DESIGN-BUILD SERVICES FOR AIRCRAFT RESCUE AND FIRE FIGHTING (ARFF) FACILITY PROJECT AT THE NORMAN Y. MINETA SAN JOSE INTERNATIONAL AIRPORT

DRAFT DESIGN-BUILD CONTRACT

BETWEEN

THE CITY OF SAN JOSE

AND

_____

DRAFT DESIGN-BUILD CONTRACT

Aircraft Rescue and Fire Fighting (ARFF) Facility Project at the Norman Y. Mineta San José International Airport

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DESIGN-BUILD CONTRACT

Aircraft Rescue and Fire Fighting (ARFF) Facility Project at the Norman Y. Mineta San José International Airport

This Design-Build Contract ("Contract") is entered into by and between the City of San José, a municipal corporation of the State of California ("City"), and [INSERT NAME OF DESIGN - BUILDER], a [INSERT TYPE OF LEGAL ENTITY] ("Design-Builder"), effective as of [INSERT DATE], 2018 ("Effective Date"), with reference to the definitions contained in Appendix 1 hereto and the following facts:

A. City owns and operates the Norman Y. Mineta San José International Airport (Airport).

B. City issued a Request for Proposals (RFP) to select a design-builder to design, build, and deliver to City the Aircraft Rescue and Fire Fighting (ARFF) Facility Project at the Airport (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. Additional improvements as described in Section 2.1.1 Project General Description may also be included in this Project.

C. City has selected Design-Builder for the Project based on its response to the RFP.

D. 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.

E. Design-Builder has the necessary professional expertise and skill to perform such services.

F. 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.

G. 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.

H. 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 Section 10, Project Technical Proposal

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 (and other forms of guarantees)

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.

Portions of the Background Documents are referenced in the Contract Documents 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 the Contract Documents. 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.

Additional details and more stringent requirements contained in a lower priority document will control unless the requirements of the lower priority document present an actual conflict with the requirements of the higher level document (i.e. it is not possible to comply with both requirements). Notwithstanding the order of precedence among Contract Documents set forth in this Section 1.3, in the event of a conflict among any standard or specification applicable to the Project established by reference contained in the Contract Documents to a described publication, City shall have the right to determine in its sole discretion which provision applies regardless of the order of precedence of the documents in which such standards are referenced. Design-Builder shall request City's determination respecting the order of precedence involving the referenced standards promptly upon becoming aware of any such conflict.

1.4 Integration of Standard Specifications into Contract

If any question arises regarding whether any provision of the Standard Specifications are 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, and instead other rules of interpretation and construction shall be used. 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 (no matter how extensive) or misdescribed details of the 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 at the South-West end of the Airfield in the vicinity of the Norman Y. Mineta San José International Airport marquee sign. Design-Builder will design, construct and commission an approximately 14,000 square foot Aircraft Rescue and Fire Fighting (ARFF) Facility with a minimum of five (5) apparatus bays housing the Airport's four (4) ARFF vehicles with one (1) additional bay being allotted for maintenance. In addition, the ARFF facility will include access roads, landscaping, twenty-seven (27) parking spaces, six (6) firefighter dormitories, toilets, showers, administrative offices and other spaces as identified by the FAA Handbook and Advisory Circulars.

If additional funds become available, the ARFF Facility may be expanded up to 16,000 square feet. The expansion would include one (1) additional bay, and one (1) additional dormitory giving the Facility a total of six (6) bays and seven (7) dorms.

2.1.2 Contract

Design-Builder will perform the Work for the Project as designated by City in this Contract, upon City's issuance of one or more Notices to Proceed directing Design-Builder to proceed with the Work defined in the Contract Documents. Subject to Section 13, Design-Builder will complete all Work stated in the Contract by the applicable Completion Deadlines stated in Section 4.2.2.1.

(a) **Task Orders**
Design-Builder shall perform the Work only as designated by City in one or more executed Task Orders, upon City's issuance of the applicable Notices to Proceed directing Design-Builder to proceed with the Work defined in the Task Orders. Subject to Section 13, Design-Builder shall complete all Work under each Task Order for the applicable Task Order Price and by the applicable Completion Deadlines. City and Design-Builder may execute Task Orders in accordance with this Section.

After execution of the Contract, Design-Builder shall submit to City proposals for all or part of the Project. For each Task Order, City and Design-Builder shall negotiate a price ("Task Order Price"), schedule ("Task Order Schedule") and scope based upon the estimating, cost, risk assessment, overhead and profit principles set forth in Appendices 4 and 20, it being the express intent of City and Design-Builder to determine the price, schedule and scope for Task Orders on this basis.

The Task Order Price shall be as follows: (a) NTE Task Orders shall have a Not to Exceed (NTE) Price; (b) Lump Sum Design Task Orders shall have a Lump Sum Price; and (c) Design-Build Task Orders shall have a Guaranteed Maximum Price (GMP). For each Design-Build Task Order, City and Design-Builder shall also negotiate a Design Development Contingency and a Construction Contingency available to Design-Builder as provided in Section 12.1.4 and a schedule of values ("Schedule of Values") consisting of a cash flow forecast, breakdown of the discreet items of the Task Order Work and the associated value for each item, such that the total of all such values equals the Task Order Price.

City shall have the right to review Design-Builder's back-up for its quantities, labor and work effort estimates, and other materials submitted by Design-Builder with its draft Task Orders during the course of any Task Order negotiations. The negotiations shall be conducted on an Open-Book Basis.

For each Task Order, City and Design-Builder may negotiate formula(s) for sharing any savings resulting from actual cost less than established Lump Sum Pricing or GMP.

The parties may agree to issue Task Orders for all or any portion of the Project, as defined in each Task Order. In such event, the Contract provisions regarding the Project shall be deemed to apply to any such portion of the Project, as applicable.

2.1.3 Performance of Work

The Work will include the design, permitting, construction, installation, and any necessary management, integration, fabrication, assembly, and/or testing the Work 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 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 Manager 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 has evaluated 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 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 _____ duly organized and validly existing under the laws of the State of _____ 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 that 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 develop the design of the Project in compliance with the Contract Documents, including specifically, the Project Technical Requirements, and other information in the Contract Documents related to City's requirements for the Project (collectively, "Program Information") to develop a design which fulfills City's program requirements within the constraints of City's budget and schedule.

(b) Design-Builder shall rely on the Program Information to describe the general design requirements for the Project, and not for detailed design dimensions or other requirements. Design-Builder shall be fully responsible for developing a fully coordinated, detailed design which complies with the Project requirements described in the Program Information.

(c) Design-Builder shall not rely on the Program Information as a basis to seek recovery for any adjustment to any Contract Price or a time extension except to the extent such adjustment is based on a change to the Project scope described in the Project Information specifically approved by City in writing, and only to the extent permitted under Section 13.

(d) Design-Builder's warranties and indemnities hereunder cover Errors in the Project even though they may be related to Errors in the Program Information, and apply to the project issued pursuant to the Contract.

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

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 Program Information (including the portions provided by City) or Background Documents, or any action or forbearance in reliance thereon, except to the extent that Design-Builder is entitled to an increase in the a Contract Price and/or extension of a Completion Deadline under Section 13 with respect to such matter. 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 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 that 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.

4.2 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:

- ____ calendar days from the NTP designated date for the Design-Builder to proceed with the Work.

(b) Project Acceptance:

- _____ calendar days from NTP designated date for the Design-Builder to proceed with the Work.

4.2.1.2 Project Acceptance Deadline

Design-Builder shall achieve Project Acceptance or Final Completion 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, including Design-Builder's updated monthly cash flow, 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.

5.3.4 Public Contract Code Section 7104

Design-Builder acknowledges and agrees that as a result of its agreement to

undertake responsibility for differences in site conditions from those which may have been anticipated by Design-Builder, except to the extent that a Change Order is allowed under Section 13.9, information regarding site conditions included in the Project Technical Requirements and Background Documents shall not be considered "indicated" therein as such term is used in Public Contract Code section 7104, except to the extent that a Change Order is allowed under Section 13.9. Design-Builder specifically waives the benefit of Public Contract Code Section 7104 to the extent that it may be inconsistent with the provisions set forth in Section 13.9.

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, City shall be entitled to reimbursement of a portion of the Contract Price in an amount equal to the greater of the amount deemed appropriate by City to provide compensation for future maintenance and/or other costs relating to the nonconforming Work, or 100% of Design- Builder's cost savings associated with its failure to perform the Work in accordance with Contract requirements. Such reimbursement shall be payable to City within 30 days after Design-Builder's receipt of an invoice therefor. Design-Builder acknowledges and agrees that City shall have sole discretion regarding acceptance or rejection of nonconforming Work and shall have reasonable discretion with regard to the amount payable in connection therewith, 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, if any, in excess of $50,000 per occurrence 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.

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. Design- Builder acknowledges and agrees that the provisions of this Section 6.2.3 satisfy City's obligations pursuant to California Government Code Section 4215, and to the extent that California Government Code section 4215 might be construed to the contrary, Design- Builder hereby waives the benefit of such statute. Design-Builder agrees that in the event any waiver pursuant to this Section 6.2.3.4 is deemed ineffective (thus resulting in a reduction in the scope of the Work), City shall be entitled to a credit against the Contract Price equal to the actual costs incurred by City to

cause performance of the obligations and satisfaction of the liabilities from which Design-Builder is thereby relieved.

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.

6.2.6.4 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 to extend any affected Completion Deadline by one day for every two days of such delay in the Critical Path.

6.2.7 Restrictions on Change Orders

6.2.7.1 Except as expressly provided otherwise in this Section 6.2, Design- Builder shall not be entitled to either a Contract Price increase or a time extension attributable to Utilities Adjustments for any reason, including:

(a) any Errors in designs furnished by any Utility Owner, including any failure of such designs to comply with all applicable requirements; and

(b) any defect in construction performed by any Utility Owner or any other failure of such construction to comply with all applicable requirements. Any Contract Price increase to which Design-Builder is entitled pursuant to this Section 6.2 shall not include any costs of coordinating with Utility Owners.

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, in excess of $50,000 per occurrence 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) Any unidentified Hazardous Materials, to the extent that the existence of such Hazardous Materials was known to Design-Builder;

(b) Any unidentified Hazardous Materials, to the extent attributable to the failure of Design-Builder to meet the professional standard of care prior to the Design-Build Contract;

(c) 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;

(d) Immaterial quantities of Hazardous Materials;

(e) Any known Hazardous Materials that could have been

avoided by reasonable design modifications or construction techniques; or

(f) Any Hazardous Materials on property outside of the Project Site, except that compensation will be allowed for remediation work on such property to the extent that it is integrally intertwined with remediation work required within the Project Site.

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 shall rely on insurance to provide compensation, in lieu of requesting a Change Order.

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 or Force Majeure Event. 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 pay all permit fees and shall comply with all permit requirements including obtaining necessary approvals of plans and specifications.

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

I. 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 30 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, 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. 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. <u>Minimum Scope of Insurance</u>

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, to the extent permitted by law.
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. Design Builder's Pollution Liability Insurance, a policy covering third-party injury and property damage claims, including clean-up costs, as a result of pollution conditions arising from Design Builder's operations and completed operations. This insurance includes coverage for all operations, completed operations, and professional services (without exclusion for asbestos or lead).

5. Professional Liability Errors and Omissions insurance for all Professional Services rendered including architecture, engineering, or design services; and

6. Builders Risk Insurance for "all risk" or special form causes of loss;

There shall be no special limitations on the scope of protection afforded to the City, its officials, employees, and agents.

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 provide coverage the greater of either limits as set forth in Design Builder's policy(ies) or:

1. Commercial General Liability: $25,000,000 each occurrence/aggregate limit for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.

2. Business Automobile Liability: $5,000,000 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. Design Builder's Pollution Liability Insurance: $2,000,000 per contamination incident. Policy shall at a minimum cover on-site and off-site liability including third-party injury and property damage claims, transportation, clean-up costs, as a result of pollution conditions arising from Design Builder's or its Design Builder's operations and completed operations. Policy shall have three years tail coverage, if canceled and non-renewed, within three years after the expiration or earlier termination of the Agreement.

5. Professional Liability (Errors and Omissions Coverage) of $2,000,000 per claim/ aggregate limit with three years tail coverage, if canceled and non-renewed, within three years of completion of the project.

6. Builders Risk Insurance for "all risk" or special form causes of loss. for limits equal to 100% of the completed value of contract, with coverage to continue until final acceptance of the Work by the City. At the discretion of the City, the requirement for such coverage may include additional protection for Earthquake and/or Flood. The City shall be added as a loss payee on such policy.

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

No deductible or self-insured retention shall exceed $100,000, be more than ten percent of limits required, or be more than is specified in the scope or limits of insurance, unless the Design Builder can, to the satisfaction of the City Risk Manager, (1) make a financial showing of ability to meet minimum deductibles/claims in the event of a claim, (2) reduce or eliminate such deductibles or self-insured retentions as respects the City, its officials, employees, agents and Design Builders; or (3) 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. Commercial General Liability and Business Automobile Liability only:

    a. The City, its officials, employees, agents and Design Builders 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 Design Builder. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officials, employees, agents and Design Builders. Additional insured endorsements provided must at least be as broad as or equivalent to:

        i. Additional insured endorsements 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).

ii. For design professional additional insureds, ISO Endorsement CG 20 32 07 04, "Additional Insured—Engineers, Architects or Surveyors Not Engaged by the Named Insured" or its equivalent.

iii. Umbrella or excess policy limits will be allowed in excess of $2 each occurrence so long as the policy follows form in scope and limits to the Commercial General Liability Policy.

b. The Design Builder's insurance coverage shall be primary insurance as respects the City, its officials, employees, agents and Design Builders. Any insurance or self-insurance maintained by the City, its officials, employees, agents or Design Builders shall be excess of the Design Builder's insurance and shall not contribute with it. Any excess or umbrella policies to meet Design Builder's insurance obligations shall be endorsed to follow form for the City, its officials, employees, agents and Design Builders.

c. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City, its officials, employees, agents, or Design Builders.

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 Design Builders.

2. Workers' Compensation and Employers Liability

Coverage shall be endorsed to state waiver of subrogation against the City, its officials, employees, agents and Design Builders.

3. Builders Risk

Coverage shall be endorsed to include the City as a loss payee.

4. 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. If required as a policy provision, Design Builder shall take all affirmative steps to notify insurer of this obligation and secure any needed special endorsement to meet this contractual obligation.

The coverage requirements for specific policies of insurance must be met by such policies, and not by reference to excess or umbrella insurance provided in other policies.

V Duration

1. All policies and limits shall be in full force and effect on or before the inception of the contract with proof of coverage
2. Commercial General Liability, Professional Liability and Pollution Liability coverages shall be maintained continuously for a minimum of three (3) years after completion of work under this AGREEMENT.
3. If any of such coverages are written on a claims-made basis, the following requirements apply:

    a. The policy retroactive date must precede the date work commenced under this AGREEMENT.

    b. If the policy is cancelled or non-renewed and coverage cannot be procured with the original retroactive date, DESIGN BUILDER must purchase an extended reporting period equal to or greater than three (3) years after completion of work under this AGREEMENT.

VI Acceptability of Insurance

Insurance is to be placed with insurers of an A.M. Best's Rating of A, VII or greater. Any self insurance programs or programs not otherwise meeting this requirement must be approved by the City's Risk Manager.

VII 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. Design Builder shall furnish City and

each other additional insured evidence of continuation of such insurance at final payment and three years thereafter.

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
Risk Management
200 East Santa Clara St., Floor T-14
San Jose, CA 95113-1905

VIII Subcontractors

Design Builders shall include all subcontractors as insureds under its policies or shall obtain separate certificates and endorsements for each subcontractor.

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 upon acceptance thereof by City. 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.

11.2.2 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.

11.3 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.

11.4 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.

11.5 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 (including all Contingencies) available to compensate Design-Builder for the Project, exclusive of Change Orders, shall not exceed $50 Million.

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.

12.1.4 Design-Builder Contingency

12.1.4.1 Each Task Order will have two Design-Builder controlled

contingencies. Concurrent with the establishment of the Task Oder Price, the parties shall negotiate a Design Development Contingency and a Construction Contingency (collectively the "Design-Builder Contingency"). The Design-Builder Contingency shall be identified as a separate line item in the Contract, but shall be treated as separate from the Task Order Price.

12.1.4.2 Once determined, the Design-Builder Contingency shall be treated as a single contingency fund. The Design-Builder Contingency is intended to pay for allowable costs pursuant to Appendix 20 in excess of the Task Order Price.

12.1.4.3 Subject to Section 13, if at any time the Design-Builder Contingency for any Task Order does not contain sufficient funds to pay all eligible expenses, Design-Builder shall be solely at risk for any additional costs incurred under the Task Order.

12.1.4.4 In the event money remains unused in a Design-Builder Contingency upon Task order Completion, either party may elect to split all or any portion of the unused Design-Builder Contingency between City and Design-Builder on a ___%/___% basis, respectively.

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 and Overhead

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 and the related Certificate, 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 3196 of the Civil Code, City may 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 identified in any RFC Notices 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 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 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 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 mutually agreed to by City and Design-Builder, 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.

J. 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 certain changes to the Program Information, to the extent permitted by Section 3.2(c);

(c) Force Majeure Events, 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) Differing Site Conditions, to the extent permitted by Section 13.9;

(g) Changes in Law, to the extent permitted by Section 13.9.

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 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.

If the Request for Change Order relates to a decision which the Contract leaves to the discretion of a Person or as to which the Contract provides that such Person's decision is final, the RFC Notice shall set out in detail all facts supporting Design-Builder's objection to the decision, including all facts supporting any contention that the decision was capricious or arbitrary or is not supported by substantial evidence.

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 allowed in writing by City. 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 caused by Differing Site Conditions, 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 50% 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) Net 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. Markups for overhead and profit will be allowed only for the net increase in cost in order to establish the amount to be added to the Contract Price.

(b) Net decrease in cost, the change shall be treated as work deleted

and the provisions of Section 13.6.5 shall be used on the net decrease in cost in order to establish the price deduct to the Contract Price.

(c) Net 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 NTE 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 NTE 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 NTE 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 this Section 13.7, 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 for 50% of the extended overhead costs 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 final completion of the entire Work which could not be compensated for by revising the sequence of Design-Builder's operations. City shall hold Design-Builder harmless from any Force Majeure Event resulting from acts of terrorism. Design-Builder shall hold City harmless from any and all claims by Design-Builder for damage to Design-Builder's property and Subcontractors' property resulting from acts of terrorism.

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) 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 insure 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 (including Errors therein traceable to Errors in the Background Documents and Program Criteria Document (including portions provided by City));

(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 has not expressly agreed to assume liability hereunder.

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 EXPRESSLY SPECIFY THAT CONTRACTOR IS ENTITLED 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 reduce 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 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) and shall in no event exceed the amounts allowed by Section 13.7 with respect thereto.

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

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 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 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) Design-Builder's actual reasonable out-of-pocket cost, without profit, and including equipment costs only to the extent permitted by Section 13.7.3, for all Work performed, including mobilization, demobilization and work done to secure the Project for termination, including reasonable overhead and accounting for any refunds payable with respect to insurance premiums, deposits or similar items, as established to 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 percentage of Design-Builder's fee is based on the percentage complete of the Contract Work.

(c) 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.

(d) 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 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, 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-Builder to City upon demand 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 for the payment of money against it in excess of $100,000 in the aggregate which remains outstanding for a period in excess 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 shall 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. Design-Builder hereby acknowledges and agrees that the events described in Section 16.1.1(i) through (l) are not curable. 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 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 and equipment on the Site as may be suitable and acceptable and 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: (i) 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.

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 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 **FIVE THOUSAND DOLLARS ($5,000)** 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 Final 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 ten 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); or

17.4.2.3 Design-Builder's liability for any type of damage or loss to the extent it is covered by the proceeds of insurance.

17.4.2.4 Design-Builder's liability for its indemnities set forth in Section 18

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

(ii) 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, regardless of whether such Errors were also included in the Background Documents or Program Criteria Document (including the portions provided by City). Design-Builder agrees that, because the concepts in the Background Documents and Program Criteria Document (including the portions provided by City) are subject to review and modification by Design-Builder, such documents shall not be deemed "design furnished" by City or any of the other Indemnified Parties, as the term "design furnished" is used in Civil Code section 2782 and Section 18.1.3.2. Design-Builder hereby waives the benefit (if any) of Civil Code section 2782 and agrees that this Section 18.1.2 constitutes an agreement governed by Civil Code section 2782.5.

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 claim, 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. The parties agree that they will defer all cross-complaints until after resolution of liability with the plaintiff. 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.

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 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. Design-Builder expressly waives any longer statute of limitations contained in any statute, including Government Code Sections 900 et seq. that would otherwise be applicable.

SECTION 20.

PROJECT SUBSTANTIAL COMPLETION AND PROJECT ACCEPTANCE

20.1 Project 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 Project 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 Design-Builder has satisfied all conditions to acceptance by local agencies and Utility Owners ;

20.1.2 Inspection by City

Upon receipt of Design-Builder's notice under Section 20.2.1, 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 Completion, Design-Builder shall provide written notification to City, and City will conduct additional inspections, surveys and/or testing as it deems desirable. This procedure shall be repeated until City finds that all prerequisites to Project Completion have been met.

20.1.3 Certificate of Project Substantial Completion

City will issue a Certificate of Project Completion at such time as (a) City finds that all conditions set forth in Section 20.2.1 have been satisfied, (b) City finds that all Errors (including incomplete Work) identified as prerequisites to Project Completion have been corrected, and (c) Design-Builder and City have agreed upon a Punch List for Work to be performed prior to Project Acceptance.

20.1.4 Recordation of Notice of Project Completion

Design-Builder is advised that recordation of a notice of completion meeting the requirements of Civil Code section 3093, within ten days after completion of all construction Work, has the effect of reducing the period for filing of stop notices and claims against the Payment Bond, under Civil Code sections 3184 and 3252. If Design-Builder wishes City to record a notice of completion, Design-Builder shall prepare such notice and deliver it to City at least ten days prior to the scheduled date for completion of construction. The notice shall: (a) identify City as the Project owner as defined in Civil Code Section 3092(g); (b) provide the names and addresses of the record owners of the improvements constructed hereunder (i.e. City and Utility Owners); and (c) otherwise meet the requirements of Civil Code Section 3093.

20.2 Project Acceptance

20.2.1 Conditions to Project Acceptance

20.3.1.1 Promptly after Project Completion has occurred, Design- Builder

shall perform all Work, if any, which was deferred for purposes of Project Completion, 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 Aircraft Rescue and Fire Fighting Facility 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.

20.3.2 Project Acceptance shall be deemed to have occurred when all of the following have occurred:

(a) All requirements for Project 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 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.

20.3.3 Inspection and Issuance of Certificate of Project Acceptance

Upon receipt of notification from Design-Builder that all conditions to Project Acceptance have been met, City will make final inspection and City will either issue a Certificate of Project Acceptance or notify Design-Builder regarding any Work remaining to be performed. If City fails to issue a Certificate of Project 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 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 Certificate of Project Acceptance.

20.3.4 No Relief from Liability

Project 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 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 (including all tax returns and supporting documentation filed with any Governmental Person) as such Persons may request from time to time in connection with the negotiation of 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 $10,000 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. No notice is required before commencing any audit before 60 days after Project Acceptance. Thereafter, City shall provide 20 days' notice to Design-Builder, any Subcontractors or their respective agents before commencing an audit. 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.

21.2 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_____, 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 to City, at Design-Builder's offices in Santa Clara County, California, 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 21.3.6 (provided, however, that the provision of such information shall not constitute a notice under Section 13.3.2).

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.

23.11 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:

Company:
(name).
Attention:
(contact)
(address)
(address)
Phone:
Facsimile:
email address:

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

Company:
(name).
Attention:
(contact)
(address)
(address)

Phone:
Facsimile:
email address:

All communications to City shall be marked as regarding the Aircraft Rescue and Fire Fighting Facility Project at the Airport and shall be delivered as follows:

Rodney Rapson
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.

SECTION 24.

AIRPORT SPECIFIC PROVISIONS

24.1 Use of Terms

The following provisions are unique to Airport contracts. For purposes of this Section 24 only, the following words have the following meaning: (1) "applicant", "offeror" and "bidder" mean "Design-Builder", (2) "bid" and "offer" means the Proposal, (3) "consultant" and "contractor" mean "Design-Builder" (4) "sub-consultant" means "sub-contractor", and (5) "owner" and "sponsor" means "City."

24.2 Federal Funding

The City anticipates that the Work performed under this Agreement will be funded by the Federal Aviation Administration's (FAA) Airport Improvement Program (AIP).

24.3 FAA Advisory Circulars

The Design-Builder must perform services in compliance and in conformance with all applicable and appropriate FAA Advisory Circulars (AC). This includes, but not limited to, FAA AC 150/5100-14E, entitled "Architectural, Engineering, and Planning Consultant Services for Airport Grant Projects", FAA AC 150/5370-10 "Standards for Specifying Construction of Airports" and FAA AC 150/5210-15A "Aircraft Rescue and Fire Fighting Station Building Design".

24.4 DBE Program

24.4.1 General. Because it anticipates being awarded $250,000 or more in AIP funded contracts during the federal fiscal year, the City has an approved DBE program on file with the FAA. Under the DBE program, the City has established an overall DBE participation goal of 6.30% for the Airport for Federal Fiscal Years 2017 – 2019. The City is committed to meeting its overall DBE participation goal from 100% race-neutral participation and 0% through race-conscious measures (contract goals). No contract goal has been established for this Agreement and no demonstration of good faith efforts is required.

24.4.2 City Expectations: The City is committed to attracting and enhancing diverse business participation amongst DBEs, minority-owned businesses, women-owned businesses and other small and local businesses in its Airport contracts. The City

encourages and expects contractors performing Airport contracts to do the same.

24.4.3 Contractor Assurance (§ 26.13): The Contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of Department of Transportation-assisted contracts. Failure by the Contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the Owner deems appropriate, which may include, but is not limited to:

a. Withholding monthly progress payments;

b. Assessing sanctions;

c. Liquidated damages; and/or

d. Disqualifying the Contractor from future bidding as non-responsible.

24.4.4 Prompt Payment (§26.29): The prime Contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than 10 days from the receipt of each payment the prime Contractor receives from the City. The prime Contractor agrees further to return any retainage payments to each subcontractor within 30 days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the City. This clause applies to both DBE and non-DBE subcontractors.

24.4.5 Cooperation with City Reporting Efforts: The Design-Builder acknowledges that the City needs to prepare and provide reports to the Department of Transportation regarding the use of DBEs on City agreements. The Design-Builder will cooperate in providing information to the City regarding the use of DBE subconsultants as needed for the City to complete these reports.

24.5 Civil Rights - General:

The Contractor agrees to comply with pertinent statutes, Executive Orders and such rules as are promulgated to ensure that no person shall, on the grounds of race, creed, color, national origin, sex, age, or disability be excluded from participating in any activity conducted with or benefiting from Federal assistance.

This provision binds the Contractor and subcontractors from the request for proposals or request for qualifications solicitation period through the completion of the contract. This provision is in addition to that required of Title VI of the Civil Rights Act of 1964.

24.6 Title VI Clauses for Compliance with Nondiscrimination Requirements

During the performance of this contract, the Contractor, for itself, its assignees, and successors in interest (hereinafter referred to as the "Contractor") agrees as follows:

1. Compliance with Regulations: The Contractor (hereinafter includes consultants) will comply with the Title VI List of Pertinent Nondiscrimination Acts And Authorities, as they may be amended from time to time, which are herein incorporated by reference and made a part of this contract.
2. Non-discrimination: The Contractor, with regard to the work performed by it during the contract, will not discriminate on the grounds of race, color, or national origin in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The Contractor will not participate directly or indirectly in the discrimination prohibited by the Nondiscrimination Acts and Authorities, including employment practices when the contract covers any activity, project, or program set forth in Appendix B of 49 CFR part 21.
3. Solicitations for Subcontracts, Including Procurements of Materials and Equipment: In all solicitations, either by competitive bidding, or negotiation made by the Contractor for work to be performed under a subcontract, including procurements of materials, or leases of equipment, each potential subcontractor or supplier will be notified by the contractor of the Contractor's obligations under this contract and the Nondiscrimination Acts And Authorities on the grounds of race, color, or national origin.
4. Information and Reports: The Contractor will provide all information and reports required by the Acts, the Regulations, and directives issued pursuant thereto and will permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the

sponsor or the Federal Aviation Administration to be pertinent to ascertain compliance with such Nondiscrimination Acts and Authorities and instructions. Where any information required of a Contractor is in the exclusive possession of another who fails or refuses to furnish the information, the Contractor will so certify to the sponsor or the Federal Aviation Administration, as appropriate, and will set forth what efforts it has made to obtain the information.

5. Sanctions for Noncompliance: In the event of a Contractor's noncompliance with the Non-discrimination provisions of this contract, the sponsor will impose such contract sanctions as it or the Federal Aviation Administration may determine to be appropriate, including, but not limited to:
   a. Withholding payments to the Contractor under the contract until the Contractor complies; and/or
   b. Cancelling, terminating, or suspending a contract, in whole or in part.
6. Incorporation of Provisions: The Contractor will include the provisions of paragraphs one through six in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Acts, the Regulations and directives issued pursuant thereto. The Contractor will take action with respect to any subcontract or procurement as the sponsor or the Federal Aviation Administration may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, that if the contractor becomes involved in, or is threatened with litigation by a subcontractor, or supplier because of such direction, the Contractor may request the sponsor to enter into any litigation to protect the interests of the sponsor. In addition, the Contractor may request the United States to enter into the litigation to protect the interests of the United States.

24.7 Title VI List of Pertinent Nondiscrimination Acts and Authorities

During the performance of this contract, the Contractor, for itself, its assignees, and successors in interest (hereinafter referred to as the "Contractor") agrees to comply with the following non-discrimination statutes and authorities; including but not limited to:

- Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq., 78 stat. 252), (prohibits discrimination on the basis of race, color, national origin);
- 49 CFR part 21 (Non-discrimination In Federally-Assisted Programs of The Department of Transportation—Effectuation of Title VI of The Civil Rights Act of 1964);
- The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, (42 U.S.C. § 4601), (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal-aid programs and projects);
- Section 504 of the Rehabilitation Act of 1973, (29 U.S.C. § 794 et seq.), as amended, (prohibits discrimination on the basis of disability); and 49 CFR part 27;
- The Age Discrimination Act of 1975, as amended, (42 U.S.C. § 6101 et seq.), (prohibits discrimination on the basis of age);
- Airport and Airway Improvement Act of 1982, (49 USC § 471, Section 47123), as amended, (prohibits discrimination based on race, creed, color, national origin, or sex);
- The Civil Rights Restoration Act of 1987, (PL 100-209), (Broadened the scope, coverage and applicability of Title VI of the Civil Rights Act of 1964, The Age Discrimination Act of 1975 and Section 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms “programs or activities” to include all of the programs or activities of the Federal-aid recipients, sub-recipients and contractors, whether such programs or activities are Federally funded or not);
- Titles II and III of the Americans with Disabilities Act of 1990, which prohibit discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing entities (42 U.S.C. §§ 12131 – 12189) as implemented by Department of Transportation regulations at 49 CFR parts 37 and 38;

- The Federal Aviation Administration's Non-discrimination statute (49 U.S.C. § 47123) (prohibits discrimination on the basis of race, color, national origin, and sex);
- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, which ensures non-discrimination against minority populations by discouraging programs, policies, and activities with disproportionately high and adverse human health or environmental effects on minority and low-income populations;
- Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, and resulting agency guidance, national origin discrimination includes discrimination because of limited English proficiency (LEP). To ensure compliance with Title VI, you must take reasonable steps to ensure that LEP persons have meaningful access to your programs (70 Fed. Reg. at 74087 to 74100);
- Title IX of the Education Amendments of 1972, as amended, which prohibits you from discriminating because of sex in education programs or activities (20 U.S.C. 1681 et seq).

24.8 Federal Fair Labor Standards Act (Federal Minimum Wage)

This contract incorporates by reference the provisions of 29 CFR part 201, the Federal Fair Labor Standards Act (FLSA), with the same force and effect as if given in full text. The FLSA sets minimum wage, overtime pay, recordkeeping, and child labor standards for full and part-time workers.

The Contractor has full responsibility to monitor compliance to the referenced statute or regulation. The Contractor must address any claims or disputes that arise from this requirement directly with the U.S. Department of Labor – Wage and Hour Division. The Contractor must include this provision in each subcontract that it enters into.

24.9 Occupational Safety and Health Act of 1970

All contracts and subcontracts that result from this solicitation incorporate by reference the requirements of 29 CFR Part 1910 with the same force and effect as if given in full text. The employer must provide a work environment that is free from recognized

hazards that may cause death or serious physical harm to the employee. The employer retains full responsibility to monitor its compliance and their subcontractor's compliance with the applicable requirements of the Occupational Safety and Health Act of 1970 (20 CFR Part 1910). The employer must address any claims or disputes that pertain to a referenced requirement directly with the U.S. Department of Labor – Occupational Safety and Health Administration.

24.10 Audit/Inspection of Records:

The Director of Aviation may require the Contractor to produce other records the Director reasonably determines are necessary to accurately audit the Contractor's compliance with the requirements of this Contract – including, but not limited to, determining compliance with labor and FAA requirements.

If the Director requires the Contractor to produce other records, the Director must give the Contractor a reasonable period to produce such other records. If the Contractor does not produce the other records within the period fixed by the Director or within any extension of time granted by the Director, the Contractor must pay the City $25.00 each day that it is late in producing the other records.

24.11 Access to Records and Reports:

The Contractor must maintain an acceptable cost accounting system. The Contractor agrees to provide the Owner, the Federal Aviation Administration, and the Comptroller General of the United States or any of their duly authorized representatives, access to any books, documents, papers, and records of the Contractor which are directly pertinent to the specific contract for the purpose of making audit, examination, excerpts and transcriptions. The Contractor agrees to maintain all books, records and reports required under this contract for a period of not less than three years after final payment is made and all pending matters are closed.

24.12 Affirmative Action Requirement:

1. The Offeror's or Bidder's attention is called to the "Equal Opportunity Clause" and the "Standard Federal Equal Employment Opportunity Construction Contract Specifications" set forth herein.

2. The goals and timetables for minority and female participation, expressed in percentage terms for the Contractor's aggregate workforce in each trade on all construction work in the covered area, are as follows:

Timetables

- Goals for minority participation for each trade: **19.6%**
- Goals for female participation in each trade: **6.9%**

These goals are applicable to all of the Contractor's construction work (whether or not it is Federal or federally assisted) performed in the covered area. If the Contractor performs construction work in a geographical area located outside of the covered area, it shall apply the goals established for such geographical area where the work is actually performed. With regard to this second area, the Contractor also is subject to the goals for both its federally involved and non-federally involved construction.

The Contractor's compliance with the Executive Order and the regulations in 41 CFR Part 60-4 shall be based on its implementation of the Equal Opportunity Clause, specific affirmative action obligations required by the specifications set forth in 41 CFR 60-4.3(a) and its efforts to meet the goals. The hours of minority and female employment and training must be substantially uniform throughout the length of the contract, and in each trade, and the Contractor shall make a good faith effort to employ minorities and women evenly on each of its projects. The transfer of minority or female employees or trainees from Contractor to Contractor or from project to project for the sole purpose of meeting the Contractor's goals shall be a violation of the contract, the Executive Order and the regulations in 41 CFR Part 60-4. Compliance with the goals will be measured against the total work hours performed.

3. The Contractor shall provide written notification to the Director of the Office of Federal Contract Compliance Programs (OFCCP) within 10 working days of award of any construction subcontract in excess of $10,000 at any tier for construction work under the contract resulting from this solicitation. The notification shall list the name, address, and telephone number of the subcontractor; employer identification number of the subcontractor; estimated dollar amount of the subcontract; estimated starting and

completion dates of the subcontract; and the geographical area in which the subcontract is to be performed.

4. As used in this notice and in the contract resulting from this solicitation, the "covered area" is City.

24.13 Breach of Contract Terms:

Any violation or breach of terms of this Agreement on the part of the Contractor or its subcontractors may result in the suspension or termination of this contract or such other action that may be necessary to enforce the rights of the parties of this contract.

Owner will provide Contractor written notice that describes the nature of the breach and corrective actions the Contractor must undertake in order to avoid termination of the contract. Owner reserves the right to withhold payments to Contractor until such time the Contractor corrects the breach or the Owner elects to terminate the Agreement. The Owner's notice will identify a specific date by which the Contractor must correct the breach. Owner may proceed with termination of the contract if the Contractor fails to correct the breach by the deadline indicated in the Owner's notice.

The duties and obligations imposed by the contract and the rights and remedies available thereunder are in addition to, and not a limitation of, any duties, obligations, rights and remedies otherwise imposed or available by law.

24.14 Buy American Preference:

The Buy American Preference in 49 USC §50101 provides that Federal funds may not be obligated unless all steel and manufactured goods used in AIP funded projects are produced in the United States, unless the FAA has issued a waiver for the product, the product is listed as an Excepted Article, Material Or Supply in the Federal Acquisition Regulation subpart 25.108, or product is included in the FAA Nationwide Buy American Waivers Issued list. If this Contract is AIP Funded, then the Contractor acknowledges that this Contract is subject to the Buy American Preference. Contractor shall comply with those certain certifications set forth in its "Certificate of Buy American Compliance", which Contractor submitted with its original bid, offer or proposal.

The Contractor must include the substance of this clause in all sub-tier contracts.

24.15 Clean Air and Water Pollution Control:

Contractor agrees to comply with all applicable standards, orders, and regulations issued pursuant to the Clean Air Act (42 USC § 740-7671q) and the Federal Water Pollution Control Act as amended (33 USC § 1251-1387). The Contractor agrees to report any violation to the Owner immediately upon discovery. The Owner assumes responsibility for notifying the Environmental Protection Agency (EPA) and the Federal Aviation Administration.

Contractor must include this requirement in all subcontractor contracts that exceeds $150,000.

24.16 Contract Workhours and Safety Standards Act Requirements:

1. **Overtime Requirements:** No contractor or subcontractor contracting for any part of the Agreement work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic, including watchmen and guards, in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

2. **Violation/Liability for Unpaid Wages/Liquidated Damages:** In the event of any violation of the clause set forth in paragraph (1) of this clause, the Contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such Contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (1) of this clause, in the sum of $10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (1) of this clause.

3. **Withholding for Unpaid Wages and Liquidated Damages:** The Federal Aviation Administration (FAA) or the City shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be

withheld, from any moneys payable on account of work performed by the Contractor or subcontractor under any such contract or any other Federal contract with the same prime Contractor, or any other federally assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime Contractor, such sums as may be determined to be necessary to satisfy any liabilities of such Consultant or subcontractort for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (2) of this clause.

4. **Subcontractors:** The Contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraphs (1) through (4) and also a clause requiring the subcontractor to include these clauses in any lower tier subcontracts. The prime Contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (1) through (4) of this clause.

24.17 Copeland "Anti-Kickback" Act:

Contractor must comply with the requirements of the Copeland "Anti-Kickback" Act (18 USC 874 and 40 USC 3145), as supplemented by Department of Labor regulation 29 CFR part 3. Contractor and subcontractors are prohibited from inducing, by any means, any person employed on the project to give up any part of the compensation to which the employee is entitled. The Contractor and each Subcontractor must submit to the Owner, a weekly statement on the wages paid to each employee performing on covered work during the prior week. Owner must report any violations of the Act to the Federal Aviation Administration.

24.18 Davis-Bacon Requirements:

1. Minimum Wages.

(i) All laborers and mechanics employed or working upon the site of the work will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by the Secretary of Labor under the Copeland Act (29 CFR Part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalent thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any

contractual relationship which may be alleged to exist between the Contractor and such laborers and mechanics.

Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (1)(iv) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in 29 CFR Part 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: *Provided* that the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under (1)(ii) of this section) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the Contractor and its subcontractors at the site of the work in a prominent and accessible place where it can easily be seen by the workers.

(ii)(A) The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

(1) The work to be performed by the classification requested is not performed by a classification in the wage determination;

(2) The classification is utilized in the area by the construction industry; and

(3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(B) If the Contractor and the laborers and mechanics to be employed in the

classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(C) In the event the Contractor, the laborers, or mechanics to be employed in the classification, or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to subparagraphs (1)(ii) (B) or (C) of this paragraph, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(iii) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(iv) If the Contractor does not make payments to a trustee or other third person, the Contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program: *Provided* that the Secretary of Labor has found, upon the written request of the Contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the Contractor to set aside in a separate account assets

for the meeting of obligations under the plan or program.

2. Withholding.

The Federal Aviation Administration or the sponsor shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the Contractor under this contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the Contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of work, all or part of the wages required by the contract, the Federal Aviation Administration may, after written notice to the Contractor, Sponsor, Applicant, or Owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

3. Payrolls and Basic Records.

(i) Payrolls and basic records relating thereto shall be maintained by the Contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work. Such records shall contain the name, address, and social security number of each such worker; his or her correct classification; hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in 1(b)(2)(B) of the Davis-Bacon Act); daily and weekly number of hours worked; deductions made; and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the Contractor shall maintain records that show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been

communicated in writing to the laborers or mechanics affected, and that show the costs anticipated or the actual costs incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

(ii)(A) The Contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the Federal Aviation Administration if the agency is a party to the contract, but if the agency is not such a party, the Contractor will submit the payrolls to the applicant, Sponsor, or Owner, as the case may be, for transmission to the Federal Aviation Administration. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under 29 CFR 5.5(a)(3)(i), except that full social security numbers and home addresses shall not be included on weekly transmittals. Instead the payrolls shall only need to include an individually identifying number for each employee (*e.g.* the last four digits of the employee's social security number). The required weekly payroll information may be submitted in any form desired. Optional Form WH–347 is available for this purpose from the Wage and Hour Division Web site at *www.dol.gov/whd/forms/wh347instr.htm* or its successor site. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors. Contractors and subcontractors shall maintain the full social security number and current address of each covered worker and shall provide them upon request to the Federal Aviation Administration if the agency is a party to the contract, but if the agency is not such a party, the Contractor will submit them to the applicant, sponsor, or Owner, as the case may be, for transmission to the Federal Aviation Administration, the Contractor, or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. It is not a violation of this section for a prime contractor to require a subcontractor to provide addresses and social security numbers to the prime contractor for its own records, without weekly submission to the sponsoring government agency (or the applicant, Sponsor, or Owner).

(B) Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the Contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

(1) The payroll for the payroll period contains the information required to be provided under 29 CFR § 5.5(a)(3)(ii), the appropriate information is being maintained under 29 CFR § 5.5 (a)(3)(i), and that such information is correct and complete;

(2) Each laborer and mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations 29 CFR Part 3;

(3) Each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(C) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (3)(ii)(B) of this section.

(D) The falsification of any of the above certifications may subject the Contractor or subcontractor to civil or criminal prosecution under Section 1001 of Title 18 and Section 231 of Title 31 of the United States Code.

(iii) The Contractor or subcontractor shall make the records required under paragraph (3)(i) of this section available for inspection, copying, or transcription by authorized representatives of the sponsor, the Federal Aviation Administration, or the Department of Labor and shall permit such representatives to interview employees during working hours on the job. If the Contractor or subcontractor fails to submit the required records or to make them available, the Federal agency may, after written notice to the Contractor, Sponsor, applicant, or Owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available

may be grounds for debarment action pursuant to 29 CFR 5.12.

4. Apprentices and Trainees.

(i) Apprentices. Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the Contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice

classification, fringes shall be paid in accordance with that determination. In the event the Bureau of Apprenticeship and Training, or a State Apprenticeship Agency recognized by the Bureau, withdraws approval of an apprenticeship program, the Contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(ii) Trainees. Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination that provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate that is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the Contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(ii) Equal Employment Opportunity. The utilization of apprentices, trainees, and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR Part 30.

5. Compliance with Copeland Act Requirements. The Contractor shall comply with the requirements of 29 CFR Part 3, which are incorporated by reference in this contract.

6. Subcontracts. The Contractor or subcontractor shall insert in any subcontracts the clauses contained in 29 CFR Part 5.5(a)(1) through (10) and such other clauses as the Federal Aviation Administration may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR Part 5.5.

7. Contract Termination: Debarment. A breach of the contract clauses in paragraph 1 through 10 of this section may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

8. Compliance with Davis-Bacon and Related Act Requirements. All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR Parts 1, 3, and 5 are herein incorporated by reference in this contract.

9. Disputes Concerning Labor Standards. Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR Parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the Contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

10. Certification of Eligibility.

(i) By entering into this contract, the Contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the Contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(ii) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(iii) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 USC 1001.

24.19 Certification – Debarment and Suspension:

1. **Contractor Certification:** Contractor certifies that neither it nor its principals are presently debarred or suspended by any Federal department or agency from participation in this transaction.

2. **Certification of Lower Tier Subcontractors Regarding Debarment:** The successful Contractor, by administering each lower tier subcontract that exceeds $25,000 as a "covered transaction", must verify each lower tier participant of a "covered transaction" under the project is not presently debarred or otherwise disqualified from participation in this federally assisted project. The successful Contractor will accomplish this by:

a. Checking the System for Award Management at website: http://www.sam.gov.

b. Collecting a certification statement similar to the Certification of Offerer/Bidder Regarding Debarment required of the Contractor as part of the procurement solicitation.

c. Inserting a clause or condition in the covered transaction with the lower tier contract.

If the Federal Aviation Administration later determines that a lower tier participant failed to disclose to a higher tier participant that it was excluded or disqualified at the time it entered the covered transaction, the FAA may pursue any available remedies, including suspension and debarment of the non-compliant participant.

24.20 Texting When Driving:

In accordance with Executive Order 13513, "Federal Leadership on Reducing Text Messaging While Driving", (10/1/2009) and DOT Order 3902.10, "Text Messaging While Driving", (12/30/2009), the Federal Aviation Administration encourages recipients of

Federal grant funds to adopt and enforce safety policies that decrease crashes by distracted drivers, including policies to ban text messaging while driving when performing work related to a grant or subgrant.

In support of this initiative, the Owner encourages the Contractor to promote policies and initiatives for its employees and other work personnel that decrease crashes by distracted drivers, including policies that ban text messaging while driving motor vehicles while performing work activities associated with the project. The Contractor must include the substance of this clause in all sub-tier contracts exceeding $3,500 that involve driving a motor vehicle in performance of work activities associated with the project.

24.21 Energy Conservation Requirements:

Contractor and subcontractor agree to comply with mandatory standards and policies relating to energy efficiency as contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (42 USC 6201*et seq*).

The Contractor must include the substance of this clause in all sub-tier contracts.

24.22 Equal Employment Opportunity:

During the performance of this contract, the Contractor agrees as follows:

(1) The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identify, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff, or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(2) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive considerations for employment without regard to race, color, religion, sex, or national

origin.

(3) The Contractor will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the Contractor's commitments under this section and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The Contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The Contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the Contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the Contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The Contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance*: Provided, however*, that in the event a contractor becomes involved in,

or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

Standard Federal Equal Employment Opportunity Construction Contract Specifications

1. As used in these specifications:

a. "Covered area" means the geographical area described in the solicitation from which this contract resulted;

b. "Director" means Director, Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor, or any person to whom the Director delegates authority;

c. "Employer identification number" means the Federal social security number used on the Employer's Quarterly Federal Tax Return, U.S. Treasury Department Form 941;

d. "Minority" includes:

(1) Black (all persons having origins in any of the Black African racial groups not of Hispanic origin);

(2) Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin regardless of race);

(3) Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and

(4) American Indian or Alaskan native (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification).

2. Whenever the Contractor, or any subcontractor at any tier, subcontracts a portion of the work involving any construction trade, it shall physically include in each subcontract in excess of $10,000 the provisions of these specifications and the Notice which contains the applicable goals for minority and female participation and which is set forth in the solicitations from which this contract resulted.

3. If the Contractor is participating (pursuant to 41 CFR part 60-4.5) in a Hometown Plan approved by the U.S. Department of Labor in the covered area either individually or through an association, its affirmative action obligations on all work in the Plan area (including goals and timetables) shall be in accordance with that Plan for those trades which have unions participating in the Plan. Contractors shall be able to demonstrate their participation in and compliance with the provisions of any such Hometown Plan. Each contractor or subcontractor participating in an approved plan is individually required to comply with its obligations under the EEO clause and to make a good faith effort to achieve each goal under the Plan in each trade in which it has employees. The overall good faith performance by other contractors or subcontractors toward a goal in an approved Plan does not excuse any covered contractor's or subcontractor's failure to take good faith efforts to achieve the Plan goals and timetables.

4. The Contractor shall implement the specific affirmative action standards provided in paragraphs 7a through 7p of these specifications. The goals set forth in the solicitation from which this contract resulted are expressed as percentages of the total hours of employment and training of minority and female utilization the Contractor should reasonably be able to achieve in each construction trade in which it has employees in the covered area. Covered construction contractors performing construction work in a geographical area where they do not have a Federal or federally assisted construction contract shall apply the minority and female goals established for the geographical area where the work is being performed. Goals are published periodically in the Federal Register in notice form, and such notices may be obtained from any Office of Federal Contract Compliance Programs office or from Federal procurement contracting officers. The Contractor is expected to make substantially uniform progress in meeting its goals in each craft during the period specified.

5. Neither the provisions of any collective bargaining agreement nor the failure by a union with whom the Contractor has a collective bargaining agreement to refer either minorities or women shall excuse the Contractor's obligations under these specifications, Executive Order 11246, or the regulations promulgated pursuant thereto.

6. In order for the non-working training hours of apprentices and trainees to be

counted in meeting the goals, such apprentices and trainees shall be employed by the Contractor during the training period and the Contractor shall have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees shall be trained pursuant to training programs approved by the U.S. Department of Labor.

7. The Contractor shall take specific affirmative actions to ensure equal employment opportunity. The evaluation of the Contractor's compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The Contractor shall document these efforts fully and shall implement affirmative action steps at least as extensive as the following:

a. Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities at which the Contractor's employees are assigned to work. The Contractor, where possible, will assign two or more women to each construction project. The Contractor shall specifically ensure that all foremen, superintendents, and other onsite supervisory personnel are aware of and carry out the Contractor's obligation to maintain such a working environment, with specific attention to minority or female individuals working at such sites or in such facilities.

b. Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources and to community organizations when the Contractor or its unions have employment opportunities available, and maintain a record of the organizations' responses.

c. Maintain a current file of the names, addresses, and telephone numbers of each minority and female off-the-street applicant and minority or female referral from a union, a recruitment source, or community organization and of what action was taken with respect to each such individual. If such individual was sent to the union hiring hall for referral and was not referred back to the Contractor by the union or, if referred, not employed by the Contractor, this shall be documented in the file with the reason therefore along with whatever additional actions the Contractor may have taken.

d. Provide immediate written notification to the Director when the union or unions with which the Contractor has a collective bargaining agreement has not referred

to the Contractor a minority person or female sent by the Contractor, or when the Contractor has other information that the union referral process has impeded the Contractor's efforts to meet its obligations.

e. Develop on-the-job training opportunities and/or participate in training programs for the area which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the Contractor's employment needs, especially those programs funded or approved by the Department of Labor. The Contractor shall provide notice of these programs to the sources compiled under 7b above.

f. Disseminate the Contractor's EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the Contractor in meeting its EEO obligations; by including it in any policy manual and collective bargaining agreement; by publicizing it in the company newspaper, annual report, etc.; by specific review of the policy with all management personnel and with all minority and female employees at least once a year; and by posting the company EEO policy on bulletin boards accessible to all employees at each location where construction work is performed.

g. Review, at least annually, the company's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination, or other employment decisions, including specific review of these items, with onsite supervisory personnel such superintendents, general foremen, etc., prior to the initiation of construction work at any job site. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.

h. Disseminate the Contractor's EEO policy externally by including it in any advertising in the news media, specifically including minority and female news media, and providing written notification to and discussing the Contractor's EEO policy with other contractors and subcontractors with whom the Contractor does or anticipates doing business.

i. Direct its recruitment efforts, both oral and written, to minority, female, and

community organizations, to schools with minority and female students; and to minority and female recruitment and training organizations serving the Contractor's recruitment area and employment needs. Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by any recruitment source, the Contractor shall send written notification to organizations, such as the above, describing the openings, screening procedures, and tests to be used in the selection process.

j. Encourage present minority and female employees to recruit other minority persons and women and, where reasonable, provide after school, summer, and vacation employment to minority and female youth both on the site and in other areas of a contractor's workforce.

k. Validate all tests and other selection requirements where there is an obligation to do so under 41 CFR part 60-3.

l. Conduct, at least annually, an inventory and evaluation at least of all minority and female personnel, for promotional opportunities and encourage these employees to seek or to prepare for, through appropriate training, etc., such opportunities.

m. Ensure that seniority practices, job classifications, work assignments, and other personnel practices do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the EEO policy and the Contractor's obligations under these specifications are being carried out.

n. Ensure that all facilities and company activities are non-segregated except that separate or single user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.

o. Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.

p. Conduct a review, at least annually, of all supervisor's adherence to and performance under the Contractor's EEO policies and affirmative action obligations.

8. Contractors are encouraged to participate in voluntary associations, which assist in fulfilling one or more of their affirmative action obligations (7a through 7p). The efforts of a contractor association, joint contractor union, contractor community, or other similar groups of which the Contractor is a member and participant may be asserted as fulfilling any one or more of its obligations under 7a through 7p of these specifications provided that the Contractor actively participates in the group, makes every effort to assure that the group has a positive impact on the employment of minorities and women in the industry, ensures that the concrete benefits of the program are reflected in the Contractor's minority and female workforce participation, makes a good faith effort to meet its individual goals and timetables, and can provide access to documentation which demonstrates the effectiveness of actions taken on behalf of the Contractor. The obligation to comply, however, is the Contractor's and failure of such a group to fulfill an obligation shall not be a defense for the Contractor's noncompliance.

9. A single goal for minorities and a separate single goal for women have been established. The Contractor, however, is required to provide equal employment opportunity and to take affirmative action for all minority groups, both male and female, and all women, both minority and non-minority. Consequently, if the particular group is employed in a substantially disparate manner (for example, even though the Contractor has achieved its goals for women generally), the Contractor may be in violation of the Executive Order if a specific minority group of women is underutilized.

10. The Contractor shall not use the goals and timetables or affirmative action standards to discriminate against any person because of race, color, religion, sex, or national origin.

11. The Contractor shall not enter into any subcontract with any person or firm debarred from Government contracts pursuant to Executive Order 11246.

12. The Contractor shall carry out such sanctions and penalties for violation of these specifications and of the Equal Opportunity Clause, including suspension, termination, and cancellation of existing subcontracts as may be imposed or ordered pursuant to Executive Order 11246, as amended, and its implementing regulations, by the Office of Federal Contract Compliance Programs. Any contractor who fails to carry

out such sanctions and penalties shall be in violation of these specifications and Executive Order 11246, as amended.

13. The Contractor, in fulfilling its obligations under these specifications, shall implement specific affirmative action steps, at least as extensive as those standards prescribed in paragraph 7 of these specifications, so as to achieve maximum results from its efforts to ensure equal employment opportunity. If the Contractor fails to comply with the requirements of the Executive Order, the implementing regulations, or these specifications, the Director shall proceed in accordance with 41 CFR part 60-4.8.

14. The Contractor shall designate a responsible official to monitor all employment related activity to ensure that the company EEO policy is being carried out, to submit reports relating to the provisions hereof as may be required by the Government, and to keep records. Records shall at least include for each employee, the name, address, telephone number, construction trade, union affiliation if any, employee identification number when assigned, social security number, race, sex, status (e.g., mechanic, apprentice, trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in an easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, contractors shall not be required to maintain separate records.

15. Nothing herein provided shall be construed as a limitation upon the application of other laws which establish different standards of compliance or upon the application of requirements for the hiring of local or other area residents (e.g. those under the Public Works Employment Act of 1977 and the Community Development Block Grant Program).

24.23 Certification Regarding Lobbying:

The Bidder or Offeror certifies by signing and submitting this bid or proposal or contract, to the best of his or her knowledge and belief, that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the Bidder or Offeror, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of

Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

3. The undersigned shall require that the language of this certification be included in the award documents for all sub-awards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all sub-recipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

24.24 Prohibition of Segregated Facilities:

a. The Contractor agrees that it does not and will not maintain or provide for its employees any segregated facilities at any of its establishments, and that it does not and will not permit its employees to perform their services at any location under its control where segregated facilities are maintained. The Contractor agrees that a breach of this clause is a violation of the Equal Employment Opportunity clause in this contract.

b. "Segregated facilities," as used in this clause, means any waiting rooms, work areas, rest rooms and wash rooms, restaurants and other eating areas, time clocks, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for

employees that are segregated by explicit directive or are in fact segregated on the basis of race, color, religion, sex, or national origin because of written or oral policies or employee custom. The term does not include separate or single-user rest rooms or necessary dressing or sleeping areas provided to assure privacy between the sexes.

c. The Contractor shall include this clause in every subcontract and purchase order that is subject to the Equal Employment Opportunity clause of this contract.

24.25. Procurement of Recovered Materials:

Contractor and subcontractor agree to comply with Section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, and the regulatory provisions of 40 CFR Part 247. In the performance of this contract and to the extent practicable, the Contractor and subcontractors are to use products containing the highest percentage of recovered materials for items designated by the Environmental Protection Agency (EPA) under 40 CFR Part 247 whenever:

1. The contract requires procurement of $10,000 or more of a designated item during the fiscal year; or

2. The contractor has procured $10,000 or more of a designated item using Federal funding during the previous fiscal year.

The list of EPA-designated items is available at www.epa.gov/smm/comprehensive-procurementguidelines-construction-products.

Section 6002(c) establishes exceptions to the preference for recovery of EPA-designated products if the contractor can demonstrate the item is:

a. Not reasonably available within a timeframe providing for compliance with the contract performance schedule;

b. Fails to meet reasonable contract performance requirements; or

c Is only available at an unreasonable price.

24.26. Rights to Inventions:

Contracts or agreements that include the performance of experimental, developmental, or research work must provide for the rights of the Federal Government and the Owner in any resulting invention as established by 37 CFR part 401, Rights to Inventions Made by Non-profit Organizations and Small Business Firms under

Government Grants, Contracts, and Cooperative Agreements. This contract incorporates by reference the patent and inventions rights as specified within 37 CFR §401.14. Contractor must include this requirement in all sub-tier contracts involving experimental, developmental, or research work.

24.27. Seismic Safety:

The Contractor agrees to ensure that all work performed under this contract, including work performed by subcontractors, conforms to a building code standard that provides a level of seismic safety substantially equivalent to standards established by the National Earthquake Hazards Reduction Program (NEHRP). Local building codes that model their code after the current version of the International Building Code (IBC) meet the NEHRP equivalency level for seismic safety.

24.28. Certifications Regarding Tax Delinquency and Felony Convictions:

By executing this Contract, the Contractor certifies:

1. It has no unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability; and

2. It was not convicted of a criminal violation under any Federal law within the preceding 24 months.

The Consultant will incorporate the following certification provision in all lower tier sub-consultant agreements and require the sub-consultant to indicate its current status as it relates to tax delinquency and felony conviction by inserting a checkmark (√) in the space following the applicable response.

Certifications

The sub-consultant represents that it is ( ) is not ( ) an entity that has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability.

The sub-consultant represents that it is ( ) is not ( ) is not an entity that was convicted of a criminal violation under any Federal law within the preceding 24 months.

Note:

If a sub-consultant responds in the affirmative to either of the above representations, the sub-consultant is ineligible to receive an award unless the City has received notification from the agency suspension and debarment official (SDO) that the SDO has considered suspension or debarment and determined that further action is not required to protect the Government's interests. The sub-consultant therefore must provide information to the Owner about its tax liability or conviction to the Owner, who will then notify the FAA Airports District Office, which will then notify the agency's SDO to facilitate completion of the required considerations before award decisions are made.

Term Definitions

- **Felony conviction:** Felony conviction means a conviction within the preceding twenty-four (24) months of a felony criminal violation under any Federal law and includes conviction of an offense defined in a section of the U.S. code that specifically classifies the offense as a felony and conviction of an offense that is classified as a felony under 18 U.S.C. § 3559.
- **Tax Delinquency**: A tax delinquency is any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted, or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability.

24.29. Termination of Contract:

1. **Termination for Convenience:**

The Owner may terminate this contract in whole or in part at any time by providing written notice to the Contractor. Such action may be without cause and without prejudice to any other right or remedy of Owner. Upon receipt of a written notice of termination, except as explicitly directed by the Owner, the Contractor shall immediately proceed with the following obligations regardless of any delay in determining or adjusting amounts due under this clause:

1. Contractor must immediately discontinue work as specified in the written notice.

2. Terminate all subcontracts to the extent they relate to the work terminated under the notice.

3. Discontinue orders for materials and services except as directed by the written notice.

4. Deliver to the Owner all fabricated and partially fabricated parts, completed and partially completed work, supplies, equipment and materials acquired prior to termination of the work, and as directed in the written notice.

5. Complete performance of the work not terminated by the notice.

6. Take action as directed by the Owner to protect and preserve property and work related to this contract that Owner will take possession.

Owner agrees to pay Contractor for:

1) completed and acceptable work executed in accordance with the contract documents prior to the effective date of termination;

2) documented expenses sustained prior to the effective date of termination in performing work and furnishing labor, materials, or equipment as required by the contract documents in connection with uncompleted work;

3) reasonable and substantiated claims, costs, and damages incurred in settlement of terminated contracts with Subcontractors and Suppliers; and

4) reasonable and substantiated expenses to the Contractor directly attributable to Owner's termination action.

Owner will not pay Contractor for loss of anticipated profits or revenue or other economic loss arising out of or resulting from the Owner's termination action.

The rights and remedies this clause provides are in addition to any other rights and remedies provided by law or under this contract.

2. **Termination for Default:** Section 80-09 of FAA Advisory Circular 150/5370-10 establishes conditions, rights, and remedies associated with Owner termination of this contract due to default of the Contractor.

24.30. Trade Restriction Certification:

By submission of an offer, the Offeror certifies that with respect to this solicitation and any resultant contract, the Offeror –

1. is not owned or controlled by one or more citizens of a foreign country included in the list of countries that discriminate against U.S. firms as published by the Office of the United States Trade Representative (USTR);

2. has not knowingly entered into any contract or subcontract for this project with a person that is a citizen or national of a foreign country included on the list of countries that discriminate against U.S. firms as published by the USTR; and

3. has not entered into any subcontract for any product to be used on the Federal project that is produced in a foreign country included on the list of countries that discriminate against U.S. firms published by the USTR.

This certification concerns a matter within the jurisdiction of an agency of the United States of America and the making of a false, fictitious, or fraudulent certification may render the maker subject to prosecution under Title 18 USC Section 1001.

The Offeror/Contractor must provide immediate written notice to the Owner if the Offeror/Contractor learns that its certification or that of a subcontractor was erroneous when submitted or has become erroneous by reason of changed circumstances. The Contractor must require subcontractors provide immediate written notice to the Contractor if at any time it learns that its certification was erroneous by reason of changed circumstances.

Unless the restrictions of this clause are waived by the Secretary of Transportation in accordance with 49 CFR 30.17, no contract shall be awarded to an Offeror or subcontractor:

1. who is owned or controlled by one or more citizens or nationals of a foreign country included on the list of countries that discriminate against U.S. firms published by the USTR or

2. whose subcontractors are owned or controlled by one or more citizens or nationals of a foreign country on such USTR list or

3. who incorporates in the public works project any product of a foreign country on such USTR list.

Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render, in good faith, the certification required by this provision. The knowledge and information of a contractor is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

The Offeror agrees that, if awarded a contract resulting from this solicitation, it will incorporate this provision for certification without modification in all lower tier subcontracts. The Contractor may rely on the certification of a prospective subcontractor that it is not a firm from a foreign country included on the list of countries that discriminate against U.S. firms as published by USTR, unless the Offeror has knowledge that the certification is erroneous.

This certification is a material representation of fact upon which reliance was placed when making an award. If it is later determined that the Contractor or subcontractor knowingly rendered an erroneous certification, the Federal Aviation Administration (FAA) may direct through the Owner cancellation of the contract or subcontract for default at no cost to the Owner or the FAA.

24.31. Veteran's Preference:

In the employment of labor (excluding executive, administrative, and supervisory positions), the Contractor and all sub-tier contractors must give preference to covered veterans as defined within Title 49 United States Code Section 47112. Covered veterans include Vietnam-era veterans, Persian Gulf veterans, Afghanistan-Iraq war veterans, disabled veterans, and small business concerns (as defined by 15 USC 632) owned and controlled by disabled veterans. This preference only applies when there are covered veterans readily available and qualified to perform the work to which the employment relates.

24.32 Labor Peace Assurance and Employee Work Environment

Pursuant to the San José Municipal Code Chapter 25.11, "Design-Builder's Labor Peace Assurances and Employee Work Environment Report" is attached hereto as Appendix 21. Design-Builder shall require each of its subcontractors to provide it with

assurances as to how the subcontractor will prevent service disruptions at the Airport due to labor disputes.

24.33 Cost Estimating Procedure

The Design Builder must perform any cost estimating services in accordance with the City's Department of Public Works Project Management Manual Cost Estimating Procedure, Number 103, dated July 10, 2006, attached here to as Appendix 22.

(remainder of page intentionally left blank)

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

"CITY"

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal corporation of the State of California

_____
KEVIN FISHER
Chief Deputy City Attorney

By_____
TONI J. TABER, CMC
City Clerk

"DESIGN-BUILDER"

[INSERT NAME OF CONSULTANT], a [INSERT TYPE OF BUSINESS ENTITY – e.g. a California corporation, a Delaware limited liability company, an individual]

By_____
Name:
Title: