 et seq., and that City will be the sole copyright owner of the deliverables and of all aspects, elements and components of them in which copyright can subsist, and of all rights to apply for copyright registration or prosecute any claim of infringement.

2.4.2.2 To the extent that any deliverable does not qualify as a "work made for hire," Design-Builder hereby irrevocably grants, conveys, bargains, sells, assigns, transfers and delivers to City, its successors and assigns, all right, title and interest in and to the copyrights and all U.S. and foreign copyright registrations, copyright applications and copyright renewals for them, and other intangible, intellectual property embodied in or pertaining to the deliverables prepared for City under the Contract, and all goodwill relating to them, free and clear of any liens, claims or other encumbrances, to the fullest extent permitted by Governmental Rules. Design-Builder will, and will cause all of its design Subcontractors, employees, agents and other persons within its control to, execute all documents and perform all acts that City may reasonably request in order to assist City in perfecting its rights in and to the copyrights relating to the deliverables, at the sole expense of City. Design-Builder warrants to City, its successors and assigns, that on the date of transfer good and marketable title in and to the copyrights for the deliverables shall be validly transferred to City. Design-Builder further warrants that it has not assigned and will not assign any copyrights and that it has not granted and will not grant any licenses, exclusive or nonexclusive, to any other party, and that it is not a party to any other agreements or subject to any other restrictions with respect to the deliverables other than the agreements with design Subcontractors that provide for the assignment of the Design Documents and are otherwise consistent with this Section 2.4. Design-Builder warrants and represents that the deliverables are complete, entire and comprehensive, and that the deliverables will constitute works of original authorship.

2.5 Design Requirements

2.5.1 Design will proceed as set forth in Appendix 9, Project Technical Requirements.

2.5.2 Design-Builder shall respond to the comments provided by City and make modifications to the Design Documents based on such comments in accordance with Appendix 9. Design-Builder shall notify City in writing within 14 days after receipt of any City comments Design-Builder believes by so incorporating would render the Design Documents or any other Contract Documents to contain Errors or which would otherwise adversely affect in any manner the design or construction of the Project Schedule, and City shall have the right to modify its comments.

2.5.3 Design-Builder shall be primarily responsible for handling all design reviews required by, and obtaining all design approvals of, Utility Owners in connection with Utilities. In the event any Utility Owner fails to perform timely regarding design approvals, City agrees to cooperate with Design-Builder to compel the Utility Owner(s) to perform timely so as to avoid any delays to the Critical Path.

2.5.4 Design-Builder shall construct the Project in accordance with the Contract Documents. Except for minor changes, the Final Design Documents may be changed only with prior written approval of City. Design- Builder may modify the Construction Documents and make minor modifications to the Final Design Documents without prior written approval of City, but must deliver the modifications to City in advance of performing the Work, and the City retains the right to review, comments, and object in its sole discretion regarding such modifications if they are not in compliance with the Contract documents.

**SECTION 3. INFORMATION SUPPLIED TO
CONTRACTOR; DISCLAIMER; ROLES OF PROJECT
MANAGEMENT CONSULTANT**

3.1 Information Supplied

City has made available to Design-Builder the Background Documents.

3.2 Responsibility for Design

Design-Builder agrees that it has full responsibility for the design of the Project for which it has executed a Contract and that Design-Builder will furnish the design of the Project. Design-Builder specifically acknowledges and agrees that:

(a) Design-Builder shall be fully responsible for developing a fully coordinated, detailed design which complies with the Contract Documents.

(b) Design-Builder is responsible for verifying all calculations and quantity takeoffs contained in the Project Technical Requirements or otherwise provided by City.

(c) The Design Builder shall notify the City immediately after any error or omission in the Contract Documents is identified by the Design Builder. The City will review such perceived error or omission and notify the Design Builder as to whether an error or omission exists within a reasonable time.

3.3 Disclaimer

3.3.1 Design-Builder understands and agrees that City shall not be responsible or liable in any respect for any loss, damage, injury, liability, cost or cause of action whatsoever suffered by any Design-Builder or its Subcontractors and Subconsultants by reason of any use of any information contained in the Contract Documents (including the portions provided by City) or Background Documents, or any action or forbearance in reliance thereon, except as provided in this Contract. Design-Builder further acknowledges and agrees that (a) the use by Design-Builder or anyone on Design-Builder's behalf of said information in any way shall be limited to the purposes described in Section 3.2, and (b) Design-Builder is capable of conducting and obligated hereunder to conduct any and all studies, analyses and investigations it deems advisable to verify or supplement said information, and that any use of said information is entirely at Design-Builder's own risk and at its own discretion.

3.3.2 The Design-Builder may rely upon the following information provided by the City as set forth in the Contract Documents and shall be entitled to a Change Order

for additional compensation and/or extension of a Completion Deadline under Section 13 with respect differences encountered with actual conditions as to any such matter:

1. Geotechnical Data Report 60-Inch Brick Interceptor Phase VIA Project prepared by AMEC dated January 2013 (Exhibit H RFP Volume 2, Book 4)
2. Geotechnical Baseline Report 60 Inch Interceptor Phase VIA Project prepared by Brierley Associates, LLC dated November 2013 (Exhibit I RFP Volume 2, Book 4)
3. Record Drawings (Exhibit P RFP Volume 2, Book 4)
4. Existing System Schematic Dry and Wet Sewer Flows Sheet G-6, New System Schematic Sheet G-7 prepared by AECOM dated 2/1/2017 (RFP Volume 2, Book 3)

3.3.3 EXCEPT AS MAY OTHERWISE BE PROVIDED FOR IN THE CONTRACT CITY DOES NOT REPRESENT OR WARRANT THAT THE INFORMATION CONTAINED IN THE BACKGROUND DOCUMENTS IS EITHER COMPLETE OR ACCURATE, OTHER THAN TO DESCRIBE CITY'S GENERAL DESIGN REQUIREMENTS FOR THE PROJECT AS PROVIDED IN SECTION 3.2, OR THAT SUCH INFORMATION IS IN CONFORMITY WITH THE REQUIREMENTS OF THE CITY-PROVIDED APPROVALS OR OTHER CONTRACT DOCUMENTS. CITY DOES NOT REPRESENT OR WARRANT THE ACCURACY OR COMPLETENESS OF ANY ITEMIZED LIST SET FORTH IN THE PROJECT TECHNICAL REQUIREMENTS. THE FOREGOING SHALL IN NO WAY AFFECT CITY'S AGREEMENT HEREIN TO ISSUE CHANGE ORDERS IN ACCORDANCE WITH SECTION 13.

3.4 Design Professional Licensing Requirements

City 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 Contract, Design-Builder acknowledges that City has no such intent. It is the intent of the parties that Design-Builder is fully responsible for furnishing the design of the Project through subcontracts with licensed design firm(s) as provided herein. 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. The terms and provisions of this

Section 3.4 shall control and supersede every other provision of all Contract Documents.

SECTION 4. TIME WITHIN WHICH PROJECT SHALL BE COMPLETED; PROJECT SCHEDULE AND PROGRESS

4.1 Time of Essence; Notice to Proceed

4.1.1 Time is of the essence in this Contract.

4.1.2 Design-Builder shall begin performance of the Work when and as directed in the Notice to Proceed.

4.1.3 Two separate "Notices to Proceed" will be issued for the Project.

4.1.3.1 The "First Notice to Proceed" shall be issued to perform the design services and other work required by the Contract except for items outlined in the "Second Notice to Proceed".

4.1.3.2 The "Second Notice to Proceed" shall be issued to commence the manufacturing, delivery and installation of the RCP sewer pipe upstream of the tunnel crossing. This Notice to Proceed will be issued once the tunnel crossing has been advanced under U.S. Highway 101 to the receiving shaft. Procuring the raw materials necessary for manufacturing this pipe is exclusive of this "Second Notice to Proceed". The Design-Builder shall diligently prosecute the Contract to completion from the first chargeable day as set forth in the "First Notice to Proceed".

4.2 Completion Deadlines

4.2.1 Design-Build Contract

4.2.1.1 Contract Completion Deadlines

Design-Builder shall diligently prosecute the Contract to completion by the Project Completion Deadlines as follows:

- (a) Substantial Completion:
 - 940 calendar days from the NTP designated date for the Design-Builder to proceed with the Work.
- (b) Project Completion and Acceptance:
 - 1000 calendar days from NTP designated date for the Design-Builder to proceed with the Work.

4.2.1.2 Project Completion and Acceptance Deadline

Design-Builder shall achieve Project Completion and Acceptance within 60 days after Substantial Completion date. The deadline for achieving Project Acceptance, as it may be extended hereunder, is referred to herein as the “Project Acceptance Deadline”.

4.2.2 “Project Completion Deadlines.” No Time Extensions

Except as otherwise specifically provided in Section 13, City shall have no obligation to extend a Completion Deadline and Design-Builder shall not be relieved of its obligation to comply with the Project Schedule and to achieve Project Completion by the applicable Completion Deadlines for any reason.

4.3 Scheduling of Design, Procurement, Construction and Payment

4.3.1 Project Schedule

The planning, design, construction, development, and completion of the Project shall be undertaken and completed in accordance with the Project Schedule. A Master CPM Schedule should be created, kept up to date at all times, and distributed to the City monthly. The parties shall use the Project Schedule for planning and monitoring the progress of the Work and the approved Schedule of Values as the basis for determining the amount of monthly progress payments to be made to Design-Builder.

4.4 Prerequisites for Start of Construction

Design-Builder shall not start construction (or recommence construction following any suspension) of the Project prior to occurrence of all the following events except with the prior written approval of City in its sole discretion, and Design-Builder shall

commence such construction promptly following occurrence of such events:

City shall have approved the Project Schedule, the Quality Control Programs and Design-Builder's Safety Program for the Project.

4.4.1 All requirements of the Construction Quality Control Program which are a condition to construction shall have been met.

4.4.2 Except as otherwise approved in writing by City, City shall have approved for compliance with the Contract Documents the Project's Design Documents and Construction Documents relating to any portion of the Project for which the Design Builder will be procuring or constructing.

4.4.3 All governmental approvals necessary for commencement of construction of the applicable portion of the Project shall have been obtained and all conditions of such governmental approvals which are a prerequisite to commencement of such construction shall have been performed.

4.4.4 All insurance policies and bonds required to be delivered to City hereunder prior to commencement of construction shall have been received and approved by City and shall remain in full force and effect.

4.4.5 All pre-construction environmental surveys and mitigation shall have been completed as required for the area proposed for construction, and Design-Builder shall have performed all other survey work for the applicable portions of Work and delivered all notices required by the Contract Documents to be delivered prior to commencement of construction.

As used in this Section 4.4, the term "construction" specifically excludes potholing and geotechnical investigations incidental to design Work, mobilization, site security and establishment of work yard(s) and storage sites.

SECTION 5. CONTROL OF WORK

5.1 Control and Coordination

5.1.1 Control and Coordination of Work

Design-Builder shall be solely responsible for, and have control over, the construction means, methods, techniques, sequences, procedures, Project Site safety, and shall be solely responsible for coordinating all portions of the Work under the Contract Documents, subject, however, to all requirements contained in the Contract Documents. Design-Builder shall construct, fabricate, assemble, provide, install, integrate, commission, test and verify all aspects of the Project in accordance with their respective Final Design Documents and Construction Documents.

5.2 Safety

Design-Builder shall take all reasonable precautions and be solely responsible for the safety of, and shall provide protection to prevent damage, injury, or loss to, all persons on the Project Site or who would reasonably be expected to be affected by the Work, including individuals performing Work, employees of City and its consultants, visitors to the Site and members of the public who may be affected by the Work. Design-Builder shall at all times comply with all safety requirements of the Contract and Design-Builder's Safety Program. The foregoing provisions shall not relieve Subcontractors of their duties to comply with Design-Builder's Safety Program and take reasonable precautions for the safety of and provide protection to prevent damage, injury or loss to persons or property on the Project Site on which they are working.

5.3 Process to Be Followed Upon Discovery of Certain Site Conditions

5.3.1 Notification to City

5.3.1.1 If Design-Builder becomes aware of (a) any on-site material that Design-Builder believes may contain Hazardous Materials required to be reported, investigated or remediated under any Environmental Law or (b) any Differing Site Conditions, as a condition precedent to Design-Builder's right to a Change Order, Design-Builder shall immediately notify City thereof telephonically or in person, to be followed immediately by written notification to City. Design-Builder shall immediately stop Work in and secure the area. In such event, City will view the location within three

business days of receipt of notification and shall advise Design-Builder at that time whether Work should be resumed or whether further investigation is required.

5.3.1.2 Notwithstanding the foregoing, Design-Builder shall not be obligated to stop Work upon discovery of any materials or conditions which the Contract Documents or any Background Documents indicate are likely or potentially present in the location in question; provided, however, that Design-Builder shall provide prompt notice to City of any such discovery. Furthermore, if any Governmental Approval specifies a procedure to be followed which differs from the procedure set forth herein, Design-Builder shall follow the procedure set forth in the Governmental Approval. Refer to Section 6.3 for additional requirements relating to Hazardous Materials.

5.3.2 Further Investigation

City shall promptly conduct such further investigation as City deems appropriate. City shall use reasonable efforts to determine within five days after receipt of such notification whether the situation falls within the scope of Section 5.3.1.1(a) or (b), and shall immediately notify Design-Builder of its determination once it is made. City shall at that time also advise Design-Builder of any action to be taken regarding the situation. If Hazardous Materials are involved, the notice shall describe the type of remediation measures, if any, that Design-Builder will undertake with respect thereto.

5.3.3 Recommencement of Work

City shall have the right to require Design-Builder to recommence Work in the area at any time, even though an investigation may still be ongoing. Design-Builder shall promptly recommence Work in the area upon receipt of notification from City to do so. Upon recommencing Work, Design-Builder shall follow all applicable procedures contained in the Contract Documents and all other Governmental Rules with respect to such Work, consistent with City's determination or preliminary determination regarding the nature of the material or condition.

5.4 Obligation to Minimize Impacts

Design-Builder shall ensure that all of its activities and the activities of Design-Builder- Related Entities, its subcontractors and subconsultants are undertaken in a manner that will minimize the adverse impact or effect on surrounding property and the public to the maximum extent practicable.

5.5 Inspection and Testing

5.5.1 Design-Builder Inspection and Testing

Design-Builder shall perform the inspection, sampling and testing necessary for Design-Builder to comply with its obligations under the Contract Documents.

5.5.2 Oversight and Inspection and Testing by City and Others

All materials and each part or detail of the Work shall also be subject to oversight, inspection and testing by City and other Persons designated by City. At all points in performance of the Work at which specific inspections or approvals by City are required by the Construction Quality Control Program, Design-Builder shall not proceed beyond that point until City has made such inspection or approval or waived its right to inspect or approve, which waiver shall be in writing. In addition, when any Utility Owner is to accept or pay for a portion of the cost of the Work, its respective representatives have the right to oversee, inspect and test the Work. Such oversight, inspection and/or testing does not make such Person a party to the Contract nor will it change the rights of the parties hereto. Design-Builder hereby consents to such oversight, inspection and testing. Upon request from City, Design-Builder shall furnish information to such Persons as are designated in such request and shall permit such Persons access to the Site and all parts of the Work.

5.5.3 Obligation to Uncover Finished Work

Design-Builder shall inform City of any part of the Work which is about to be covered and offer a full and adequate opportunity to City to inspect and test such part of the Work before it is covered. At all times before Project Acceptance, Design-Builder shall remove or uncover such portions of the finished construction Work as directed by City. After examination by City and any other Persons designated by City, 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 not be the basis for an adjustment to the Contract Price and Design-Builder shall not be entitled to any time extension. Furthermore, any Work done or materials used without adequate notice to and opportunity for prior inspection by City or without inspection in accordance

with Section 5.5.2 may be ordered uncovered, removed or restored without adjustment in the Contract Price and without a time extension, 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 5.5.3 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 a City-Caused Delay, and Design-Builder shall be entitled to a Change Order for the cost of such efforts and recovery of any delay to any Critical Path occasioned thereby. Refer to Section 5.7 for provisions regarding payments owing by Design-Builder to City if City agrees (in its sole discretion) to accept certain nonconforming Work.

5.6 Effect of Oversight, Spot Checks, Audits, Tests, Acceptances and Approvals

5.6.1 Oversight and Acceptance

The oversight, spot checks, audits, tests, acceptances and approvals conducted by City and others do not constitute acceptance of the materials or Work inspected or waiver of any warranty or legal or equitable right with respect thereto. City may suggest corrective remedies for nonconforming Work and/or identify additional Work which must be performed to bring the Project into compliance with the Contract Documents requirements at any time prior to Project Acceptance, whether or not previous oversight, spot checks, audits, tests, acceptances or approvals were conducted by City or any such Persons.

5.6.2 No Estoppel

Design-Builder shall not be relieved of obligations to perform the Work in accordance with the Contract Documents, or any of its Warranty or indemnity obligations, as the result of oversight, spot checks, audits, reviews, tests or inspections performed by any Persons, approvals or acceptances made by any Persons, or any failure of any Person to take such action. City shall not be precluded or estopped, by any measurement, estimate or certificate made either before or after Project Acceptance, or by making any payment, from showing that any such measurement, estimate or certificate is incorrectly made or untrue, or from showing the true amount and character of the work performed and materials furnished by Design-Builder, or from showing that the work or materials do not conform in fact to the requirements of

the Contract Documents. Notwithstanding any such measurement, estimate or certificate, or payment made in accordance therewith, City shall not be precluded or estopped from recovering from Design-Builder and its Surety(ies) such damages as City may sustain by reason of Design-Builder's failure to comply or to have complied with the terms of the Contract Documents.

5.7 Nonconforming Work

5.7.1 Rejection, Removal and Replacement of Work

Nonconforming Work rejected by City as not in compliance with the Contract Documents shall be removed and replaced so as to conform to the requirements of the Contract Documents, without adjustment to the Contract Price and without a time extension; and Design-Builder shall promptly take all action necessary to prevent similar deficiencies from occurring in the future. The fact that City may not have discovered the nonconforming Work shall not constitute an acceptance of such nonconforming Work. If Design-Builder fails to correct any nonconforming Work within ten days of receipt of notice from City requesting correction, or if such nonconforming Work cannot be corrected within ten (10) days, and Design-Builder fails to: (a) provide to City a schedule for correcting any such nonconforming work acceptable to City within such ten-day (10) period, (b) commence such corrective Work within such ten-day period and (c) thereafter diligently prosecute such correction in accordance with such approved schedule to completion, then City may cause the nonconforming Work to be remedied or removed and replaced and may deduct the cost of doing so from any moneys due or to become due Design-Builder and/or obtain reimbursement from Design-Builder for such cost.

5.7.2 Agreement to Accept Nonconforming Work

If Design-Builder requests that City accept nonconforming Work and City agrees to accept the nonconforming Work without requiring it to be fully corrected the City shall have sole discretion regarding acceptance or rejection of nonconforming Work and shall be entitled to a reduction on the Contract Price, which amount shall be subject to dispute resolution set forth in Section 19.

**SECTION 6. ACCESS TO SITE; UTILITY RELOCATIONS;
COOPERATION WITH LOCAL AGENCIES**

6.1 Access to Site

City shall provide access to the Project Site consistent with the Project Schedule in accordance with issuance of a Notice to Proceed date for the Design-Builder to perform the Work under the Design-Build Contract.

6.2 Utility Relocations

6.2.1 Design-Builder's Responsibility

Design-Builder is responsible for causing all Utility Adjustments, whether the Utility Adjustment Work is performed by Design-Builder or by the Utility Owner. All Utility Adjustment Work shall comply with all applicable Governmental Rules, the Contract Documents, the Standard Specifications, standards of practice and construction methods that the Utility Owner customarily applies to comparable facilities being constructed by or for the Utility Owner at its own expense (and not for the purpose of accommodating the facilities of others). Design-Builder shall coordinate, monitor and otherwise undertake the necessary efforts to cause Utility Owners performing Utility Adjustment Work to perform such work in accordance with the Project Schedule, in coordination with the Work and in compliance with the standards of design and construction and other applicable requirements specified in the Contract Documents. However, regardless of the arrangements made with Utility Owners and except as otherwise provided in Section 13, Design-Builder shall continue to be the responsible party to City for timely performance of all Utility Adjustment Work so that upon completion of the Work, all Utilities located within or in the vicinity of the Project Site are compatible with the Project. City shall provide to Design-Builder the benefit of any provisions in recorded utility or other easements affecting the Project which require the easement holders to relocate at their own expense, subject, however, to any applicable Governmental Rules affecting the easement holder's payment obligations for Utility Adjustments.

6.2.2 Utility Adjustment Costs

6.2.2.1 Design-Builder is responsible for all costs of the Utility Adjustment Work, excluding costs attributable to Betterment and any other costs for

which the Utility Owner is responsible under Governmental Rules and as provided in Section 13. Design- Builder shall fulfill this responsibility either by performing the Utility Adjustment Work itself as Cost of the Work or by reimbursing the Utility Owner for its Utility Adjustment Work.

Design-Builder is solely responsible for collecting directly from the Utility Owner any reimbursement due to Design-Builder for Betterment costs or other costs incurred by Design-Builder for which the Utility Owner is responsible under Governmental Rules. The mechanisms for determining costs for reimbursement and for payment shall be as agreed between Design-Builder and the Utility Owner.

6.2.2.2 If for any reason Design-Builder is unable to collect any amounts due to Design-Builder from any Utility Owner, then (a) City shall have no liability for such amounts, (b) Design-Builder shall have no right to collect such amounts from City or to offset such amounts against amounts otherwise owing from Design-Builder to City and (c) Design-Builder shall have no right to stop Work or to exercise any other remedies against City on account of such failure to pay.

6.2.3 Accuracy of Utility Information

6.2.3.1 If (a) any Utility requiring Utility Adjustment is not indicated at all in the Background Documents, is not anticipatable and materially impacts the Work ("unidentified"), or (b) any Utility is materially different in size, location or type of service from that indicated in the Background Documents, is not anticipatable and materially impacts the Work ("misidentified"), then subject to certain limitations as specified in Section 6.2.3.2, Design-Builder shall be entitled to a Change Order in accordance with Section 13 to (i) increase the Contract Price for additional costs of performing the Work (subject to Section 13.9.1) directly attributable to such lacking or differing information, and (ii) extend any affected Completion Deadline to the extent that any delay in the Critical Path is directly caused by any such lacking or differing information. The increase in the Contract Price under this Section is limited to: a) the amount in excess of \$20,000 per occurrence; and b) the amount in excess of \$200,000 for all occurrences.

6.2.3.2 Design-Builder shall not be entitled to a Change Order pursuant to Section 6.2.3.1 for increased costs of the Work or delays attributable to unidentified or misidentified Utilities to the extent that the existence of the facility was known to Design- Builder or could have been inferred from the presence of other facilities, such as buildings, meters, junction boxes, manholes or identifying markers, visible during a surface inspection of the area conducted prior to execution of the Contract or to the extent attributable to the failure of Design-Builder to meet the professional standard of care prior to the Effective Date of the Design-Build Contract.

6.2.3.3 Design-Builder acknowledges that any information with respect to Utilities provided in the Background Documents is for informational purposes only, is preliminary and has not been verified, and shall not be relied upon by Design-Builder, except as otherwise provided in Section 6.2.3.1. Design-Builder further acknowledges that Design-Builder will have ample opportunity as part of the Contract to analyze the utility information provided by City, to contact and inquire of Utility Owners and to perform such additional investigations as Design-Builder deems appropriate to verify and supplement such information.

6.2.3.4 The parties specifically intend for Design-Builder to bear responsibility for Utility Adjustment of all Utilities impacted by the Project, including any facilities that have not been accurately identified by City, and to allocate to Design-Builder all risk of increased costs of the Work hereunder resulting from inaccuracies in the reputed locations of such facilities, except as otherwise provided in this Section 6.2.3.

6.2.4 Payment and Performance Bonds; Insurance

All Utility Adjustment Work performed by Design-Builder will be automatically covered by the Payment and Performance Bonds described in Section 8. If required as a condition for the performance by Design-Builder of Utility Adjustment Work, Design-Builder will provide separate bonds or other security satisfactory to the Utility Owners. Design- Builder shall include the cost (or the allocable cost, as applicable) of any applicable bond premiums in all cost estimates it provides for Utility Adjustment Work.

6.2.5 Betterments

Design-Builder shall be responsible for addressing any requests by Utility Owners that Design-Builder design and/or construct a Betterment. Any Betterment, whether designed and/or constructed by Design-Builder or by the Utility Owner, shall be subject to the same standards and requirements as if it were a necessary Utility Adjustment. Under no circumstances shall Design-Builder proceed with any Betterment that is incompatible with the Project or is not in compliance with Governmental Rules, the governmental approvals or the Contract Documents. Under no circumstances will Design-Builder be entitled to any additional compensation or time extension hereunder as the result of any Betterment, whether performed by Design-Builder or by the Utility Owner.

6.2.6 Failure of Utility Owners to Cooperate

6.2.6.1 Design-Builder shall use diligent efforts to obtain the cooperation of each Utility Owner as necessary for the Project. Design-Builder shall notify City immediately if (a) Design-Builder becomes aware that any Utility Owner is not cooperating in a timely manner to provide agreed-upon work or approvals or (b) any other dispute arises between Design-Builder and a Utility Owner with respect to the Project, despite Design-Builder's diligent efforts to obtain such Utility Owner's cooperation or otherwise resolve such dispute. Such notice may include a request that City assist in resolving the dispute or in otherwise obtaining the Utility Owner's timely cooperation. Design-Builder shall provide City with such information as City requests regarding the Utility Owner's failure to cooperate and the effect of any resulting delay on the Schedule. After delivering to City any notice or request for assistance, Design-Builder shall continue to use diligent efforts to pursue the Utility Owner's cooperation.

6.2.6.2 If Design-Builder requests City's assistance pursuant to Section 6.2.6.1, Design-Builder shall provide evidence reasonably satisfactory to City that (a) the subject Utility Adjustment is necessary, (b) the time for completion of the Utility Adjustment in the Schedule was, in its inception, a reasonable amount of time for completion of such work, (c) Design-Builder has made diligent efforts to obtain the Utility Owner's cooperation and (d) the Utility Owner is not cooperating. Following City's

receipt of satisfactory evidence, City shall take such reasonable steps as may be requested by Design-Builder to obtain the cooperation of the Utility Owner or resolve the dispute; however, City shall have no obligation to prosecute eminent domain or other legal proceedings or to exercise any other remedy available to it under Governmental Rules or existing contract, unless City elects to do so in its sole discretion. If City holds contractual rights that might be used to enforce the Utility Owner's obligation to cooperate and City elects in its sole discretion not to exercise those rights, then City shall assign those rights to Design-Builder upon Design-Builder's request; however, such assignment shall be without any representation or warranty as to either the assignability or the enforceability of such rights. Any assistance City provides shall not relieve Design-Builder of its sole responsibility for satisfactory compliance with its obligations and timely completion of all Utility Adjustment Work.

6.2.6.3 If requested by City, Design-Builder shall cooperate with City in any efforts to obtain Utility Owner cooperation and/or to resolve disputes with Utility Owners, including in connection with any lawsuit or alternate proceedings undertaken by City for such purpose. Such cooperation shall include Design-Builder's staff and consultants acting as witnesses in such lawsuits and proceedings and providing testimony, information, reports, graphs, photos, plans, renderings and similar materials to City's counsel at Design-Builder's expense. City shall remit to Design-Builder any amounts collected on Design-Builder's behalf as a result of any such action or proceeding, after first deducting all costs (including attorneys', accountants' and expert witness fees and costs) incurred by City in pursuing such action or proceeding. Any assistance provided by City shall not relieve Design-Builder of its sole and primary responsibility for the satisfactory compliance with its obligations under the Contract Documents and timely completion of all necessary Utility Adjustments.

Provided Design-Builder has fulfilled the requirements of Sections 6.2.6.2(a) through (d), to the extent that any delay in the Critical Path is directly attributable to a delay by a Utility Owner, Design-Builder shall be entitled to a Change Order in accordance with Section 13.

6.3 Hazardous Materials Management

6.3.1 Procedures and Compensation for Hazardous Materials Management

6.3.1.1 If Design-Builder encounters any Hazardous Materials, in addition to the requirements set forth in Section 5.3.1, Design-Builder shall (a) promptly advise City of any obligation to notify State or federal agencies under applicable Governmental Rules and (b) take reasonable steps, including design modifications and/or construction techniques, to avoid excavation or dewatering in areas with Hazardous Materials. Where excavation or dewatering is not reasonably avoidable, Design-Builder shall select the most cost-effective approach to Hazardous Materials Management, unless otherwise directed by City. Wherever feasible and consistent with applicable Governmental Rules, contaminated soil and groundwater shall not be disposed off-site. All Hazardous Materials shall be managed in accordance with applicable Governmental Rules, governmental approvals, Design-Builder's management plan approved by City and the approved Safety Plan.

6.3.1.2 Upon Design-Builder's fulfillment of all applicable requirements of Sections 5.3.1, 6.3 and 13, and subject to the limitations and exceptions contained therein, Design-Builder shall be entitled to a Change Order to (a) increase the Contract Price for additional costs (subject to Section 13.9.1) directly attributable to changes in the Work arising from discovery of unidentified pre-existing Hazardous Materials within the Project Site, if any, and (b) extend any affected Completion Deadline to the extent that any delay in the Critical Path is directly caused by any such conditions. Entitlement to additional compensation or a time extension shall be limited to costs of Work performed pursuant to the approved management plan under Section 6.3.1.1.

6.3.1.3 Notwithstanding the foregoing, no additional compensation or time extension shall be allowed with respect to:

- (a) Release(s) or threatened Release(s) of Hazardous Material attributable to the actions, omissions, negligence, willful misconduct, or breach of applicable Governmental Rules, Environmental Approvals or contract by any Design-Builder-Related Entity;

- (b) Immaterial quantities of Hazardous Materials;
- (c) Any known Hazardous Materials that could have been avoided by reasonable design modifications or construction techniques; or
- (d) Any Hazardous Materials on property outside of the Project Site, unless such property was provided by the City for use by the DB. No additional time for delay or compensation is due to DB for instances of found hazardous materials on lands or in facilities where DB, of its own choosing, has selected that land or facility for its use in supporting performance of the Project.

6.3.1.4 To the extent that any proceeds of insurance are available to pay the cost of any Hazardous Materials Management, Design-Builder will be diligent in applying for such proceeds, shall share such insurance information with the City, and shall rely on insurance to provide compensation, in lieu of requesting a Change Order or reduce its request for additional compensation by the amount of insurance proceeds.

6.3.2 Hazardous Materials Generator

As between Design-Builder and City, City shall be considered the generator of existing Hazardous Materials located within the Project Site as of the Effective Date; provided, however, that the foregoing shall not preclude or limit any rights or remedies that City may have against third parties and/or prior owners, lessees, licensees and occupants of such properties, and provided that Design-Builder (and not City) shall be considered the generator with respect to any Release(s) of Hazardous Materials attributable to the negligence, willful misconduct, or breach of applicable Governmental Rules or contract by any Design-Builder-Related Entity.

6.3.3 Materials Brought to Site by Design-Builder

Design-Builder shall be solely responsible for: (a) compliance with all Governmental Rules applicable to Hazardous Materials brought onto the Site by any Design-Builder-Related Entity; (b) use, containment, storage, management, transport and disposal of all such Hazardous Materials in accordance with the Contract and all applicable Governmental Rules and any other applicable environmental approvals; and (c) payment of all penalties, expenses (including attorneys' fees and costs), costs, suits, judgments, claims, actions, damages (including damages to natural resources,

property or Persons), delays and liability associated with, arising out of or related to such Hazardous Materials.

6.3.4 Environmental Approvals Relating to Hazardous Materials

It is the responsibility of Design-Builder to obtain all governmental approvals relating to Hazardous Materials Management including federal and State surface water and groundwater discharge permits and permits for recycling or reuse of Hazardous Materials. Design-Builder shall be solely responsible for compliance with such governmental approvals and applicable Governmental Rules, including those governing the preparation of waste profiles, waste manifests and bills of lading.

6.4 Environmental Mitigation and Approval Requirements

6.4.1 Environmental Laws

Design-Builder shall comply with all applicable Environmental Laws in performance of the Work, and with applicable requirements contained in governmental approvals issued there under, whether obtained by City or Design-Builder, including the requirements set forth in the City-Provided Approvals.

6.4.2 New Approvals

6.4.2.1 Approvals To Be Obtained at City's Expense

City shall be responsible for obtaining any New Approvals necessitated by a City-Directed Change, a Force Majeure Event or an event described in Section 13.3.1.1, Eligible Changes. Design-Builder shall provide support services to City with respect to obtaining any such New Approval, without additional charge to City. Any Change Order covering a City-Directed Change or Force Majeure Event shall include compensation to Design-Builder for any changes in the Work (including performance of additional mitigation measures but excluding performance of such support services) resulting from such New Approvals, as well as any time extension necessitated by the City-Directed Change or Force Majeure Event subject to the conditions and limitations contained in Section 13.

6.4.2.2 Approvals To Be Obtained at Design-Builder's Expense

If a New Approval becomes necessary for any reason other than those specified in Section 6.4.2.1, Design-Builder shall be fully responsible for the cost of

obtaining the New Approval and any other environmental approvals that may be necessary, and for all requirements and delays resulting there from, as well as for any litigation arising in connection therewith. If Design-Builder wishes to adopt any design or construction approach that would require a revision, modification or amendment to a City- Provided Approval, Design-Builder shall consult with City. Design-Builder shall not implement any such approach unless concurrence of City has first been obtained.

6.5 Cooperation with Local Agencies

6.5.1 Compliance with Local Agency Requirements

Design-Builder shall comply with local agency requirements applicable to the Work, including payment of all plan review and construction inspection costs charged by local agencies relating to the Work.

6.5.2 Encroachment Permits

Governmental approvals to be obtained by Design-Builder hereunder include encroachment permits for Work to be performed in areas under the jurisdiction of local agencies. "Design-Builder shall apply for and obtain all permits necessary for the construction of the Project and shall comply with all permit requirements including obtaining necessary approvals of plans and specifications. The City shall pay the costs of the services provided by the permitting agency including any inspection fees related to the permit."

6.5.3 Bonds and Insurance

Upon request by City, Design-Builder shall: (a) provide additional obligee riders acceptable to the Surety to the Payment and Performance Bonds in favor of local agencies; and (b) provide certificates naming local agencies as additional insureds to the policies required to be provided under Section 9.

6.6 Vehicle Signage

Design-Builder shall affix signage, as approved by City, to each and all vehicles used to perform Work related to the Project.

SECTION 7. SUBCONTRACTORS AND LABOR

7.1 Omitted

Reserved.

7.2 Subcontracts for Design Subconsultants and Construction Subcontractors

7.2.1 Listed Design Subcontractors Design-Builder shall use the design Subcontractors as provided in Section 2.2.3.

7.2.2 Procurement of New Construction Subcontracts and Substitution of Construction Subcontracts

Design-Builder shall be subject to the provisions of the Standard Specifications regarding construction Subcontractors, including provisions for Subcontractor substitutions, that are listed in Appendix 5. In the event that Design-Builder wishes to use first-tier construction Subcontractors that are not listed in Appendix 5, Design-Builder shall solicit bids and award any such Subcontracted construction work to the lowest responsible bidder. Design-Builder shall include a prequalification plan for first-tier construction Subcontractors with an estimated Subcontract value over \$250,000 not already pre-qualified with the Design-Builder by the City.

7.2.3 Subcontract Requirements

7.2.3.1 Each Subcontract shall provide that, pursuant to terms in form and substance satisfactory to City, (a) City 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, (b) all guarantees and warranties, express or implied, shall inure to the benefit of City, and its respective successors and assigns; and (c) the rights of Design-Builder under such instrument are assigned to City contingent only upon delivery of a written request from City following default by Design-Builder or termination or expiration of the Contract, allowing City to assume the benefit of Design-Builder's rights with liability only for those remaining obligations of Design-Builder accruing after the date of assumption by City.

7.2.3.2 Notwithstanding any Subcontract or agreement with any Subcontractor, Design-Builder shall be fully responsible for all of the Work. City shall

not be bound by any Subcontract, and no Subcontract shall include a provision purporting to bind it. Each Subcontract shall include the following provision:

Nothing contained herein shall be deemed to create any privity of contract between the City and the Subcontractor, nor does it create any duties, obligations, or liabilities on the part of City to the Subcontractor except those allowed under California law. In the event of any claim or dispute arising under the Subcontract and/or Design- Builder's Contract with City, 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 City arising out of the Subcontract or otherwise arising in connection with the Subcontractor's Work.

The foregoing provision shall not limit Design-Builder's rights to recovery under the Contract relating to the Work performed by a Subcontractor.

7.2.3.3 Except for subcontractors and subconsultants already pre-qualified with the Design-Builder by the City, Design-Builder shall notify and request approval of any additional subcontractors and subconsultants that Design-Builder intends to engage. Design-Builder shall allow City access to all Subcontracts and records regarding Subcontracts and shall deliver to City, within ten days after receipt of a request from City, true and complete copies of all Subcontracts as may be requested.

7.2.4 Subcontract Work

Design-Builder shall be fully responsible to City for all acts and omissions of its own employees, and of Subcontractors and their employees. Design-Builder shall also coordinate the Work performed by Subcontractors. If City makes reasonable objection to the use or continued use of a design Subcontractor other than the Architect or Engineer of Record, the design Subcontractor shall be replaced at the request of City and shall not again be employed on the Project. No Subcontractor may start any Work until after City receives a copy of such Subcontractor's valid California Contractor License (as applicable to construction subcontractors) and any insurance documents required pursuant to Section 9.

7.2.5 Form of Subcontract

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 appropriate for the scope of the Work to be performed by each Subcontractor to ensure compliance by the Subcontractor with all applicable requirements of the Contract Documents.

7.2.5.1 Each Subcontract shall:

- (a) Set forth effective procedures for claims and change orders.
- (b) Require the Subcontractor to carry out its scope of work in accordance with the Contract requirements and to participate in any dispute resolution proceeding pursuant to Section 19, if such participation is requested by Design-Builder or City.
- (c) Set forth warranties, guaranties and liability provisions of the contracting party in accordance with good commercial practice for work of similar scope and scale.
- (d) Include the following: (i) requirement to maintain usual and customary books and records for the type and scope of operations of business in which the Subcontractor is engaged (e.g., constructor, equipment supplier, designer, service provider); (ii) provision permitting audits to be conducted by Design-Builder and City; (iii) requirement to provide progress reports to Design-Builder appropriate for the type of work it is performing sufficient to enable Design-Builder to provide the reports it is required to furnish City under the Contract; (iv) requirement for the Subcontractor to maintain all appropriate licenses; and (v) provision prohibiting assignment of the Subcontract without Design-Builder's prior written consent.
- (e) Include the following: (i) be terminable by the Subcontractor only for cause; and (ii) include an indemnity from the Subcontractor in favor of Design- Builder and the Indemnified Parties against any and all loss, damage, injury, liability, cost or cause of action arising out of, related to or associated with, the actions, omissions, negligence, willful misconduct, or breach of applicable Governmental Rules or contract by the Subcontractor or any of its officers, employees, agents or representatives.
- (f) Expressly require the Subcontractor to participate in meetings between Design-Builder and City, upon City's request, concerning matters

pertaining to such Subcontract or its work, provided that all direction to such Subcontractor shall be provided by Design-Builder, and provided further that nothing in this clause (f) shall limit the authority of City to give such direction or take such action which, in its opinion, is necessary to remove an immediate and present threat to the safety of life or property.

(g) Contain certification by the Subcontractor that the Subcontractor is experienced in and qualified to do, and knowledgeable about, the subcontracted Work.

The amount of retainage to be withheld under Subcontracts shall not exceed the amount withheld by City pursuant to Section 12.3.1, and (b) if the Subcontract is exclusively for performance of design or construction management services, it shall not include any requirement for retainage to be withheld.

7.2.5.2 City shall have the right, but not the obligation, to review the form of subcontract used by Design-Builder for the Project and to require modifications thereto to conform to the requirements set forth herein.

7.2.6 Subcontracts with Affiliates

All Subcontracts with Affiliates shall be on terms no less favorable than those that would have been provided by Persons not affiliated with Design-Builder, and all Subcontracts between a Subcontractor and one of its affiliates shall be on terms no less favorable than those that would have been provided by Persons not affiliated with the Subcontractor.

7.2.7 Other Requirements

Design-Builder shall comply with all other subcontracting requirements set forth in the Contract Documents.

7.3 Equality Assurance

Design-Builder shall comply with the Nondiscrimination / Nonpreferential Treatment requirements set forth in Appendix 7 and Appendix 8, which are attached hereto and incorporated herein, pursuant to Chapter 4.08 of the City of San José Municipal Code. Failure by Design-Builder to carry out these requirements is a material breach of the Contract, which may result in termination of the Contract or

such other remedy a City deems appropriate.

7.4 Labor Code Requirements

Design-Builder shall strictly adhere to the provisions of the Labor Code, including Sections 1810 through 1813 and 1815, regarding minimum wages, the 8-hour day and 40-hour week, overtime, Saturday, Sunday, and holiday work. Design-Builder shall forfeit to City the penalties prescribed in the Labor Code for noncompliance, including the penalties set forth in Section 1813 for violations of Sections 1810 through 1815.

7.4.1 Pursuant to the requirements of Section 1860 of the Labor Code, Design-Builder will be required to secure the payment of workers' compensation to its employees in accordance with the provisions of Section 3700 of the Labor Code.

7.4.2 Pursuant to Section 1861 of the Labor Code, Design-Builder is obligated to sign and file with City a certification as set forth in the Standard Specifications, Section 7- 1.01A(6). Execution of the Contract by Design-Builder shall constitute signing and filing of the certificate.

7.4.3 Design-Builder shall comply with the applicable provisions of the Labor Code and implementing regulations relating to Labor Nondiscrimination, including those more specifically set forth in Appendix 10.

7.5 Prevailing Wages

Attention is called to the fact that the State of California Wage requirements apply to construction Work for the entire Project. Not less than the General Prevailing Rate of Per Diem Wages must be paid for all construction Work. Copies of the Prevailing Rate of Per Diem Wages are on file with City's Office of the City Clerk or City's Office of Equality Assurance and can be obtained from those offices. Additional provisions regarding the Prevailing Wage Requirements are included in Appendix 10, Contract Provisions for Labor Management. All questions regarding prevailing wage should be directed to City's Office of Equality Assurance at (408) 535-8430. Design-Builder agrees to comply with all of the applicable provisions of Sections 1777.5 and 1777.6 of the Labor Code, which Sections are hereby specifically referred to, incorporated herein by reference and made a part hereof as though set forth at length herein.

7.6 Key Personnel; Character of Employees

7.6.1 The name and title of each key individual indicated on the project staff organizational chart ("Key Personnel") shall be set forth in Appendix 11. All Key Personnel must have experience on projects of a like size and scope, and their responsibilities on those projects must have been as significant as and comparable in scope to the responsibilities he or she will have on the Project.

7.6.2 If any Key Personnel should be unable to continue in the performance of assigned duties because of death, disability or termination, Design-Builder will promptly notify City, with an explanation of the circumstances. Design-Builder will furnish to City within 15 days the name of the person substituting for the individual unable to continue, together with any information City may require to judge the experience and competence of the substitute person. Upon City's approval, such substitute person will be assigned to the Project and if City rejects the substitute based upon reasonable grounds, Design-Builder will have five days thereafter to submit a second substitute person. Such process will be repeated until a proposed replacement has been approved by City. Design-Builder will not make any other changes in assignment of Key Personnel without City's prior written approval.

7.6.3 All individuals performing the Work shall have the skill and experience and any licenses or certifications required to perform the Work assigned to them. If City determines in its sole discretion that any Person employed by Design-Builder or by any Subcontractor is not performing the Work in a proper, safe and skillful manner, then at the written request of City, Design-Builder or such Subcontractor shall remove such Person and such Person shall not be re-employed on the Project without the prior written approval of City in its sole discretion. If Design-Builder or the Subcontractor fails to remove such Person or Persons or fails to furnish skilled and experienced personnel for the proper performance of the Work, then City may, in its sole discretion, suspend the affected portion of the Work by delivery of written notice of such suspension to Design-Builder. Such suspension shall in no way relieve Design-Builder of any obligation contained in the Contract Documents or entitle Design-Builder to a Change Order. Once compliance is achieved, City will notify Design-Builder and Design-Builder shall be entitled to and shall promptly resume the Work.

7.6.4 Design-Builder acknowledges and agrees that the award of the Contract by City to Design-Builder was based, in large part, on the qualifications and experience of the personnel listed in the Proposal and Design-Builder's commitment that such individuals would be available to undertake and perform the Work, subject to procedures for substitution in §7.62. Design-Builder represents, warrants and covenants that such individuals are available for and will fulfill the roles identified for them in the Proposal in connection with the Work.

7.7 Gifts

7.7.1 Design-Builder is familiar with City's prohibition against acceptance of any gift by a City officer or designated employee, which prohibition is found in Chapter 12.08 of the San José Municipal Code.

7.7.2 Design-Builder agrees not to offer any City officer or designated employee any gift prohibited by said Chapter.

7.7.3 The offer or giving of any gift prohibited by Chapter 12.08 shall constitute a material breach of the Contract by Design-Builder. In addition to any other remedies City may have in law or equity, City may terminate the Contract for such breach as provided in Section 16.

7.8 Disqualification of Former Employees

Design-Builder is familiar with the provisions relating to the disqualification of former officers and employees of City in matters which are connected with former duties or official responsibilities as set forth in Chapter 12.10 of the San José Municipal Code (the "Revolving Door Ordinance"). Design-Builder shall not utilize either directly or indirectly any officer, employee, or agent of City to perform services under the Contract, if in the performance of such services, the officer, employee or agent would be in violation of the Revolving Door Ordinance.

SECTION 8. PERFORMANCE AND PAYMENT BONDS

Each bond required hereunder shall be provided by a Surety authorized to do business in the State with an A.M. Best Co. "Best's Rating" of A or better and Class VIII or better, or as otherwise approved by City in its sole discretion.

8.1 Performance Bond

As a condition to issuance of a Notice to Proceed for the Design-Build Contract, Design-Builder shall provide to City and continuously maintain in place for the benefit of City, a Performance Bond in the form of Appendix 13 in the amount of the Contract Price. If the Contract Price is increased in connection with a Change Order, City may, in its sole discretion, require a corresponding proportionate increase in the amount of the Performance Bond.

8.2 Payment Bond

As a condition to issuance of a Notice to Proceed for the Design-Build Contract, Design-Builder shall provide to City and continuously maintain in place for the benefit of City, a Payment Bond in the form of Appendix 15 in the amount of the Contract Price. Design-Builder shall maintain the Payment Bond in full force and effect until (a) Design- Builder has delivered to City (i) evidence satisfactory to City that all Persons eligible to file a claim against the bond have been fully paid and (ii) unconditional releases of Liens and stop notices from all Subcontractors who filed preliminary notice of a claim against the bond, or (b) expiration of the statutory period for Subcontractors to file a claim against the bond. If the Contract Price is increased in connection with a Change Order, City may, in its sole discretion, require a corresponding proportionate increase in the amount of the Payment Bond.

8.3 No Relief of Liability

Notwithstanding any other provision set forth in the Contract Documents, performance by a Surety of any of the obligations of Design-Builder shall not relieve Design-Builder of any of its obligations hereunder.

SECTION 9. INSURANCE

9.1 Insurance Requirements

From the Effective Date of the Contract, Design-Builder shall procure and maintain insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the services hereunder by Design-Builder, its agents, representatives, employees or subcontractors. General Liability coverage shall be maintained for a minimum of 5 years after completion of the Project, and Errors and Omissions coverage shall be maintained for a minimum of five years after completion of the Project.

Design Builder shall procure and maintain for the duration of the Contract insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the work hereunder by the Design-Builder, its agents, representatives, employees or subcontractors. Design-Builder will also be required to obtain additional insurance, if required, by any local, State or Federal Agency that must issue a permit to complete the work as required or in connection with the performance of the work hereunder by the Design-Builder, its agents, representatives, employees or subcontractors. The cost of such insurance shall be included in the Design-Builder's bid.

I. Minimum Scope of Insurance

Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage ("occurrence" form CG 0001) including:
 - a. Products and completed operations/product hazard coverage:
 - i. Such insurance shall be maintained for five years after final payment.
 - ii. Design Builder shall furnish City and each other additional insured (as identified in the Supplementary Conditions or elsewhere in the Contract) evidence of continuation of such insurance at final payment and five years thereafter.
 - b. Blanket contractual liability coverage.
 - c. Broad form property damage coverage.

- d. Severability of interest.
 - e. Personal injury coverage.
2. The coverage provided by Insurance Services Office form number CA 0001 covering Automobile Liability. Coverage shall be included for all owned, non-owned and hired automobiles; and
 3. Workers' Compensation insurance as required by the Labor Code of the State of California and Employers Liability insurance; and
 4. Professional Liability Errors and Omissions insurance for all Professional Services rendered including architecture, engineering, or design services; and
 5. Contractor's Pollution Liability Insurance, including coverage for all operations, completed operations and professional services; and
 6. Builders' Risk Insurance;

There shall be no endorsement reducing the scope of coverage required above unless approved by the City's Risk Manager.

II. **Minimum Limits of Insurance**

Design Builder shall maintain limits no less than:

1. Commercial General Liability: \$25,000,000 per occurrence and \$25,000,000 aggregate for bodily injury, personal injury and property damage.
2. Automobile Liability: \$2,000,000 combined single limit per accident for bodily injury and property damage.

3. Workers' Compensation and Employers Liability: Workers' Compensation limits as required by the Labor Code of the State of California and Employers Liability limits of \$1,000,000 per accident.
4. Professional Liability Errors and Omissions: \$5,000,000 per claim, coverage to be maintained following completion of work on project for 5 years or, if policy is canceled, extended reporting period to equal the same.
5. Contractor's Pollution Liability: \$2,000,000 each occurrence/aggregate limit.
6. Builder's Risk: The cost to repair or replace the lost or damaged property, valued as of the time and place of loss, with material of like kind and quality, less betterment, including contractor's reasonable profit and overhead in the same proportion as that included in the original contract documents. The policy shall be further endorsed to cover damage to existing structure, property or improvements. No deductible shall exceed \$50,000 or for special endorsement on earthquake \$250,000.00.

In the event that Design Builder requests to use an umbrella policy or excess policy to meet policy limits, umbrella or excess coverage must follow form or have greater scope of coverage than required in the section I. **Minimum Scope of Insurance**. City shall receive the same status on the excess/umbrella policy including meeting all provision as set forth in section II. **Other Insurance Provisions**.

III. **Deductibles and Self-Insured Retentions**

Any deductibles or self-insured retentions must be declared to, and approved by, the City. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officials, employees, agents and contractors; or the Design Builder shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the City.

IV. Other Insurance Provisions

The policies are to contain, or be endorsed to contain, the following provisions:

1. General Liability and Automobile Liability Coverages

- a. The City, its officials, employees, agents and contractors are to be covered as additional insureds as respects: liability arising out of activities performed by, or on behalf of, the Design Builder; products and completed operations of the Design Builder; premises owned, leased or used by the Design Builder; or automobiles owned, leased, hired or borrowed by the Contractor. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officials, employees, agents and contractors.
 - i. Additional insured endorsements shall be provided that include both ongoing operations and products and completed operations coverage through ISO Endorsements CG 20 10 10 01 and CG 20 37 10 01 (together); or CG 20 10 07 04 and CG 20 37 07 04 (together); or their equivalent.
 - ii. For design professionals, additional insureds, ISO Endorsement CG 20 32 07 04, "Additional Insured—Engineers, Architects or Surveyors Not Engaged by the Named Insured" or its equivalent shall be provided.
 - iii. Additional insured endorsements shall be provided for any local, State or Federal Agency that must issue a permit to complete the work as required or in connection with the performance of the work hereunder by the Design Builder, his agents, representatives, employees or subcontractors.

- b. The Design Builder's insurance coverage shall be primary insurance as respects the City, its officials, employees, agents and contractors. Any

insurance or self-insurance maintained by the City, its officials, employees, agents or contractors shall be excess of the Design Builder's insurance and shall not contribute with it.

- c. Any failure by Design Builder to comply with reporting provisions of the policies shall not affect coverage provided to the City, its officials, employees, agents, or contractors.
- d. Coverage shall state that the Design Builder's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- e. Coverage shall contain a waiver of subrogation in favor of the City, its officials, employees, agents and contractors.

2. Workers' Compensation and Employers' Liability

Coverage shall contain a waiver of subrogation in favor of the City, its officials, employees, agents and contractors.

3. All Coverages

Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled, reduced in coverage or in limits except after thirty (30) days' prior written notice has been given to the City; except that ten (10) days' prior written notice shall apply in the event of cancellation for non-payment of premium.

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V. Acceptability of Insurance

Insurance is to be placed with insurers acceptable to the City's Risk Manager.

VI. Verification of Coverage

Design Builder shall furnish the City with certificates of insurance and with original endorsements affecting coverage required by this clause. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Copies of all the required ENDORSEMENTS shall be attached to the CERTIFICATE OF INSURANCE which shall be provided by the Design Builder's insurance company as evidence of the stipulated coverages.

Proof of insurance shall be either emailed in pdf format to:

Riskmgmt@sanjoseca.gov, or mailed to the following postal address (or any subsequent email or postal address as may be directed in writing by the Risk Manager):

City of San Jose – Finance Department
Risk & Insurance
200 East Santa Clara St., 14th Floor
San Jose, CA 95113-1905

VII. Subcontractors

Design Builder shall include all subcontractors as insureds under its policies or shall obtain separate certificates and endorsements for each subcontractor or subconsultant. Subconsultants providing professional services shall be required to maintain and provide, at City's request, proof of professional liability insurance of at least \$1,000,000 per claim or greater depending on standard industry practice.

9.1.1 Subcontractors

Design-Builder shall arrange for insurance coverage required under the Contract from all Subcontractors while working on site during the course of the Project.

SECTION 10. SITE SECURITY; MAINTENANCE AND REPAIR

10.1 Site Security

During the period commencing upon the date indicated in issuance of the Notice to Proceed for the Design-Build Contract with respect to the Project and ending upon Project Acceptance, Design-Builder shall provide appropriate security for the Project Site, and shall take all reasonable precautions and provide protection to prevent damage, injury, or loss to the Work and materials and equipment to be incorporated therein, as well as all other property at or on the Project Site, whether owned by Design-Builder, City or any other Person.

10.2 Obligation to Maintain and Repair

10.2.1 Maintenance Liability Period

Design-Builder's maintenance liability under this Section 10.2 with respect to Project shall commence upon issuance of the Notice to Proceed for the Project. Effective as of the date on which the Project Completion occur Design-Builder shall be relieved of maintenance liability for the Project

10.2.2 Maintenance and Repair Liability

Design-Builder shall maintain, rebuild, repair, restore or replace all Work (including Design Documents, Construction Documents, materials, equipment, supplies and maintenance equipment which are purchased for permanent installation in, or for use during construction of the Project and regardless of whether City has title thereto), that is injured or damaged during the period specified in Section 10.2.1. All such Work shall be at no additional cost to City. Design-Builder shall also have full responsibility for rebuilding, repairing and restoring all other property at the Project Site whether owned by Design-Builder, City or any other Person. Where necessary to protect the Work or materials from damage, Design-Builder shall, at Design-Builder's expense, provide suitable drainage and erect those temporary structures that are necessary to protect the Work or materials from damage. The suspension of the Work, regardless of cause, shall not relieve Design-Builder of the responsibility for the Work and materials as herein specified.

10.2.3 Use of Insurance Proceeds

If insurance proceeds with respect to any loss or damage are paid to City under any insurance policies required to be provided hereunder, then City shall arrange for such proceeds to be paid to Design-Builder as repair or replacement work is performed by Design-Builder to the extent that City has not previously paid for such repair or replacement work; provided, however, that release of such proceeds to Design-Builder shall not be a condition precedent to its performing such replacement or repair work or indicate that such replacement or repair work has been approved and accepted by City, and Design-Builder shall remain obligated to pay deductibles as specified in Section 9.

10.3 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 furnished, or to be furnished, by it and its Subcontractors that become part of the Project or are purchased for City for the operation, maintenance or repair thereof, free and clear of all Liens. Title to all of such materials, equipment, tools and supplies which shall have been delivered to the Project Site shall pass to City, free and clear of all Liens, upon the sooner of (a) incorporation into the Project or (b) payment by City to Design-Builder of invoiced amounts pertaining thereto. Notwithstanding any such passage of title, Design-Builder shall retain sole care, custody and control of such materials, equipment, tools and supplies and shall exercise due care with respect thereto until Project Completion or until Design-Builder is removed from the Project.

SECTION 11. WARRANTIES

11.1 Warranties

11.1.1 Warranty

Design-Builder warrants that (a) all design Work furnished pursuant to the Contract Documents shall conform to all professional engineering principles generally accepted as standards of the industry in the State, (b) the Work shall be free of defects, including design Errors, except to the extent that such defects are inherent in prescriptive specifications included in the Contract Documents, (c) the Project shall be fit for use for the intended function, (d) materials and equipment furnished under the Contract Documents shall be of good quality and new, and (e) the Work shall meet all of the requirements of the Contract Documents and industry standards for performance, service life, deterioration and wear.

11.1.2 Warranty Term

The Warranty term for the Project shall commence sixty (60) days after Substantial Completion. Except as may be extended below, the Warranties regarding the Project shall remain in effect until one year after Project Acceptance. If City determines that any of the Work has not met the requirements set forth in this Section 11.1 at any time within the Warranty term, then Design-Builder shall correct such Work as specified below, and repair any damage to the Project as well or other property of the City to the extent caused by the failure of the work to meet the requirements set forth in this Section 11.1, even if the performance of such corrective work extends beyond the stated warranty term. City and Design-Builder shall conduct a walkthrough of the Project Site prior to expiration of the Warranty term and shall produce a Punch List of those items requiring Warranty Work.

Design-Builder warrants the Work for one year against faulty materials and workmanship.

11.1.3 Remedy

Within seven (7) days of receipt by Design-Builder of notice from City specifying a failure of any of the Work to satisfy Design-Builder's Warranties, or of

any Subcontractor representation, warranty, guarantee or obligation which Design-Builder is responsible to enforce, Design-Builder shall implement appropriate action to remedy such violation and shall notify City in writing of the action; provided, however, that in case of an emergency requiring immediate curative action, Design-Builder shall immediately implement such action. If Design-Builder does not use its best efforts to proceed to effectuate such remedy within the agreed time, or should Design-Builder and City fail to reach such an agreement within such seven-day period (or immediately should City disapprove of the actions being taken, in the case of emergency conditions), City, after notice to Design-Builder, shall have the right to perform or have performed by third parties the necessary remedy, and the costs thereof shall be borne by Design-Builder. City may agree to accept nonconforming Work in accordance with Section 5.7.2. Notwithstanding the foregoing, in the event of existence of a condition on or affecting the Project which the Director of Public Works believes poses an immediate and imminent danger to public health or safety, the Director of Public Works may, without notice, rectify the dangerous condition at Design-Builder's cost, if the need for such action is ultimately determined to be due to a failure of the Work to satisfy Design-Builder's Warranties or any Subcontractor representation, warranty, guarantee or obligation which Design-Builder is responsible to enforce.

11.1.4 Permits and Costs

Design-Builder shall be responsible for obtaining and paying for any required access permits from City and any required consents from any other Persons in connection with Warranty Work. Design-Builder shall bear all costs of Warranty Work, including additional testing and inspections

11.2 Subcontractor Warranties

11.2.1 Warranty Requirements

Without in any way derogating the Warranties and Design-Builder's own representations and warranties and other obligations with respect to all of the Work, Design-Builder shall obtain from all Subcontractors and cause to be extended to City appropriate representations, warranties, guarantees and obligations with respect

to design, materials, workmanship, equipment, tools and supplies furnished by such Subcontractors. All representations, warranties, guarantees and obligations of Subcontractors (a) shall be written so as to survive all City inspections, tests and approvals, and (b) shall run directly to and be enforceable by Design-Builder and City and their respective successors and assigns. Design-Builder hereby assigns to City all of Design-Builder's rights and interest in all extended warranties for periods exceeding the applicable warranty term which are received by Design-Builder from any of its Subcontractors.

11.2.1 Enforcement

During the Warranty term, upon receipt from City of notice of a failure of any of the Work to satisfy any Subcontractor warranty, representation, guarantee or obligation, Design-Builder shall enforce or perform any such representation, warranty, guaranty or obligation, in addition to Design-Builder's other obligations hereunder. City's rights under this Section 11.2.2 shall commence at the time such representation, warranty, guaranty or obligation is furnished and shall continue until the expiration of Design-Builder's relevant warranty. Until such expiration, the cost of any equipment, material, labor (including re- engineering) or shipping shall be for the account of Design-Builder if such cost is covered by such a warranty and Design-Builder shall be required to replace or repair defective equipment, material or workmanship furnished by Subcontractors in accordance with the procedures set forth in Section 11.1.3.

11.2.2 No Limitation of Liability

The foregoing Warranties and Subcontractor warranties are in addition to all rights and remedies available under the Contract Documents or applicable Governmental Rules, and shall not limit Design-Builder's liability or responsibility imposed by the Contract Documents or applicable Governmental Rules with respect to the Work, including liability for design defects, latent construction defects, strict liability, negligence or fraud.

11.2.3 Damages for Breach of Warranty

In addition to City's other rights and remedies hereunder, at law or in equity, Design-Builder shall be liable for actual damages resulting from any breach of an express or implied warranty or any defect in the Work.

11.2.4 Warranty Disputes

Any disagreement between City and Design-Builder relating to this Section 11 shall be subject to dispute resolution in accordance with Section 19.

SECTION 12. PAYMENT FOR SERVICES

12.1 Contract Price

12.1.1 Contract Design-Build Lump Sum (Fixed) Price

Notwithstanding anything herein to the contrary, the aggregate compensation available to compensate Design-Builder for the Project, exclusive of Change Orders, shall not exceed \$42,526,880.95.

12.1.2 Contract Price

As full compensation for the Work and all other obligations to be performed by Design-Builder under the Contract Documents associated with Project, City shall pay to Design-Builder the Design-Build Contract Price in accordance with this Section 12. Contract Price shall be increased or decreased only by a Change Order issued in accordance with Section 13 or by a Contract amendment.

12.1.3 Items Included in the Contract Price

Design-Builder acknowledges and agrees that, subject only to Design-Builder's rights under Section 13, the Contract Price includes (a) all studies, investigations, designs, permits, equipment, materials, labor, insurance and bond premiums, home office, jobsite and other overhead, profit and services relating to Design-Builder's performance of its obligations under the Contract Documents (including all Work, equipment, materials, labor and services provided by Subcontractors and intellectual property rights necessary to perform the Work); (b) the cost of obtaining all Governmental approvals (except as specified in Section 2.2.4); (d) all costs of compliance with and maintenance of the governmental approvals and compliance with Governmental Rules; (e) payment of any taxes, duties, permit and other fees and/or royalties imposed with respect to the Work and any equipment, materials, labor or services included therein; and (f) compensation for all risks and contingencies assigned to Design-Builder under the Contract Documents.

12.2 Invoicing and Payment

The following process shall apply to invoicing and payment:

12.2.1 Payment

Invoices shall be paid within the Design-Build Lump Sum Contract Price on the basis of the approved Schedule of Values (SOV) included in the Contract Documents and the measured progress each month as approved by the City. Design-Builder shall be obligated to complete all of the Design-Build Work for an amount not to exceed the Design-Build Lump Sum in accordance with the Contract Schedule.

12.2.1.1 Profit

Profit allocated to the Project will be incorporated in the item breakdown within the Schedule of Values.

12.2.2 Draft Invoice and Progress Meeting

Design-Builder shall deliver a draft invoice based on the evaluated progress of Work items listed in the Schedule of Values to City on or about the first business day of each month. At each Progress Meeting to be held no later than the fifth business day of each month, Design-Builder and City's designated representative shall ascertain the progress of the Work and verify the quantities for any Time and Materials and unit priced Work. Each Progress Meeting shall be attended by Design-Builder and City and/or its consultants. Design-Builder and City's designated representative shall review the draft invoice and certificate reflecting the value of Work completed as of the date of the meeting (based on (a) quantities and unit prices for unit priced Work, (b) time and materials for Work, (c) percentage completion for Lump Sum Design Work and (d) percentage completion of each line item in the Schedule of Values for Design-Build Work. Design-Builder and City's designated representatives shall sign the draft invoice, indicating the portions of it that have been approved and setting forth the proposed total payment amount, which shall be the approved value of the Work then completed, calculated in accordance with the type of Schedule, plus the value of unit priced, Time and Materials and Schedule of Values Work, less Retainage and progress payments previously made. The amounts set forth in the draft invoice shall be used by Design-Builder in preparation of its monthly payment request described in Section 12.2.3.

12.2.3 Delivery of Invoice

Within seven (7) days after each Progress Meeting, Design-Builder shall submit to City two copies of an invoice in the form attached hereto as Appendix 18, for the Work performed under the Contract Documents during the immediately preceding month. Each invoice shall be based upon the approved draft invoice. Within seven (7) business days after City's receipt of the invoice, City will review the invoice and all attachments thereto for consistency with the draft invoice prepared at the most recent Progress Meeting and conformity with all requirements of the Contract Documents, and shall notify Design- Builder of the amount approved for payment and specify the reason for disapproval of any remaining invoiced amounts. Design-Builder may include such disapproved amounts in the next month's invoice after correction of the deficiencies noted by City (all such disapproved amounts shall be deemed in dispute unless otherwise agreed).

12.2.4 Payment by City

Within thirty (30) days after receipt by City of each complete invoice, City shall pay Design-Builder the amount of the invoice approved for payment less any applicable Retainage and less any amounts which City is otherwise entitled to withhold or deduct.

12.2.4.1 City and Design-Builder may agree to modify the Schedule of Values during the Project Schedule in the event of changes to the Work or agreed modifications to the breakdown of the Design-Build Lump Sum Price indicated in the SOV.

12.3 Deductions, Exclusions and Limitations on Payment

12.3.1 Retainage

12.3.1.1 City shall withhold funds (the "Retainage") from each Design-Build Contract payment to be made to Design-Builder as described in Section 12.2.4 until such time as Project Substantial Completion is achieved in accordance with Standard Specification Section 9-1.06.

12.3.1.2 No portion of the Retainage shall be released unless and until all of the following conditions have been met: (a) Liquidated Damages shall not then be payable to City; (b) Design-Builder shall have established to City's reasonable satisfaction that Liquidated Damages are not anticipated to be payable to City; (c)

Design-Builder shall have applied in writing for such release; (d) no Event of Default has occurred and no event has occurred that, with the passage of time or the giving of notice, would constitute an Event of Default; and (e) such release shall have been approved in writing by each Surety.

12.3.1.3 City agrees to release Retainage being withheld for Work performed by Subcontractors, upon receipt of application from Design-Builder stating that the Subcontractor has completed all Work required to be performed under its Subcontract, stating the amount withheld by Design-Builder under the Subcontract, and providing all backup information and stop notice and lien releases as may be required by City. City will process such applications once per fiscal quarter, with the first release to occur following completion of 50% of the Work.

12.3.1.4 City agrees to release a portion of the Retainage from time to time in accordance with Section 9-1.06 of the Standard Specifications. The amount to be released shall be reduced by (a) any amounts which City is required to retain under Public Contract Code section 9203, (b) amounts applied to the payment of losses, damages or expenses incurred by City for which Design-Builder is responsible, (c) amounts that City deems advisable, in its sole discretion, to retain to cover any existing or threatened claims, Liens and stop notices from Subcontractors, Suppliers, laborers, Utility Owners or other third parties relating to the Project which have not been bonded around per statutory requirements, and (d) the estimated cost of repairing any nonconforming Work or otherwise remedying any breach of contract by Design-Builder.

On the date that Final Payment for the Project is due hereunder, City shall release to Design-Builder all remaining Retainage other than estimated amounts to pay (a) amounts applied to the payment of Liquidated Damages, amounts City is required to retain under Public Contract Code section 9203, amounts applied to the payment of losses, damages or expenses incurred by City for which Design-Builder is responsible, (d) amounts that City deems advisable, in its sole discretion, to retain to cover any existing or threatened claims, Liens and stop notices from Subcontractors, Suppliers, laborers, Utility Owners or other third parties relating to the Project which have not been bonded around per statutory requirements, and (e) 150% of the estimated cost of repairing any nonconforming Work or otherwise remedying any breach of contract by

Design-Builder. Final payment of such Retainage not applied to the matters identified above shall be made upon Design-Builder showing, to City's reasonable satisfaction, that all such matters have been resolved, including delivery to City of a certification representing that there are no outstanding claims of Design-Builder or any claims, Liens or stop notices of any Subcontractor, Supplier, laborer, Utility Owner or other third party with respect to the Work other than those that have been bonded around by Design-Builder in accordance with statutory requirements or which are directly related to City's acts or omissions and are included in RFC Notices filed concurrently with the Application for Final Payment.

12.3.1.5 Design-Builder shall have the right to substitute securities or a letter of credit for the Retainage pursuant to the procedures contained in Public Contract Code Section 22300. No such substitution shall be accepted until such securities or letter of credit have been approved by City as qualifying for substitution, the value of such securities has been established to City's reasonable satisfaction, the parties have entered into an escrow agreement (if the securities are to be held in escrow) in form substantially similar to that contained in Public Contract Code Section 22300, and all documentation necessary for assignment of the securities to City or to the escrow agent, as appropriate, has been delivered in form reasonably satisfactory to City.

12.3.1.6 If Design-Builder has substituted securities for any of the Retainage, then City may request that such securities be revalued from time to time, but not more often than monthly. Such revaluation would be made by the Person designated by City and approved by Design-Builder. If such revaluation results in a determination that such securities have a market value which is less than the amount of Retainage for which they were substituted, then notwithstanding anything to the contrary contained herein, the amount of the Retainage required under the Contract shall be increased by such difference in market value. Such increased Retainage shall be withheld from the next progress payment due Design-Builder hereunder.

12.3.2 Deductions

In addition to the deductions provided for under Section 12.3.1, City may deduct from each progress payment and the Final Payment the following:

(a) Any City or third party claims or losses for which Design-Builder is responsible, other than third-party personal injury or property damage claims or losses covered by insurance hereunder, or any Liquidated Damages which have accrued as of the date of the application for payment;

(b) If a notice to stop payment is filed with City, due to Design-Builder's failure to pay for labor or materials used in the work, money due for such labor or materials, plus the 25% prescribed by law, will be withheld from payment to Design-Builder. In accordance with Section 9364 of the Civil Code, City will accept a bond by a corporate surety in lieu of withholding payment;

(c) Any sums expended by or owing to City as a result of Design-Builder's failure to maintain the as-built drawings;

(d) Any sums expended by City in performing any of Design-Builder's obligations under the Contract which Design-Builder has failed to perform; and

(e) Any other sums which City is entitled to recover from Design-Builder under the terms of the Contract.

The failure by City to deduct any of these sums from a progress payment shall not constitute a waiver of City's right to such sums.

All amounts owing by Design-Builder to City under the Contract shall earn interest from the date on which such amount is owing at the lesser of (i) 10% per annum or (ii) the maximum rate allowable under applicable Governmental Rules.

12.3.3 Unincorporated Materials

City will not pay for materials not yet incorporated in the Work unless all of the following conditions are met:

12.3.3.1 Material shall be delivered to the Project Site, or delivered to Design-Builder and promptly stored by Design-Builder in bonded storage at a location approved by City. Design-Builder shall submit certified bills for such materials with the invoice, as a condition to payment for such materials. If such materials are stored at any site not approved by City, Design-Builder shall accept responsibility for and pay all personal and property taxes that may be levied against City by any state or subdivision thereof on account of such storage of such materials. City will permit Design-Builder, at its own cost, to in good faith contest the validity of any such

tax levied against City in appropriate proceedings and in the event of any judgment or decree of a court, Design- Builder agrees to pay same together with any penalty or other costs, relating thereto.

12.3.3.2 All such materials so accepted shall be and become the property of City. Design-Builder at its own cost shall promptly execute, acknowledge and deliver to City proper bills of sale or other instruments in writing in a form acceptable to City conveying and assuring to City title to such material included in any invoice, free and clear of all Liens. Design-Builder at its own cost shall conspicuously mark such material as the property of City, shall not permit such materials to become commingled with non-City- owned property and shall take such other steps, if any, as City may require or regard as necessary to vest title to such material in City free and clear of Liens.

12.3.3.3 Material included in an invoice but which is subsequently lost, damaged or unsatisfactory shall be deducted from succeeding invoices.

12.3.3.4 Payment for material furnished and delivered as indicated in this Section 12.3.3 will not exceed the amount paid by Design-Builder as evidenced by a bill of sale supported by paid invoice. City shall withhold Retainage from such payment as specified in Section 12.3.1.

12.4 Final Payment

Final Payment for the Work will be made as follows:

12.4.1 On or about the date of delivery of its Affidavit of Project Completion, Design-Builder shall prepare and submit a proposed Application for Final Payment to City showing the proposed total amount due Design-Builder, including Retainage. In addition to meeting all other requirements for invoices hereunder, the Application for Final Payment shall list all outstanding or pending RFC Notices and all existing or threatened claims, Liens and stop notices by Subcontractors, Utility Owners or other third parties relating to the Project, including any notices filed or to be filed with the Affidavit of Project Completion, stating the amount at issue associated with each such notice. The Application for Final Payment shall be accompanied by:

(a) complete and legally effective releases or waivers of Liens and stop notices satisfactory to City, from all Persons legally eligible to file Liens and stop notices in

connection with the Work, which may be contingent upon receipt of final payment, provided City may issue final payment in the form of a joint check; (b) consent of Surety(ies) to final payment; (c) an executed release meeting the requirements of Section 12.4.3 and otherwise satisfactory in form and content to City; and (d) such other documentation as City may reasonably require. Prior applications and payments shall be subject to correction in the proposed Application for Final Payment. RFC Notices filed concurrently with the Application for Final Payment must be otherwise timely and meet all requirements under Section 13 and Section 19.

12.4.2 As a condition to its obligation to make payment to Design-Builder based on the Application for Final Payment, City shall have received an executed release meeting the requirements of Section 12.4.3 and otherwise satisfactory in form and content to City. The payment amount will be reduced by any amounts deductible under Section 12.3.2, and by any amounts that City is entitled to withhold under Section 12.3.1.5.

12.4.3 The executed release from Design-Builder shall be from any and all claims arising from the Work, and shall release and waive any claims against the Indemnified Parties, excluding only those matters listed as outstanding in the Application for Final Payment. The release shall be accompanied by an affidavit from Design-Builder certifying that:

(a) it has resolved any known and undisputed claims made by Subcontractors, Utility Owners and others against Design-Builder or the Project other than claims included in outstanding RFC Notices listed in the Application for Final Payment

(b) it has no reason to believe that any Person has a valid claim against Design-Builder or the Project which has not been communicated in writing by Design-Builder to City as of the date of the certificate; and

(c) all guarantees and warranties are in full force and effect. The release and the affidavit shall survive Final Payment.

12.4.4 All prior partial estimates and payments shall be subject to correction in the final estimate of payments.

12.5 Payment to Subcontractors

12.5.1 Upon receipt of payment from City, Design-Builder shall promptly pay each Subcontractor, out of the amount paid to Design-Builder on account of such Subcontractor's portion of the Work, the amount to which such Subcontractor is entitled, less any retainage provided for in the Subcontract. Retainage on Subcontracts shall comply with applicable Governmental Rules. Upon satisfactory completion of all Work to be performed by a Subcontractor, including provision of appropriate releases, certificates and other evidence of the Subcontractor's compliance with all applicable requirements of the Contract Documents, Design-Builder shall return all moneys withheld in retention from the Subcontractor. Such payment shall be made promptly following satisfaction of the foregoing requirements, even if Work to be performed by Design-Builder or other Subcontractors is not completed and has not been accepted, provided that release of the Subcontract retention shall be made on or before the later to occur of (a) 10 days following satisfaction of the foregoing requirements or (b) 30 days following receipt of payment from City for the completed Subcontract Work.

12.5.2 Each Subcontract shall require the Subcontractor to make payments to sub-subcontractors and Suppliers in a similar manner.

12.5.3 This requirement shall not be construed to limit or impair any legal, contractual, administrative, or judicial remedies otherwise available to Design-Builder or any Subcontractor in the event of a dispute involving late payment or nonpayment by Design-Builder or deficient Subcontract performance or noncompliance by a Subcontractor.

12.5.4 City shall have no obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by law.

12.6 Disputes

Failure by City to pay any amount in dispute shall not alleviate, diminish or modify in any respect Design-Builder's obligation to perform under the Contract Documents, including Design-Builder's obligation to achieve Project Acceptance for the Project and all Work in accordance with the Contract Documents, and Design-Builder shall not cease or slow down its performance under the Contract Documents

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on account of any such amount in dispute. Any dispute regarding such payment shall be resolved pursuant to Section 19. Design-Builder shall proceed as directed by City pending resolution of the dispute. Upon resolution of any such dispute, each party shall promptly pay to the other any amount owing.

**SECTION 13.
CHANGES IN THE WORK**

This Section 13 sets forth the requirements for obtaining all Change Orders under the Contract. Design-Builder hereby acknowledges and agrees that the Design-Build Lump Sum Contract Price constitutes full compensation for performance of all Work, subject only to those exceptions specified in this Section 13, and that City is subject to constraints limiting its ability to increase the Contract Prices or extend the Completion Deadlines. Design-Builder hereby waives the right to make any claim for a time extension or for any monetary compensation in addition to the Contract Price and other compensation specified in the Contract for any reason whatever, except as specifically set forth in this Section 13.

13.1 Circumstances Under Which Change Orders May Be Issued

13.1.1 Definition of and Requirements Relating to Change Orders

13.1.1.1 Definition of Change Order

The term "Change Order" shall mean a written amendment to the terms and conditions of the Contract Documents issued in accordance with this Section 13. City may issue unilateral Change Orders as specified in Section 13.2.2. Change Orders may be requested by Design-Builder only pursuant to Section 13.3. A Change Order shall not be effective for any purpose unless executed by City. Change Orders may be issued for the following purposes (or combination thereof):

- (a) to modify the scope of the Work;
- (b) to revise a Completion Deadline;
- (c) to revise a Contract Price; and
- (d) to revise other terms and conditions of the Contract Document

Upon City's approval of the matters set forth in the Change Order form whether it is initiated by City or requested by Design-Builder), City shall sign such Change Order form indicating approval thereof. A Change Order may, at the sole discretion of City,

direct Design-Builder to proceed with the Work with the amount of any adjustment of any Completion Deadline or Contract Price to be determined in the future.

13.1.1.2 Issuance of Directive Letter

City may at any time issue a Directive Letter to Design-Builder in the event of any desired change in the Work or in the event of any dispute regarding the scope of the Work. The Directive Letter will state that it is issued under this Section 13.1.1.2, will describe the Work in question and will state the basis for determining compensation, if any. Design-Builder shall proceed immediately as directed in the letter, pending the execution of a formal Change Order (or, if the letter states that the Work is within Design-Builder's original scope of Work, Design-Builder shall proceed with the Work as directed but shall have the right pursuant to Section 13.3 to request that City issue a Change Order with respect thereto).

13.1.1.3 Directive Letter as Condition Precedent to Claim that City-Directed Change Has Occurred

13.1.1.3.1 Receipt of a Directive Letter from City shall be a condition precedent to Design-Builder's right to claim that a City-Directed Change has occurred, in addition to provision of notice and subsequent Request for Change Order pursuant to Section 13.3.2; provided that no Directive Letter shall be required for any City-Directed Changes directly attributable to delays caused by bad faith actions, active interference, gross negligence or comparable tortious conduct by City or its duly authorized representatives. Except when a Directive Letter is not required pursuant to this Section 13.1.1.3, Design-Builder shall be deemed to have waived any right to payment for work performed prior to receipt of a Directive Letter from City stating that it is issued pursuant to Section 13.1.1.2, or a Change Order for such Work signed by City, notwithstanding that Design-Builder believes such work is outside of its original scope. Receipt of a Directive Letter from City is not a condition precedent to Design-Builder's right to a Change Order on grounds other than performance of a City-Directed Change.

13.1.1.3.2 The fact that a Directive Letter was issued by City shall not be considered evidence that in fact a City-Directed Change occurred. The determination whether a City-Directed Change in fact occurred shall be based on

an analysis of the original Contract requirements and a determination whether the Directive Letter in fact constituted a change in those requirements. The requirements of Section 13.1.1.3.1 shall not imply that a Directive Letter would be required in order for Design-Builder to have the right to receive compensation for Work within its original scope for which additional compensation is specifically allowed under this Section 13.

13.1.2 Right of City to Issue Change Orders

City may, at any time and from time to time, without notice to any Surety, authorize and/or require changes in the Work within the general scope of the Contract pursuant to a Change Order. For the purpose of this Section 13.1.2, any direction to perform work shall be considered within the general scope of the Contract if it is related to the Project; any direction to delete or modify Work shall be considered within the general scope unless as a result the Contract would no longer be considered a design-build contract for the Project of the nature described in the RFP. Design-Builder shall have no obligation to perform any work outside the general scope of the Contract, except on terms mutually acceptable to City and Design-Builder.

13.2 City-Initiated Change Orders

This Section 13.2 concerns (a) Change Orders issued by City following a Change Notice and (b) Change Orders unilaterally issued by City.

13.2.1 Change Notice

13.2.1.1 If City desires to issue a City-Directed Change or to evaluate whether to initiate such a change, then City may, at its discretion, issue a Change Notice. A Directive Letter may also constitute a Change Notice.

13.2.1.2 Within seven days after Design-Builder's receipt of a Change Notice, or such longer period as may be mutually agreed to by City and Design-Builder, City and Design-Builder shall consult to define the proposed scope of the change. Within five days after the initial consultation, or such longer period as may be mutually agreed to by City and Design-Builder, City and Design-Builder shall consult concerning the estimated cost and time impacts. Design-Builder shall provide data regarding such matters as requested by City.

13.2.1.3 Within five business days after the second consultation and provision of any data described in Section 13.2.1.2, City shall notify Design-Builder

whether City (a) wishes to issue a Change Order, (b) wishes to request Design-Builder to provide a cost and schedule proposal, (c) wishes to request Design-Builder to prepare a modified work plan for the change and a cost and schedule proposal based on the modified plan, or (d) no longer wishes to issue a Change Order. City may at any time, in its sole discretion, require Design-Builder to provide two (2) alternative costs and schedule proposals, one of which shall provide for a time extension and any additional costs permitted hereunder, and the other of which shall show all acceleration schedule associated with meeting the original Completion Deadlines, as well as any additional costs permitted hereunder.

13.2.1.4 If so requested, Design-Builder shall, within ten (10) business days after receipt of the notification described in Section 13.2.1.3, or such longer period as may be reasonably necessary, prepare and submit to City for review and approval by City a Cost and Schedule Proposal (in the format provided by City) for the requested change, complying with all applicable requirements of Section 13.4, and incorporating and fully reflecting all requests made by City. Design-Builder shall bear the cost of developing the Cost and Schedule Proposal, including any modifications thereto requested by City, except that costs of design and engineering work required for preparation of plans or exhibits necessary to the Cost and Schedule Proposal, as pre-authorized by City, may be included in the Change Order as reimbursable items. If the Change Order is approved, such design and engineering costs will be included within the Change Order, otherwise, they shall be separately reimbursed through a separate Change Order.

13.2.1.5 If Design-Builder and City agree that a change in the requirements relating to the Work has occurred but disagree as to whether the change justifies additional compensation or time or disagree as to the amount of any change to be made to the Contract Price or a Completion Deadline, City may, in its sole discretion, order Design-Builder to proceed with the performance of the Work in question notwithstanding such disagreement. Such order may, at City's option, be in the form of: (a) a Time and Materials Change Order as provided in Section 13.7 or (b) a Directive Letter under Section 13.1.1.2.

13.2.1.6 If it is not practicable, due to the nature and/or timing of the event giving rise to a proposed Change Order, for Design-Builder to provide a complete Cost and Schedule Proposal meeting all of the requirements of Section 13.4, Design-Builder shall provide an incomplete proposal which includes all information capable of being ascertained. Said incomplete proposal shall: (a) include a list of those Change Order requirements which are not fulfilled together with an explanation reasonably satisfactory to City stating why such requirements cannot be met; (b) provide such information regarding projected impact on a critical path as is requested by City to the extent such impact is ascertainable; and (c) in all events include sufficient detail to ascertain the basis for the proposed Change Order and for any price increase or decrease associated therewith, to the extent such amount is then ascertainable. Design-Builder shall provide monthly updates to any incomplete Cost and Schedule Proposals in the same manner as updates to incomplete Requests for Change Order under Section 13.3.2.3.2.

13.2.2 Unilateral Change Orders

City may issue a Change Order at any time, regardless of whether it has issued a Change Notice. Design-Builder shall be entitled to compensation in accordance with Section 13.7 for additional Work which is required to be performed as the result of any unilateral Change Order, and shall have the right to submit the issue of entitlement to an extension of the Completion Deadlines to dispute resolution in accordance with Section 19. For deductive unilateral Change Orders, the Change Order may contain a price deduction deemed appropriate by City, and Design-Builder shall have the right to submit the amount of such price deduction to dispute resolution in accordance with Section 19.

13.2.3 Changes in Law

City shall be entitled to a change in the Contract Price for any Change in Law that changes the cost of the Work, if and to the extent that the Change in Law (i) allows a material modification in the design of the Project resulting in a net cost change, (ii) changes the mitigation requirements for the Project associated with archaeological or paleontological resources, or (iii) specifically targets the Project. The change in Contract Price shall be calculated in accordance with Section 13.6.5.

13.3 Design-Builder-Initiated Change Orders

13.3.1 Eligible Changes

13.3.1.1 Design-Builder may request a Change Order to extend a Completion Deadline only for delays which change the duration of a Critical Path and to increase or decrease the Contract Price directly attributable to one or more of the following events or circumstances:

(a) Additional or reduction in the Work resulting from City-Directed Changes and City-Caused Delays for which City has not issued a Change Order or a Change Notice;

(b) Additional or reductions of Work resulting from City-directed changes to the Contract Documents,

(c) To the extent permitted by Section 13.9;

(d) Certain Utility Adjustment Work and certain delays by Utility Owners, to the extent permitted by Section 6.2;

(e) Discovery of unidentified, pre-existing Hazardous Materials, to the extent permitted by Section 6.3;

(f) Adjustments subject to Section 3.3.2

(g) Adjustments in quantities of unit price AC paving work identified as item 1AC thru 29AC and item 46 in the Schedule of Values.

13.3.1.2 Design-Builder's entitlement to a Change Order for eligible changes is subject to the restrictions and limitations contained in this Section 13 and furthermore is subject to Design-Builder's compliance with all notification and other requirements identified herein. Design-Builder shall initiate the Change Order process by delivery of an RFC Notice as described in Section 13.3.2, followed by submittal of a Request for Change Order and supporting documentation to City.

13.3.2 Procedures

The requirements set forth in this Section 13.3.2 constitute conditions precedent to Design-Builder's entitlement to request and receive a Change Order except those involving a Change Notice. Design-Builder understands that it shall be forever barred

from recovering against City under this Section 13 if it fails to give notice of any act, or failure to act, by City or any of its representatives or the happening of any event, thing or occurrence pursuant to a proper Request for Change (RFC) Notice, and thereafter complies with the remaining requirements of this Section 13.3.

13.3.2.1 Request for Change (RFC) Notice

Design-Builder shall deliver to City a written notice (“RFC Notice”) stating that an event or situation has occurred within the scope of Section 13.3.1 which Design-Builder believes justifies a change in the Contract Price and/or a Completion Deadline and shall state which subsection(s) thereof is applicable. The first notice shall be labeled “RFC No. 1” and subsequent notices shall be numbered sequentially.

Each RFC Notice shall be delivered as promptly as possible after the occurrence of such event or situation. If any RFC Notice is delivered later than ten days after Design-Builder first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence described therein, Design-Builder shall be deemed to have waived the right to collect any and all costs incurred prior to the date of delivery of the RFC Notice, and shall be deemed to have waived the right to seek an extension of any Completion Deadline with respect to any delay in a Critical Path which accrued prior to the date of delivery of the written notice. Furthermore, if any RFC Notice concerns any condition or material described in Section 5.3.1, Design-Builder shall be deemed to have waived the right to collect any and all costs incurred in connection therewith to the extent that City is not afforded the opportunity to inspect such material or condition before it is disturbed. Design-Builder’s failure to provide a RFC Notice within sixty (60) days after Design-Builder first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence of a given event or situation shall preclude Design-Builder from any relief, unless Design-Builder can show, based on a preponderance of the evidence, that (a) City was not materially prejudiced by the lack of notice, or (b) City’s designated representative specified in accordance with Section 23.5.1 had actual knowledge, prior to the expiration of the 60-day period, of the event or situation and that Design-Builder believed it was entitled to a Change Order with respect thereto.

13.3.2.1.1 The RFC Notice shall: (a) state in detail the facts underlying the anticipated Request for Change Order, the reasons why Design-Builder believes additional compensation or time will or may be due and the date of occurrence; (b) state the name, title, and activity of each City representative knowledgeable of the facts underlying the anticipated Request for Change Order; (c) identify any documents and the substance of any oral or written communication involved in the facts underlying the anticipated Request for Change Order; (d) state in detail the basis for necessary accelerated schedule performance, if applicable; (e) state in detail the basis that the work is not required by the Contract, if applicable; (f) identify particular elements of Contract performance for which additional compensation may be sought under this Section 13.3.2; (g) identify any potential critical path impacts; and (h) provide an estimate of the time within which a response to the notice is required to minimize cost, delay or disruption of performance.

13.3.2.1.2 The written notification described in Section 5.3.1.1 may also serve as a RFC Notice provided it meets the requirements for RFC Notices.

13.3.2.1.3 Any adjustments made to the Contract shall not include increased costs or time extensions for delay resulting from Design-Builder's failure to timely provide requested additional information under this Section 13.3.2.1.

13.3.2.2 Delivery of Request for Change Order

Design-Builder shall deliver all Requests for Change Order under this Section 13.3 to City Engineer within Thirty (30) days after delivery of the RFC Notice to the City of their authorized representative, or such longer period of time as may be reasonably necessary up to sixty (60) days after which further extension of time must be mutually agreed to by the City and Design-Builder. City may require design and construction costs to be covered by separate Requests for Change Order. If Design-Builder requests a time extension, then City, in its sole discretion, may require Design-Builder to provide two alternative Requests for Change Order, one of which shall provide for a time extension and any additional costs permitted hereunder, and the other of which shall show all Acceleration Costs associated with meeting the original Completion Deadlines, as well as any additional costs permitted hereunder. If it is not feasible to recover to the original Completion Deadline or if Design-Builder

believes that the costs associated with such a recovery are prohibitive, then Design-Builder shall recommend a date to be shown in the alternative Change Order form. If Design-Builder fails to deliver a complete Request for Change Order or incomplete Request for Change Order meeting all of the requirements of Section 13.3.2.3 within the appropriate time period, Design-Builder shall be required to provide a new RFC Notice before it may submit a Request for Change Order.

13.3.2.3 Incomplete Requests for Change Order

Each Request for Change Order provided under Section 13.3.2.2 shall meet all requirements set forth in Section 13.4; provided that if any such requirements cannot be met due to the nature and/or timing of the occurrence, Design-Builder shall provide an incomplete Request for Change Order which fills in all information capable of being ascertained. Said incomplete Request for Change Order shall: (a) include a list of those Change Order requirements which are not fulfilled together with an explanation reasonably satisfactory to City stating why such requirements cannot be met, (b) provide such information regarding projected impact on a critical path as is requested by City, and (c) in all events include sufficient detail to ascertain the basis for the proposed Change Order and for any price increase associated therewith, to the extent such amount is then ascertainable.

13.3.2.3.1 Design-Builder shall furnish, when requested by City or its designee, such further information and details as may be required to determine the facts or contentions involved. Design-Builder agrees that it shall give City or its designee access to any and all of Design-Builder's books, records and other materials relating to the proposed Change Order, and shall cause its Subcontractors to do the same, so that City or its designee can investigate the basis for such proposed Change Order. Design-Builder shall provide City with a monthly update to all outstanding Requests for Change Order describing the status of all previously unfulfilled requirements and stating any changes in projections previously delivered to City, expenditures to date and time anticipated for completion of the activities for which the time extension is claimed. City may reject the Request for Change Order at any point in the process. Once a complete Request for Change Order is provided,

City's failure to respond thereto within 21 days of delivery of the request shall be deemed a rejection of such request.

13.3.2.4 Importance of Timely Response

Design-Builder acknowledges and agrees that, due to limitations on funding for the Project, timely delivery of notification of such events and situations and Requests for Change Orders and updates thereto are of vital importance to City. City is relying on Design-Builder to evaluate promptly upon the occurrence of any event or situation whether the event or situation will affect the Contract Schedule or the Contract Price and, if so, whether Design-Builder believes a time extension and/or price increase is required hereunder. If an event or situation occurs which may affect a Contract Price or a Completion Deadline, City will evaluate the situation and determine whether it wishes to make any changes to the definition of the Project so as to bring it within City's funding and time restraints. The following matters (among others) shall be considered in determining whether City has been prejudiced by Design-Builder's failure to provide timely notice: (a) the effect of the delay on alternatives available to City (that is, a comparison of alternatives which are available at the time notice was actually given and alternatives which would have been available had notice been given within ten days after occurrence of the event or when such occurrence should have been discovered in the exercise of reasonable prudence); and (b) the impact of the delay on City's ability to obtain and review objective information contemporaneously with the event.

13.3.2.5 Compliance With Section 5.3.1 Requirements

Design-Builder shall comply with all applicable requirements contained in Section 5.3.1, unless precluded from doing so by emergency circumstances.

13.3.2.6 Review of Subcontractor Claims

Prior to submission by Design-Builder of any Request for Change Order which is based in whole or in part on a request by a Subcontractor to Design-Builder for a price increase or time extension under its Subcontract, Design-Builder shall have reviewed all claims by the Subcontractor which constitute the basis for the Request for Change Order and determined in good faith that each such claim is reasonably justified

hereunder and that Design-Builder is justified in requesting an increase in the Price and change in Completion Deadlines in the amounts specified in the Request for Change Order. Each Request for Change Order involving Subcontractor Work, and each update to an incomplete Change Order request involving such Work shall include a summary of Design-Builder's analysis of all Subcontractor claims components and shall include a certification signed by Design-Builder's Project Executive stating that Design-Builder has investigated the basis for the Subcontractor's claims and has determined that all such claims are justified as to entitlement and amount of money and/or time requested and has no reason to believe and does not believe that the factual basis for the Subcontractor's claim is falsely represented. Any Request for Change Order involving Subcontractor Work which is not accompanied by such analysis and certification shall be considered incomplete.

13.3.3 Performance of Disputed Work

If City refuses to issue a Change Order based on Design-Builder's request, Design-Builder shall nevertheless perform all work as specified by Directive Letter, and shall have the right to submit the issue to dispute resolution pursuant to Section 19. Design-Builder shall maintain and deliver to City, upon request, contemporaneous records, meeting the requirements of Section 13.10, for all work performed which Design-Builder believes constitutes extra work (including non-construction work), until all Disputes regarding entitlement or cost of such work are resolved.

13.4 Contents of Change Orders

13.4.1 Form of Change Order

Each Cost and Schedule Proposal and Request for Change Order shall be prepared in form acceptable to City, and shall meet all applicable requirements of this Section 13.

13.4.2 Scope of Work, Cost Estimate, Delay Analysis and Other Supporting Documentation

Design-Builder shall prepare a scope of work, cost estimate, delay analysis and other information as required by this Section 13.4.2 for each Cost and Schedule Proposal and Request for Change Order.

13.4.2.1 Scope of Work

The scope of work shall describe in detail satisfactory to City all activities associated with the Change Order, including a description of additions, deletions and modifications to the existing Contract requirements.

13.4.2.2 Cost Estimate

The cost estimate shall set out the estimated costs in such a way that a fair evaluation can be made. It shall include a breakdown for labor, materials, equipment and markups for overhead and profit, unless City agrees otherwise. The estimate shall include costs allowable under Section 13.5.2, if any. If the work is to be performed by Subcontractors and if the work is sufficiently defined to obtain Subcontractor quotes, Design-Builder shall obtain quotes (with breakdowns showing cost of labor, materials, equipment and markups for overhead and profit) on the Subcontractor's stationery and shall include such quotes as back-up for Design-Builder's estimate. No markup shall be allowed in excess of the amounts allowed under Appendix 4. Design-Builder shall identify all conditions with respect to prices or other aspects of the cost estimate, such as pricing contingent on firm orders being made by a certain date or the occurrence or non-occurrence of an event.

13.4.2.3 Delay Analysis

If Design-Builder claims that such event, situation or change affects a Critical Path, it shall provide an impacted delay analysis indicating all activities represented or affected by the change, with activity numbers, durations, predecessor and successor activities, resources and cost, and with a narrative report, in form satisfactory to City, which compares the proposed new schedule to the current approved Schedule.

13.4.2.4 Other Supporting Documentation

Design-Builder shall provide such other supporting documentation as may be required by City.

13.4.3 Justification

All Requests for Change Orders shall include an attachment containing a detailed narrative justification therefor, describing the circumstances underlying the proposed change, identifying the specific provision(s) of Section 13 which permit a Change Order to be issued, and describing the data and documents (including all data and reports required under Section 13.10) which establish the necessity and amount of such proposed change.

13.4.4 Design-Builder Representation

Each Change Order shall contain a certification under penalty of perjury, using a form acceptable to City, executed by Design-Builder and stating that (a) the amount of time and/or compensation requested is justified as to entitlement and amount, (b) except as otherwise expressly provided in the Change Order, the amount of time and/or compensation requested includes all known and anticipated impacts or amounts, direct, indirect and consequential, which may be incurred as a result of the event or matter giving rise to such proposed change, and (c) the cost and pricing data forming the basis for the Change Order is complete, accurate and current.

13.5 Certain Limitations

13.5.1 Limitation on Contract Price Increases

Any increase or decrease in the Contract Price allowed hereunder shall exclude: (a) costs caused by the breach of contract or fault or negligence, or act or failure to act by any Design-Builder-Related Entity; (b) costs to the extent that they are unnecessary or could reasonably be avoided by Design-Builder, including by resequencing, reallocating or redeploying its forces to other portions of the Work or to other activities unrelated to the Work (including in the equation any additional costs reasonably incurred in connection with such reallocation or redeployment); and (c) costs for remediation of any nonconforming Work.

13.5.2 Limitation on Delay and Disruption Damages

13.5.2.1 Acceleration Costs; Delay and Disruption Damages

Except for delays caused by Differing Site Conditions, acceleration Costs shall be compensable hereunder only with respect to Change Orders issued by City as an alternative to allowing an extension of a Completion Deadline as contemplated by Sections 13.2.1.3 and 13.3.2.2. Other delay and disruption damages shall be compensable hereunder only in the case of delays which entitle Design-Builder to an extension of a Completion Deadline, to the extent of such extension, as follows:

(a) For City-Caused Delays, Design-Builder shall be entitled to 100% of the extended overhead incurred by Design-Builder during the delay period.

(b) For delays caused by events for which neither the City nor Design-Builder are responsible, Design-Builder shall be entitled to 50% of the extended overhead incurred by Design-Builder during the delay period.

(c) For delays concurrently caused by the City and the Design-Builder, the Design-Builder shall be entitled to 50% of the extended overhead incurred by Design-Builder during the delay period.

(d) For delays concurrently caused by Design-Builder and other events for which the City is not responsible, Design-Builder shall be entitled to 25% of the extended overhead incurred by Design-Builder during the delay period.

13.5.2.2 Other Limitations

Delay and disruption damages shall be limited to direct costs in the percentages described in Section 13.5.2.1 and markups thereon in accordance with Section 13.7 and any additional field office and jobsite overhead costs incurred by Design-Builder directly attributable to such delays. In addition, before Design-Builder may obtain any increase in the Contract Price to compensate for additional or extended overhead, Acceleration Costs or other damages relating to delay, Design-Builder shall have demonstrated to City's satisfaction that:

(a) its schedule which defines the affected Critical Path in fact set forth a reasonable method for completion of the Work;

(b) the change in the Work or other event or situation which is the subject of the requested Change Order has caused or will result in an identifiable and measurable disruption of the Work which impacted the Critical Path activity (i.e. consumed all available Float and extended the time required to achieve Project Completion beyond the applicable Completion Deadline); the delay or damage was not due to any breach of contract or fault or negligence, and could not reasonably have been avoided by Design-Builder, including by resequencing, reallocating or redeploying its forces to other portions of the Work or other activities unrelated to the Work (subject to reimbursement for additional costs reasonably incurred in connection with such reallocation or redeployment); and

(c) Design-Builder has suffered or will suffer actual costs due to such delay, each of which costs shall be documented in a manner satisfactory to City.

13.5.3 Limitation on Time Extensions

If a delay for which Design-Builder is otherwise entitled to an extension of a Completion Deadline under Section 13.3.1.1, except for delays resulting from events included in Section 13.9, Design-Builder's entitlement to an extension of a Completion Deadline is limited in certain circumstances as follows:

(a) For City-Caused Delays, Design-Builder shall be entitled to an extension of the Completion Deadline equal to 100% of the delay period.

(b) For delays caused by events for which neither the City nor Design-Builder are responsible, Design-Builder shall be entitled to an extension of the Completion Deadline equal to 100% of the delay period.

(c) For delays concurrently caused by the City and the Design-Builder, the Design-Builder shall be entitled to an extension of the Completion Deadline equal to 75% of the delay period.

(d) For delays concurrently caused by Design-Builder and other events for which the City is not responsible, Design-Builder shall be entitled to an extension of the Completion Deadline equal to 50% of the delay period.

Any extension of a Completion Deadline allowed hereunder shall exclude any delay to the extent that it (a) did not impact a Critical Path, or (b) could reasonably

have been avoided by Design-Builder, including by resequencing, reallocating or redeploying its forces to other portions of the Work (provided that if the request for extension involves a City-Caused Delay, City shall have agreed, if requested to do so, to reimburse Design- Builder for its costs incurred, if any, in resequencing, reallocating or redeploying its forces). Design-Builder shall be required to demonstrate to City's satisfaction that the change in the Work or other event or situation which is the subject of the Request for Change Order seeking a change in a Completion Deadline has caused or will result in an identifiable and measurable disruption of the Work which has impacted the Critical Path activity (i.e., consumed all available Float and extended the time required to achieve Project Completion beyond the applicable Completion Deadline).

13.5.4 Work Performed Without Direction

To the extent that Design-Builder undertakes any efforts outside of the scope of the Work, unless Design-Builder has received a Directive Letter or Change Order signed by City to undertake such efforts, Design-Builder shall be deemed to have undertaken the extra work voluntarily and shall not be entitled to a Change Order in connection therewith. In addition, City may require Design-Builder to remove or otherwise undo any such work, at Design-Builder's sole cost.

13.6 Change Order Pricing

The price of a Change Order under this Section 13.6 shall be a negotiated, lump sum price, a unit price, or a time & material not to exceed (NTE) price. Lump sum or unit prices shall be based on the original allocations of the Contract Price to comparable activities, whenever possible. If reference to price allocations is inappropriate and if requested by City, negotiation for Change Orders shall be on an Open Book Basis and may be based on competitive Subcontractors' bid prices. All changes to be executed on a T&M Not to Exceed basis must have the Design-Builder's documentation approved by the City or its Representative for all actual costs including, but not limited to, engineering and design, trade labor, materials and equipment for direct costs in order to support the Design-Builder's invoice for payment.

13.6.1 Detailed Cost Proposal

Design-Builder may be required to submit a detailed cost proposal identifying all categories of costs in accordance with the requirements of Section 13.7: (a) showing all impacts on the Contract from Work additions, deletions and modifications shown in the Change Order being priced; and (b) setting out the proposed costs in such a way that a fair evaluation can be made.

13.6.2 Identification of Conditions

Design-Builder shall identify all conditions with respect to prices or other aspects of the proposal, such as pricing contingent on firm orders being made by a certain date or the occurrence or nonoccurrence of an event.

13.6.3 Contents

A negotiated Change Order shall specify costs, scheduling requirements, time extensions and all costs of any nature arising out of the Work covered by the Change Order. Notwithstanding the foregoing, the parties may mutually agree to use a multiple- step process involving issuance of a Change Order which includes an estimated construction cost and which provides for a revised Change Order to be issued after a certain design level has been reached, thus allowing a refinement and further definition of the estimated construction cost.

13.6.4 Added Work

When the Change Order adds Work to Design-Builder's scope, the change in the Contract Price shall be negotiated based on estimated costs of labor, material and equipment, or shall be based on actual costs in accordance with Section 13.7. For negotiated Change Orders, markups for profit and overhead shall be consistent with Sections 13.5.2 and 13.7.3, and risk associated with the Work described in the Change Order shall be addressed through an additional amount agreed to by City and Design- Builder.

13.6.5 Deleted Work

When the Change Order deletes Work from Design-Builder's scope, the amount of the reduction in the Contract Price shall be based upon a current estimate, including a bill of material, a breakdown of labor and equipment costs and the markup for overhead and profit associated with the deleted Work. The current estimated amount

of risk associated with such Work shall be a factor in determining the markup for the deduction. When a deduction is involved, documented cancellation and restocking charges may be included in costs and subtracted from the price deduction.

13.6.6 Change Order Both Adding and Deleting Work

When the Change Order includes both added and deleted Work, Design-Builder shall prepare a statement of the cost of labor, material and equipment for both added and deleted work. If the cost of labor, material and equipment for the work added and deleted results in a:

(a) For each item of increase in cost, the change shall be treated as work added and the provisions of Section 13.6.4 shall be used to determine markups for overhead and profit. to establish the amount to be added to the Contract Price.

(b) For each item of decrease in cost, the change shall be treated as work deleted and the provisions of Section 13.6.5 shall be used in order to establish the price deduct to the Contract Price.

(c) For each item of change of zero cost increase and decrease, there will be no change in the Contract Price.

13.6.7 Unit Priced Change Orders

Measurement of unit-priced quantities will be in accordance with Section 9-1.01 of the Standard Specifications. Unit prices shall be deemed to include all costs for labor, material, overhead and profit, and shall not be subject to change regardless of any change in the estimated quantities. Unit-priced Change Orders shall initially include an estimated increase in the Contract Price based on estimated quantities. Upon final determination of the quantities, City will issue a modified Change Order setting forth the final adjustment to the Contract Price.

13.7 Time and Materials Change Orders

13.7.1 Issuance

City may at its discretion issue a Time and Materials Change Order whenever City determines that a Time and Materials Change Order is advisable. The Time and Materials Change Order shall instruct Design-Builder to perform the Work, indicating expressly the intention to treat the items as changes in the Work, and setting forth

the kind, character, and limits of the Work as far as they can be ascertained, the terms under which changes to the Contract Price will be determined and the estimated total not to exceed change in the Contract Price anticipated thereunder. Upon final determination of the allowable costs, City shall issue a modified Change Order setting forth the final adjustment to the Contract Price.

13.7.2 Pricing and Payment

13.7.2.1 Time and Materials Change Orders shall be issued in accordance with Section 9-1.03 of the Standard Specifications. Design-Builder shall comply with all recordkeeping and other obligations set forth in said Section 9-1.03.

13.7.2.2 Payments for Time and Materials Work shall be invoiced with the regular monthly invoice, based on the extra work reports furnished by Design-Builder for each period. Costs evidenced by daily extra work reports furnished less than five (5) business days prior to preparation of the invoice shall be included in the subsequent month's invoice.

13.7.3 Overhead Items

Unless otherwise indicated in the Contract, the markups and labor surcharges under this Section 13.7 are full and complete compensation for all overhead and other indirect costs of the added or changed Work, as well as for profit thereon. The following items are considered overhead costs and are included in the Change Order markups and labor surcharges set forth in Section 9-1.03 of the Standard Specifications:

- (a) Salary and expenses of executive officers, supervising officers or supervising employees;
- (b) Design-Builder's superintendents and other construction supervision;
- (c) Clerical or stenographic employees;
- (d) Charges for minor equipment, such as small tools, including shovels, picks, axes, saws, bars, sledges, lanterns, jacks, cables, pails, wrenches, etc., consumables, and other miscellaneous supplies and services;
- (e) Any and all field and home office overhead and operating expenses whatsoever;

- (f) Subsistence and travel expenses for all personnel; and
- (g) Quality assurance and quality control.

With respect to non-construction related labor costs, overhead is covered by the labor surcharge, and includes accessories such as computer assisted drafting and design (CADD) systems, software and computers, facsimile machines, scanners, plotters, etc.

13.8 Omitted.

13.9 Change Orders for Differing Site Conditions, Force Majeure Events and Changes in Law

13.9.1 Differing Site Conditions

For the purpose of this Section 13.9.1 only, the term "Differing Site Conditions" shall be deemed to include Utilities and Hazardous Materials. Upon Design- Builder's fulfillment of all applicable requirements of Section 5.3.1 and Section 13, City shall issue Change Orders, (a) to increase the applicable Contract Price for additional direct costs directly attributable to changes in the Work arising from Differing Site Conditions, if any, subject to the limitations set forth in Section 13.9.1.2 below, and (b) to extend any affected Completion Deadline to the extent that any delay in the Critical Path is directly caused by any such conditions.

13.9.1.1 In the event a Differing Site Condition directly causes a delay to the Critical Path, thereby entitling Design-Builder to an extension of the Completion Deadline, City shall increase the Contract Price incurred as a result of such delay to the Critical Path only if the Critical Path delay is not concurrent with any other Critical Path Delay caused by Design-Builder.

13.9.1.2 Design-Builder shall bear the burden of proving that a Differing Site Condition exists and that it could not reasonably have worked around the Differing Site Condition so as to avoid additional cost, and that the Design-Builder is taking steps to mitigate the impact of any delay caused by the Differing Site Condition. Each request for a Change Order relating to a Differing Site Condition shall be accompanied by a statement setting forth all relevant assumptions made by Design-Builder with respect to the condition of the Project Site, justifying the basis for such

assumptions, explaining exactly how the existing conditions differ from those assumptions, and stating the efforts undertaken by Design-Builder to find alternative design or construction solutions to eliminate or minimize the problem and the associated costs.

13.9.1.3 Prior to filing any request for a Change Order relating to a Differing Site Condition, Design-Builder shall inquire if insurance proceeds may be available to cover costs in connection with such item. If Design-Builder finds that reasonable grounds for filing an insurance claim exist, then Design-Builder shall so notify City. City shall not be in default for failure to pay any amounts which Design-Builder or City finds may be covered by insurance, unless and until the claim is denied by the insurance company. Design-Builder shall maintain contemporaneous records of all costs incurred by it with respect to the Differing Site Condition pending the insurance company's determination regarding the claim. Upon denial of any such claim by the insurance company and receipt of a Change Order request, City will process the Request for Change Order. City shall have the right to contest the denial of any insurance claim, and Design-Builder shall cooperate with City in that regard. Notwithstanding anything to the contrary contained in Section 13.3.2, Design-Builder shall not be obligated to include amounts which may be covered by insurance in any Change Order request until twenty (20) days after the insurance company has denied the claim. However, the notice requirements of Section 13.3.2 shall remain effective with respect to the event in question.

13.9.2 Force Majeure Events

Subject to the limitations contained in, and upon Design-Builder's fulfillment of all applicable requirements of, this Section 13, City shall issue Change Orders to increase the Contract Price for additional costs (subject to Section 13.5.2) directly attributable to changes in the scope of the Work arising from a Force Majeure Event and to extend the applicable Completion Deadlines as the result of any delay in a Critical Path directly caused by a Force Majeure Event. No increase in the Contract Price or extension of time will be granted for a delay caused by a shortage of materials unless Design-Builder furnishes to City documentary proof that Design-Builder has made every effort to obtain such materials from all known sources within reasonable

reach of the Work in a diligent and timely manner, and further proof in the form of supplementary progress schedules, that the inability to obtain such materials when originally planned, did in fact cause a delay in project completion of the entire Work which could not be compensated for by revising the sequence of Design-Builder's operations.

13.9.3 Change in Law

Upon Design-Builder's fulfillment of all applicable requirements of this Section 13, and subject to the restrictions and limitations contained therein, City shall issue Change Orders (a) to increase the Contract Price for additional costs (subject to Section 13.5.2) and extend the Project Completion date for reasons directly attributable to a Change in Law, to the extent that the Change in Law (i) requires a material modification in the design of the Project, (ii) results in imposition of additional mitigation requirements on the Project due to impacts on archaeological or paleontological resources, or (iii) specifically targets the Project; and/or (b) to extend the Completion Deadlines as the result of any delay in the Critical Path caused by any Change in Law described in clause (a) above.

13.10 Change Order Records

Design-Builder shall maintain its records in such a manner as to provide a clear distinction between the direct costs of Work for which it is entitled (or for which it believes it is entitled) to an increase in a Contract Price based on a T&M NTE change order. Design-Builder shall contemporaneously collect, record in writing, segregate and preserve (a) separate daily occurrence logs, together with all other data necessary to determine the T&M costs of all Work which is the subject of a Change Order or a requested Change Order, specifically including costs associated with design Work as well as Relocations, and (b) all data necessary to show the actual impact (if any) of the change on each Critical Path with respect to all Work which is the subject of a Change Order or a proposed Change Order, if the impact on the Schedule is in dispute. Such data shall be provided to the City and its authorized representatives as directed by City, on forms approved by City. The cost of furnishing such reports is included in Design-Builder's predetermined overhead and profit markups.

13.10.1 Daily Work Reports and Data Collection

Design-Builder shall furnish City completed daily work reports for each day's Work which is to be paid for on a time and material basis. The daily Time and Material Work reports shall be detailed as follows:

(a) Name, classification, date, daily hours, total hours, rate, and extension for each worker (including both construction and non-construction personnel) for whom reimbursement is requested.

(b) Designation, dates, daily hours, total hours, rental rate, and extension for each unit of machinery and equipment.

(c) Quantities of materials, prices, and extensions.

(d) Transportation of materials.

13.10.2 The reports shall also state the total costs to date for the Time and Materials Change Order Work.

13.10.3 Supplier's Invoices

Materials charges shall be substantiated by valid copies of Supplier's invoices. Such invoices shall be submitted with the daily time and material Work reports, or if not available, they shall be submitted with subsequent daily time and material Work reports. Should said Supplier's invoices not be submitted within 60 days after the date of delivery of the materials, City shall have the right to establish the cost of such materials at the lowest current wholesale prices at which such materials are available, in the quantities concerned, delivered to the location of Work, less any discounts available.

13.10.4 Execution of Reports

All Time and Materials Change Order reports shall be signed by Design-Builder's Superintendent.

13.10.5 Adjustment

City will compare its records with the completed daily Time and Material Work reports furnished by Design-Builder and make any necessary adjustments. When these daily time and material Work reports are agreed upon and signed by both parties, said reports shall become the basis of payment for the Work performed, but

shall not preclude subsequent adjustment based on a later audit. Design-Builder's cost records pertaining to Work paid for on a Time and Material basis shall be open, during all regular business hours, to inspection or audit by representatives of City during the life of the Contract and for a period of not less than three years after Project Acceptance, and Design- Builder shall retain such records for that period. Where payment for materials or labor is based on the cost thereof to any Person other than Design-Builder, Design-Builder shall make every reasonable effort to ensure that the cost records of each such other Person will be open to inspection and audit by representatives of City on the same terms and conditions as the cost records of Design-Builder. Payment for such costs may be deleted if the records of such third parties are not made available to City's representatives. If an audit is to be commenced more than 60 days after Project Acceptance, Design- Builder will be given a reasonable notice of the time when such audit is to begin.

13.11 Matters Not Eligible for Change Orders and Waiver

Design-Builder acknowledges and agrees that no increase in the Contract Price or extension of a Completion Deadline is available except in circumstances expressly provided for in the Contract, that such price increase and time extension shall be available only as provided in this Section 13 and that Design-Builder shall bear full responsibility for the consequences of all other events and circumstances. Matters which are Design- Builder's exclusive responsibility include the following:

(a) Errors in the Design Documents and Construction Documents prepared by the Design Builder (including Errors therein traceable to Errors in the Background Documents and subject to exceptions otherwise specified in this Contract.

(b) any design changes requested by City as part of the process of (i) approving the Design Documents for consistency with the requirements of the Contract Documents, the governmental approvals and/or applicable Governmental Rules or (ii) designing the Project within the applicable budget and within the applicable deadlines set forth in Section 4.2.2.2;

(c) defective or incorrect schedules of Work or changes in the planned sequence of performance of the Work (unless arising from causes which otherwise give rise to a right to a Change Order);

(d) action or inaction of Design-Builder's employees, Suppliers or Subcontractors (unless arising from causes which otherwise give rise to a right to a Change Order);

(e) untimely delivery of equipment or material, or unavailability or defectiveness or increases in costs of material, equipment or products specified by the Contract Documents, except to the extent resulting from a Force Majeure Event;

(f) any costs covered by insurance proceeds received by (or on behalf of) Design-Builder;

(g) correction of nonconforming Work and review and acceptance thereof by City (including rejected design submittals);

(h) failure by Design-Builder to comply with Contract requirements (including any failure to provide the notifications to property owners, Utility Owners and others required by the Contract Documents);

(i) delays not on a Critical Path;

(j) obtaining all governmental approvals except as specified in Section 2.2.4, and compliance with the terms and conditions of all governmental approvals;

(k) any suspensions, terminations, interruptions, denials, non-renewals of, or delays in issuance of a Governmental Approval that is required to be obtained by Design-Builder, or any failure to obtain such Governmental Approval;

(l) any increased costs or delays related to any Utility Adjustment Work or failure to timely obtain any approval, work or other action from a Utility Owner, except as specified in Section 6.2;

(m) any situations which, while not within one of the categories delineated above, were or should have been anticipated because such situations are referred to elsewhere in the Contract or arise out of the nature of the Work; and

(n) all other events beyond the control of City for which City is not responsible.

Design-Builder hereby assumes responsibility for all such matters, and acknowledges and agrees that assumption by Design-Builder of responsibility for such risks, and the consequences and costs and delays resulting therefrom, is reasonable under the

circumstances of the Contract and that contingencies associated with the Contract Price in Design-Builder's sole judgment, will constitute sufficient consideration for its acceptance and assumption of said risks and responsibilities.

DESIGN-BUILDER HEREBY EXPRESSLY WAIVES ALL RIGHTS TO ASSERT ANY AND ALL CLAIMS BASED ON ANY CHANGE IN THE WORK, DELAY, SUSPENSION OR ACCELERATION (INCLUDING ANY CONSTRUCTIVE CHANGE IN THE WORK, DELAY, SUSPENSION OR ACCELERATION) FOR WHICH DESIGN-BUILDER FAILED TO PROVIDE PROPER AND TIMELY NOTICE OR FAILED TO PROVIDE A TIMELY REQUEST FOR CHANGE ORDER AS REQUIRED IN THIS SECTION 13, AND AGREES THAT IT SHALL BE ENTITLED TO NO COMPENSATION OR DAMAGES WHATSOEVER IN CONNECTION WITH THE WORK EXCEPT TO THE EXTENT THAT THE CONTRACT DOCUMENTS ENTITLE THE CONTRACTOR TO A CHANGE ORDER OR OTHER COMPENSATION OR DAMAGES.

13.12 Disputes

If City and Design-Builder agree that a request to increase the Contract Price and/or extend any Completion Deadline by Design-Builder has merit, but are unable to agree as to the amount of such price increase and/or time extension, City agrees to mark up the Request for Change Order or Cost and Schedule Proposal, as applicable, provided by Design-Builder to change the amount of the price increase or time extension as deemed appropriate by City. In such event, City will execute and deliver the marked-up Change Order to Design-Builder within a reasonable period after receipt of a request by Design-Builder to do so, and thereafter will make payment and/or grant a time extension based on such marked-up Change Order. The failure of City and Design-Builder to agree to any Change Order under this Section 13 (including agreement as to the amount of compensation allowed under a Time and Materials Change Order and the disputed amount of the increase in the Contract Price and/or extension of a Completion Deadline in connection with a Change Order as described above) shall, at the option of either Design Builder or the City, be a dispute to be resolved pursuant to Section 19. Except as otherwise specified in the Change Order, execution of a Change Order by both parties shall be deemed accord and

satisfaction of all claims by Design-Builder of any nature arising from or relating to the Work covered by the Change Order. Design-Builder's Claim and any award by the dispute resolver shall be limited to the incremental costs incurred by Design-Builder with respect to the disputed matter (crediting City for any corresponding reduction in Design-Builder's other costs)

13.13 Changes Not Requiring Change Order

Deviations from design standards specified in the Contract Documents which have a neutral net cost effect shall not require a Change Order provided such deviations are approved by City. Any other change in the requirements of the Contract Documents shall require either a Directive Letter or a Change Order.

13.14 No. Release or Waiver

13.14.1 No extension of time granted hereunder shall release Design-Builder's Surety from its obligations. Work shall continue and be carried on in accordance with all the provisions of the Contract and the Contract shall be and shall remain in full force and effect during the continuance and until Project Completion unless formally suspended or terminated by City in accordance with the terms hereof. Permitting Design-Builder to finish the Work or any part thereof after a Completion Deadline, or the making of payments to Design-Builder after such date, shall not constitute a waiver on the part of City of any rights under the Contract.

13.14.2 Neither the grant of an extension of time beyond the date fixed for the completion of any part of the Work, nor the performance and acceptance of any part of the Work or materials specified by the Contract after a Completion Deadline, shall be deemed to be a waiver by City of its right to terminate the Contract for abandonment or failure to complete within the time specified (as it may have been extended) or to impose and deduct damages as may be provided.

13.14.3 No course of conduct or dealings between the parties nor express or implied acceptance of alterations or additions to the Work, and no claim that City has been unjustly enriched shall be the basis for any claim, request for additional compensation or extension of a Completion Deadline. Design-Builder shall not undertake any work included in any request, order or other authorization issued by a person in excess of that person's authority as provided in Appendix 19. Design-Builder

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shall be deemed to have performed any work not properly authorized as a volunteer and at its sole cost. In addition, City may require Design-Builder to remove or otherwise undo any such work, at Design-Builder's sole cost.

SECTION 14. SUSPENSION

14.1 Suspensions for Convenience

City may, at any time and for any reason, by written notice, order Design-Builder to suspend all or any part of the Work required under the Contract Documents for the period of time that City deems appropriate for the convenience of City. Design-Builder shall promptly comply with any such written suspension order. Design-Builder shall promptly recommence the Work upon receipt of written notice from City directing Design-Builder to resume Work. Any such suspension for convenience shall be considered a City-Directed Change; provided that City shall have the right to direct suspensions for convenience not exceeding 48 hours each, which shall not be considered a City-Directed Change; and provided further that all suspensions shall be considered a City-Caused Delay, if a Critical Path is delayed. Adjustments of the Contract Price and the Completion Deadlines shall be available for any such City-Directed Change, subject to Design-Builder's compliance with the terms and conditions set forth in Section 13.

14.2 Suspensions for Cause

City has the authority to suspend the Work by written order, wholly or in part, for Design-Builder's failure to:

- (a) Comply with any Governmental Approval, Governmental Rule or otherwise carry out the requirements of the Contract;
- (b) Carry out orders of City;
- (c) Comply with requirements for developing and implementing the Quality Control Programs; or
- (d) Comply with environmental requirements.

Design-Builder shall promptly comply with any such written suspension order. Design-Builder shall promptly recommence the Work upon receipt of written notice from City directing Design-Builder to resume Work. City shall have no liability to Design-Builder in connection with any such suspension.

14.3 Responsibilities of Design-Builder During Suspension Periods

During periods that Work is suspended, Design-Builder shall continue to be responsible for the Work. During any suspension period, Design-Builder shall prevent damage or injury to the Project, and provide for drainage, erect necessary temporary

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structures, signs or other facilities required to maintain the Project. Additionally, Design-Builder shall continue other Work that has been or can be performed onsite or offsite during the period that Work is suspended.

SECTION 15. TERMINATION FOR CONVENIENCE

15.1 Termination

City may terminate the Contract and the performance of the Work by Design-Builder in whole or, from time to time, in part, if City determines, in its sole discretion that a termination is in City's best interest. City shall terminate by delivering to Design-Builder a written Notice of Termination for Convenience or Notice of Partial Termination for Convenience specifying the extent of termination and its effective date. Termination (or partial termination) of the Contract shall not relieve any Surety of its obligation for any claims arising out of the Work performed.

15.2 Design-Builder's Responsibilities After Receipt of Notice of Termination

After receipt of a Notice of Termination for Convenience or Notice of Partial Termination for Convenience, and except as otherwise directed by City, Design-Builder shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this Section 15:

15.2.1 Stop Work as specified in the notice.

15.2.2 Notify all affected Subcontractors that the Contract is being terminated and that their Subcontracts (including orders for materials, services or facilities) are not to be further performed unless otherwise authorized in writing by City.

15.2.3 Place no further Subcontracts (including orders for materials, services or facilities), except as necessary to complete the continued portion of the Work, if any, or for mitigation of damages.

15.2.4 Unless instructed otherwise by City, terminate all Subcontracts to the extent they relate to the Work terminated.

15.2.5 Assign to City in the manner, at the times, and to the extent directed by City, all of the right, title, and interest of Design-Builder under the Subcontracts so terminated, in which case City will have the right, in its sole discretion, to accept performance, settle or pay any termination settlement proposal arising out of the termination of such Subcontract.

15.2.6 Subject to the prior written approval of City, settle all outstanding liabilities and all termination settlement proposals arising from termination of Subcontracts.

15.2.7 No later than 120 days from the effective date of termination, unless extended in writing by City upon written request of Design-Builder within this 120-day

period, provide City with an inventory list of all materials previously produced, purchased or ordered from Suppliers for use in the Work and not yet used in the Work, including its storage location, as well as any documentation or other property required to be delivered hereunder which is either in the process of development or previously completed but not yet delivered to City, and such other information as City may request; and, conditioned upon City's payment for such items at documented cost plus markups in accordance with Appendix 2, Section 9-1.03A, transfer title and deliver to City through bills of sale or other documents of title, as directed by City, (a) the Work in process, completed Work, supplies and other material produced or acquired for the Work terminated, and (b) the Design Documents, Construction Documents and all other completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, records, samples, information and other property that would have been required to be furnished to City if the Work had been completed.

15.2.8 Complete performance in accordance with the Contract Documents of all Work not terminated.

15.2.9 Take all action that may be necessary, or that City may direct, for the safety, protection and preservation of (a) the public, including public and private vehicular movement, (b) the Work and (c) equipment, machinery, materials and property related to the Project that is in the possession of Design-Builder and in which City has or may acquire an interest.

15.2.10 As authorized by City in writing, use its best efforts to sell at reasonable prices any property of the types referred to in Section 15.2.7; provided, however, that Design-Builder (a) is not required to extend credit to any purchaser, and (b) may acquire the property under the conditions prescribed and at prices approved by City. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by City under the Contract Documents or paid in any other manner directed by City.

15.2.11 If requested by City, withdraw from the portions of the Project Site designated by City and remove such materials, equipment, tools and instruments used by, and any debris or waste materials generated by, Design-Builder and any Subcontractor in the performance of the Work as City may direct.

15.2.12 Take other actions directed by City.

15.3 Acceptance

15.3.1 Design-Builder shall continue to be responsible for damage to materials after issuance of the Notice of Termination for Convenience, except as follows:

(a) Design-Builder's responsibility for damage to materials for which partial payment has been made as provided herein shall terminate when City's designated representative certifies that those materials have been stored in the manner and at the locations directed by City.

(b) Design-Builder's responsibility for damage to materials purchased by City subsequent to the issuance of the notice that the Contract is to be terminated shall terminate when title and delivery of those materials has been taken by City.

15.3.2 When City's Project Manager determines that Design-Builder has completed the Work directed to be completed prior to termination and such other work as may have been ordered to secure the Project for termination, City's Project Manager will recommend that City formally accept such Work, and immediately upon and after the acceptance by City, Design-Builder will not be required to perform any further work thereon and shall be relieved of the contractual responsibilities for injury to persons or property which occurs after the formal acceptance of such Work by City.

15.4 Settlement Proposal

After receipt of a Notice of Termination for Convenience or Notice of Partial Termination for Convenience, Design-Builder shall submit a final termination settlement proposal to City in the form and with the certification prescribed by City. Design-Builder shall submit the proposal promptly, but no later than 120 days from the effective date of termination unless Design-Builder has requested a time extension in writing within such 120-day period and City has agreed in writing to allow such an extension. Design-Builder's termination settlement proposal shall then be reviewed by City and acted upon, returned with comments, or rejected. If Design-Builder fails to submit the proposal within the time allowed, City may determine, on the basis of information available, the amount, if any, due Design-Builder because of the termination and shall pay Design-Builder the amount so determined.

15.5 Amount of Negotiated Termination Settlement

Design-Builder and City may agree, as provided in Section 15.4, upon the whole or any part of the amount or amounts to be paid to Design-Builder by reason of the total or

partial termination of Work for convenience pursuant to this Section 15. Such negotiated settlement may include a reasonable allowance for profit solely on Work which has been completed as of the termination date and subsequently inspected and accepted by City. Such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total Contract Price as reduced by the amount of payments otherwise made and the Contract Price of Work not terminated. Upon determination of the settlement amount the Contract will be amended accordingly, and Design-Builder will be paid the agreed amount as described in this Section 15.5. Nothing in Section 15.6, prescribing the amount to be paid to Design-Builder in the event that Design-Builder and City fail to agree upon the whole amount to be paid to Design-Builder by reason of the termination of Work pursuant to this Section 15, shall be deemed to limit, restrict or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to Design-Builder pursuant to this Section 15.5. City's execution and delivery of any settlement agreement shall not affect any of its rights under the Contract Documents with respect to completed Work, relieve Design-Builder from its obligations with respect thereto, including Warranties, or affect Design-Builder's rights under the Performance Bond and/or Payment Bond as to such completed or non-terminated Work.

15.6 No Agreement as to Amount of Termination Settlement

If Design-Builder and City fail to agree upon the whole amount to be paid to Design-Builder by reason of the termination of Work for convenience pursuant to this Section 15, the amount payable (exclusive of interest charges) shall be determined by City in accordance with the following, but without duplication of any items or of any amounts agreed upon in accordance with Sections 15.4 and 15.5:

15.6.1 City will pay Design-Builder the sum of the following amounts for Work performed prior to the effective date of the Notice of Termination for Convenience or Notice of Partial Termination for Convenience:

(a) The amount earned to date of termination based upon the approved Schedule of Values, plus Design-Builder's actual cost and markup as determined with reference to Appendix 2, Section 9-1.03A for any cost incurred which is not included in the approved Schedule of Values for all Work performed, including mobilization, demobilization and work done to secure the Project for termination, including accounting for any refunds payable with respect to insurance premiums, deposits or similar items, as established to

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City's satisfaction. In determining the reasonable cost, deductions will be made for the cost of materials to be retained by Design-Builder, amounts realized by the sale of materials, and for other appropriate credits against the cost of the work. Deductions will also be made, when the contract is terminated as the result of a Force Majeure event, for the cost of materials damaged by the "occurrence." When, in the opinion of City's Project Manager, the cost of a contract item of Work is excessively high due to costs incurred to remedy or replace defective or rejected Work, the reasonable cost to be allowed will be the estimated reasonable cost of performing that Work in compliance with the requirements of the Contract Documents and the excessive actual cost shall be disallowed.

(b) The cost of settling and paying claims arising out of the termination of Work under Subcontracts as provided in Section 15.2.6, exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the Subcontractor prior to the effective date of the Notice of Termination for Convenience or Notice of Partial Termination for Convenience of Work under the Contract, which amounts shall be included in the cost on account of which payment is made under clause (a) above.

(c) The reasonable out-of-pocket cost (including reasonable overhead) of the preservation and protection of property incurred pursuant to Section 15.2.9 and any other reasonable out-of-pocket cost (including overhead) incidental to termination of Work under the Contract, including the reasonable cost to Design-Builder of handling material returned to the vendor, delivered to City or otherwise disposed of as directed by City, and including a reasonable allowance for Design-Builder's administrative costs in determining the amount payable due to termination of the Contract.

15.6.2 Design-Builder acknowledges and agrees that it shall not be entitled to any compensation in excess of the value of the Work performed (determined as provided in Section 15.6.1) plus its settlement costs, and that items such as lost or anticipated profits, unabsorbed overhead and opportunity costs shall not be recoverable by it upon termination of the Contract. The total amount to be paid to Design-Builder, exclusive of costs described in Sections 15.6.1(c) and (d), may not exceed the sum of the Contract Price less the amount of payments previously made. Furthermore, in the event that any refund is payable with respect to insurance or bond premiums, deposits or other items which were previously passed through to City by Design-Builder, such refund shall be paid directly to City or otherwise credited to City. Except for normal spoilage, and except to the extent that

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City will have otherwise expressly assumed the risk of loss, there will be excluded from the amounts payable to Design-Builder under Section 15.6.1, the fair value, as determined by City, of equipment, machinery, materials and property which is destroyed, lost, stolen, or damaged so as to become undeliverable to City, or sold pursuant to Section 15.2.10. Upon determination of the amount of the termination payment, the Contract shall be amended to reflect the agreed termination payment, Design-Builder shall be paid the agreed amount, and the Contract Price and Contract NTE Amount shall be reduced to reflect the reduced scope of Work.

15.6.3 If a termination hereunder is partial, Design-Builder may file a proposal with City for an equitable adjustment of the price for the continued portion of the Contract. Any proposal by Design-Builder for an equitable adjustment under this clause shall be requested within 90 days from the effective date of termination unless extended in writing by City. The amount of any such adjustment as may be agreed upon shall be set forth in an amendment to the Contract.

15.7 Reduction in Amount of Claim

The amount otherwise due Design-Builder under this Section 15 shall be reduced by (a) the amount of any claim which City may have against any Design-Builder-Related Entity in connection with the Contract, (b) the agreed price for, or the proceeds of sale, of property, materials, supplies or other things acquired by Design-Builder or sold, pursuant to the provisions of this Section 15, paid for by the City and not otherwise recovered by or credited to City, (c) all unliquidated advance or other payments made to or on behalf of Design-Builder applicable to the terminated portion of the Work or Contract, (d) amounts that City deems advisable to retain to cover any existing or threatened claims, Liens and stop notices relating to the Project, including claims by Utility Owners, (e) the cost of repairing any nonconforming Work and (f) any amounts due or payable by Design-Builder to City.

15.8 Payment

City may from time to time, under such terms and conditions as it may prescribe and in its sole discretion, make partial payments on account against costs incurred by Design-Builder in connection with the terminated portion of the Contract, whenever in the opinion of City the aggregate of such payments shall be within the amount to which Design-Builder will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this Section 15, such excess shall be payable by Design-

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Builder to City within thirty (30) days upon demand without interest and if not so paid then paid thereafter together with interest at the rate of the lesser of (a) 10% per annum or (b) the maximum rate allowable under applicable Governmental Rules.

15.9 Subcontracts

15.9.1 Design-Builder shall ensure that provisions are included in each Subcontract (at all tiers) regarding terminations for convenience, allowing such terminations to be passed through to the Subcontractors and establishing terms and conditions relating thereto, including procedures for determining the amount payable to the Subcontractor upon a termination, consistent with this Section 15.

15.9.2 Each Subcontract shall provide that, in the event of a termination for convenience by City, the Subcontractor will not be entitled to any anticipatory or unearned profit on Work terminated or partly terminated, or to any payment which constitutes consequential damages on account of the termination or partial termination.

15.10 No Consequential Damages

Under no circumstances shall Design-Builder be entitled to anticipatory or unearned profits or consequential or other damages as a result of a termination or partial termination under this Section 15. The payment to Design-Builder determined in accordance with this Section 15 constitutes Design-Builder's exclusive remedy for a termination hereunder.

15.11 No Waiver

Anything contained in the Contract to the contrary notwithstanding, a termination under this Section 15 shall not waive any right or claim to damages which City may have and City may pursue any cause of action which it may have by law, in equity or under the Contract.

15.12 Dispute Resolution

The failure of the parties to agree on amounts due under this Section 15 shall be a dispute to be resolved in accordance with Section 19.

SECTION 16. DEFAULT

16.1 Default of Design-Builder

16.1.1 Design-Builder shall be in default under the Contract upon the occurrence of any one or more of the following events or conditions:

(a) Design-Builder fails promptly to begin the Work under the Contract following issuance of the Notice to Proceed, or fails to resume performance of Work which has been suspended or stopped, within a reasonable time after receipt of notice from City to do so or (if applicable) after cessation of the event preventing performance;

(b) Design-Builder materially fails to perform the Work in accordance with the Contract Documents, including conforming to applicable standards set forth therein in design and construction of the Project, or refuses to remove and replace rejected materials or nonconforming or unacceptable Work;

(c) Design-Builder suspends, ceases, stops or abandons the Work or fails to continuously and diligently prosecute the Work (exclusive of work stoppage (i) due to termination by City, or (ii) due to and during the continuance of a Force Majeure Event or suspension by City);

(d) Design-Builder fails to maintain the insurance and bonds required hereunder;

(e) Design-Builder shall have assigned or transferred the Contract Documents or any right or interest herein, except as expressly permitted under Section 23.4;

(f) Design-Builder shall have 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 shall have failed to comply with any Governmental Rule or failed reasonably to comply with the instructions of City consistent with the Contract Documents;

(g) Design-Builder materially breaches any other agreement, representation or warranty contained in the Contract Documents;

(h) Failure of Design-Builder to discharge or obtain a stay of any final judgment(s) or order by a court of competent jurisdiction for the payment of money against it in excess of \$100,000 in the aggregate which remains outstanding for a period in excess

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of six months (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);

(i) Issuance of any final judgment holding Design-Builder liable for an amount in excess of \$100,000 based on a finding of intentional or reckless misconduct or violation of a state or federal false claims act;

(j) Any representation or warranty made by Design-Builder in the Contract Documents or the Proposal or any certificate, schedule, instrument or other document delivered by Design-Builder pursuant to the Contract Documents which was known or reasonably should have been known by the Design Builder to have been false or materially misleading when made;

(k) Design-Builder commences a voluntary case seeking liquidation, reorganization or other relief with respect to itself or its debts under any bankruptcy, insolvency or other similar law now or hereafter in effect; seeks the appointment of a trustee, receiver, liquidator, custodian or other similar official of it or any substantial part of its assets; becomes insolvent, or generally does not pay its debts as they become due; admits in writing its inability to pay its debts; makes an assignment for the benefit of creditors; or takes any action to authorize any of the foregoing; or any of the foregoing acts or events shall occur with respect to any Surety; or

(l) An involuntary case is commenced against Design-Builder seeking liquidation, reorganization, dissolution, winding up, a composition or arrangement with creditors, a readjustment of debts or other relief with respect to Design-Builder or Design-Builder's debts under any bankruptcy, insolvency or other similar Governmental Rules now or hereafter in effect; seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of Design-Builder or any substantial part of Design-Builder's assets; seeking the issuance of a writ of attachment, execution, or similar process; or seeking like relief, and such involuntary case shall not be contested by Design-Builder in good faith or shall remain undismissed and unstayed for a period of 60 days; or any such involuntary case; or any of the foregoing acts or events shall occur with respect to any Surety.

16.1.2 Design-Builder and Surety shall be entitled to 10 days written notice and opportunity to cure any breach before an Event of Default is declared, provided that no such notice and opportunity to cure is required for any breach which by its nature cannot be cured. Failure to provide notice to Surety shall not preclude City from exercising its

remedies against Design-Builder. If a breach is capable of cure but, by its nature, cannot be cured within 10 days, as determined by City, such additional period of time shall be allowed as may be reasonably necessary to cure the breach so long as Design-Builder commences such cure within such 10-day period and thereafter diligently prosecutes such cure to completion; provided, however, that in no event shall such cure period exceed 180 days in total. Notwithstanding the foregoing, City may, without notice and without awaiting lapse of the period to cure any default, in the event of existence of a condition on or affecting the Project which City believes poses an immediate and imminent danger to public health or safety, rectify the dangerous condition at Design-Builder's cost.

16.2 Remedies

16.2.1 If any breach described in Section 16.1.1 is not subject to cure or is not cured within the period (if any) specified in Section 16.1.2, City may declare that an "Event of Default" has occurred and notify Design-Builder to discontinue the Work. The declaration of an Event of Default shall be in writing and given to Design-Builder and Surety. In addition to all other rights and remedies provided by law or equity and such rights and remedies as are otherwise available under the Contract and the Performance Bond, if an Event of Default shall occur, then City shall have the following rights without further notice and without waiving or releasing Design-Builder from any obligations and Design-Builder shall have the following obligations (as applicable):

(a) City may terminate the Contract or a portion thereof, including Design-Builder's rights of entry upon, possession, control and operation of the Project, in which case, the provisions of Sections 15.2 and 15.3 shall apply;

(b) If and as directed by City, Design-Builder shall withdraw from the Project Site and shall remove materials, equipment, tools and instruments used by, and any debris or waste materials generated by, any Design-Builder-Related Entity in the performance of the Work;

(c) Design-Builder shall deliver to City possession of any or all Design Documents, Construction Documents and all other completed or partially completed drawings (including plans, sections, details and diagrams), specifications, records, information, schedules, samples, shop drawings, electronic files and other documents and facilities related to the Project that City deems necessary for completion of the Work;

(d) Design-Builder shall confirm the assignment to City of the

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Subcontracts requested by City and Design-Builder shall terminate, at its sole cost, all other Subcontracts;

(e) City may deduct from any amounts payable by City to Design-Builder such amounts payable by Design-Builder to City, including reimbursements owing, Liquidated Damages or other damages that City has determined may be payable to City under the Contract Documents;

(f) City shall have the right, but not the obligation, to pay such amount and/or perform such act as may then be required;

(g) City may appropriate any or all materials on the Site, or in off-Site storage for which the City has paid the Design Builder in whole or in part, as may be suitable and acceptable and, subject to provisions of any performance guaranty issued for the Project, may direct the Surety to complete the Contract or may enter into an agreement for the completion of the Contract according to the terms and provisions hereof with another contractor or the Surety, or use such other methods as may be required for the completion of the Contract, including completion of the Work by City; and/or

(h) If City exercises any right to perform any obligations of Design-Builder, in the exercise of such right City may, but is not obligated to, among other things: perform or attempt to perform, or cause to be performed, such work; (ii) spend such sums as City deems necessary and reasonable to employ and pay such architects, engineers, consultants and contractors and obtain materials and equipment as may be required for the purpose of completing such work; (iii) execute all applications, certificates and other documents as may be required for completing the work; (iv) modify or terminate any contractual arrangements; (v) take any and all other actions which it may in its sole discretion consider necessary to complete the Work; and (vi) prosecute and defend any action or proceeding incident to the Work. Nothing in this Contract waives, relinquishes or abridges in any way the rights and remedies of the Design Builder, or any guarantor or surety under law or by the terms of any bond or guaranty provided for the benefit of the City under this Contract.

16.2.2 If an Event of Default shall have occurred, Design-Builder and Surety shall be liable to City (in addition to any other damages under the Contract Documents except for those costs intended to be covered by Liquidated Damages payable hereunder) for all costs reasonably incurred by City or any party acting on City's behalf in completing the Work

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or having the Work completed by another Person (including any re-procurement costs, throw away costs for unused portions of the completed Work, and increased financing costs). Upon occurrence of an Event of Default and so long as it continues, City shall be entitled to withhold all or any portion of further payments to Design-Builder until Project Acceptance or the date on which City otherwise accepts the Project as complete or determines that it will not proceed with completion, at which time City will determine whether Design-Builder is entitled to further payments. Promptly following Project Acceptance or the date on which City otherwise accepts the Project as complete or determines that it will not proceed with completion, the total cost of all completed Work shall be determined, and City shall notify Design-Builder and its Surety in writing of the amount, if any, that Design-Builder and its Surety shall pay City or City shall pay Design-Builder or its Surety with respect thereto. All costs and charges incurred by City, including attorneys', accountants' and expert witness fees and costs, together with the cost of completing the Work under the Contract Documents, will be deducted from any moneys due or which may become due Design-Builder or its Surety. If such expense exceeds the sum which would have been payable under the Contract, then Design-Builder and its Surety(ies) shall be liable and shall pay to City the amount of such excess. If the Surety fails to pay such amount immediately upon City's demand, then City shall be entitled to collect interest from the Surety on the amounts City is required to pay in excess of the remaining balance of the Contract Price. The interest rate which the Surety shall pay shall be the lesser of (a) 10% per annum or (b) the maximum rate allowable under applicable Governmental Rules. The interest rate shall accrue on all amounts City has had to pay excess of the remaining balance of the Contract Price from the date of City payment.

16.2.3 Design-Builder acknowledges that if a default under Section 16.1.1(k) or (l) occurs, such event could impair or frustrate Design-Builder's performance of the Work. Accordingly, Design-Builder agrees that upon the occurrence of any such event, City shall be entitled to request of Design-Builder, or its successor in interest, adequate assurance of future performance in accordance with the terms and conditions hereof. Failure to comply with such request within ten days of delivery of the request shall entitle City to terminate the Contract and to the accompanying rights set forth above. Pending receipt of adequate assurance of performance and actual performance in accordance therewith, City shall be entitled to proceed with the Work with its own forces or with other contractors on a time

and material or other appropriate basis, the cost of which will be credited against and deducted from City's payment obligations hereunder. The foregoing shall be in addition to all other rights and remedies provided by law or equity and such rights and remedies as are otherwise available under the Contract and the Performance Bond.

16.2.4 In lieu of the provisions of this Section 16.2 for terminating the Contract and completing the Work, City may pay Design-Builder for the parts already done according to the provisions of the Contract Documents and may treat the parts remaining undone as if they had never been included or contemplated by the Contract. No claim under this provision will be allowed for prospective profits on, or any other compensation relating to, Work uncompleted by Design-Builder.

16.2.5 Subject to Section 16.1.2, in the event that the Contract is terminated for grounds which are later determined not to justify a termination for default, such termination shall be deemed to constitute a termination for convenience pursuant to Section 15.

16.2.6 The exercise or beginning of the exercise by City of any one or more rights or remedies under this Section 16.2 shall not preclude the simultaneous or later exercise by City of any or all other such rights or remedies, each of which shall be cumulative.

16.2.7 Design-Builder and Surety shall not be relieved of liability for continuing Liquidated Damages on account of a default by Design-Builder hereunder or by City's declaration of an Event of Default, or by actions taken by City under this Section 16.2.

16.2.8 City's remedies associated with any false statement contained in Design-Builder's response to the RFP shall include the right to rescind the Contract.

16.3 Right to Stop Work for Failure by City to Make Undisputed Payment

Design-Builder shall have the right to stop Work if City fails to make an undisputed payment due hereunder within seven days after receipt of notice of nonpayment. Any such work stoppage shall be considered a suspension under Section 14. Design-Builder shall not have the right to terminate the Contract for default as the result of any failure by City to make an undisputed payment due hereunder, but Design-Builder shall have the right to declare a termination for convenience under Section 15 by delivering to City a written notice of termination specifying its effective date.

SECTION 17. LIQUIDATED DAMAGES

Design-Builder understands and agrees that if Design-Builder fails to complete the Work required in accordance with the Contract Documents, City will suffer damages which cannot be quantified as of the date of execution hereof. Therefore, Design-Builder and City have agreed to stipulate the amount payable by Design-Builder in the event of its failure to meet certain Completion Deadline(s). The parties intend for the Liquidated Damages set forth herein to constitute liquidated damages as such term is used in Government Code Section 53069.85 to the extent said statute may apply, and to constitute stipulated damages to the extent that said statute is not applicable. Design-Builder acknowledges and agrees that the Liquidated Damages are intended to compensate City solely for Design-Builder's failure to meet the applicable Project Completion Deadlines, and shall not excuse Design-Builder from liability from any other breach of Contract requirements, including any failure of the Work to conform to applicable requirements. The fact that City has agreed to accept Liquidated Damages as compensation for its damages associated with delay in meeting a Project Completion Deadline shall not preclude City from exercising its other rights and remedies respecting the delay set forth in Section 16.2 other than the right to collect other damages due to the delay.

17.1 Amount of Liquidated Damages

Liquidated Damages will be applied to the Design-Builder for not achieving certain Contract Times for this Project as follows:

The Design-Builder shall pay to the City of San Jose a sum of **TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500)** per day for each and every day's delay in achieving the Contract Time to obtain Substantial Completion of the Work in excess of the number of days from Notice to Proceed prescribed in Section 4 of the Design-Build Contract.

The Design-Builder shall pay to the City of San Jose a sum of **ONE THOUSAND DOLLARS (\$1,000)** per day for each and every day's delay in achieving the Contract Time to obtain Project Completion of the Work in excess of the number of days from the Notice to Proceed prescribed in Section 4 of the Design-Build Contract.

17.2 Reasonableness of Liquidated Damages

Design-Builder acknowledges and agrees that the foregoing damages have been set based on an evaluation by City of damages to City and the public caused by late completion. Design-Builder and City agree that the amount of such damages are impossible to ascertain as of the date of execution hereof and the parties have agreed to such Liquidated Damages in order to fix Design-Builder's costs and to avoid later disputes over which items are properly chargeable to Design-Builder. It is understood and agreed by Design-Builder that any Liquidated Damages payable in accordance with this Section 17 are in the nature of liquidated damages and not a penalty and that such sums are reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of the proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. Design-Builder further acknowledges and agrees that Liquidated Damages may be owing even though no Event of Default has occurred.

17.3 Payment; Offset; Reduction; Waiver

17.3.1 Liquidated Damages shall be payable by Design-Builder to City within thirty (30) days after Design-Builder's receipt of an invoice from City.

17.3.2 City shall have the right to deduct any amount owed by Design-Builder to City hereunder from any amounts owed by City to Design-Builder, including any Retainage which may be payable by City to Design-Builder pursuant to Section 12.3.1.

17.3.3 Permitting or requiring Design-Builder to continue and finish the Project or any part thereof after a Completion Deadline shall not act as a waiver of City's right to receive Damages hereunder or any rights or remedies otherwise available to City.

17.4 Exclusion of Consequential Damages

17.4.1 Liability Excluded

Notwithstanding any other provision of the Contract Documents and except as set forth in Section 17.4.2, in no event shall either City or Design-Builder be liable to the other party for indirect, incidental, special, punitive or consequential damages of any nature, whether arising in contract, tort (including negligence) or other legal theory.

17.4.2 Exceptions to Exclusion

The exclusion of consequential damages set forth in Section 17.4.1 shall not exclude or affect:

17.4.2.1 Design-Builder's obligation to pay Liquidated Damages;

17.4.2.2 Liability for fraud, intentional misconduct or criminal acts determined in a court of law (other than a violation of a criminal law based upon strict liability or negligence);

17.4.2.3 Design-Builder's liability for any type of damage or loss to the extent it is covered within, but not in excess of, limits of insurance required by the Contract;

17.4.2.4 Each party's liability for its indemnities to the other, provided nothing in this subsection creates new or modifies any express indemnities otherwise contained in this Agreement.

SECTION 18. INDEMNIFICATION

18.1 Indemnifications by Design-Builder

18.1.1 Subject to Section 18.1.3, Design-Builder shall defend, indemnify and hold harmless City, the members of the City Council, and their successors and assigns and their respective officers, directors, agents and employees (collectively referred to as the "Indemnified Parties") from and against any and all third party claims, causes of action, suits, judgments, investigations, legal or administrative proceedings, costs, penalties, fines, damages, losses, liabilities and response costs, including any injury to or death of persons or damage to or loss of property, and including penalties, fines, attorneys', accountants' and expert witness fees and costs incurred in connection with the enforcement of this indemnity, arising out of, relating to, or resulting from:

- (a) The breach or alleged breach of the Contract by any Design-Builder-Related Entity;
- (b) The failure or alleged failure by any Design-Builder-Related Entity to comply with the governmental approvals, any applicable Environmental Laws or other Governmental Rules (including Governmental Rules regarding Hazardous Materials Management);
- (c) Inverse condemnation, trespass, nuisance or similar taking of or harm to real property by reason of (i) the failure of any Design-Builder-Related Entity to comply with requirements of the Contract Documents or governmental approvals respecting control and mitigation of construction activities and construction impacts, (ii) the intentional misconduct or negligence of any Design-Builder-Related Entity, or (iii) the actual physical entry onto or encroachment upon another's property by any Design-Builder-Related Entity;
- (d) Any alleged patent or copyright infringement or other allegedly improper appropriation or use of trade secrets, patents, proprietary information, know-how, copyright rights or inventions in performance of the Work, or arising out of any use in connection with the Project of methods, processes, designs, information, or other items furnished or communicated to City or another Indemnified Party pursuant to the Contract; provided that this indemnity shall not apply to any infringement resulting

from City's failure to comply with specific written instructions regarding use provided to City by Design- Builder;

(e) The alleged negligent act or omission or willful misconduct of any Design-Builder-Related Entity provided that the injury or damage alleged to have resulted from a patent defect occurred during performance of the Contract or within four years after Project Completion, and that the injury or damage alleged to have resulted from a patent defect occurred during performance of Design-Builder is discovered within ten years after Project Completion;

(f) Any and all claims by any governmental or taxing authority claiming taxes based on gross receipts, purchases or sales, the use of any property or income of Design-Builder or any of its Subcontractors or any of their respective agents, officers or employees with respect to any payment for the Work made to or earned by any Design-Builder-Related Entity;

(g) Any and all stop notices and/or Liens filed in connection with the Work, including all expenses and attorneys', accountants' and expert witness fees and costs incurred in discharging any stop notice or Lien, provided that City is not in default in payments owing to Design-Builder with respect to such Work;

(h) Any spill or release or threatened spill or release of a Hazardous Material (i) which was brought onto the Site by any Design-Builder-Related Entity, or

attributable to the negligence, willful misconduct, or breach of contract by any Design- Builder-Related Entity;

(i) The claim or assertion by any contractor of inconvenience, disruption, delay or loss caused by interference by any Design-Builder-Related Entity with or hindering the progress or completion of work being performed by other contractors as described in Standard Specification Section 7-1.14, or failure of any Design-Builder- Related Entity to cooperate reasonably with other contractors in accordance therewith; and/or

(j) Design-Builder's performance of, or failure to perform, any Utility Adjustments which are Design-Builder's responsibility pursuant to the Contract

Documents, or any dispute between Design-Builder and a Utility Owner as to whether work relating to a Utility Adjustment constitutes a Betterment.

18.1.2 Subject to Section 18.1.3, Design-Builder shall release, defend, indemnify and hold harmless the Indemnified Parties from and against any and all claims, causes of action, suits, judgments, investigations, legal or administrative proceedings, cost, penalties, fines, damages, losses, liabilities and response costs, including any injury to or death of persons or damage to or loss of property, and including penalties, fines, attorneys', accountants' and expert witness fees and costs, arising out of, relating to or resulting from Errors in the Design Documents or the Utility plans furnished by Design-Builder.

18.1.3 The following restrictions shall apply to the indemnities set forth in Sections 18.1.1 and 18.1.2:

18.1.3.1 Design-Builder's indemnity obligation shall not extend to any loss, damage or cost in excess of required insurance coverage amounts to the extent that such loss, damage or cost was caused by the active negligence or willful misconduct of such Indemnified Party or its agents, servants or independent contractors who are directly responsible to such Indemnified Party (in other words, a comparative negligence standard shall apply).

18.1.3.2 Except as permitted by Civil Code sections 2782.1, 2782.2 and 2782.5, such indemnities shall not inure to the benefit of an Indemnified Party so as to impose liability on Design-Builder for the active negligence of City, or to relieve City of liability for such active negligence.

18.1.4 In claims by an employee of Design-Builder, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section 18.1 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for Design-Builder or a Subcontractor under workers' compensation, disability benefit or other employee benefits laws.

18.1.5 Design-Builder hereby acknowledges and agrees that it is Design-Builder's obligation to cause the Project to be designed and to construct the Project in accordance with the Contract Documents and that the Indemnified Parties are fully

entitled to rely on Design-Builder's performance of such obligation.

18.1.6 For purposes of this Section 18.1, "third party" means any person or entity other than an Indemnified Party and Design-Builder, except that a "third party" includes any Indemnified Party's employee, agent or contractor who asserts a claim against an Indemnified Party which is within the scope of the indemnities and which is not covered by the Indemnified Party's workers' compensation program, and "third party" includes City in its capacity as owner or operator of property other than the Project triggering Design-Builder's indemnification obligation hereunder.

18.2 Omitted.

18.3 No Effect on Other Rights

The foregoing obligations shall not be construed to negate, abridge, or reduce other rights or obligations which would otherwise exist in favor of a party indemnified hereunder.

18.4 CERCLA Agreement

The indemnities set forth in Section 18.1.1(h) are intended to operate as agreements pursuant to Section 107(e) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9607(e), and Health and Safety Code section 25364, to insure, protect, hold harmless and indemnify the Indemnified Parties.

18.5 Intent of Indemnity for Breach of Contract

The requirement to provide an indemnity for breach of contract set forth in Section 18.1.1(h) is intended to provide protection to City with respect to third party claims associated with such breach. It is not intended to provide City with an alternative cause of action for damages incurred directly by City with respect to such breach.

18.6 Defense and Indemnification Procedures

18.6.1 If any of the Indemnified Parties receives notice of a claim or otherwise has actual knowledge of a claim that it believes is within the scope of the indemnities under Section 18.1, City shall by writing as soon as practicable after receipt of the claim, (a) inform Design-Builder of the claim, (b) send to Design-Builder a copy of all written materials City has received asserting such claim and (c) notify Design-Builder that should no insurer accept defense of the claim, the Indemnified Party will conduct

its own defense unless Design-Builder accepts the tender of in accordance with Section 18.6.3. As soon as practicable after Design-Builder receives notice of a claim or otherwise has actual knowledge of a claim, it shall tender claim in writing to the insurers under all potentially applicable insurance policies. City and other Indemnified Parties also shall have the right to tender such claims to such insurers.

18.6.2 If the insurer under any applicable insurance policy accepts the tender of defense, City and Design-Builder shall cooperate in the defense as required by the insurance policy. If no defense is provided by insurers under potentially applicable insurance policies, then Section 18.6.3 shall apply.

18.6.3 If the defense is tendered to Design-Builder, then with 45 days after receipt of the tender it shall notify the Indemnified Party whether it has tendered the matter to an insurer and (if not tendered to an insurer or if the insurer has rejected the tender) shall deliver a written notice stating that Design-Builder (a) accepts the tender of defense and confirms that the claim is subject to full indemnification hereunder without any “reservation of rights” to deny or disclaim full indemnification thereafter, (b) accepts the tender of defense but with a “reservation of rights” in whole or in part or (c) rejects the tender of defense based on a determination that it is not required to indemnify against the claim under the terms of the Contract Documents.

18.6.4 If Design-Builder accepts the tender of defense under Section 18.6.3(a), Design-Builder shall have the right to select legal counsel for the Indemnified Party, subject to reasonable approval by the Indemnified Party, and Design-Builder shall otherwise control the defense of such claim, including settlement, and bear the fees and costs of defending and settling such claim. During such defense: (a) Design-Builder shall fully and regularly inform the Indemnified Party of the progress of the defense and of any settlement discussions; and (b) the Indemnified Party shall fully cooperate in said defense, provide to Design-Builder all materials and access to personnel it requests as necessary for defense, preparation and trial and which or who are under the control of or reasonably available to the Indemnified Party, and maintain the confidentiality of all communications between the Indemnified Party and Design-Builder concerning such defense.

18.6.5 If Design-Builder responds to the tender of defense as specified in Section 18.6.3(b) or (c), the Indemnified Party shall be entitled to select its own legal counsel and otherwise control the defense of such Indemnified Party's liability, including settlement subject to Section 18.6.7.

18.6.6 If the Indemnified Party, at the time it gives notice of the claim or at any time thereafter, reasonably determines that (a) a conflict exists between it and Design- Builder which prevents or potentially prevents Design-Builder from presenting a full and effective defense, (b) Design-Builder is otherwise not providing an effective defense in connection with the claim, or (c) Design-Builder lacks the financial capacity to satisfy potential liability or to provide an effective defense, the Indemnified Party may assume its own defense by delivering to Design-Builder written notice of such election and the reasons therefor.

18.6.7 If the Indemnified Party is entitled and elects to conduct its own defense pursuant hereto, all costs and expenses it incurs in investigating and defending a claim for which it is entitled to indemnification hereunder shall be reimbursed by Design-Builder on a current basis. In the event the Indemnified Party is entitled to and elects to conduct its own defense, then (a) in the case of a defense conducted under Section 18.6.4, it shall have the right to settle or compromise the claim without Design-Builder's prior written consent and with the full benefit of Design-Builder's indemnity, and (b) in the case of a defense conducted under Section 18.6.5, it shall have the right to settle or compromise the claim with Design-Builder's prior written consent, which shall not be unreasonably withheld or delayed, or with approval of the court or arbitrator, and with the full benefit of Design- Builder's indemnity.

18.6.8 A refusal of, or failure to accept, a tender of defense, as well as any dispute over whether an Indemnified Party which has assumed control of defense is entitled to do so under Section 18.6.6 may be treated by either party as a claim subject to dispute resolution pursuant to the provisions of Section 19. Design-Builder shall be entitled to contest an indemnification claim and pursue, through dispute resolution, recovery of defense and indemnity payments it has made to or on behalf of the Indemnified Party.

18.6.9 The parties acknowledge that while this Section 18 contemplates that Design-Builder will have responsibility for certain claims and liabilities arising out of its obligations to indemnify, circumstances may arise in which there may be shared liability of the parties with respect to such claims and liabilities. In such case, where either party believes a claim or liability may entail shared responsibility and that principles of comparative negligence and indemnity are applicable, it shall confer with the other party on management of the claim or liability in question. If the parties cannot agree on an approach to representation in the matter in question, each shall arrange to represent itself. Within 30 days subsequent to the final, non-appealable resolution of the matter in question, whether by arbitration or by judicial proceedings, the parties shall adjust the costs of defense, including reimbursement of reasonable attorneys' fees and other litigation and defense costs, in accordance with the indemnification arrangements of this Section 18, and consistent with the outcome of such proceedings concerning the respective liabilities of the parties on the claim or liability

18.6.10 In determining responsibilities and obligations for defending suits pursuant to this Section 18.6, specific consideration shall be given to the following factors:

- (a) the party performing the activity in question;
- (b) the location of the activity and incident;
- (c) contractual arrangements then governing the performance of the activity; and
- (d) allegations of respective fault contained in the claim.

18.6.11 Nothing in this Section amends, waives or in any way modifies the rights and duties of an insured under any policy of insurance provided under this Contract.

SECTION 19 PARTNERING AND DISPUTE RESOLUTION

19.1 Partnering

19.1.1 City and Design-Builder shall use good faith efforts to promote the formation of a successful Formal Partnering relationship in order to effectively complete the Contract to the benefit of both parties. The purpose of this relationship is to establish and maintain cooperative communication and to mutually resolve conflicts at the lowest responsible management level. The establishment of a Formal Partnering relationship will not change or modify the terms and conditions of the Contract and will not relieve either party of the legal requirements of the Contract.

19.1.2 In Formal Partnering, City and Design-Builder implement the Partnering relationship through at least one pre-construction partnering workshop conducted by an independent facilitator. The purpose of the initial pre-construction workshop is to mutually develop a strategy for forming a successful partnering relationship. City and Design-Builder may participate in additional facilitated workshops during the life of the Project as they mutually agree is necessary and appropriate.

19.1.3 The scheduling of a partnering workshop, selection of the partnering facilitator and workshop site, and other administrative details shall be as agreed to by both parties. The parties shall use good faith efforts to schedule the initial, pre-construction partnering workshop and to select the facilitator for the workshop as soon as reasonably possible following award of the Contract.

19.1.4 The costs of Formal Partnering involved in providing the pre-construction partnering workshop, any subsequent, additional partnering workshops, and the facilitator for the partnering workshops shall be borne equally by City and Design-Builder.

19.1.5 All other costs associated with Formal Partnering will be borne separately by the party incurring the costs, such as wages and travel expenses, and no additional compensation will be allowed therefor.

19.2 Commencement of Dispute Resolution Process

It is the policy of City to encourage City and Design-Builder to reach a mutually agreeable resolution of a dispute that cannot be resolved with the use of Partnering techniques. This Dispute Resolution Process involves a three-tiered approach to encouraging the resolution of Disputes. Except as otherwise provided herein, each of the tiers of the Dispute Resolution Process shall be completed prior to commencing any

litigation. All Claims and other disputes (collectively, "Disputes") between Design-Builder and City shall be resolved as provided in this Section 19 and implemented in Part 4 of Chapter 14.06 of the San José Municipal Code. All Disputes that cannot be resolved with Partnering are to be decided strictly in accordance with the terms and conditions of the Contract Documents and general principles of contract law of the State of California. Before Design-Builder may submit any Dispute to dispute resolution under Section 19.3, it must first obtain a final City Decision following a Settlement Conference in accordance with this Section 19.2.

19.2.1 Request for Settlement Conference

19.2.1.1 If a Dispute cannot be resolved through Formal Partnering techniques, then Design-Builder shall request a conference to meet with City in an effort to resolve the Dispute in a manner acceptable to both parties.

19.2.1.2 City shall conduct the conference in a timely manner, with the goal of attempting to resolve the Dispute as early as possible. The conference shall be conducted informally, with both sides being able to present their respective issues.

19.2.1.3 Both Design-Builder and City will exchange written documentation of the Dispute sufficiently prior to the conference to allow it to be adequately considered by all parties.

19.2.2 Facilitated Dispute Resolution

19.2.2.1 If the Dispute remains unresolved after the conference provided for in Section 19.2.1, then Design-Builder shall request Facilitated Dispute Resolution.

19.2.2.2 The scheduling of Facilitated Dispute Resolution and the selection of a person to act as facilitator will be agreed upon by City and Design-Builder.

19.2.2.3 All costs associated with conducting Facilitated Dispute Resolution will be shared equally by City and Design-Builder.

19.2.2.4 City will issue a Final City Decision to Design-Builder within 30 business days after conclusion of the Facilitated Dispute Resolution meeting(s); provided that if no written decision is issued, City shall be deemed to have denied Design-Builder's protest and a Final City Decision to that effect shall be deemed received by Design-Builder at the end of such 30 business day period. The Final City Decision shall be final and conclusive on the subject, subject to Design-Builder's right to submit the issue to further Dispute Resolution and Section 19.3.

19.2.3 Foregoing Dispute Resolution

Notwithstanding anything to the contrary set forth in Section 19, City and Design-Builder may at any time mutually agree to forego the conference set forth in Section 19.1, the Facilitated Dispute Resolution set forth in Section 19.2.

19.3 Additional Dispute Resolution Procedures

The parties may agree to include additional dispute resolution procedures in the Project.

19.4 Effect of Dispute Resolution Procedures

The dispute resolution procedure set forth in this Section 19, together with all rules, regulations, Contract provisions and administrative procedures established by the Director to implement this provision, are intended to directly conflict with, and supersede in its entirety, and shall be in lieu of, those construction dispute resolution procedures set forth in Article 1.5 of Chapter 1 of Part 3 of Division 2 of the California Public Contract Code. The dispute resolution policy is not intended to preclude the parties from litigating a dispute or from otherwise mutually agreeing after a dispute arises from engaging in other methods of dispute resolution.

19.5 Continuing Performance

During any dispute resolution proceedings, Design-Builder shall carry on its duties under the Contract Documents and City shall continue to make payments in accordance with the Contract.

19.6 Participation in Proceedings

19.6.1 Joinder

Design-Builder agrees that, (a) at City's request, Design-Builder shall take appropriate action to join third parties involved in the design or construction of any part of the Project as parties in dispute resolution proceedings under this Section 19 or any litigation, and (b) Design-Builder will allow itself to be joined as a participant in any proceeding that involves City and any other Person relating to the Project. This provision is for the benefit of City and not for the benefit of any other party.

19.7 Emergency Dispute Resolution

If a Dispute arises which must be resolved expeditiously in order to prevent serious damage to person or property, or serious interference with a critical path, both parties shall

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make every effort to resolve such Dispute quickly. In such case, if Design-Builder's Project Executive and City's Project Manager cannot reach a resolution of that Dispute within 24 hours, they must refer the Dispute to their respective Chief Executive Officers (or other officer with each party to make final decisions subject only to City Council approval and any required third party approvals) for a meeting between those Chief Executive Officers to occur within the following 24 hours. Once the urgent aspects of the Dispute have been resolved, the parties may continue with the remaining procedures for dispute resolution if necessary and to the extent applicable.

19.8 Time Limitation

Design-Builder acknowledges and agrees that City is subject to constraints which have resulted in limitations on its ability to increase the Design-Build Lump Sum (Fixed) Price or extend a Completion Deadline. Design-Builder acknowledges and agrees that, due to limitations on funding for the Project, prompt resolution of Disputes is of vital importance to City. Design-Builder agrees that the time limitations stated in the Contract for the filing of Claims and/or complaints or for serving a Complaint in litigation are necessary and reasonable.

SECTION 20.

**SUBSTANTIAL COMPLETION AND PROJECT
COMPLETION AND ACCEPTANCE**

20.1 Substantial Completion

20.1.1 Notice by Design-Builder

With respect to the Design-Build Project, Design-Builder shall provide written notice to City when, in the opinion of the Design-Builder, each of the following have occurred:

For Substantial Completion: Design-Builder has completed all Work (except Punch List items and other minor items as accepted by the City) in order to allow the entire Project to operate for its intended use, without the need of temporary supports or need for future closures, and including the following:

(a) Design-Builder has furnished to City a certification from Design- Builder's Project Executive, in form and substance satisfactory to City, certifying conformity of the construction with the Design Documents;

(b) Design-Builder has furnished to City a certification from Design- Builder's Construction Quality Assurance Manager, in form and substance satisfactory to City, certifying that there are no outstanding non-conformances other than those identified on the Punch List;

(c) Design-Builder has ensured that the Project may be operated without damage to the Project or any other property on or off the Project Site, and without injury to any Person;

(d) Design-Builder has received all applicable Governmental Approvals required for Project use;

(e) Design-Builder has satisfied all conditions required by local agencies and utility owners for acceptance by local agencies and Utility Owners;

20.1.2 Inspection by City

Upon receipt of Design-Builder's notice under Section 20.1.1, City will conduct such inspections, surveys and/or testing as the City deems desirable. If such inspections, surveys and/or tests disclose that any of Work does not meet the

requirements of the Contract Documents, City will promptly advise Design-Builder as to any Errors in the Work (including incomplete Work) necessary to be corrected as a condition to achieving Substantial Completion or Project Acceptance. Upon correction of the Errors (including incomplete Work) identified as a prerequisite to Project Substantial Completion, Design-Builder shall provide written notification to City of their belief that the Errors were corrected, and City will conduct additional inspections, surveys and/or testing as reasonable and necessary. This procedure shall be repeated until City finds that all prerequisites to Project Substantial Completion have been met. Unless reasonable and necessary or agreed by the Design-Builder, the City shall not delay, defer, or perform in piecemeal fashion any such inspections.

20.1.3 Substantial Completion

City will determine Substantial Completion at such time as (a) City finds that all conditions set forth in Section 20.1.1 have been satisfied, (b) City finds that all Errors (including incomplete Work) identified as prerequisites to Substantial Completion have been corrected, and (c) Design-Builder and City have agreed upon a Punch List for Work to be performed prior to Project Completion and Acceptance.

20.2 Project Completion and Acceptance

20.2.1 Conditions to Project Completion and Acceptance

Promptly after Substantial Completion has occurred, Design- Builder shall perform all Work, if any, which was deferred for purposes of Project Completion and Acceptance, and shall satisfy all of its other obligations under the Contract Documents, including ensuring that the Project has been completed and all equipment, materials, facilities, improvements, structures and components have been properly adjusted and tested, and provision of all deliverables described in Section 20.3.2. When all of the foregoing have occurred, Design-Builder shall provide an executed sworn Affidavit of Project Completion to City including the following statement:

To the best of Design-Builder's knowledge and belief, all Work under the [identify Project] has been completed in accordance with the Contract Documents, no lawful debts for labor or materials are outstanding and no federal excise

tax has been included in the Price; all requests for funds for undisputed work under the Contract, including changes in the Work, and under all billings of whatsoever nature are accurate, complete and final and no additional compensation over and above the final payment will be requested or is due under the Contract or under any adjustment issued thereunder for said undisputed work; there are no outstanding claims, Liens or stop notices relating to the Project including claims by Utility Owners, there is no existing default of City's obligations under any agreement with a Utility Owner that are Design-Builder's responsibility pursuant to the Contract Documents, and no event has occurred which, with the passing of time or giving of notice or both, would lead to a claim relating to the Work or an event of default under any agreement with a Utility Owner; and upon receipt of final payment, Design-Builder and Subcontractors acknowledge that City and any and all employees of City and their authorized representatives will thereby be released, discharged and acquitted from any and all claims or liability for additional sums on account of undisputed work performed under the Contract.

If Design-Builder is unable to provide the affidavit in the above form, the affidavit shall certify that all such outstanding matters are set forth in an attached list which shall describe the outstanding matters in such detail as may be requested by City. The affidavit shall include a representation of Design-Builder that it is diligently and in good faith contesting all such matters by appropriate legal proceedings and shall provide a status report regarding the same including an estimate of the maximum payable with respect to each such matter.

20.2.2 Project Completion and Acceptance shall be deemed to have occurred when all of the following have occurred:

- (a) All requirements for Substantial Completion shall have been fully satisfied;
- (b) City shall have received all Design Documents, original working drawings, shop drawings and final as-built drawings of the Project, right-of-way record maps, surveys, test data and other deliverables required under the Contract Documents, and Design-Builder shall have satisfied the applicable requirements set forth in the Project Technical Requirements

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

(d) The items on the Punch List shall have been completed to the satisfaction of City, and all of Design-Builder's other obligations under the Contract Documents (other than obligations which by their nature are required to be performed after

(e) Project Completion and Acceptance shall have been satisfied in full or waived in writing by City.

(f) All of Design-Builder's and Subcontractors' personnel, supplies, equipment, waste materials, rubbish and temporary facilities shall have been removed from the Project Site, Design-Builder has restored and repaired all damage or injury arising from such removal to the satisfaction of City, and the Project Site is in good working order and condition; and

(g) All necessary work by Utility Owners had been completed, and Design-Builder has obtained all design and construction approvals by Utility Owners required by the Contract.

20.2.3 Inspection and Recordation of Project Completion and Acceptance

Upon receipt of notification from Design-Builder that all conditions to Project Completion and Acceptance have been met, City will make final inspection and City will either submit a Notice of Project Completion and Acceptance with the County of Santa Clara in accordance with Section 7-1.17 of the Standard Specifications or notify Design-Builder regarding any Work remaining to be performed. If City fails to submit a Notice of Project Completion and Acceptance, Design-Builder shall promptly remedy the defective and/or uncompleted portions of the Work. Thereafter, Design-Builder shall give City a revised Affidavit of Project Completion and Acceptance with a new date based on when the defective and/or uncompleted portions of the Work were corrected. The foregoing procedure shall apply successively thereafter until City has given Design-Builder an executed Notice of Project Completion and Acceptance.

20.2.4 No Relief from Liability

Project Completion and Acceptance will not prevent City from correcting any measurement, estimate, or certificate made before or after completion of the Work, nor shall it prevent City from recovering from Design-Builder, its Surety(ies), or other provider of performance security or any combination of the foregoing, overpayment sustained for failure of Design- Builder to fulfill the obligations under the Contract. A waiver on the part of City of any breach of any part of Design-Builder shall not be held to be a waiver of any other or subsequent breach. Project Completion and Acceptance shall not relieve Design-Builder from any of its continuing obligations hereunder, including Warranty obligations.

SECTION 21. DOCUMENTS AND RECORDS

21.1 Maintenance of, Access to and Audit of Records

Design-Builder shall maintain at its Project administration office in the State a complete set of all books and records prepared or employed by Design-Builder in its management, scheduling, cost accounting and otherwise with respect to the Project. Design-Builder shall grant to City, and Utility Owners such audit rights and allow such Persons such access to and the right to copy such books and records as such Persons may request from time to time in connection with the Contract, issuance of Change Orders, resolution of Disputes and such other matters as such Persons reasonably deem necessary for purposes of complying or verifying compliance with the Contract and Governmental Rules.

21.1.1 Where the payment method for any Work is on a time and materials basis, such examination and audit rights shall include all books, records, documents and other evidence and accounting principles and practices sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of such Work. If an audit indicates Design-Builder has been overcredited under a previous progress report or progress payment, that overcredit will be credited against current progress reports or payments.

21.1.2 For cost and pricing data submitted in connection with pricing Contract and Change Orders, unless such pricing is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the public, or prices set by Governmental Rules, such Persons and their representatives have the right to examine all books, records, documents and other data of Design-Builder related to the negotiation of or performance of Work under such Change Orders for the purpose of evaluating the accuracy, completeness and currency of the cost or pricing data submitted. The right of examination shall extend to all documents deemed necessary by such Persons to permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

21.1.3 Except for audits of claims, described in Section 21.1.4 below, and except as otherwise required under any applicable Governmental Rule, City's audit rights

extend only to (a) subcontractors and subconsultants listed in Appendix 5; and (b) subcontractors and subconsultants at any tier only if the total compensation payable to the subcontractor or subconsultant is greater than \$250,000. Except for audits of claims, described in Section 21.1.4 below, and except as otherwise required under any applicable Governmental Rule, City shall not have audit rights for subcontracts that are competitively bid by the Design-Builder

21.1.4 All claims filed against City shall be subject to audit at any time following the filing of the claim. The audit may be performed by employees of City or by an auditor under contract with City, upon reasonable notice of not less than 20 days. Design-Builder, Subcontractors or their agents shall provide adequate facilities, acceptable to City, for the audit during normal business hours. Design-Builder, Subcontractors or their agents shall cooperate with the auditors. Failure of Design-Builder, Subcontractors or their agents to maintain and retain sufficient records to allow the auditors to verify all or a portion of the claim or to permit the auditor access to the books and records of Design-Builder, Subcontractors or their agents shall constitute a waiver of the claim and shall bar any recovery thereunder.

21.1.5 At a minimum, the auditors shall have available to them the following documents relating to the Contract and/or the Work:

- (a) Daily time sheets and supervisor's daily reports;
- (b) Union agreements;
- (c) Insurance, welfare, and benefits records;
- (d) Payroll registers;
- (e) Earnings records;
- (f) Payroll tax forms;
- (g) Material invoices and requisitions;
- (h) Material cost distribution work sheet;
- (i) Equipment records (list of company equipment, rates, etc.);
- (j) Subcontractors' (including Suppliers) invoices;

- (k) Subcontractors' and agents' payment certificates;
- (l) Canceled checks;
- (m) Job cost report;
- (n) Job payroll ledger;
- (o) General ledger;
- (p) Cash disbursements journal;
- (q) All documents that relate to each and every claim together with all documents that support the amount of damages as to each claim;
- (r) Work sheets used to prepare the claim establishing the cost components for items of the claim including labor, benefits and insurance, materials, equipment, subcontractors, all documents that establish the time periods, individuals involved, the hours for the individuals, and the rates for the individuals;
- (s) email;
- (t) network servers, data storage devices, backup tapes/media; and
- (u) letters and correspondence.

21.1.6 Full compliance by Design-Builder with the provisions of this Section 21.1 is a contractual condition precedent to Design-Builder's right to seek relief under Section 19.

21.1.7 Design-Builder represents and warrants the completeness and accuracy of all information provided by it or its agents in connection with this Section 21.1.

21.1.8 . Nothing herein requires the Design Builder to disclose communications or documents that are privileged or confidential by law.

21.2 Retention of Records

Design-Builder shall maintain all records and documents relating to the Work and the Project (including copies of all original documents delivered to City) in Santa Clara County, California or at its home office in Santa Ana, California, until three years after the latest Project Acceptance date or the termination of the Contract, whichever

is applicable, or any longer period required by Governmental Rules. Design-Builder shall notify City where such records and documents are kept. Notwithstanding the foregoing, all records which relate to Claims being processed or actions brought under the dispute resolution provisions hereof shall be retained and made available until such actions and Claims have been finally resolved. Records to be retained include all books, electronic information and files and other evidence bearing on Design-Builder's costs under the Contract Documents. Design-Builder shall make these records and documents available for audit and inspection at all reasonable times, without charge, and shall allow City to make copies of such documents (at no expense to Design-Builder). Copies of such documents shall be provided to City for inspection at City Hall when it is practical to do so. If approved by City, photographs, microphotographs or other authentic reproductions may be maintained instead of original records and documents. Where City has reason to believe that such records or documents may be lost or discarded due to dissolution, disbandment or termination of Design-Builder's business, City may, by written request by any of the above-named officers, require that custody of the records be given to City and that the records and documents be maintained in City Hall. Access to such records and documents shall be granted to any party authorized by Design-Builder, Design-Builder's representatives, or Design-Builder's successor-in-interest.

21.3 Confidential Information; Public Records Act

21.3.1 All data, documents, discussions or other information developed or received by or for Design-Builder in performance of the Contract and marked in writing as "confidential" are to be considered confidential and not to be disclosed to any person for a period of five years after Project Acceptance except as authorized by City, or as required by Governmental Rules, including the Public Records Act.

21.3.2 If Design-Builder is presented with a request from a third party (other than Design-Builder's Subcontractors under the Contract) for any records, data or documents which may be in Design-Builder's possession by reason of the Contract, Design-Builder shall refer such request to City's Authorized Representative and Design-Builder shall not provide any such records, data or documents to any such third party without prior written authorization from City's Authorized Representative. If

Design-Builder is presented with a request for documents by any administrative agency or with a subpoena duces tecum regarding any records, data or documents which may be in Design-Builder's possession by reason of the Contract, Design-Builder must immediately give notice to City with the understanding that City will have the opportunity to contest such process by any means available to it before the records or documents are submitted to a court or other third party. Design-Builder, however, is not obligated to withhold the delivery beyond the time ordered by the court or administrative agency, unless the subpoena or request is quashed or the time to produce is otherwise extended.

Design-Builder acknowledges and agrees that all records, documents, drawings, plans, specifications and other materials in City's possession, including materials submitted by Design-Builder, are subject to the provisions of the California Public Records Act (Government Code sections 6250 et seq.). Design-Builder shall be solely responsible for all determinations made by it under such law, and for clearly and prominently marking each and every page or sheet of materials with "Trade Secret" or "Confidential" as it determines to be appropriate. Design-Builder is advised to contact legal counsel concerning such law and its application to Design-Builder.

21.3.3 If any of the materials submitted by Design-Builder to City are clearly and prominently labeled "Trade Secret" or "Confidential" by Design-Builder, City will endeavor to advise Design-Builder of any request for the disclosure of such materials prior to making any such disclosure. Under no circumstances, however, will City be responsible or liable to Design-Builder or any other Person for the disclosure of any such labeled materials, whether the disclosure is required by law, by court order or occurs through inadvertence, mistake or negligence on the part of City.

21.3.4 In the event of litigation concerning the disclosure of any material submitted by Design-Builder to City, City's sole involvement will be as a stakeholder retaining the material until otherwise ordered by a court, and Design-Builder shall be fully responsible for otherwise prosecuting or defending any action concerning the materials at its sole cost and risk.

21.3.5 Design-Builder shall collect and preserve each of the following types of data in written form contemporaneously during Design-Builder's performance of the Work, all of which shall be in form approved by City and index filed as approved by City:

(a) Monthly report of labor by classification of management, supervision, engineering and other technical personnel used on the job;

(b) Daily Labor and Equipment Reports from Design-Builder and each Subcontractor for construction related activities;

(c) Quality Control documentation as required by the Project Technical Requirements;

(d) A Daily Occurrence Log (in the form of a bound book with entries in ink) for construction related activities which shall be maintained by Design-Builder's Project Executive or his/her designee(s), in which shall be recorded daily in a narrative form all significant occurrences on the Project, including permit problems, unusual weather, asserted Force Majeure events, events and conditions causing or threatening to cause delay or disruption or interference with the progress of any of the Work, known injuries to person or property, a listing of each activity depicted on the Project Schedule which is being actively prosecuted; notifications given and received, and significant Project related meetings; and

(e) A Daily Record in the format required by City, recording all labor, materials and equipment expenses which are being incurred by reason of any event, condition or circumstance which Design-Builder believes is or may become the subject of a claim against City. Any initialed or signed concurrence by City (or designees) will be for purposes of verifying physical labor, material and equipment count rather than validating Design-Builder's Claims.

To the extent requested by City, provide City with access to and a copy of each item described in this Section 21.3.65 (provided, however, that the provision of such information shall not constitute a notice under Section 13.3.2). In addition, if requested by the Design Builder, the City will provide the Design Builder with any such daily reports or contemporaneous progress reports maintained by the City during the

5/4/2018

course of the Project without the need for compliance with or reference to the California Public Records Act.

5/4/2018

**SECTION 22.
[RESERVED]**

**SECTION 23.
MISCELLANEOUS PROVISIONS**

23.1 Amendments

The Contract Documents may be amended only by a written instrument duly executed by the parties or their respective successors or assigns.

23.2 Waiver

Either party's waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of the Contract Documents at any time shall not in any way limit or waive that party's right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision, any course of dealing or custom of the trade notwithstanding. Furthermore, if the parties make and implement any interpretation of the Contract Documents without documenting such interpretation by an instrument in writing signed by both parties, such interpretation and implementation thereof will not be binding in the event of any future disputes.

23.3 Independent Contractor

It is understood and agreed that Design-Builder, in the performance of the Work and services agreed to be performed by Design-Builder, shall act as and be an independent contractor and not an agent or employee of City; and as an independent contractor, Design-Builder shall obtain no rights to retirement benefits or other benefits which accrue to City's employees, and Design-Builder hereby expressly waives any claim it may have to any such rights.

23.4 Successors and Assigns

The Contract Documents shall be binding upon and inure to the benefit of City and Design-Builder and their permitted successors, assigns and legal representatives.

23.4.1 City may assign all or part of its right, title and interest in and to any Contract Documents, including rights with respect to the Payment and Performance Bonds, to any other Person.

23.4.2 The parties agree that the expertise and experience of Design-Builder are material considerations for the Contract. Design-Builder shall not assign or transfer any interest in the Contract nor the performance of any of Design-Builder's obligations

hereunder, without the prior written consent of City, in City's sole discretion, and any attempt by Design-Builder to assign the Contract or any rights, duties or obligations arising hereunder shall be void and of no effect.

23.5 Designation of Representatives; Cooperation with Representatives

23.5.1 City and Design-Builder shall each designate an individual or individuals who shall be authorized to make decisions and bind the parties on matters relating to the Contract Documents. Appendix 19 hereto provides the initial designations. Such designations may be changed by a subsequent writing delivered to the other party in accordance with Section 23.11. The parties may also designate technical representatives who shall be authorized to investigate and report on matters relating to the construction of the Project and negotiate on behalf of each of the parties but who do not have authority to bind City or Design-Builder.

23.5.2 Design-Builder shall cooperate with City and all representatives of City designated as described above.

23.6 Gratuities and Conflicts of Interest

23.6.1 Design-Builder is familiar with City's prohibition against the acceptance of any gift by a City officer or designated employee, which prohibition is found in Chapter 12.08 of the San José Municipal Code.

23.6.2 Design-Builder agrees not to offer any City officer or designated employee any gift prohibited by said Chapter.

23.6.3 The offer or giving of any gift prohibited by Chapter 12.08 shall constitute a material breach of the Contract by Design-Builder. In addition to any other remedies City may have in law or equity, City may terminate the Contract for such breach as provided in Section 16.

23.6.4 Employment (whether as an employee, consultant, or independent contractor) of personnel on City's payroll by any Design-Builder-Related Entity is not permitted in the performance of the Contract, even though such employment may be outside City employee's regular working hours or on Saturdays, Sundays, holidays or vacation time; further, employment by any Design-Builder-Related Entity of personnel who have been on City's payroll within one year prior to the date of

Contract award is also prohibited, if such employment is caused by and/or dependent upon Design-Builder securing the Contract or a related contract with City.

23.6.5 The rights and remedies of City specified in this Section 23.6 are not exclusive and are in addition to any other rights and remedies allowed by law.

23.7 Survival

Design-Builder's representations and warranties, the dispute resolution provisions contained in Section 19, and all other provisions which by their inherent character should survive termination of the Contract and/or Project Acceptance, shall survive the termination of the Contract and Project Acceptance.

23.8 Limitation on Third Party Beneficiaries

It is not intended by any of the provisions of the Contract Documents to create any third party beneficiary hereunder or to authorize anyone not a party hereto to maintain a suit for personal injury or property damage pursuant to the terms or provisions hereof, except to the extent that specific provisions (such as the warranty and indemnity provisions) identify third parties and state that they are entitled to benefits hereunder. The duties, obligations and responsibilities of the parties to the Contract Documents with respect to third parties shall remain as imposed by law. The Contract Documents shall not be construed to create a contractual relationship of any kind between City and a Subcontractor or any Person other than Design-Builder.

23.9 Personal Liability of City Employees

City's authorized representatives are acting solely as agents and representatives of City when carrying out the provisions of or exercising the power or authority granted to them under the Contract. They shall not be liable either personally or as employees of City for actions in their ordinary course of employment. No agent, consultant, officer or authorized employee of City nor any member of City's Council, shall be personally responsible for any liability arising under the Contract.

23.10 Governing Law and Venue

The Contract Documents shall be governed by and construed in accordance with the law of the State, without regard to conflict of law principles. In the event suit is brought by either party to the Contract, the parties agree that venue shall be exclusively vested in the state courts of the County of Santa Clara, or if federal

jurisdiction is appropriate, exclusively in the United States District Court, Northern District of California, San José, California.

23.7 Notices and Communications

Notices under the Contract Documents shall be in writing and (a) delivered personally, (b) sent by certified mail, return receipt requested, (c) sent by a recognized overnight mail or courier service, with delivery receipt requested, or (d) sent by telefacsimile or email communication followed by a hard copy and with receipt confirmed by telephone, to the following addresses (or to such other address as may from time to time be specified in writing by such Person):

All correspondence with Design-Builder shall be sent to Design-Builder's Project Administrator or as otherwise directed by Design-Builder's Project Administrator. The address for such communications shall be:

Steve P. Rados, Inc.
Attention: Mr. Jeff Peel
9550 Elder Creek Road
Sacramento, CA 95829
Phone: (916) 475-1654
Facsimile: (916) 475-1655
Email: jpeel@radoscompanies.com

In addition, copies of all notices to proceed and suspension, termination and default notices shall be delivered to the following persons:

Steve P. Rados, Inc.
Attention: Mr. Stephen S. Rados
2002 E. McFadden Avenue, Suite 200
Santa Ana, CA 92705
Phone: (714) 835-4612
Facsimile: (714) 835-2186
Email: ssrados@radoscompanies.com

5/4/2018

All communications to City shall be marked as regarding the Fourth Street 84-in Interceptor Phase VI-A Project and shall be delivered as follows:

Mathew Nguyen
200 East Santa
Clara St. 5th Floor
San Jose, CA 95113

In addition, copies of all notices regarding disputes, termination and default notices shall be delivered to the following:

Office of the City
Attorney 200 East
Santa Clara St. San
Jose, CA 95113

23.11.1 Notices shall be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U. S. Postal Service, private carrier or other Person making the delivery. Notwithstanding the foregoing, notices sent by telefacsimile after 4:00 p.m. Pacific Standard or Daylight Time (as applicable) and all other notices received after 5:00

p.m. shall be deemed received on the first business day following delivery (that is, in order for a fax to be deemed received on the same day, at least the first page of the fax must have been received before 4:00 p.m.). Any technical or other communications pertaining to the Work shall be conducted by Design-Builder's Project Executive and technical representatives designated by City. Design-Builder's representatives shall be available at all reasonable times for consultation. Except as otherwise provided in Section 23.5.1, each party's representative shall be authorized to act on behalf of such party in matters concerning the Work.

23.11.2 Design-Builder shall copy City on all written correspondence pertaining to the Contract between Design-Builder and any Person other than Design-Builder's Subcontractors, consultants and attorneys.

23.12 Further Assurances

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

the validity of

(a) the assignments of Subcontracts contained herein and (b) any instruments securing performance hereof.

23.13 Severability

If any clause, provision, section or part of the Contract is ruled invalid under Section 19 or otherwise by a court having proper jurisdiction, then the parties shall: (a) promptly meet and negotiate a substitute for such clause, provision, section or part, which shall, to the greatest extent legally permissible, effect the original intent of the parties, including an equitable adjustment to the Contract Price to account for any change in the Work resulting from such invalidated portion; and (b) if necessary or desirable, apply to the court or other decision maker (as applicable) which declared such invalidity for an interpretation of the invalidated portion to guide the negotiations. The invalidity or unenforceability of any such clause, provision, section or part shall not affect the validity or enforceability of the balance of the Contract, which shall be construed and enforced as if the Contract did not contain such invalid or unenforceable clause, provision, section or part.

23.14 Headings

The captions of the sections of the Contract are for convenience only and shall not be deemed part of the Contract or considered in construing the Contract.

23.15 Entire Agreement

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.

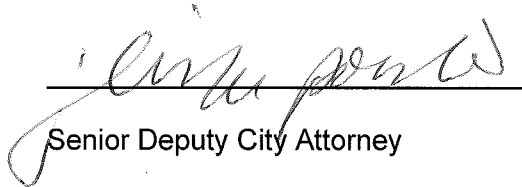
23.16 Counterparts

This instrument may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

5/4/2018

Executed as of the day and year written on the first page of this Contract.

APPROVED AS TO FORM:



Senior Deputy City Attorney

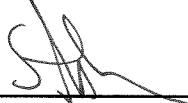
“CITY”

CITY OF SAN JOSE, a municipal corporation

By _____
TONI J. TABER, CMC
City Clerk

“DESIGN-BUILDER”

Steve P. Rados, Inc., a California corporation

By  _____
Name: Stephen S. Rados
Title: President

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

CIVIL CODE § 1189

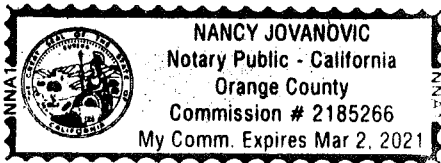
A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
County of Orange)
On May 4, 2018 before me, Nancy Jovanovic, Notary Public,
Date Here Insert Name and Title of the Officer
personally appeared Stephen S. Rados
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature Nancy Jovanovic
Signature of Notary Public

Place Notary Seal Above

OPTIONAL

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

Description of Attached Document

Title or Type of Document: _____
Document Date: _____ Number of Pages: _____
Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____
 Corporate Officer — Title(s): _____
 Partner — Limited General
 Individual Attorney in Fact
 Trustee Guardian or Conservator
 Other: _____
Signer Is Representing: _____

Signer's Name: _____
 Corporate Officer — Title(s): _____
 Partner — Limited General
 Individual Attorney in Fact
 Trustee Guardian or Conservator
 Other: _____
Signer Is Representing: _____

DRAFT--Contact the Office of the City Clerk at (408) 535-1260 or CityClerk@sanjoseca.gov for final document.

Please see attached California All-Purpose Acknowledgment

ACKNOWLEDGMENT

State of California
County of _____)

On _____ before me, _____
(insert name and title of the officer)

personally appeared _____,
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are
subscribed to the within instrument and acknowledged to me that he/she/they executed the same in
his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the
person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing
paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)