

Standard Form of  
Agreement Between  
Design-Builder and  
Design Consultant



**Document No. 540**

Second Edition, 2010

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





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

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

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

# INSTRUCTIONS

For DBIA Document No. 540 Standard Form of Agreement Between Design-Builder and Design Consultant (2010 Edition)

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## Checklist

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

- \_\_\_\_\_ Page 1 Enter date of the Agreement
- \_\_\_\_\_ Page 1 Design-Builder's name, address and form of business
- \_\_\_\_\_ Page 1 Design Consultant's name, address and form of business
- \_\_\_\_\_ Page 1 Project name, location and general description
- \_\_\_\_\_ Page 1 Owner's name, address and form of business
- \_\_\_\_\_ Section 2.4.1 Attach list of primary personnel
- \_\_\_\_\_ Section 2.5.1 Attach permit list (optional)
- \_\_\_\_\_ Section 2.7.6 Attach requirements for frequency of site visits (optional)
- \_\_\_\_\_ Section 2.8.1 Attach Additional Services list (optional)
- \_\_\_\_\_ Section 4.4.1.2 Insert additional compensation the Design Consultant is due for the use of its work Product under the circumstances described in this section.
- \_\_\_\_\_ Section 6.1.2 Attach basis for compensation for Design Phase Services, Construction Phase Services, Additional Services, if any, and list of Reimbursable Costs
- \_\_\_\_\_ Section 6.2.1 Complete blanks for day of month
- \_\_\_\_\_ Section 6.7.1 Complete blanks for interest rate
- \_\_\_\_\_ Section 8.1.1 Insert Design-Builder's Senior Representative's name, etc.
- \_\_\_\_\_ Section 8.1.2 Insert Design-Builder's Representative's name, etc.
- \_\_\_\_\_ Section 8.2.1 Insert Design Consultant's Senior Representative's name, etc.
- \_\_\_\_\_ Section 8.2.2 Insert Design Consultant's Representative's name, etc.
- \_\_\_\_\_ Section 9.1.1 Attach Insurance Exhibit
- \_\_\_\_\_ Section 15.1 Insert any other provisions (optional)
- \_\_\_\_\_ Last Page Design-Builder's and Design Consultant's execution of the Agreement

## General Instructions

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

## Specific Instructions

Section	Title	Instruction
General	Purpose of This Agreement	DBIA Document No. 540, <i>Standard Form of Agreement Between Design-Builder and Design Consultant</i> (2010 Edition) ("Agreement") sets forth the terms and conditions under which the design for the Project and other design services during the construction phase of the Project will be performed. This Agreement envisions that Design Consultant and Design-Builder have cooperated with each other in the procurement of the Design-Build Agreement between Design-Builder and Owner (either DBIA Document No. 525, <i>Standard Form of Agreement Between Owner and Design-Builder - Lump Sum</i> (2010 Edition), or DBIA Document No. 530, <i>Standard Form of Agreement Between Owner and Design-Builder - Cost Plus Fee with an Option for a Guaranteed Maximum Price</i> (2010 Edition), and including DBIA Document No. 535, <i>Standard Form of General Conditions of Contract Between Owner and Design-Builder</i> (2010 Edition)), and requires Design Consultant to design the Project consistent with the Contract Documents.
General	Purpose of These Instructions	These Instructions are not part of this Agreement, but are provided to aid the parties in their understanding of the Agreement and in completing the Agreement.
General	Date	On Page 1, enter the date when both parties reach a final understanding. It is possible, due to logistical reasons, that the dates when the parties execute the Agreement may be different. Once both parties execute the Agreement, the effective date of the Agreement will be the date recorded on Page 1. This date does not, however, determine the Date of Commencement, which is measured according to the terms of Section 5.1.1.
General	Parties: Design-Builder and Design Consultant	On Page 1 enter the legal name and full address of Design-Builder, Design Consultant and Owner, as well as the legal form of each entity, e.g., corporation, partnership, limited partnership, limited liability company, or other.
1.1.1	Pass Through	The section recognizes that the Design Consultant has the same rights, responsibilities and obligations as to Design-Builder as Design-Builder by the Design-Build Agreement has against and to Owner. However, because the Design-Build Agreement also affords the Design-Builder and Owner many opportunities to customize their contractual relationship by the selection of optional provisions, DBIA does not believe that these optional provisions should automatically pass through to the Design Consultant. Accordingly, if the Design-Builder and Design Consultant believe it is appropriate to afford the Design Consultant the same rights, responsibilities and obligations as it relates to these optional provisions, the parties should make that clear by adding the necessary and appropriate provisions at Article 15 of this Agreement.
1.2	Definitions	Terms, words and phrases used in the Agreement shall have the same meanings used in the Design-Build Agreement between Owner and Design-Builder except to the extent set forth in Section 1.2.
1.3.1	Contract Documents	This section identifies the Contract Documents, which include the Basis of Design Documents defined in Section 1.2.3.
1.4.2	Order of Precedence	The Contract Documents are listed in Section 1.3 in the order of their precedence.
1.4.3	Design Specifications	If the Owner has provided design specifications to the Design-Builder, the Design Consultant is entitled to rely on the information provided to the same extent as Design-Builder. If said information is not accurate, the Design Consultant may be entitled to an adjustment of costs and/or time to the extent the Design-Builder recovers from the Owner.
1.5.2	Mutual Obligations and Acknowledgments	This Agreement contemplates that the Design-Builder and Design Consultant have cooperated in the procurement of the Design-Build Agreement and that the Design Consultant has familiarized itself with the Design-Build Agreement, including the Basis of Design Documents.

<b>Section</b>	<b>Title</b>	<b>Instruction</b>
2.1.1	Design Professional Services	The parties should be aware that in addition to requiring compliance with state licensing laws for design professionals, some states also require that the design professional have a corporate professional license.
2.2.1	Standard of Care for Design Professional Services	Design Consultant's obligation is to deliver a design that meets prevailing industry standards. However, DBIA has provided the parties at Article 15 an optional provision whereby the Owner can identify specific performance standards that can be objectively measured. If this optional provision is selected Design Consultant is obligated to design the Project to satisfy these standards. To avoid any confusion and to ensure that the parties fully understand what their obligations are, the specific performance standards should be clearly identified and should be able to be objectively measured. The Design Consultant should recognize that this is a heightened standard of care that has insurance ramifications that should be discussed with the Design Consultant's insurance advisor.
2.4.1	Primary Personnel	Attach a list of Design Consultants primary personnel for the Project.
2.5.1	Government Approvals and Permits	Design Consultant is responsible for obtaining the specific permits, approvals, and licenses set forth in an exhibit to the Agreement.
2.6.1	Design Development Services	In accordance with the Design Schedule, the parties will hold design monitoring meetings during the development of the Project design so that the final design shall be consistent with the requirements of the Contract Documents, including the Basis of Design Documents, as the Basis of Design Documents may have been modified.
2.6.3	Deviations from the Basis of Design Documents	If the Design Consultant fails to identify changes to the Contract Documents, including the Basis of Design Documents, or fails to produce Construction Documents consistent with approved changes, Design Consultant is responsible for any additional costs incurred by Design-Builder.
2.7.6	Site Visits	If the parties agree to a specific frequency of Design Consultant site visits, attach an exhibit setting forth such requirements.
2.8	Additional Services	If the parties agree that Design Consultant shall provide any services beyond those contained in the Agreement, such Additional Services shall be set forth in an exhibit attached to the Agreement.
3.3.1	Furnishing of Information	Design-Builder shall furnish Design Consultant with the listed Owner-provided information. Design Consultant is entitled to rely on the Owner-provided information to the same extent Design-Builder is entitled to pursuant to the Design-Build Agreement.
4.1	Work Product	This Agreement provides that Design Consultant shall retain ownership of the Work Product. However, if the Design-Build Agreement conflicts with the above, then Design Consultant grants the Design-Builder the same rights that Design-Builder has provided the Owner.
4.2	Agreement to Grant Rights to Owner	Design Consultant has reviewed the Design-Build Agreement and understands that it is required to grant Owner the rights to the Work Product according to the terms and circumstances described in the Design-Build Agreement.
4.3	Indemnification for Use of Work Product	If either Design-Builder or Design Consultant uses the Work Product on any other project, that party shall defend, indemnify and hold harmless the other party and Owner.
4.4.1	Design-Builder's Use of Work Product Upon Termination for Convenience or Design-Builder's Default	If Design-Builder terminates this Agreement for convenience or if the Design Consultant terminates this Agreement due to Design-Builder's default, Design Consultant grants the Design-Builder and Owner the right to use the Work Product as set forth in Section 4.1.1. The granting of these rights is conditioned on (i) paying Design Consultant all amounts due under the Agreement, including paying Design Consultant an additional sum (to be negotiated) under Section 4.4.1.2 for the use of the Work Product; and (ii) Design-Builder using the Work Product at its sole risk.

Section	Title	Instruction
4.4.2	Design-Builder's Use of Work Product Upon Design Consultant's Default	If Design Consultant is properly terminated for default, Design-Builder shall have the same rights to use the Work Product as set forth in Section 4.1.1.
5.1	Date of Commencement	Design Consultant's obligation to commence work is triggered by its receipt of a Notice to Proceed unless the parties mutually agree otherwise.
6.1.2	Design Consultant's Fee	Attach an exhibit setting forth the basis for compensating Design Consultant for its Design Phase Services, Construction Phase Services, Additional Services, if any, and Reimbursable Costs.
6.2.1	Applications for Payment	Enter the day of the month when Design Consultant shall submit its Application for Payment.
6.7	Interest	The parties should enter the rate at which interest will accrue on Design Consultant's payments if unpaid five (5) days after due. Late payment creates a hardship for Design Consultant and its Design Sub-Consultants.
6.9	Record Keeping	The Design-Builder is provided access to, and the right to audit Design Consultant's records. However, if the parties have agreed to fees (that are either a lump sum or percentage of construction costs), multipliers or markups, the time to challenge and negotiate those percentages is at the time the parties execute the Agreement and not during the Project or after it has been completed. Accordingly, the Design-Builder can at any time audit these percentages only to confirm that such percentage has been properly charged and not to challenge the composition of such percentage.
7.1	Design-Builder's Right to Terminate for Convenience	Design-Builder shall only have the right to terminate Design Consultant without cause if Owner elects to terminate Design-Builder for any reason.
Article 8	Representatives of the Parties	Enter the name, title, address and telephone number of Design-Builder's Senior Representative and Design-Builder's Representative at Sections 8.1.1 and 8.1.2, respectively.  Enter the name, title, address and telephone number of Design Consultant's Senior Representative and Design Consultant's Representative at Sections 8.2.1 and 8.2.2, respectively.
9.1.1	Design Consultant's Insurance Requirements	Attach an Insurance Exhibit setting forth in detail the insurance coverages Design Consultant is required to provide for the Project. Parties are advised to consult their insurance advisors.
9.1.2	Design Consultant's Insurance Requirements	Design Consultant is obligated to require its Design Sub-Consultants to provide the insurance coverage set forth in the Insurance Exhibit to the Agreement. Parties are advised to consult their insurance advisors.
9.1.3	Exclusions to Design-Build	Parties are advised that standard liability insurance policies may contain exclusions for the design-build delivery method. This Section 9.1.3 requires that any such exclusions be deleted from the policy.
9.1.4	Errors and Omissions Insurance	Should Design-Builder, after its analysis of the risk factors involved, require this insurance, the coverage required shall be as set forth in the Insurance Exhibit.
11.3	Disputes Involving Owner	Disputes for which Owner is responsible will be resolved in accordance with the dispute resolution clause in the Design-Build Agreement.

Section	Title	Instruction
11.4	Disputes Not Involving Owner	DBIA endorses the use of partnering, negotiation, mediation and arbitration for the prevention and resolution of disputes. The Agreement provides for the parties' Representatives and Senior Representatives to attempt to negotiate the dispute or disagreement. If this attempt fails, the dispute shall be submitted to mandatory, non-binding mediation. Any dispute that cannot be resolved by mediation shall then be submitted to binding arbitration pursuant to Section 11.5 unless the parties elect the option in Section 15.1 of the Agreement to submit their dispute to a court of competent jurisdiction.
11.5.4	Arbitration	The prevailing party in any arbitration shall receive reasonable attorneys' fees from the other party. DBIA supports this "loser pays" provision to encourage parties to negotiate or mediate their differences and to minimize the number of frivolous disputes.
11.6	Duty to Continue Performance	Pending the resolution of any dispute or disagreement, both Design-Builder and Design Consultant shall continue to perform their respective duties under the Contract Documents, unless the parties provide otherwise in the Contract Documents.
11.7	Consequential Damages	DBIA believes that it is inappropriate for either Design-Builder or Design Consultant to be responsible to the other for consequential damages arising from the Project. This limitation on consequential damages in no way restricts, however, Design-Builder's entitlement to recover against Design Consultant liquidated damages assessed by Owner against Design-Builder which are attributable to Design Consultant, and which may include damages that might otherwise be deemed consequential.
Article 13	Electronic Data	Design-Builder will determine, after consultation with Design Consultant, the software and format for the transmission of Electronic Data. Ownership of Work Product in electronic form is governed by Article 4 of the Agreement. The transmitting party disclaims all warranties with respect to the media transmitting the Electronic Data, but nothing in this Article is intended to negate duties with respect to the standard of care in creating the Electronic Data. In the event the Design-Build Agreement contains a conflicting provision governing Electronic Data, the provision in the Design-Build Agreement takes precedence.
Article 15	Other Provisions	Insert any other provisions. For example, the parties may elect to have disputes resolved through litigation rather than arbitration in which case the optional language in this Section should be included. Also, the parties may want to incorporate specific optional provisions from the Design-Build Agreement in which case those provisions should be expressly incorporated in Article 15.

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# Standard Form of Agreement Between Design-Builder and Design Consultant

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

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

**DESIGN-BUILDER:**

*(Name and address)*

**DESIGN CONSULTANT**

*(Name and address)*

**PROJECT:**

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

**OWNER:**

*(Name and address)*

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

## Article 1 General

### 1.1 Basic Purpose.

1.1.1 Design-Builder has contracted with Owner to provide the services of a licensed design professional to perform all necessary design services for the Project as set forth in the Design-Build Agreement between Owner and Design-Builder. Design Consultant, through itself and its Design Sub-Consultants, has agreed to provide such architectural, engineering, and other services required by this Agreement and the other Contract Documents. Design-Builder and Design Consultant further agree that to the extent applicable to the performance of the Services hereunder, Design Consultant shall have the same rights, responsibilities, and obligations as to Design-Builder as Design-Builder by the Design-Build Agreement has against and to Owner, except as may be modified herein. Notwithstanding the foregoing, if the Design-Builder and Owner have checked boxes indicating the selection of optional provisions from the Design-Build Agreement, those optional provisions are only passed through to the Design Consultant to the extent those provisions have been expressly set forth in Article 15.

### 1.2 Basic Definitions.

1.2.1 Terms used in this Agreement shall have the meanings set forth in the Design-Build Agreement between Owner and Design-Builder unless otherwise provided herein, with the following specific terms defined as follows:

1.2.1.1 *Additional Services* are those services identified in Section 2.8 hereof.

1.2.1.2 *Agreement* refers to this executed contract between Design-Builder and Design Consultant under DBIA Document 540, *Standard Form of Agreement Between Design-Builder and Design Consultant* (2010 Edition).

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

1.2.1.4 *Construction Documents* are the documents, consisting of Drawings and Specifications, to be prepared or assembled by Design Consultant consistent with the Basis of Design Documents, unless a deviation from the Basis of Design Documents is specifically set forth in a Change Order.

1.2.1.5 *Construction Phase Services* refers to those services identified in Section 2.7 hereof.

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

1.2.1.7 *Design-Build Agreement* refers to the contract between Design-Builder and Owner for the design and construction of the Project under either DBIA Document No. 525, *Standard Form of Agreement Between Owner and Design-Builder - Lump Sum* (2010 Edition), or DBIA Document No. 530, *Standard Form of Agreement Between Owner and Design-Builder - Cost Plus Fee with an Option for a Guaranteed Maximum*

*Price* (2010 Edition), including the DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (2010 Edition), and all exhibits, attachments, and other Contract Documents enumerated and incorporated therein.

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

**1.2.1.9** *Design Phase Services* refers to those services set forth in Sections 2.5 and 2.6 hereof.

**1.2.1.10** *Design Schedule* refers to the schedule setting forth the dates by which Design Consultant must perform the various Services required herein, consistent with the Project Schedule.

**1.2.1.11** *Design Consultant's Fee* shall refer to the compensation due Design Consultant for the performance of the Services as set forth herein.

**1.2.1.12** *Final Completion* is the date on which all Work is complete in accordance with the Contract Documents, including but not limited to any items identified in the punch list prepared under Section 6.6.1 of the General Conditions of Contract and the submission of all documents set forth in Section 6.7.2 of the General Conditions of Contract.

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

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

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

**1.2.1.16** *Project Schedule* refers to the schedule setting forth the dates by which the various stages of both the design and construction of the Project must be performed so as to satisfy Design-Builder's obligations to Owner.

**1.2.1.17** *Services* shall include all Design Phase Services, Construction Phase Services and Additional Services required by the Contract Documents or as may be authorized in writing by Design-Builder except for those design services provided by others under Section 1.5.3 or by Owner's design consultants.

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

**1.2.1.19** *Subcontractor* is any person or entity retained by Design-Builder as an independent contractor to perform a portion of the construction work for the Project and

shall include materialmen and suppliers.

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

**1.2.1.21** *Substantial Completion* or *Substantially Complete* is the date on which the Project, or an agreed upon portion of the Project, is sufficiently complete so that Owner can occupy and use the Project or a portion thereof for its intended purposes.

### **1.3 Contract Documents.**

**1.3.1** The Contract Documents are comprised of the following:

**1.3.1.1** All written modifications, amendments, minor changes and Change Orders to this Agreement;

**1.3.1.2** The Basis of Design Documents;

**1.3.1.3** This Agreement, including all exhibits and attachments, executed by Design-Builder and Design Consultant;

**1.3.1.4** Construction Documents; and

**1.3.1.5** The Design-Build Agreement, (excluding the Basis of Design Documents), but only to the extent the Design-Build Agreement relates to the Services and the terms and conditions under which the Services shall be performed.

### **1.4 Interpretation and Intent.**

**1.4.1** Design-Builder and Design Consultant, prior to execution of the Agreement, shall carefully review all the Contract Documents, including the various documents comprising the Basis of Design Documents, for any conflicts or ambiguities. Design-Builder and Design Consultant will discuss and resolve any identified conflicts or ambiguities prior to execution of the Agreement.

**1.4.2** The Contract Documents are intended to be complementary and interpreted in harmony so as to avoid conflict, with words and phrases interpreted consistent with construction and design industry standards. In the event inconsistencies, conflicts, or ambiguities between or among the Contract Documents are discovered after execution of the Agreement, the parties shall attempt to resolve such ambiguities, conflicts or inconsistencies informally, recognizing that the Contract Documents shall take precedence in the order in which they are listed in Section 1.3 hereof.

**1.4.3** If Owner's Project Criteria contain design specifications, Design Consultant shall be entitled to reasonably rely on the accuracy of the information represented in such design specifications and their compatibility with other information set forth in Owner's Project Criteria, including any performance specifications, to the same extent as Design-Builder is entitled to so rely in the Design-Build Agreement. If Design Consultant contends that its costs and/or time of performance have been adversely impacted by such inaccurate design specifications, then it shall proceed in accordance with Section 11.3.

### **1.5 Mutual Obligations and Acknowledgments.**

**1.5.1** Design-Builder and Design Consultant commit at all times to cooperate fully with each other, and proceed on the basis of trust and good faith, to permit each party to realize the benefits

afforded under the Contract Documents. Design-Builder and Design Consultant shall perform their respective responsibilities, obligations and services in a timely manner to facilitate the other's timely and efficient performance and so as not to delay or interfere with the other's performance of its obligations under the Contract Documents.

**1.5.2** Design-Builder and Design Consultant acknowledge that they have cooperated with each other in the procurement of the Design-Build Agreement, and that Design-Builder and Design Consultant have met to review, discuss, and familiarize themselves with the Design-Build Agreement, including the Basis of Design Documents.

**1.5.3** Design-Builder may choose to have portions of the overall design (e.g., structural and MEP) undertaken by design professionals directly employed by or contracting with Design-Builder. Design-Builder and Design Consultant acknowledge the importance of integrating all of the designs into the Project's overall design concept. The parties commit to working with each other, and with any other design professionals working on the Project with Design-Builder to facilitate the coordination and integration of Design Consultant's Services with the Project's overall design concept. Design-Builder is responsible for the services performed by design professionals under contract with Design-Builder, but nothing herein is intended to relieve Design Consultant of its obligation to coordinate its Services with the services performed by other design professionals.

**1.5.4** Design-Builder and Design Consultant mutually agree that time is of the essence with respect to the dates and times set forth in the Design Schedule, Project Schedule and Contract Documents. Each party agrees to provide the other party with information in a timely fashion and in the form and manner as reasonably required.

## **1.6 Entire Agreement.**

**1.6.1** Subject to the limitations in Section 1.3.1, the Contract Documents, all of which are incorporated by reference into this Agreement, form the entire agreement between Design-Builder and Design Consultant and are as fully binding on the parties as if repeated herein. No oral representations or other agreements have been made by the parties except as specifically stated in the Contract Documents.

## **Article 2**

### **Design Consultant's Services and Responsibilities**

#### **2.1 General.**

**2.1.1** Design Consultant shall, consistent with applicable state licensing laws, provide the Services, including architectural, engineering and other professional services, required by the Contract Documents. Design Consultant agrees that such Services shall be provided through qualified, licensed professionals who are either (i) employed by Design Consultant or (ii) procured by Design Consultant from qualified, licensed Design Sub-Consultants.

**2.1.2** Design Consultant shall not engage the services of any Design Sub-Consultant without first obtaining the approval of Design-Builder, which approval shall not be unreasonably withheld. Design Consultant agrees that each Design Sub-Consultant shall be fully bound to Design Consultant in the same manner as Design Consultant is bound to Design-Builder for all the requirements of the Contract Documents to the extent applicable to the Design Sub-Consultant's scope of services. Design Consultant shall at all times be responsible for the services performed by its Design Sub-Consultants, and shall coordinate the services of its Design Sub-Consultants to satisfy Design Consultant's obligations under the Contract Documents. Nothing in this Agreement shall relieve Design Consultant from responsibility for the services performed by its Design Sub-

Consultants, or create any legal or contractual relationship between Design-Builder and any Design Sub-Consultant.

**2.1.3** If Design-Builder or Owner performs other work on the Project with separate design professionals under Design-Builder's or Owner's control, Design Consultant agrees to reasonably cooperate and coordinate its activities with those of such separate design professionals so that the Project can be completed in an orderly and coordinated manner and without disruption.

**2.1.4** Design Consultant shall only communicate with Owner, Subcontractor(s), or Sub-Subcontractors through Design-Builder unless the parties agree otherwise. Notwithstanding the preceding sentence, Design Consultant may communicate directly with the Owner (with written copy to Design-Builder) on matters of public health, safety, and welfare when required by applicable Legal Requirements or professional codes of ethics.

**2.1.5** Within seven (7) days after execution of this Agreement, Design-Builder and Design Consultant will meet to discuss issues affecting the administration of the Services and to implement the necessary procedures, including but not limited to those relating to the schedule for the Services, schedule updates, review of submittals, and payment, to facilitate the ability of the parties to perform their obligations under the Contract Documents and allow Design Consultant to meet its obligations to design the Project consistent with the Contract Documents, without compromising any professional obligations of Design Consultant.

## **2.2 Standard of Care.**

**2.2.1** The standard of care for all design professional services performed by Design Consultant and its Design Sub-Consultants pursuant to this Agreement shall be the care and skill ordinarily used by members of the design profession practicing under similar conditions at the same time and locality of the Project.

## **2.3 Legal Requirements.**

**2.3.1** Design Consultant agrees to perform the Services in accordance with all applicable Legal Requirements.

**2.3.2** Design Consultant's Fee and/or the Design Schedule shall be adjusted to compensate Design Consultant for the effects, if any, of any changes in the Legal Requirements enacted after the date of the Agreement affecting the performance of the Services. Such effects may include, without limitation, revisions Design Consultant is required to make to the Construction Documents because of changes in Legal Requirements.

## **2.4 Design Consultant's Personnel.**

**2.4.1** Design Consultant agrees that the primary personnel assigned to perform the Services shall be as listed in Exhibit \_\_\_\_\_. Design Consultant shall not change such personnel without Design-Builder's prior approval.

**2.4.2** Design Consultant's Representative shall be reasonably available to Design-Builder and shall have the necessary expertise and experience required to supervise the Services. Design Consultant's Representative shall communicate regularly with Design-Builder and shall be vested with the authority to act on behalf of Design Consultant. Design Consultant shall replace its Representative upon the reasonable request of Design-Builder.

## **2.5 Government Approvals and Permits.**

**2.5.1** Design Consultant shall obtain and pay for the permits, approvals, and licenses, if any, set forth in Exhibit \_\_\_\_\_.

**2.5.2** Design Consultant shall provide reasonable assistance to Design-Builder and Owner in obtaining any permits, approvals, and licenses which are not Design Consultant's obligation to obtain, but which are required for the construction of the Project.

**2.5.3** Design Consultant shall make any revisions to the Construction Documents necessary to secure permits, approvals, and licenses, including those which have been denied for failure of the Construction Documents to meet Legal Requirements. If such revisions are necessary for reasons beyond the control of Design Consultant or its Design Sub-Consultants, Design Consultant shall be compensated for such revisions as a change to this Agreement.

## **2.6 Design Development Services.**

**2.6.1** In accordance with the times set forth in the Design Schedule, Design Consultant shall submit to Design-Builder all interim design submissions and revisions as required by the Contract Documents. Interim design submissions shall be consistent with the Basis of Design Documents, as the Basis of Design Documents may have been modified in accordance with the Contract Documents. Such interim design submissions shall be in the form and quantity called for in the Contract Documents and may include design criteria, drawings, diagrams and specifications setting forth the Project requirements. Design-Builder and Design Consultant agree that prior to the scheduled date for submitting all interim design submissions to Owner, Design-Builder and Design Consultant will hold meetings for the purpose of discussing and monitoring the design for consistency with the requirements of the Contract Documents.

**2.6.2** In accordance with the Contract Documents and with the times set forth in the Design Schedule, Design Consultant shall submit to Design-Builder Construction Documents setting forth in detail drawings and specifications describing the requirements for construction of the Work. The Construction Documents shall be consistent with the latest set of interim design submissions, as such submissions may have been modified in a design review meeting. Design Consultant shall provide the Construction Documents in the form and quantity called for in the Contract Documents. Design Consultant shall perform agreed upon revisions and submit revised Construction Documents to Design-Builder for Design-Builder's and Owner's approval.

**2.6.3** Design Consultant shall attend and participate in such meetings as are held between Owner and Design-Builder to discuss interim design submissions and the Construction Documents. Design Consultant shall identify during each such meeting, among other things, the evolution of the design and any changes or deviations from the Contract Documents, including the Basis of Design Documents, or, if applicable, previously submitted design submissions. To the extent that Design Consultant fails to identify such changes or fails to produce Construction Documents consistent with the Basis of Design Documents and identified and approved changes and Design-Builder incurs additional uncompensated costs as a result, Design Consultant shall be responsible for such costs. Minutes of the meetings between Design-Builder and Design Consultant, and Design-Builder and Owner, including a full listing of all changes, will be maintained by Design-Builder and provided to all attendees for review. Design Consultant shall review such minutes and provide notice of any objections thereto. The Construction Documents shall be consistent with the latest set of interim design submissions, as such submissions may have been modified in a design review meeting and recorded in the meetings minutes.

**2.6.4** In addition to the interim design submissions and Construction Documents, Design Consultant shall, if requested by Design-Builder, prepare (i) those design documents necessary for the establishment of a GMP Exhibit or GMP Proposal and (ii) interim design submissions and

Construction Documents required to permit commencement of construction on a portion of the Project before the entire Construction Documents for the Project are completed.

**2.6.5** Design-Builder's and Owner's review and/or approval of interim design submissions and the Construction Documents are for the purpose of mutually establishing a conformed set of Construction Documents compatible with the requirements of the Contract Documents. The review and/or approval by either Design-Builder or Owner of any interim design submission or the Construction Documents shall not be deemed to transfer any design liability from Design Consultant to Design-Builder or Owner.

**2.6.6** Design Consultant will, at its own cost, revise any interim design submission or the Construction Documents to correct any of its errors, mistakes or omissions. Such revisions shall be performed timely and so as not to jeopardize the Design Schedule and/or the Project Schedule.

**2.7.7** Design Consultant shall be responsible for paying all royalties and licensing fees for patented or copyrighted materials, methods or systems specified by Design Consultant and incorporated into the Project.

## **2.7 Construction Phase Services.**

**2.7.1** Design Consultant shall assist Design-Builder in preparing bidding documents for specified portions of the Project's construction, and clarifying and responding to questions involving the bidding documents.

**2.7.2** Design Consultant shall timely provide requested clarifications and interpretations of the Construction Documents, which shall be consistent with the intent of, and reasonably inferable from, the Contract Documents. Design Consultant shall make all revisions to the Construction Documents necessary for the proper construction of the Project.

**2.7.3** Design Consultant shall review and approve such submittals, including shop drawings, product data and samples, as may be required by the Design-Build Agreement or Design-Builder. Design Consultant shall expeditiously inform Design-Builder of any revisions that are necessary as a condition to Design Consultant's approval of submittals. The time within which Design Consultant shall review and respond to submittals will be as established at the meeting required by Section 2.1.5 hereof. Design Consultant's review and approval shall not relieve Design-Builder or Subcontractors of responsibility for construction means and methods or safety precautions.

**2.7.4** Design Consultant shall review, and if acceptable approve, any substitutions for materials or equipment proposed by Design-Builder.

**2.7.5** Design Consultant shall, if requested by Design-Builder, review any inspection reports or tests involving the construction of the Project and provide its comments to Design-Builder. Design Consultant is not responsible for the accuracy or completeness of the tests or inspections performed by others.

**2.7.6** Unless otherwise provided, Design Consultant is not providing full-time resident services. Nevertheless, Design Consultant shall at appropriate intervals visit the Site to determine if the construction is proceeding in accordance with the Construction Documents. If Design-Builder and Design Consultant have agreed to a specific frequency of Design Consultant's Site visits, such frequency shall be set forth as an exhibit to this Agreement. Design Consultant shall promptly notify Design-Builder of any defects, deficiencies, deviations, omissions, or violations observed by Design Consultant in the construction of the Project, and make recommendations to Design-Builder on how to proceed.

**2.7.7** At the request of Design-Builder, Design Consultant shall attend meetings with Design-Builder and Owner and/or Subcontractor(s) and Sub-Subcontractors to discuss design issues which may arise during construction.

**2.7.8** Design Consultant shall, if requested by Design-Builder, provide such certifications as may be necessary relative to Substantial Completion, and if required by the Design-Build Agreement, Final Completion.

**2.7.9** Design Consultant's provision of the Construction Phase Services shall not be construed to make Design Consultant responsible for (i) the acts or omissions of Design-Builder, any Subcontractors, or any Sub-Subcontractors, (ii) the means, methods, sequences, and techniques of construction of the Project or (iii) safety precautions and programs in connection with the construction of the Project. Nothing in this Agreement shall create any legal or contractual relationship between Design Consultant and any Subcontractor or Sub-Subcontractor.

## **2.8 Additional Services.**

**2.8.1** Additional Services, if any, agreed upon by the parties shall be set forth in Exhibit \_\_\_\_\_, and may include by way of example only, site visits in excess of those agreed upon by the parties, evaluating changes, including the preparation or revision of the Construction Documents, providing record drawings, and providing consultation concerning replacement of Work damaged by fire or other causes during construction.

## **Article 3**

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

#### **3.1 Timely Reviews, Approvals and Submittals.**

**3.1.1** Design-Builder shall provide timely reviews and approvals of all interim design submissions and Construction Documents consistent with the turnaround times set forth in the Design Schedule, or as agreed to by the parties at the meeting required under Section 2.1.5 hereof.

**3.1.2** Design-Builder shall timely submit to Design Consultant all submittals, including shop drawings, product data and samples, for Design Consultant's review and approval consistent with the Project Schedule, or as agreed to by the parties at the meeting required under Section 2.1.5 hereof.

**3.1.3** Design-Builder shall provide timely notice to Design Consultant of any delays to the Project caused by Design Consultant.

#### **3.2 Design-Builder's Representative.**

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

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

**3.3.1** Unless expressly stated to the contrary in the Contract Documents, and to the extent Design-Builder has received such items from Owner, Design-Builder shall provide for Design Consultant's information the items listed below. Design-Builder does not warrant the accuracy or

completeness of such items, provided, however, that Design Consultant is entitled to rely upon such items to the same extent Design-Builder is entitled to rely upon such items in the Design-Build Agreement:

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

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

**3.3.1.3** Temporary and permanent easements, zoning and other requirements and encumbrances affecting land use, or necessary to permit the proper design and construction of the Project and enable Design Consultant to perform the Services;

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

**3.3.1.5** Record drawings of any existing structures at the Site;

**3.3.1.6** Environmental studies, reports and impact statements describing the environmental conditions, including Hazardous Conditions, in existence at the Site;

**3.3.1.7** Owner's Project Criteria;

**3.3.1.8** All permits, approvals and licenses set forth in the Owner's Permit List attached as an exhibit to the Design-Build Agreement; and

**3.3.1.9** Test and inspection reports.

**3.3.2** Design-Builder shall provide Design Consultant with a copy of the Design-Build Agreement, including all exhibits, attachments, and other Contract Documents enumerated and incorporated therein.

**3.3.3** Design-Builder shall provide all cost estimating and scheduling services related to the construction of the Project and shall be responsible for mistakes or miscalculations of market conditions that result in construction costs that are contrary to Design-Builder's budget and pricing assumptions. Nothing herein shall relieve Design Consultant from its obligation to prepare a design for the Project that is consistent with the Contract Documents.

**3.3.4** Upon Design Consultant's reasonable request, Design-Builder shall provide Design Consultant with information in Design-Builder's possession regarding Owner's financial ability to pay for the Services set forth in this Agreement.

**3.3.5** Design-Builder shall provide Design Consultant with the Project Schedule and appropriate updates thereto.

**3.3.6** Design-Builder shall provide administration of the Design-Build Agreement, and promptly forward any communications to Owner from Design Consultant that may impact the Services.

**3.3.7** Design-Builder shall provide Design Consultant reasonable access to the Project and the Site.

#### **3.4 Notification of Errors.**

**3.4.1** Design-Builder shall notify Design Consultant of any errors, inconsistencies, or omissions Design-Builder discovers in the Services, including any interim design submissions, Construction

Documents or other Services. Notwithstanding anything to the contrary in this Agreement, nothing in this Agreement shall relieve Design Consultant of responsibility for errors, inconsistencies, or omissions in the Services.

### **3.5 Attendance at Design Meetings.**

**3.5.1** Design-Builder shall afford Design Consultant and its Design Sub-Consultants the opportunity to attend all necessary design meetings with Owner, Subcontractor(s) and/or Sub-Subcontractors.

## **Article 4**

### **Ownership of Work Product**

#### **4.1 Work Product.**

**4.1.1** All drawings, specifications and other documents and electronic data furnished by Design Consultant to Design-Builder under this Agreement ("Work Product") are deemed to be instruments of service and Design Consultant shall retain ownership and property interests therein provided, however, that Design Consultant hereby grants Design-Builder, (for the purpose of allowing Design-Builder to grant to Owner) upon Design-Builder's payment to Design Consultant of amounts properly due under this Agreement, a limited license to use the Work Product in connection with completing this Project. Notwithstanding the preceding sentence, if the Design-Build Agreement grants ownership and/or property rights to Owner that conflict with the above, then Design Consultant hereby grants such rights to Design-Builder (for the purpose of allowing Design-Builder to grant to Owner) under the same terms and conditions that Design-Builder grants such rights to Owner.

#### **4.2 Agreement to Grant Rights to Owner.**

**4.2.1** Design Consultant has reviewed the Design-Build Agreement and is fully aware of the ownership and property rights to use the Work Product which may be granted to Owner therein. Design Consultant accepts and agrees to Owner's ownership and property rights with respect to the Work Product contained in the Design-Build Agreement.

#### **4.3 Indemnification for Use of Work Product.**

**4.3.1** If either Design-Builder or Design Consultant uses the Work Product on any other project, such party agrees that it shall do so at its sole risk and without liability or legal exposure to the other party, Owner, or anyone working through them. Such party further agrees that it shall defend, indemnify and hold harmless the other party and Owner from and against any and all claims, damages, liabilities, losses and expenses, including attorneys' fees, arising out of or resulting from such use of the Work Product on another project.

#### **4.4 Use of Work Product On Termination or Default.**

**4.4.1** If Design-Builder terminates this Agreement for its convenience as set forth in Section 7.1 hereof, or if Design Consultant elects to terminate this Agreement in accordance with Section 7.4 of this Agreement, Design Consultant, upon Design-Builder's payment in full of the amounts due Design Consultant under the Contract Documents, grants Design-Builder and Owner the same rights as set forth in Section 4.1.1 above to use the Work Product to complete the Project and subsequently occupy the Project, conditioned on the following:

**4.4.1.1** Use of the Work Product is at Design-Builder's sole risk without liability or legal exposure to Design Consultant or anyone working by or through Design Consultant, and on Design-Builder's obligation to provide the indemnity set forth in Section 4.3 herein,

and

**4.4.1.2** Design-Builder agrees to pay Design Consultant the additional sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) as compensation for the right to use the Work Product to complete the Project and subsequently use the Work Product in accordance with Section 4.1.1 if Design-Builder resumes the Project through its employees, agents, or third parties.

**4.4.2** If this Agreement is terminated due to Design Consultant's default pursuant to Section 7.2 of this Agreement, then Design-Builder shall have the same rights as set forth in Section 4.1.1 above to use the Work Product to complete the Project and subsequently occupy the Project, and Design-Builder and Owner shall thereafter have the same rights and obligations as set forth in Section 4.1.1 above. Notwithstanding the preceding sentence, if it is ultimately determined that Design Consultant was not in default, Design-Builder shall be deemed to have terminated the Agreement for convenience, and Design Consultant shall be entitled to the rights and remedies set forth in Section 4.4.1 above.

## **Article 5**

### **Time of Performance**

#### **5.1 Date of Commencement.**

**5.1.1** The Services shall commence five (5) days after Design Consultant's receipt of Design-Builder's Notice to Proceed ("Date of Commencement") unless the parties mutually agree otherwise in writing.

#### **5.2 Design Schedule.**

**5.2.1** Unless a schedule for the execution of the Work has been attached to the Agreement as an exhibit at the time this Agreement is executed, Design Consultant shall prepare and submit for Design-Builder's review and acceptance, at least three (3) days prior to the meeting required by Section 2.1.5 hereof, a schedule for the execution of the Design Phase Services in accordance with the Contract Documents. The schedule shall indicate the dates for the start and completion of the various stages of the Design Phase Services, including the dates for the design monitoring and review meetings required herein, and the dates when Design-Builder and Owner information and approvals are required, and shall take into account Design-Builder's obligations to Owner under the Design-Build Agreement. Design-Builder and Design Consultant will jointly review Design Consultant's schedule to determine whether it permits Design-Builder to satisfy its obligations under the Project Schedule and the Design-Build Agreement. The accepted schedule (the "Design Schedule") shall be revised as required by conditions and progress of the Project, but such revisions shall not relieve Design Consultant of its obligations to perform the Services in accordance with the Contract Documents, subject to its rights under this Agreement. Design-Builder shall incorporate the Design Schedule into the Project Schedule.

#### **5.3 Status Reports.**

**5.3.1** Design Consultant shall provide Design-Builder on a regular basis a status report detailing the progress of the Design Phase Services, including whether (i) the Design Phase Services are proceeding according to the Design Schedule, and (ii) items exist which require resolution so as not to jeopardize Design Consultant's ability to meet the dates set forth in the Design Schedule and Design-Builder's ability to meet the Project Schedule. The frequency of the status reports shall be established at the meeting required by Section 2.1.5 hereof.

#### **5.4 Delays.**

**5.4.1** If Design Consultant's performance of the Services are delayed for any reason so as to impact the Design Schedule or the Project Schedule, Design Consultant shall promptly notify Design-Builder in writing of the cause(s) of such delay within sufficient time to permit Design-Builder to provide timely notice to Owner in accordance with the Design-Build Agreement. If the delay is due to any act, neglect, or omission on the part of Design Consultant, Design Sub-Consultants, or anyone for whom they are responsible, Design Consultant shall, subject to any limitations contained herein, compensate and indemnify Design-Builder for all costs, damages, and expenses arising from such delay. If the delay is caused by Design-Builder, the Design Consultant's Fee and the Design Schedule shall be adjusted to compensate Design Consultant for the effects, if any, of the delay, subject to any limitations contained herein.

**5.4.2** Notwithstanding any other provision to the contrary, any delay and resulting damages that arise out of, or relate to, problems caused by Owner or for which Owner is responsible shall be resolved pursuant to Section 11.3 hereof.

## **Article 6**

### **Design Consultant's Compensation**

#### **6.1 Design Consultant's Fee.**

**6.1.1** Design Consultant's Fee shall be the compensation due Design Consultant for the performance of the Services, including all Design Phase Services, Construction Phase Services, and Additional Services, and for Reimbursable Costs, all as set forth in this Agreement. Unless otherwise provided in the Contract Documents, the Design Consultant's Fee is deemed to include all sales, use, consumer and other taxes mandated by applicable Legal Requirements.

**6.1.2** Design Consultant will be compensated for the Design Phase Services, Construction Phase Services, Additional Services, if any, and Reimbursable Costs as set forth in Exhibit \_\_\_\_\_. *(Provide for a fixed lump sum amount, hourly rates, percentage fees, or some other basis of compensation for the Services.)*

#### **6.2 Applications for Payment.**

**6.2.1** Beginning with the first month after the Date of Commencement, Design Consultant shall submit on the \_\_\_\_\_ (\_\_\_\_\_) day of each month for Design-Builder's review and approval, Design Consultant's certified Application for Payment requesting payment for all Services performed as of the date of the Application for Payment. The Application for Payment shall be accompanied by all supporting documentation required by the Contract Documents and/or established at the meeting required by Section 2.1.5 hereof. Once approved, Design-Builder will submit Design Consultant's Application for Payment to Owner with Design-Builder's application.

**6.2.2** The Application for Payment shall constitute Design Consultant's representation that (i) the Services have been performed consistent with the Contract Documents, (ii) the Services have progressed to the point indicated in the Application for Payment, (iii) Design Sub-Consultants have been paid all amounts previously received by Design Consultant on account of their services, and (iv) there are no claims, obligations or liens outstanding or unsatisfied for labor, services, taxes, or other items performed, furnished, or incurred for or in connection with the Services.

**6.2.3** Design-Builder shall make payment on Design Consultant's properly submitted and accurate Application for Payment within three (3) days after Design-Builder's receipt of payment

from Owner on account of Design Consultant's monthly Application for Payment, but in each case less the total of payments previously made, and less amounts properly withheld hereunder.

### **6.3 Retainage on Applications for Payment.**

**6.3.1** Design-Builder will not retain any funds from Design Consultant's Applications for Payment unless Owner is retaining funds from Design-Builder's progress payments for the Services, and then only in the same amount or percentage retained from Design-Builder's progress payments as set forth in the Design-Build Agreement. Unless mutually agreed otherwise between the parties, retainage (if applicable) will be released to Design Consultant within three (3) days after Design-Builder's receipt of such retained amounts from Owner.

### **6.4 Withholding of Payments.**

**6.4.1** If Design-Builder determines that Design Consultant is not entitled to all or part of an Application for Payment, it will notify Design Consultant in writing at least five (5) days prior to the date payment is due. The notice shall indicate the specific amounts Design-Builder intends to withhold, the reasons and contractual basis for the withholding, and the specific measures Design Consultant must take to rectify Design-Builder's concerns. Design-Builder and Design Consultant will attempt to resolve Design-Builder's concerns prior to the date payment is due. If the parties cannot resolve such concerns, Design-Builder shall pay Design Consultant the uncontested amount of the Application for Payment, and Design Consultant may pursue its rights under the Contract Documents, including those under Article 11 hereof.

### **6.5 Final Payment.**

**6.5.1** At the time Design Consultant submits its final Application for Payment to Design-Builder, Design Consultant shall provide (i) all deliverables required by the Contract Documents; (ii) an affidavit that there are no claims, obligations or liens outstanding or unsatisfied for or in connection with the Services which will in any way affect Design-Builder's or Owner's interests; (iii) a general release executed by Design Consultant waiving, upon receipt of final payment by Design Consultant, all claims, except those claims previously made in writing to Design-Builder and remaining unsettled at the time of final payment; and (iv) certificates of insurance confirming that required coverages will remain in effect consistent with the requirements of the Contract Documents. Design-Builder shall make payment on Design Consultant's properly submitted and accurate final Application for Payment within ten (10) days after Design-Builder's receipt of final payment from Owner on account of Design Consultant's final Application for Payment, provided also that Design Consultant has satisfied the requirements for final payment set forth herein.

### **6.6 Pay When Paid.**

**6.6.1** Design Consultant agrees that all payments to Design Consultant hereunder, whether progress or final payment, or for changes or delays to the Services, shall not be due until after Design-Builder actually receives payment on account of same from Owner. Notwithstanding the preceding sentence, Design-Builder shall pay Design-Consultant within a reasonable time if it has not been paid by the Owner unless the Owner's failure to pay the Design-Builder is caused by the Design Consultant's failure to perform in accordance with this Agreement.

### **6.7 Interest.**

**6.7.1** Payments due and unpaid under this Agreement shall bear interest commencing five (5) days after payment is due at the rate of \_\_\_\_\_ percent (\_\_\_\_\_%) per annum.

## **6.8 Design Consultant's Payment Obligations.**

**6.8.1** Design Consultant will pay Design Sub-Consultants, in accordance with its contractual obligations to such parties, all the amounts Design Consultant has received from Design-Builder on account of their services. Design Consultant will impose similar requirements on Design Sub-Consultants to pay those parties with whom they have contracted. Design Consultant will indemnify and defend Owner and Design-Builder against any claims for payment and mechanic's liens, provided Design-Builder is not in breach of its contractual obligations to make payments to Design Consultant for its Services.

## **6.9 Record Keeping and Finance Controls.**

**6.9.1** Design Consultant shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management, using accounting and control systems in accordance with generally accepted accounting principles and as may be provided in the Contract Documents. During the performance of the Services and for a period of three (3) years after final payment of the Services or such longer period as set forth in the Design-Build Agreement for the review of Design-Builder's records, Design-Builder and Design-Builder's accountants shall be afforded access to and the right to audit from time-to-time, upon reasonable notice, Design Consultant's records, books, correspondence, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to the cost of performing the Services, including changes in the Services, and reimbursable expenses all of which Design Consultant shall preserve for a period of three (3) years after final payment. Such inspection shall take place at Design Consultant's offices during normal business hours unless another location and time is agreed by the parties. Any fee (that is either a lump sum or percentage of construction cost), multipliers or markups agreed to by the Design-Builder and Design Consultant as part of this Agreement are only subject to audit to confirm that such fee, multiplier or markup has been charged in accordance with this Agreement, with the composition of such fee, multiplier or markup not being subject to audit.

# **Article 7**

## **Termination and Design Consultant's Right to Stop Services**

### **7.1 Design-Builder's Right to Terminate for Convenience.**

**7.1.1** If Owner terminates Design-Builder for any reason, then Design-Builder may terminate this Agreement. In such event, Design-Builder shall pay Design Consultant only those amounts Design-Builder actually receives from Owner on behalf of Design Consultant. Notwithstanding the preceding sentence, in the event the Design-Builder does not receive any compensation from the Owner because the Design-Builder was terminated for default, the Design-Builder is obligated to pay the Design Consultant for all services performed by the Design Consultant prior to receiving notice of the termination, providing that the Design-Builder's default was not caused by the Design Consultant's failure to perform in accordance with its obligations.

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

**7.2.1** If Design Consultant persistently fails to (i) comply with applicable Legal Requirements, (ii) timely pay, without cause, its Design Sub-Consultants, (iii) prosecute the Services with promptness and diligence so that the Services are completed by the times set forth in the Design Schedule or the Project Schedule, (iv) provide qualified, licensed design professionals, or (v) perform material obligations under the Contract Documents, then Design-Builder shall have the rights, in addition to any other rights and remedies provided in the Contract Documents or by law, set forth in Sections 7.2.2 and 7.2.3 below.

**7.2.2** Upon the occurrence of an event set forth in Section 7.2.1 above, Design-Builder may provide written notice to Design Consultant that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be cured, within seven (7) days of Design Consultant's receipt of such notice. If Design Consultant fails to cure, or reasonably commence to cure, such problem, then Design-Builder may give a second written notice to Design Consultant of its intent to terminate within an additional seven (7) day period. If Design Consultant, within such second seven (7) day period, fails to cure, or reasonably commence to cure, such problem, then Design-Builder may declare the Agreement terminated for default by providing written notice to Design Consultant of such declaration.

**7.2.3** Upon declaring the Agreement terminated pursuant to Section 7.2.2 above, Design-Builder may complete the Services in whatever fashion it deems most efficient, and shall have the right to use the existing Work Product for purposes of completing the Project, subject to Section 4.4 above. To the extent Design-Builder has been adversely impacted by Design Consultant's default and termination, Design-Builder shall be entitled to recover against Design Consultant all of Design-Builder's costs. Such costs and expense shall include not only the cost of completing the Services, but also losses, damages, costs and expense, including attorneys' fees and expenses, incurred by Design-Builder in connection with the procurement and defense of claims arising from Design Consultant's default, subject to the waiver of consequential damages set forth in Section 11.7 hereof.

### **7.3 Design Consultant's Right To Stop Services.**

**7.3.1** If (i) Owner fails to pay amounts due Design-Builder under the Design-Build Agreement for Services performed by Design Consultant, such failure is not due to the fault of Design Consultant, and Design Consultant has not been paid such amounts due, or (ii) Design-Builder fails to pay any amounts due Design Consultant under this Agreement, Design Consultant may, in addition to any other rights afforded under the Contract Documents or at law, stop work in accordance with Section 7.3.2 below.

**7.3.2** Should either of the events set forth in Section 7.3.1 above occur, Design Consultant has the right to provide Design-Builder with written notice that Design Consultant will stop work unless said failure to pay is cured within seven (7) days from Design-Builder's receipt of Design Consultant's notice. If Design-Builder does not cure the problem within such seven (7) day period, Design Consultant may stop work. In such case, Design Consultant shall be entitled to make a claim for adjustment to the Design Consultant's Fee and the Design Schedule to the extent it has been adversely impacted by such stoppage. To the extent Design-Builder's failure to pay is related to a dispute between the parties, the dispute will be resolved in accordance with Article 11, and the parties will continue performance in accordance with Section 11.6.

### **7.4 Design Consultant's Right to Terminate for Cause.**

**7.4.1** Design Consultant in addition to any other rights and remedies afforded under the Contract Documents or at law, may terminate the Agreement for cause in accordance with this Section 7.4.2 if Design-Builder has failed to cure the problems set forth in Section 7.3.2 within thirty (30) days after Design Consultant has stopped work.

**7.4.2** Upon the occurrence of the event set forth in Section 7.4.1 above, Design Consultant may provide written notice to Design-Builder that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be cured, within seven (7) days of Design-Builder's receipt of such notice. If Design-Builder fails to cure, or reasonably commence to cure, such problem, then Design Consultant may give a second written notice to Design-Builder of its intent to terminate within an additional seven (7) day period. If Design-Builder, within such second

seven (7) day period, fails to cure, or reasonably commence to cure, such problem, then Design Consultant may declare the Agreement terminated for default by providing written notice to Design-Builder of such declaration.

## **7.5 Bankruptcy of Design-Builder or Design Consultant.**

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

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

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

If the Bankrupt Party fails to comply with its foregoing obligations, the non-Bankrupt Party shall be entitled to request the bankruptcy court to reject the Agreement, declare the Agreement terminated and pursue any other recourse available to the non-Bankrupt Party under this Article 7.

**7.5.2** The rights and remedies under Section 7.5.1 above shall not be deemed to limit the ability of the non-Bankrupt Party to seek any other rights and remedies provided by the Contract Documents or by law, including its ability to seek relief from any automatic stays under the United States Bankruptcy Code.

## **Article 8**

### **Representatives of the Parties**

#### **8.1 Design-Builder's Representatives.**

**8.1.1** Design-Builder designates the individual listed below as its Senior Representative ("Design-Builder's Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under Section 11.4 hereof: *(Identify individual's name, title, address and telephone numbers)*

**8.1.2** Design-Builder designates the individual listed below as its Design-Builder's Representative, which individual has the authority and responsibility set forth in Section 3.2 hereof: *(Identify individual's name, title, address and telephone numbers)*

## **8.2 Design Consultant's Representatives.**

**8.2.1** Design Consultant designates the individual listed below as its Senior Representative ("Design Consultant's Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under Section 11.4 hereof: *(Identify individual's name, title, address and telephone numbers)*

**8.2.2** Design Consultant designates the individual listed below as its Design Consultant's Representative, which individual has the authority and responsibility set forth in Section 2.4.2 hereof: *(Identify individual's name, title, address and telephone numbers)*

## **Article 9**

### **Insurance**

#### **9.1 Design Consultant's Insurance Requirements.**

**9.1.1** Design Consultant is responsible for procuring and maintaining, from insurance companies authorized to do business in the state in which the Project is located, the insurance coverages set forth in the Insurance Exhibit, with the minimum ratings set forth in said exhibit, for certain claims which may arise from or out of the performance of this Agreement and the obligations under the Contract Documents.

**9.1.2** Design Consultant shall require its Design Sub-Consultants to procure and maintain, from insurance companies authorized to do business in the state in which the Project is located, the insurance coverages set forth in the Insurance Exhibit.

**9.1.3** Design Consultant's and its Design Sub-Consultants' insurance coverage set forth in the Insurance Exhibit shall specifically delete any design-build or similar exclusions that could compromise coverages because of the design-build delivery of the Project.

**9.1.4** To the extent Design-Builder requires Design Consultant to provide professional liability insurance for claims arising from the negligent performance of design services by Design Consultant or Design Sub-Consultants, the coverage limits, duration and other specifics of such insurance shall be set forth in the Insurance Exhibit. Such policies shall be provided prior to the commencement of any design services hereunder.

**9.1.5** Prior to commencing any services hereunder, Design Consultant shall provide Design-Builder with certificates evidencing that (i) all insurance obligations required by the Contract Documents are in full force and in effect and will remain in effect for the duration required by the

Contract Documents and (ii) no insurance coverage will be canceled, renewal refused, or materially changed unless at least thirty (30) days prior written notice is given to Design-Builder.

**9.1.6** Except as otherwise stated in the Insurance Exhibit, the insurance policies required herein shall list Design-Builder, and all other entities required by the Contract Documents, if any, as an additional insured.

**9.1.7** If any of the foregoing insurance coverages are required to remain in force after final payment, an additional certificate evidencing continuation of such coverage shall be submitted with the final Application for Payment.

## **9.2 Waiver of Subrogation.**

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

## **Article 10**

### **Indemnification**

#### **10.1 Patent and Copyright Infringement.**

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

**10.1.2** If Owner is enjoined from the operation or use of the Project, or any part thereof, as the result of any patent or copyright suit, claim, or proceeding, Design Consultant shall at its sole expense take reasonable steps to procure the right to operate or use the Project, or applicable part thereof. If Design Consultant cannot so procure such right within a reasonable time, Design Consultant shall promptly, at Design Consultant's option and at Design Consultant's expense, (i) modify the Project, or applicable part thereof, so as to avoid infringement of any patents, or copyrights, or (ii) replace said work with work that does not infringe or violate any such patent or copyright, and is consistent with the Contract Documents.

**10.1.3** Sections 10.1.1 and 10.1.2 above shall not be applicable to any suit, claim or proceeding based on infringement or violation of a patent or copyright (i) relating solely to a particular process or product of a particular manufacturer specified by Owner or Design-Builder and not offered or recommended by Design Consultant to Owner or Design-Builder; or (ii) arising from modifications

to the Project by Owner or Design-Builder after acceptance of the Project. If the suit, claim or proceeding is based upon events set forth in the preceding sentence, Design-Builder shall defend, indemnify and hold harmless Design Consultant to the same extent Design Consultant is obligated to defend, indemnify and hold harmless Design-Builder in Section 10.1.1 above.

**10.1.4** The obligations set forth in this Section 10.1 shall constitute the sole agreement between the parties relating to liability for infringement or violation of any patent or copyright.

## **10.2 Design Consultant's General Indemnification.**

**10.2.1** Design Consultant, to the fullest extent permitted by law, shall indemnify and hold harmless Owner, Design-Builder and their officers, directors, employees and agents from and against losses, and damages, including attorneys' fees and expenses, for bodily injury, sickness or death, and property damage or destruction (other than to the Work itself) to the extent resulting from the negligent acts or omissions of Design Consultant, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable.

**10.2.2** If an employee of Design Consultant, anyone employed directly or indirectly by Design Consultant or anyone for whose acts any of them may be liable has a claim against any party indemnified pursuant to Section 10.2.1 above, Design Consultant's indemnity obligation set forth in Section 10.2.1 above shall not be limited by any limitation on the amount of damages, compensation or benefits payable by or for Design Consultant, or other entity under any employee benefit acts, including workers' compensation or disability acts.

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

**10.3.1** Design-Builder, to the fullest extent permitted by law, shall indemnify and hold harmless Design Consultant and its officers, directors, employees and agents from and against losses and damages, including attorneys' fees and expenses, for bodily injury, sickness or death, and property damage or destruction (other than to the Work itself) to the extent resulting from the negligent acts or omissions of Design-Builder, anyone employed directly or indirectly by Design-Builder or anyone for whose acts Design-Builder may be liable.

**10.3.2** If an employee of Design-Builder, anyone employed directly or indirectly by Design-Builder or anyone for whose acts Design-Builder may be liable has a claim against any party indemnified pursuant to Section 10.3.1 above, Design-Builder's indemnity obligation set forth in Section 10.3.1 above shall not be limited by any limitation on the amount of damages, compensation or benefits payable by or for Design-Builder or other entity under any employee benefit acts, including workers' compensation or disability acts.

# **Article 11**

## **Contract Adjustments and Disputes**

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

**11.1.1** If either Design Consultant or Design-Builder believes that it is entitled to relief against the other for any event arising out of or related to the Services or the Project, such party shall provide written notice to the other party of the basis for its claim for relief. Such notice shall be in accordance with specific notice requirements contained in applicable sections of the Contract Documents and, if possible, be made prior to incurring any cost or expense. Design Consultant shall provide Design-Builder written notice of claims for which Owner may be responsible, including but not limited to changes in the Basis of Design Documents, in sufficient time for Design-Builder to meet its notice requirements to Owner set forth in the Contract Documents. In

the absence of any specific notice requirement, written notice shall be given within a reasonable time, not to exceed ten (10) days, after the occurrence giving rise to the claim for relief or after the claiming party reasonably should have recognized the event or condition giving rise to the request, whichever is later. Such notice shall be in accordance with the Contract Documents and shall include sufficient information to advise the other party of the circumstances giving rise to the claim for relief, the specific contractual adjustment or relief requested and the basis of such request. Design Consultant shall comply with all documentation requirements set forth in the Design-Build Agreement when submitting its claim to Design-Builder.

## **11.2 Dispute Avoidance and Resolution.**

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

## **11.3 Disputes Involving Owner.**

**11.3.1** To the extent a claim, dispute or controversy arises out of, or relates to, problems caused by Owner or for which Owner is responsible ("Owner Disputes"), such Owner Disputes shall be resolved pursuant to the dispute resolution clause set forth in the Design-Build Agreement. Both Design-Builder and Design Consultant agree to cooperate in the presentation and prosecution or defense of Owner Disputes. If, after a request for an extension of time or additional compensation from Design Consultant, Design-Builder believes that the event causing the delay or additional compensation is the responsibility of Owner, then Design-Builder will cooperate with and assist Design Consultant in presenting a request for an extension of time or additional compensation to Owner. Notwithstanding the above, Design-Builder reserves the right not to submit a claim to Owner. In such cases, the claim shall be resolved pursuant to Section 11.4.

**11.3.2** Notwithstanding any other provisions herein to the contrary, Design-Builder and Design Consultant each agree to accept the relief as to a time extension or additional compensation obtained from Owner, if any, as well as all other aspects of the final decision following appeal or the expiration of the time for appeal, as full and final resolution of any Owner Dispute.

**11.3.3** If Design-Builder asserts a claim against Owner involving Design Consultant, each party shall bear its own costs for outside counsel and third-party consultants retained to prosecute claims against Owner and for any other litigation costs. Each party shall present its portion of the claim to Owner.

**11.3.4** If Owner contends that the Contract Documents have been breached, or otherwise asserts a claim or set-off against Design-Builder, the party determined to be responsible for the breach either by settlement or by the trier of fact shall be responsible for all costs occasioned by the breach, including counsel and litigation costs. If the trier of fact fails to determine the relative degrees of fault of Design-Builder and Design Consultant in connection with any claim by Owner, then Design-Builder and Design Consultant agree that the allocation of fault shall be determined pursuant to Section 11.4.

## **11.4 Disputes Not Involving Owner.**

**11.4.1** For any claim, dispute or controversy not arising out of, or relating to, problems caused by Owner or for which Owner is responsible, Design Consultant and Design-Builder will first attempt to resolve such claim, dispute or controversy at the field level through discussions between Design-Builder's Representative and Design Consultant's Representative.

**11.4.2** If a claim, dispute or controversy cannot be resolved through Section 11.4.1, Design-Builder's Senior Representative and Design Consultant's Senior Representative, upon the request of either party, shall meet as soon as conveniently possible, but in no case later than thirty (30) days after such a request is made, to attempt to resolve such claim, dispute or controversy. Five (5) days prior to any meetings between the Senior Representatives, the parties will exchange relevant information that will assist the parties in resolving the claim, dispute or controversy.

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

## **11.5 Arbitration**

**11.5.1** Any claims, disputes or controversies between the parties arising out of or relating to the Agreement, or the breach thereof, which has not been resolved in accordance with the procedures set forth in Section 11.4 above, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the AAA then in effect, unless the parties mutually agree otherwise.

**11.5.2** The award of the arbitrator(s) shall be final and binding upon the parties without the right of appeal to the courts. Judgment may be entered upon it in accordance with applicable law by any court having jurisdiction thereof.

**11.5.3** Design Consultant and Design-Builder expressly agree that any arbitration pursuant to this Section 11.5 may be joined or consolidated with any arbitration involving any other person or entity (i) necessary to resolve the claim, dispute or controversy, or (ii) substantially involved in or affected by such claim, dispute or controversy. Both Design-Builder and Design Consultant will include appropriate provisions in all contracts they execute with other parties in connection with the Project to require such joinder or consolidation.

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

## **11.6 Duty to Continue Performance.**

**11.6.1** Unless provided to the contrary in the Contract Documents, Design Consultant shall continue to perform the Services and Design-Builder shall continue to satisfy its payment obligations to Design Consultant, pending the final resolution of any dispute or disagreement between Design-Builder and Design Consultant.

## **11.7 CONSEQUENTIAL DAMAGES.**

**11.7.1** NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY (EXCEPT AS SET FORTH IN SECTION 11.7.2 BELOW), NEITHER DESIGN-BUILDER NOR DESIGN CONSULTANT SHALL BE LIABLE TO THE OTHER FOR ANY CONSEQUENTIAL LOSSES OR DAMAGES, WHETHER ARISING IN CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, INCLUDING BUT NOT LIMITED TO LOSSES OF USE, PROFITS, BUSINESS, REPUTATION OR FINANCING.

**11.7.2** Notwithstanding Section 11.7.1 above, Design-Builder shall be entitled to recover against Design Consultant (i) any liquidated damages that Owner may assess against Design-Builder which are attributable to Design Consultant, even though both parties recognize that such liquidated damages may include some damages that might otherwise be deemed to be consequential and (ii) consequential damages that may be imposed upon Design-Builder by the Design-Build Agreement.

## **Article 12**

### **Miscellaneous**

#### **12.1 Assignment.**

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

#### **12.2 Successorship.**

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

#### **12.3 Governing Law.**

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

#### **12.4 Severability.**

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

#### **12.5 No Waiver.**

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

## **12.6 Headings.**

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

## **12.7 Notice.**

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

## **12.8 Amendments.**

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

## **12.9 Survival.**

**12.9.1** Design Consultant's obligations under this Agreement shall not be released, and shall specifically survive, the completion of all Services hereunder, final payment to Design Consultant, and the termination of this Agreement for any reason.

# **Article 13**

## **Electronic Data**

### **13.1 Electronic Data.**

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

### **13.2 Transmission of Electronic Data.**

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

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

**13.2.3** By transmitting Work Product in electronic form, the transmitting party does not transfer or assign its rights in the Work Product. The rights in the Electronic Data shall be as set forth in Article 4 of the Agreement. Under no circumstances shall the transfer of ownership of Electronic

Data be deemed to be a sale by the transmitting party of tangible goods.

### **13.3 Electronic Data Protocol.**

**13.3.1** The parties acknowledge that Electronic Data may be altered or corrupted, intentionally or otherwise, due to occurrences beyond their reasonable control or knowledge, including but not limited to compatibility issues with user software, manipulation by the recipient, errors in transcription or transmission, machine error, environmental factors, and operator error. Consequently, the parties understand that there is some level of increased risk in the use of Electronic Data for the communication of design and construction information and, in consideration of this, agree, and shall require their independent contractors, Subcontractors and Design Sub-Consultants to agree, to the following protocols, terms and conditions set forth in this Section 13.3.

**13.3.2** Electronic Data will be transmitted in the format determined in Section 13.2.1 above, including file conventions and document properties, unless prior arrangements are made in advance in writing.

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

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

**13.4** In the event the Design-Build Agreement contains a provision governing Electronic Data, and there is a conflict between the provision in the Design-Build Agreement and this Article 13, the provision in the Design-Build Agreement takes precedence notwithstanding the order of precedence set forth in Section 1.4.2.

## **Article 14**

### **Confidential Information**

#### **14.1 Confidential and/or Proprietary Information.**

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

**14.1.2** Design Consultant may receive information from Design-Builder that is either confidential or proprietary to either Design-Builder or to Owner. Such information shall be labeled as confidential and/or proprietary. Design Consultant agrees to maintain the confidential nature of

such information and to execute any such additional agreements as may be required by Owner or Design-Builder with respect to such information.

**14.1.3** In the event the Design-Build Agreement contains a provision governing Confidential Information, and there is a conflict between the provision in the Design-Build Agreement and this Article 14, the provision in the Design-Build Agreement takes precedence notwithstanding the order of precedence set forth in Section 1.4.2.

## **Article 15**

### **Other Provisions**

**15.1 Other provisions, if any, are as follows:**

*(Insert any additional provisions such as incentives or other provisions from the Design-Build Agreement that the parties believe are appropriate to be passed through to the Design Consultant).*

**[Section 2.2.1 sets forth a traditional negligence standard as it relates to Design Consultant's performance of its Services. If the Basis of Design Documents identify specific performance standards that can be objectively measured, the parties, by including the following language, agree that the Design Consultant is obligated to achieve such standards.]**

Notwithstanding Section 2.2.1 above, if the Design-Build Agreement, including but not limited to the Basis of Design Documents, contain specifically identified performance standards for aspects of the Work, Design Consultant agrees that all Services shall be performed to achieve such standards.

***[In lieu of Sections 11.5.1 through 11.5.3 of the Agreement, the parties may want to delete such sections and include the following alternative dispute resolution clause.]***

Any claims, disputes, or controversies between the parties arising out of or related to the Agreement, or the breach thereof, which have not been resolved in accordance with the procedures set forth in Section 11.4 herein shall be resolved in a court of competent jurisdiction in the state in which the Project is located.

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

**DESIGN-BUILDER:**

\_\_\_\_\_  
*(Name of Design-Builder)*

\_\_\_\_\_  
*(Signature)*

\_\_\_\_\_  
*(Printed Name)*

\_\_\_\_\_  
*(Title)*

Date: \_\_\_\_\_

**DESIGN CONSULTANT:**

\_\_\_\_\_  
*(Name of Design Consultant)*

\_\_\_\_\_  
*(Signature)*

\_\_\_\_\_  
*(Printed Name)*

\_\_\_\_\_  
*(Title)*

Date: \_\_\_\_\_

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