

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

## Document No. 535

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Washington, D.C.





## Design-Build Institute of America - Contract Documents

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- 8. Acknowledgment.** 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.

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# **Article 1**

## **General**

### **1.1 Definitions.**

**1.1.1** *Agreement* refers to the contract between Owner and Design-Builder, DBIA Document No. 545, *Standard Form of Progressive Design-Build Agreement for Water and Wastewater Projects* (2022 Edition), as amended.

**1.1.2** *Basis of Design Documents* are Owner's Project Criteria, attached to the Agreement as Exhibit A, the Design-Builder's Proposal, attached to the Contract Price Amendment, and the Deviation List, if any, also attached as an exhibit to the Contract Price Amendment.

**1.1.3** *Construction Documents* are defined in the Agreement and consisting of the Agreement, contract change orders or modifications, drawings, technical specifications, these General Conditions of Contract, performance and payment bonds, and Owner's insurance rider.

**1.1.4** *Contract Price* means the agreed sum that Owner shall pay Design-Builder for performance of the Work.

**1.1.5** *Contract Time* shall mean the agreed amount of time, measured in days, in which Design-Builder shall complete the Work.

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

**1.1.5** *Design-Build Team* is comprised of Design-Builder and all subconsultants, subcontractors, and any other entity under the direction, control, or supervision of the Design-Builder for the Project.

**1.1.6** *Design Consultant* is a subconsultant, whom the Design-Builder has determined to be a qualified, licensed design professional who is not an employee of Design-Builder and who is retained by Design-Builder, or employed or retained by anyone under contract with Design-Builder, to furnish design services required under the Contract Documents.

**1.1.7** *Design Submission* means any and all deliverables, work product, documents, shop drawings, electronic information, including computer programs and computer generated materials, data, plans, drawings, sketches, illustrations, specifications, descriptions, models, and other information developed, prepared, furnished, delivered or required to be delivered by, for, or through Design-Builder for the Project.

**1.1.8** *Final Completion* is the date on which all Work is complete in accordance with the Contract Documents and Design-Builder has fully complied with all conditions precedent to receipt of final payment.

**1.1.9** *Force Majeure Events* are those events that are beyond the control of both Design-Builder and Owner, including the events of war, floods, labor disputes, earthquakes, epidemics, adverse weather conditions not reasonably anticipated, and other acts of God.

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

**1.1.12** *Guaranteed Maximum Price (GMP)* means the maximum amount of payment by Owner for the Work.

**1.1.13** *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.

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

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

**1.1.16** *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 is attached to the Agreement as Exhibit A.

**1.1.17** *Parties* means both Owner and Design-Builder.

**1.1.18** *Site* is the land or premises on which the Project is located and identified in the Owner's Project Criteria.

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

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

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

**1.1.22** *Substantial Completion* or *Substantially Complete* means the date on which the Work, or an agreed upon portion of the Work, is sufficiently complete in accordance with the Contract Documents so that Owner can occupy and use the Project or a portion thereof for its intended purposes.

**1.1.23** *Work* is comprised of all Design-Builder's design, construction and other services required by the Contract Documents, including procuring and furnishing all materials, equipment, services and labor reasonably inferable from the Contract Documents.

## **Article 2**

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

#### **2.1 General Services.**

**2.1.1** Design-Builder's Representative shall be reasonably available to Owner and shall have the necessary expertise and experience required to supervise the Work. Design-Builder's

Representative shall communicate regularly with Owner and shall be vested with the authority to act on behalf of Design-Builder. Design-Builder's Representative may be replaced only with Owner's consent, which shall not be unreasonable withheld.

**2.1.2** Unless the parties agree on a different time period for submission of a status report, Design-Builder shall provide Owner with a monthly status report detailing the progress of the Work and any items that may affect the progress or cost of the Work.

**2.1.3** Design-Builder shall prepare and submit to Owner baseline schedules at the commencement of each Phase as described in section 1.2 of the Agreement. The baseline schedule must be provided to Owner no later than three (3) days following execution of the Agreement or Phase 1 and the Contract Price Amendment for Phase 2.

2.1.3.1 All baseline and progress schedules shall indicate the dates for the start and completion of the various stages of Work. Construction schedules must utilize critical path methodology and track any impacts to the critical path from prior activities. The schedule shall be revised as required by conditions and progress, but not less than once per month, and provided to the Owner and displayed at the Site. Schedules are not Contract Documents and shall not relieve Design-Builder of its obligations to complete the Work within the Contract Time.

**2.1.4** The Owner and Design-Builder shall meet within seven (7) days following execution of the Agreement and the Contract Price Amendment to discuss issues affecting the administration of the Work, implementation of necessary procedures to facilitate performance, including those relating to submittals and payment, milestones and other matters affecting the scope of Design-Builder's work or the Work itself.

## **2.2 Design Professional Services.**

**2.2.1** Design-Builder shall comply with all applicable state licensing requirements. Design-Builder shall provide all necessary design services, including architectural, engineering and other design professional services, for the preparation of the required drawings, specifications and other design submittals to permit Design-Builder to complete the Work in accordance with the Owner's Project Criteria and the Contract Documents.

**2.2.2** Design-Builder shall employ only Design Consultants and/or Design Subconsultants who are duly licensed and qualified to perform the Work. Design-Builder shall identify in writing to Owner all Design Consultants and Design Subconsultants. Design-Builder shall not substitute a listed Design Consultant or Subconsultant without obtaining Owner's prior written consent; such consent shall not be unreasonably withheld.

## **2.3 Standard of Care for Design Professional Services.**

**2.3.1** Design-Builder, and all Design Consultants and subconsultants shall provide services in accordance with the Texas Occupations Code and all applicable legal standards of care applicable to design professionals by utilizing the degree of care and skill ordinarily employed by members of the same profession practicing under similar conditions at the same time and locality of the Project.

## **2.4 Design Development Services.**

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

**2.4.1.1** Design Submissions shall be consistent with the Owner's Project Criteria as well as the Basis of Design Documents. By submitting Design Submissions, Design-Builder

represents to the Owner that the Work depicted and otherwise shown, contained, or reflected in Design Submissions may be constructed in compliance with the then current Contract Price and Contract Time. Notwithstanding the above, Design-Builder may propose Design Submissions that may alter the Basis of Design Documents, the Contract Price and/or Contract Time; however, Design-Builder must provide notice thereof in accordance with Article 10 of the General Conditions and obtain a Change Order before such proposed Design Submissions are incorporated into the Construction Documents.

**2.4.1.2** On or about the time of the Design Submissions, Design-Builder and Owner shall meet and confer about the Design Submissions, with Design-Builder identifying during such meetings, among other things, the evolution of the design and any changes to the Basis of Design Documents, or, if applicable, previously submitted Design Submissions. Minutes of the meetings, including a full listing of all changes, will be maintained by Design-Builder.

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

**2.4.2** Design-Builder shall submit to Owner Construction Documents setting forth in detail drawings and specifications describing the requirements for construction of the Work. The Construction Documents shall be consistent with the latest set of interim Design Submissions, as such submissions may have been modified in a design review meeting and recorded in the meeting minutes. Design-Builder shall proceed with construction only following the dual execution of the Contract Price Amendment. One set of approved Construction Documents shall be provided to Owner with the GMP Proposal.

**2.4.3** Owner's review of interim Design Submissions, meeting minutes, and the Construction Documents is for the purpose of mutually establishing a conformed set of Contract Documents compatible with the requirements of the Work. Owner's review of any interim Design Submissions, meeting minutes, and Construction Documents does not transfer any design liability from Design-Builder to Owner. Design-Builder shall provide Owner with sufficient time in the Project Schedule to review and approve the Design Submissions.

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

## **2.5 Legal Requirements.**

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

## **2.6 Government Approvals and Permits.**

**2.6.1** Except as may be expressly identified in the Contract Documents as an Owner obligation, Design-Builder shall obtain and pay for all necessary permits, approvals, licenses, government charges and inspection fees required for the prosecution of the Work by any government or quasi-government entity having jurisdiction over the Project.

**2.6.2** The Parties shall provide reasonable assistance to each other in obtaining permits, approvals and licenses required for the Work.

## **2.7 Design-Builder's Construction Phase Services.**

**2.7.1** Design-Builder shall provide the necessary supervision, labor, inspection, testing, start-up, material, equipment, machinery, temporary utilities and other temporary facilities to permit Design-Builder to complete construction of the Project.

**2.7.2** Design-Builder shall perform the Work in accordance with the Contract Documents. The Design-Builder shall not be relieved of this obligation by the activities, tests, inspections or approvals of the Owner. Design-Builder shall perform all construction activities efficiently and in a good and workmanlike manner. Design-Builder shall at all times exercise complete and exclusive control over the means, methods, sequences and techniques of construction.

**2.7.3** The Design-Builder shall perform the Work in compliance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities. If the Design-Builder performs Work contrary to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities, the Design-Builder shall assume responsibility for such Work and shall bear the costs attributable to correction.

**2.7.4** Design-Builder assumes responsibility to Owner for the performance of the Work and any acts and omissions in connection with such performance.

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

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

## **2.8 Design-Builder's Responsibility for Project Safety.**

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

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



## **2.9 Design-Builder's Warranty.**

**2.9.1** Design-Builder warrants and guarantees for one (1) year from Final Completion, or for a longer period if expressly stated in the Contract Documents, the Work. This includes a Warranty and Guarantee against any and all defects. The Design-Builder must correct any and all defects in material and/or workmanship which may appear during the Warranty and Guarantee period, or any defects that occur within one (1) year of Final Completion even if discovered more than one (1) year after Final Completion, by repairing (or replacing with new items or new materials, if necessary) any such defect at no cost to the Owner, within a reasonable period of time, and to the Owner's satisfaction.

**2.9.2** Design-Builder's general warranty and any additional or special warranties are not limited by the Design-Builder's obligations to specifically correct defective or nonconforming Work, nor are they limited by any other remedies provided in the Contract Documents.

**2.9.3** The Design-Builder must furnish all special warranties required by the Design-Build Documents to the Owner no later than Final Completion.

## **2.10 Correction of Defective Work.**

**2.10.1** Design-Builder agrees to correct any Work that is found to not be in conformance with the Contract Documents.

**2.10.2** Design-Builder shall, within seven (7) days of receipt of written notice from Owner that the Work is not in conformance with the Contract Documents, take meaningful steps to commence correction of such nonconforming Work, including the correction, removal or replacement of the nonconforming Work and any damage caused to other parts of the Work affected by the nonconforming Work.

**2.10.3** If Design-Builder fails to comply with its obligation to correct nonconforming Work, Owner, in addition to any other remedies provided under the Contract Documents, may perform such corrective Work or withhold sufficient funds from Design-Builder to fund corrective measures. Regardless of chosen remedy by Owner, Design-Builder shall be responsible for all reasonable costs incurred by Owner in performing such correction.

# **Article 3**

## **Owner's Services and Responsibilities**

### **3.1 Duty to Cooperate.**

**3.1.1** Owner shall, throughout the performance of the Work, cooperate with Design-Builder and perform its responsibilities, obligations and services in a timely manner to facilitate Design-Builder's timely and efficient performance of the Work.

**3.1.2** Owner shall provide timely reviews and approvals of interim Design Submissions and Construction Documents consistent with the turnaround times set forth in Design-Builder's schedule.

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

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

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

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

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

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

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

**3.2.1.6** To the extent available, environmental studies, reports and impact statements describing the environmental conditions, including Hazardous Conditions, in existence at the Site.

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

### **3.3 Financial Information.**

**3.3.1** At Design-Builder's written request, Owner shall promptly furnish reasonable evidence satisfactory to Design-Builder that Owner has adequate funds available and committed to fulfill all of Owner's contractual obligations under the Contract Documents.

### **3.4 Owner's Representative.**

**3.4.1** Owner's Representative shall be responsible for providing Owner-supplied information and approvals in a timely manner to permit Design-Builder to fulfill its obligations under the Contract Documents. Owner's Representative shall communicate regularly with Design-Builder but may not bind Owner to any contractual agreement or obligations absent an express delegation of authority by Owner's city council.

### **3.5 Owner's Separate Contractors.**

**3.5.1** Owner is responsible for all work performed on the Project or at the Site by separate contractors under Owner's control. Owner shall contractually require its separate contractors to cooperate with and coordinate their activities so as not to interfere with Design-Builder.

## **Article 4**

### **Hazardous Conditions and Differing Site Conditions**

#### **4.1 Hazardous Conditions.**

**4.1.1** Unless otherwise expressly provided in the Contract Documents to be part of the Work, Design-Builder is not responsible for any Hazardous Conditions encountered at the Site. Upon encountering any Hazardous Conditions, Design-Builder will stop Work immediately in the affected area and duly notify Owner and, if required by Legal Requirements, all government or quasi-government entities with jurisdiction over the Project or Site.

**4.1.2** Upon receiving notice of the presence of suspected Hazardous Conditions, Owner shall take the necessary measures required to ensure that the Hazardous Conditions are remediated or rendered harmless. Such necessary measures may include Owner retaining qualified independent professionals to (i) ascertain whether Hazardous Conditions have actually been encountered, and, if they have been encountered, (ii) prescribe the remedial measures that Owner must take either to remove the Hazardous Conditions or render the Hazardous Conditions harmless.

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

**4.1.4** Notwithstanding the preceding provisions of this Section 4.1, Owner is not responsible for Hazardous Conditions introduced to the Site by Design-Builder, Subcontractors or anyone for whose acts they may be liable. To the fullest extent permitted by law, Design-Builder shall indemnify, defend and hold harmless Owner and Owner's officers, directors, employees and agents from and against all claims, losses, damages, liabilities and expenses, including attorneys' fees and expenses, arising out of or resulting from those Hazardous Conditions introduced to the Site by Design-Builder, Subcontractors or anyone for whose acts they may be liable.

## **4.2 Differing Site Conditions.**

**4.2.1** Design-Builder assumes the risk of unknown or concealed subsurface conditions at the Site. Design-Builder shall have unrestricted access to evaluate, test, explore, survey, and identify all conditions, including subsurface conditions, at the Site during the entirety of the Project. Design-Builder will not be entitled to an increase in the Contract Price and/or Contract Time unless Owner has made express representations concerning conditions at the Site which were incorrect and upon which Design-Builder can demonstrate reliance and actual impact to the Contract Price or Contract Time

# **Article 5**

## **Insurance and Bonds**

### **5.1 Design-Builder's Insurance Requirements.**

**5.1.1** Design-Builder is responsible for procuring and maintaining the insurance for the coverage amounts all as set forth in Owner's Insurance Rider.

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

**5.1.3** Prior to commencement of any Work under the Agreement, Design-Builder shall provide Owner with proof of insurance in compliance with all insurance obligations required by the Contract Documents.

### **5.2 Owner's Liability Insurance.**

**5.2.1** Owner is a municipality of the State of Texas and maintains insurance through the intergovernmental risk pool. Proof of insurance will not be provided by Owner to Contractor.

### **5.3 Bonds and Other Performance Security.**

**5.3.1** Design-Builder shall provide performance and payment bonds in compliance with chapter 2253 of the Texas Government Code. Design-Builder shall provide statutorily required bonds within 10 days of execution of the Agreement. If Design-Builder provides other fiscal security to the satisfaction of Owner, the provision of bonds may be delayed until the first 10 days within execution of the Contract Price Amendment. However, in no event shall any construction activity commence without the prior provision of valid bonds to Owner.

**5.3.2** All bonds furnished by Design-Builder shall be in a form satisfactory to Owner. The surety shall be a company qualified and registered to conduct business in the state of Texas.

## **Article 6**

### **Payment**

#### **6.1 Schedule of Values.**

**6.1.1** Within ten (10) days of execution of the Agreement, Design-Builder shall submit for Owner's review and approval a schedule of values for the Work required for Phase 1. Design-Builder shall provide its schedule of values for Phase Two work as an exhibit to the Contract Price Amendment. The Schedule of Values will (i) subdivide the Work into its respective parts; (ii) include values for all items comprising the Work; and (iii) serve as the basis for monthly progress payments made to Design-Builder throughout the Work.

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

#### **6.2 Monthly Progress Payments.**

**6.2.1** On or before the date established in the Agreement, Design-Builder shall submit for Owner's review and approval its Application for Payment requesting payment for all Work performed as of the date of the Application for Payment. The Application for Payment shall be accompanied by all supporting documentation required by the Contract Documents.

**6.2.2** The Application for Payment may request payment for equipment and materials not yet incorporated into the Project, provided that (i) Owner is satisfied that the equipment and materials are suitably stored at either the Site or another acceptable location; (ii) the equipment and materials are protected by suitable insurance; and (iii) upon payment, Owner will receive the equipment and materials free and clear of all liens and encumbrances.

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

#### **6.3 Withholding of Payments.**

**6.3.1** On or before the date established in the Agreement, Owner shall pay Design-Builder all amounts properly due. If Owner determines that Design-Builder is not entitled to all or part of an Application for Payment as a result of Design-Builder's failure to meet its obligations hereunder, it

will notify Design-Builder in writing at least five (5) days prior to the date payment is due. The notice shall indicate the specific amounts Owner intends to withhold, the reasons and contractual basis for the withholding, and the specific measures Design-Builder must take to rectify Owner's concerns. When Owner's basis for withholding has been addressed by Design-Builder, Owner shall pay withheld amounts to Design-Builder.

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

#### **6.4 Design-Builder's Payment Obligations.**

**6.4.1** Design-Builder will pay Design Consultants and Subcontractors, in accordance with its contractual obligations to such parties, all the amounts Design-Builder has received from Owner on account of their work. Design-Builder will impose similar requirements on Design Consultants and Subcontractors to pay those parties with whom they have contracted.

**6.4.2** Design-Builder acknowledges that funds received from Owner for the benefit of all downstream payees are construction trust funds. Design-Builder shall comply with the provisions of the Texas Trust Fund Act, Chapter 162 of the Texas Property Code. With respect to payments made by the Owner, such funds are considered Trust Funds and shall be safeguarded and used as represented by Design-Builder to pay any consultants and subcontractors that may be due payment pursuant to the schedule of values.

#### **6.6 Substantial Completion.**

**6.6.1** Design-Builder shall notify Owner when it believes the Work, or to the extent permitted in the Contract Documents, a portion of the Work, is Substantially Complete. Within five (5) days of Owner's receipt of Design-Builder's notice, Owner and Design-Builder will jointly inspect such Work to verify that it is Substantially Complete in accordance with the requirements of the Contract Documents. If such Work is Substantially Complete, Design-Builder shall prepare and issue to Owner, for its acceptance and approval, a Certificate of Substantial Completion that will set forth (i) the date of Substantial Completion of the Work or portion thereof; (ii) the remaining items of Work that have to be completed before final payment; and (iii) provisions (to the extent not already provided in the Contract Documents) establishing Owner's and Design-Builder's responsibility for the Project's security, maintenance, utilities and insurance pending final payment..

**6.6.2** Upon Substantial Completion of the entire Work or, if applicable, any portion of the Work, Owner shall release to Design-Builder retained amounts as provided in the Agreement.

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

#### **6.7 Final Payment.**

**6.7.1** After receipt of a final pay application, Owner shall make payment by the time required in the Agreement, provided that Design-Builder has achieved Final Completion.

**6.7.2** At the time of submission of its Final Application for Payment, Design-Builder shall provide the following as a condition precedent to final payment:

**6.7.2.1** All documentation required to by the Contract Documents or a declaration by Design-Builder that said documents have been previously provided to Owner.

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

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

**6.7.2.4** A list of all claims previously made in writing that Design-Builder believes remain unresolved;

**6.7.2.5** Consent of Design-Builder's surety to final payment;

**6.7.2.6** satisfactory evidence that title to all Work, materials, and equipment has passed to Owner free and clear of any Liens or other title defects, or will so pass upon final payment.

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

## **Article 7**

### **Indemnification**

#### **7.1 Patent and Copyright Infringement.**

**7.1.1** Design-Builder shall defend any action or proceeding brought against Owner based on any claim that the Work, or any part thereof, or the operation or use of the Work or any part thereof, constitutes infringement of any United States patent or copyright, now or hereafter issued. Owner shall give prompt written notice to Design-Builder of any such action or proceeding and will reasonably provide authority, information and assistance in the defense of same. Design-Builder agrees to keep Owner informed of all developments in the defense of such actions.

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

**7.1.3** Sections 7.1.1 and 7.1.2 above shall not be applicable to any suit, claim or proceeding based on infringement or violation of a patent or copyright (i) relating solely to a particular process or product of a particular manufacturer specified by Owner and not offered or recommended by Design-Builder to Owner; or (ii) arising from modifications to the Work by Owner or its agents after acceptance of the Work.

#### **7.2 Tax Claim Indemnification.**

**7.2.1** Owner enjoys tax-exempt status as a municipality. To enjoy the cost-savings benefits of its tax-exempt status, the Owner will provide a Tax Exemption Certificate to Design-Builder for use on the Project. Design-Builder shall use that certificate to exempt any purchases made for the Work from taxes. All savings for the tax-exempt status will be passed on to the Owner by Design-Builder. Design-Builder agrees to bind all Subcontractors of any tier to the obligation to present and use the tax exemption certificate and pass all savings to the Owner. Design-Builder shall indemnify Owner from any costs and expenses for tax liability to which the exemption applies or should have applied.

### **7.3 Payment Claim Indemnification.**

**7.3.1** Provided that Owner is not in breach of its contractual obligation to make payments to Design-Builder, Design-Builder shall indemnify, defend and hold harmless Owner from any claims, assertion of liens, or other payment claims brought against Owner as a result of the alleged failure of Design-Builder, or those for whose acts it is responsible, to pay for any services, materials, labor, equipment, taxes or other items or obligations furnished or incurred for or in connection with the Work. Within three (3) days of receiving written notice from Owner that such a claim or assertion of lien has been filed, Design-Builder shall commence to take the steps necessary to discharge said claim or lien.

### **7.4 Design-Builder's Indemnification of Owner.**

**7.4.1 TO THE FULLEST EXTENT PERMITTED BY LAW, DESIGN-BUILDER SHALL INDEMNIFY AND HOLD HARMLESS OWNER, ITS OFFICIALS, EMPLOYEES, AGENTS, AND REPRESENTATIVES (HEREINAFTER REFERRED TO INDIVIDUALLY AS AN "INDEMNITEE" AND COLLECTIVELY AS THE "INDEMNITEES") FROM AND AGAINST ALL CLAIMS, DAMAGES, LOSSES AND EXPENSES, INCLUDING BUT NOT LIMITED TO REASONABLE ATTORNEYS' FEES AND COSTS INCURRED BY INDEMNITEES WHICH ARE:**

**7.4.1.1 DUE TO THE VIOLATION OF ANY ORDINANCE, REGULATION, STATUTE, OR OTHER LEGAL REQUIREMENT IN THE PERFORMANCE OF THIS AGREEMENT, BY THE DESIGN-BUILDER, ITS AGENT, INCLUDING ANY ENGINEER, ARCHITECT, CONTRACTOR, OR SUBCONTRACTOR, ANY CONSULTANT UNDER CONTRACT, OR ANY OTHER ENTITY OVER WHICH THE PROFESSIONAL EXERCISES CONTROL;**

**7.4.1.2 CAUSED BY OR RESULTING FROM ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION IN VIOLATION OF DESIGN-BUILDER'S STANDARD OF CARE, BY THE DESIGN-BUILDER, ITS AGENT, INCLUDING ANY ENGINEER, ARCHITECT, CONTRACTOR, OR SUBCONTRACTOR, ANY CONSULTANT UNDER CONTRACT, OR ANY OTHER ENTITY OVER WHICH THE DESIGN-BUILDER EXERCISES CONTROL;**

**7.4.1.3 CAUSED BY OR RESULTING FROM ANY CLAIM ASSERTING INFRINGEMENT OR ALLEGED INFRINGEMENT OF A PATENT, TRADEMARK, COPYRIGHT OR OTHER INTELLECTUAL PROPERTY RIGHT IN CONNECTION WITH THE INFORMATION FURNISHED BY OR THROUGH THE DESIGN-BUILDER, ITS AGENT, INCLUDING ANY ENGINEER, ARCHITECT, CONTRACTOR, OR SUBCONTRACTOR, ANY CONSULTANT UNDER CONTRACT, OR ANY OTHER ENTITY OVER WHICH THE DESIGN-BUILDER EXERCISES CONTROL;**

**7.1.4.4 DUE TO THE FAILURE OF THE DESIGN-BUILDER, ITS AGENT, INCLUDING ANY ENGINEER, ARCHITECT, CONTRACTOR, OR SUBCONTRACTOR, ANY CONSULTANT UNDER CONTRACT, OR ANY OTHER ENTITY OVER WHICH THE DESIGN-BUILDER EXERCISES CONTROL TO PAY THEIR CONSULTANTS OR SUBCONSULTANTS AMOUNTS DUE FOR SERVICES PROVIDED IN CONNECTION WITH THE PROJECT; OR**

**7.1.4.5 OTHERWISE ARISING OUT OF OR RESULTING FROM THE PERFORMANCE OF THE SERVICES UNDER THIS AGREEMENT, INCLUDING SUCH CLAIMS, DAMAGES, LOSSES OR EXPENSES ATTRIBUTABLE TO BODILY INJURY, SICKNESS, DISEASE OR DEATH, OR TO INJURY TO OR DESTRUCTION OF TANGIBLE PROPERTY, INCLUDING LOSS OF USE RESULTING THEREFROM, BUT ONLY TO THE EXTENT SUCH CLAIMS, DAMAGES, LOSSES, COSTS AND EXPENSES ARE CAUSED BY OR RESULT FROM ANY NEGLIGENT OR INTENTIONAL ACTS OR OMISSIONS OF THE DESIGN-BUILDER, ITS AGENT, INCLUDING ANY ENGINEER, ARCHITECT, CONTRACTOR, OR SUBCONTRACTOR, ANY CONSULTANT UNDER CONTRACT, OR ANY OTHER ENTITY OVER WHICH THE DESIGN-BUILDER EXERCISES CONTROL.**

**7.4.2** If an employee of Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable has a claim against Owner, its officers, directors, employees, or agents, Design-Builder's indemnity obligations set forth above shall not be limited by any limitation on the amount of damages, compensation or benefits payable by or for Design-Builder, Design Consultants, Subcontractors, or other entity under any employee benefit acts, including workers' compensation or disability acts.

## **Article 8**

### **Time**

#### **8.1 Obligation to Achieve the Contract Times.**

**8.1.1** Design-Builder agrees that it will commence performance of the Work and achieve the Contract Time(s) in accordance with Article 5 of the Agreement.

**8.1.2** Owner may direct Design-Builder to accelerate its performance if progress schedules demonstrate unrealistic logic, artificially compress tasks or durations, or the Design-Builder acknowledges delay in progress schedules.

#### **8.2 Delays to the Work.**

**8.2.1** In the event Contractor shall fall behind schedule for any reason which does not justify an extension of the Contract Time, Contractor shall, within ten (10) days after written request of Owner, develop and deliver a recovery plan to the Owner with a recovery schedule and a program describing the additional manpower, overtime, material expediting, re-sequencing of the Work and other steps Contractor shall take to meet the requirements of the Contract with regard to the Contract Time. If the delay causing impact to the critical path was caused by Design-Builder or anyone for whom Design-Builder is responsible as to Owner, no compensation shall be paid by Owner for acceleration. The Contract Sum may be increased upon Design-Builder's request for additional compensation accompanying its explanation as to the compensability of an event of delay.

**8.2.2** Design-Builder shall be entitled to an adjustment of the Contract Time for delays caused by Force Majeure Events. The Contract Price shall not be adjusted due to Force Majeure Events.

**8.2.3** For purposes of establishing weather delays, no day on which Design-Builder is able to perform critical path work on the Project for more than fifty percent (50%) of the usual workday will be counted as day of delay.

**8.2.4** Owner shall grant an extension to the Contract Time if Design-Builder shows that the weather experienced at the Project site during was unusually severe, that is, more severe than the



adverse weather anticipated for the Project location during any given month, and the weather caused a delay to the critical path.

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

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

| JAN | FEB | MAR | APR | MAY | JUNE | JULY | AUG | SEPT | OCT | NOV | DEC |
|-----|-----|-----|-----|-----|------|------|-----|------|-----|-----|-----|
| (3) | (3) | (3) | (3) | (4) | (3)  | (3)  | (2) | (4)  | (4) | (3) | (3) |

**8.2.6** For the duration of the Work, Design-Builder shall maintain daily reports recording an accurate and contemporaneous statement of the occurrence of adverse weather and resultant impact to normally scheduled Work. The number of actual adverse weather days shall be calculated monthly.

## **Article 9**

### **Changes to the Contract Price and Time**

#### **9.1 Change Orders.**

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

**9.1.1.1** The scope of the change in the Work;

**9.1.1.2** The amount of the adjustment to the Contract Price; and

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

**9.1.2** All changes in the Work authorized by applicable Change Order shall be performed under the applicable conditions of the Contract Documents. Owner and Design-Builder shall negotiate in good faith and as expeditiously as possible the appropriate adjustments for such changes.

#### **9.2 Work Change Directives.**

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

**9.2.2** Upon receipt of a Change Directive, Contractor shall promptly proceed with the change in the Work involved.

**9.2.3** A Work Change Directive may be issued by the Owner if the Parties cannot agree on a Change Order. A Work Change Directive may also be issued if the Parties expect that the change ordered by a Work Change Directive will be incorporated in a subsequently issued Change Order following negotiations by the parties as to the Work Change Directive's effect, if any, on the Contract Price and Contract Times.

**9.2.4** In the event Owner has issued a Work Change Directive that the Parties subsequently agree shall be incorporated into a Change Order, Owner and Design-Builder shall negotiate in good faith and as expeditiously as possible, and upon reaching an agreement, the Parties shall prepare and execute an appropriate Change Order.

### **9.3 Minor Changes in the Work.**

**9.3.1** Design-Builder may perform minor changes in the Work that do not adjust the Contract Price and/or Contract Time. Minor changes in the Work do not materially or adversely affect the Work required by the Contract Documents. Minor changes may not be performed by Design-Builder without prior notice and approval of Owner. Design-Builder shall record such changes on the documents maintained by Design-Builder.

### **9.4 Contract Price Adjustments.**

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

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

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

**9.4.1.3** Costs, fees and any other markups set forth in the Agreement; or

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

### **9.5 Emergencies.**

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

## **Article 10**

### **Contract Adjustments and Disputes**

#### **10.1 Claims**

**10.1.1** Submittal of Claim: The party submitting a Claim shall deliver written notice directly to the other party to the Contract promptly (but in no event later than 30 days) after the start of the event giving rise to the claim for relief or after the claiming party reasonably should have recognized the event or condition giving rise to the request, whichever is later. In the case of appeals regarding Change Proposals notice shall be delivered within 30 days of the decision under appeal. The responsibility to substantiate a Claim shall rest with the party making the Claim. Such notice shall include sufficient information to advise the other party of the circumstances giving rise to the claim for relief, the specific contractual adjustment or relief requested and the basis of such request.

**10.1.2** Review of Claim: The party receiving a Claim shall review it thoroughly, giving full

consideration to its merits. The two parties shall seek to resolve the Claim through the exchange of information and direct negotiations. All actions taken on a Claim shall be stated in writing and submitted to the other party.

**10.1.3 Denial of Claim:** If efforts to resolve a Claim are not successful, the party receiving the Claim may deny it by giving written notice of denial to the other party.

**10.1.4 Resolution of Claim:** If the parties reach a mutual agreement regarding a Claim, whether through approval of the Claim, direct negotiations, mediation, or otherwise, that agreement should be memorialized in a Change Order.

**10.1.5 Duty to Continue Performance:** Unless provided to the contrary in the Contract Documents, Contractor shall continue to perform the Work pending the final resolution of any dispute or disagreement between Contractor and Owner.

**10.2 Mediation:** At any time after initiation of a Claim, Owner and Design-Builder may mutually agree to mediation of the underlying dispute. The agreement to mediate shall stay the Claim submittal and response process.

**10.2.1** If Owner and Design-Builder agree to mediation, the mediation shall occur within 60 days of the agreement to mediate. However, the mediation may be stayed and its scope and schedule may be amended, provided that the mediation occur no later than 60 days following Final Completion. The mediation shall be conducted by a mutually agreeable impartial mediator, or if the parties cannot so agree, a mediator designated by the American Arbitration Association ("AAA") pursuant to its Construction Industry Mediation Rules.

**10.2.2** Owner and Design-Builder shall each pay one-half of the mediator's fees and costs.

### **10.3 Arbitration.**

**10.3.1** Any claims, disputes or controversies between the parties arising out of or relating to the Agreement, or the breach thereof, which have not been resolved in accordance with the procedures set forth in Section 10.2 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.

**10.3.2** 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.

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

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

### **10.4 CONSEQUENTIAL DAMAGES.**

**10.5.1** Design-Builder and Owner waive rights to recover 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 from the other.

## **Article 11**

### **Stop Work and Termination**

#### **11.1 Owner's Right to Stop Work.**

**11.1.1** Owner may, without cause and for its convenience, order Design-Builder in writing to stop and suspend the Work.

**11.1.2** If Work is defective, or the progression of the Work will impair Owner's rights or otherwise negatively impact the Project, then Owner may order Design-Builder to stop the Work, or any portion thereof, until the cause for such order has been eliminated.

**11.1.3** Design-Builder is entitled to seek an adjustment of the Contract Price and/or Contract Time if its cost or time to perform the Work has been adversely impacted by any suspension of stoppage of the Work by Owner through no cause or fault of Design-Builder. Design-Builder must mitigate its damages in the event of a Work suspension regardless of the cause of said suspension as a precondition to entitlement to a Contract Price adjustment.

#### **11.2 Design-Builder Default, Owner's Right to Perform; Terminate for Cause.**

**11.2.1** Design-Builder commits an event of default if it becomes insolvent or voluntarily files for bankruptcy protection or it fails to (a) provide a sufficient number of skilled workers, (b) supply the materials required by the Contract Documents, (c) comply with applicable Legal Requirements, (d) timely pay, without cause, Design Consultants or Subcontractors, (e) prosecute the Work with promptness and diligence to ensure that the Work is completed by the Contract Time, as such times may be adjusted, or (f) perform material obligations under the Contract Documents, then Owner, in addition to any other rights and remedies provided in the Contract Documents or by law, shall have the rights set forth herein.

**11.2.2** Upon the occurrence of an event of default set forth above, Owner shall provide Design-Builder notice to cure the default at least seven (7) days prior to Owner's entitlement to contractual or other remedies. If Design-Builder fails to cure, or to commence curative efforts for an event which cannot be cured within seven days, then Owner may a) withhold funds sufficient to allow Owner to cure the default, b) suspend Design-Builder's performance of the Work or any portion thereof; c) make demand for performance on Design-Builder's surety; terminate Design-Builder's right to continue performance for cause; or take any other action afforded to Owner in the Contract Documents.

**11.2.3** If Owner has terminated for cause, Owner may exclude Contractor from the Site, take possession of the Work, incorporate in the Work all materials and equipment stored at the Site or for which Owner has paid Contractor but which are stored elsewhere, and complete the Work as Owner may deem expedient. Any such action by Owner shall not waive any right or preclude any alternate action by Owner. Owner's rights under the Contract Documents are intended to be cumulative and nonexclusive.

**11.2.3.1** In the event of such termination, Design-Builder shall not be entitled to receive any further payments under the Contract Documents until the Work shall be finally completed in accordance with the Contract Documents. At such time, if the unpaid balance of the Contract Price exceeds the cost and expense incurred by Owner in completing the Work, such excess shall be paid by Owner to Design-Builder with consent of surety. Notwithstanding the preceding sentence, if the Agreement establishes a Guaranteed Maximum Price, Design-Builder will only be entitled to be paid for Work performed prior to its default. If Owner's cost and expense of completing the Work exceeds the unpaid

balance of the Contract Price, then Design-Builder shall be obligated to pay the difference to Owner. Such costs and expense shall include not only the cost of completing the Work, but also losses, damages, costs and expense, including design professional and attorneys' fees, incurred by Owner in connection with the cure of Design-Builder's default.

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

### **11.3 Design-Builder's Right to Stop Work.**

**11.3.1** Design-Builder may stop the Work for the following reasons:

**11.3.1.1** Owner's failure to provide financial assurances as required under Section 3.3 hereof; or

**11.3.1.2** Owner's delay of payments properly due to Design-Builder for a period exceeding 60 days.

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

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

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

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

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

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

### **11.5 Termination for Convenience.**

**11.5.1** Upon seven (7) days written notice to Design-Builder, Owner may, without cause and without prejudice to any other right or remedy of Owner, terminate the Contract. In such case, Design-Builder shall be paid (subject to the GMP) for

- .1 completed and acceptable Work executed in accordance with the Contract Documents prior to the effective date of termination;
- .2 expenses sustained prior to the effective date of termination in performing services and furnishing labor, materials, or equipment as required by the Contract Documents in connection with uncompleted Work; and
- .3 demobilization expenses.

## **Article 12**

### **Electronic Data**

#### **12.1 Electronic Data.**

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

#### **12.2 Transmission of Electronic Data.**

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

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

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

#### **12.3 Electronic Data Protocol.**

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

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

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

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

## **Article 13**

### **Miscellaneous**

#### **13.1 Open Records Act/Texas Public Information Act Requests**

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

**13.1.2** Design-Builder must (1) preserve all contracting information related to the Contract as provided by the records retention requirements applicable to Owner for the duration of the Contract; (2) promptly provide to Owner any contracting information related to the contract that is in the custody or possession of the entity on request of Owner; and (3) on completion of the contract, either:

.1 provide at no cost to Owner all contracting information related to the Contract that is in the custody or possession of the entity; or

.2 preserve the contracting information related to the Contract as provided by the records retention requirements applicable to Owner.

**13.1.3** The requirements of Subchapter J, Chapter 552, Government Code, may apply to this Contract and the Design-Builder agrees that the Contract can be terminated if the contractor or vendor knowingly or intentionally fails to comply with a requirement of that subchapter.

### **13.2 Confidential Information**

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

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

### **13.3 Prevailing Wage**

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

### **13.4 Survival of Obligations**

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

### **13.5 Giving Notice**

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

### **13.6 Assignment.**

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

### **13.7 Successorship.**

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

### **13.8 Governing Law.**

**13.8.1** The Agreement and all Contract Documents shall be governed by the laws of the State of Texas.

### **13.9 Severability.**

**13.9.1** If any provision or any part of a provision of the Contract Documents shall be finally determined to be superseded, invalid, illegal, or otherwise unenforceable pursuant to any



applicable Legal Requirements, such determination shall not impair or otherwise affect the validity, legality, or enforceability of the remaining provision or parts of the provision of the Contract Documents, which shall remain in full force and effect as if the unenforceable provision or part were deleted.

**13.10 No Waiver.**

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

**13.11 Headings.**

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

**13.12 Notice.**

**13.12.1** 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; (iii) if transmitted by facsimile, by the time stated in a machine-generated confirmation that notice was received at the facsimile number of the intended recipient; or (iv) by electronic mail, by the time frame stated in the email-generated confirmation that notice was received by the email of the intended recipient.

**13.13 Amendments.**

**13.13.1** 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.

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