

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
DEPARTMENT OF GENERAL SERVICES**

**DESIGN-BUILD SERVICES  
BALLOU SENIOR HIGH SCHOOL  
ATHLETIC FIELDS & SITE IMPROVEMENTS**

**Solicitation #: DCAM-16-CS-0066  
Amendment No. 3**

**Issued: January 15, 2015**

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This Amendment Number 03 is issued by e-mail on January 15, 2016. Except as modified hereby, the Request for Proposals ("RFP") remains unmodified.

**Item #1:**

**Requests for Information:** Below is a list of questions received and the Department's responses.

1. Spec Sections 11 68 33, 11 82 26, 11 99 00, 12 65 14 and 12 66 00 are missing. Please provide. **RESPONSE: All available information has been provided.**
2. What is the budget or cost range for this project? **RESPONSE: \$5 Million-10 Million**

**Item #2:**

**Form of Contract:** Attached to this Amendment is the Form of Contract. THE TERMS OF THE FORM OF CONTRACT SHALL PREVAIL OVER THE RFP. TO THE EXTENT THERE IS AN INCONSISTENCY BETWEEN THE FORM OF CONTRACT ISSUED HERewith AND THE RFP, THE FORM OF CONTRACT SHALL GOVERN.

**Item #3:**

**The bid date remains unchanged.** Proposals are due by **January 19, 2016 at 2:00 pm EST.** Proposals that are hand-delivered should be delivered to the attention of: Jamar Spruill, Contract Specialist, at **Frank D. Reeves Center, 2000 14th Street, NW, 8th floor, Washington, DC 20009.**

**DESIGN-BUILD SERVICES  
BALLOU SENIOR HIGH SCHOOL  
ATHLETIC FIELDS & SITE IMPROVEMENTS  
DCAM-16-CS-0066**

THIS AGREEMENT (“Agreement”) is made by and between the **DISTRICT OF COLUMBIA GOVERNMENT**, acting by and through its **DEPARTMENT OF GENERAL SERVICES** (the “Department”) and **[CONTRACTOR]** (“Design-Builder”), duly organized under the laws of **[JURISDICTION]**, and with a place of business at **[ADDRESS]** (the “Design-Builder”), (collectively, the “Parties”).

**A. PROJECT INFORMATION**

**Project Name:** Ballou SHS Athletic Fields & Site Improvement (the “Project”)  
**Guaranteed Maximum Price (“GMP”):** [AMOUNT] (\$ \_\_\_\_\_)  
**Preconstruction Fee:** [AMOUNT] (\$ \_\_\_\_\_)  
**Design-Build Fee:** [AMOUNT] (\$ \_\_\_\_\_)  
**Design Fee:** [AMOUNT] (\$ \_\_\_\_\_)  
**Substantial Completion Date:** August 1, 2016  
**Liquidated Damages:** Two Thousand Five Hundred Dollars (\$2,500) per calendar day not to exceed Two Hundred Thousand Dollars (\$200,000) in the aggregate.

**B. ATTACHMENTS**

**Exhibit A:** List of Design Documents  
**Exhibit B:** Assumptions and Clarifications  
**Exhibit C:** GMP Breakdown & Alternate Prices  
**Exhibit D:** List of allowances and unit prices  
**Exhibit E:** Key Personnel  
**Exhibit F:** LSDBE Utilization Plan  
**Exhibit G:** Workforce Utilization Plan  
**Exhibit H:** Davis Bacon Act Wage Determinations  
**Exhibit I:** Form of Lien Waivers

**C. TERMS & CONDITIONS**

**SECTION 1 GENERAL PROVISIONS**

**Section 1.1 Relationship of Parties.** The Design-Builder accepts the relationship of trust and confidence established with the Department by this Agreement, and covenants with the Department to furnish the Design-Builder’s reasonable skill and judgment and to cooperate with the Department and its Program Manager in furthering the interests of the Department. The Design-Builder shall use its best efforts to perform the Project in an expeditious and economical manner consistent with the interests of the Department.

**Section 1.2 Project Description.** In general, the project both preconstruction and

construction services necessary to construct of two artificial turf athletic fields on the Ballou Senior High School site, 3401 4<sup>th</sup> Street, SE, Washington, DC 20032, as depicted on the design documents listed on **Exhibit A** (the “Design Documents”) including construction of the following related:

- (i) an artificial turf, competition field for football, soccer and lacrosse with improvements for track and field events;
- (ii) a 400-meter, 8-lane running track;
- (iii) bleacher seating for 1600 spectators (1200 home and 400 visitors);
- (iv) a press box, a scoreboard and ticket booths;
- (v) an artificial turf practice field;
- (vi) two parking lots, including two loading docks;
- (vii) sports and security lighting;
- (viii) replacement of public sidewalks and restoration of curbs and gutters around the perimeter of athletic complex;
- (ix) power, IT, data, wireless internet connections for the press box, practice field, competition field and parking lot;
- (x) utility vehicle access road;
- (xi) security fencing and field spectator fencing;
- (xii) nine frost-proof watering sources (2 water sources on the competition field and 1 water source in the steeplechase area; 2 wall mounted water fountains on the north face of the building; 2 freestanding water fountains for home team spectators; 2 freestanding water fountains for visiting team spectators);
- (xiii) landscaping; and
- (xiv) site access, including ADA-access.

The project includes any and all design and engineering services necessary to confirm whether the Design Documents will deliver a fully complete and fully functioning Project and if necessary, and to address any deficiencies in order to deliver a fully complete and fully functioning Project. The Design-Builder understands that the Guaranteed Maximum Price set forth in this Agreement is intended to be the total maximum cost to be paid by the Department for Design-Builder’s complete performance under the Agreement, including, all work necessary to implement the work outlined in the Design Documents, including any work reasonably inferable therefrom or necessary to deliver a fully functioning Project no later than the Substantial Completion Date.

**Section 1.3 Completion Date.** Subject to the Excusable Delay provisions of this Agreement, the Design-Builder agrees to Substantially Complete the Project on or before the date set forth in the Project Information Section of this Agreement. Substantial Completion shall mean that all of the following have occurred: (1) the work has been completed with only minor punch list items remaining to be completed; (2) any and required permits or approvals related to the work have been obtained; (3) all clean-up required by the Contract has been completed; and (4) the Project is ready for the Department to use it for its intended purpose. In addition, the Design-Builder shall provide (i) all operating and maintenance manuals, training videotapes and warranties required by the Contract and (ii) schedule training session required by the Contract as

quickly as possible, but no later than fifteen (15) business days after Substantial Completion. "Minor punch list items" are defined for this purpose as items that, in the aggregate, can be completed within thirty (30) days without interfering with the Department's normal use of the Project. Final Completion shall mean the point at which Substantial Completion has been achieved, all punch list items noted at Substantial Completion have been completed and all documents the Design-Builder is required to deliver to the Department as a condition to receiving final payment have been received. Final Completion shall be achieved no later than thirty (30) days after the Substantial Completion Date.

**Section 1.4 Project Manager.** The Department has assigned a Project Manager to oversee the Design-Builder's efforts in furtherance of this Project. Such Project Manager shall, at all times, be acting solely for the benefit of the Department, not the Design-Builder. The Design-Builder shall take direction from, and coordinate its work with, the assigned Project Manager. **The Design-Builder acknowledges, however, that the Project Manager is not authorized to modify any of the rights or obligations of the Department or the Design-Builder pursuant to this Contract, or to issue Change Orders or Change Directives.**

**Section 1.5 Prolog.** The Design-Builder shall utilize the Department's Prolog system to submit any and all documentation required to be provided by the Design-Builder for the Project, including, but not limited to, (i) requests for information; (ii) submittals; (iii) meeting minutes; (iv) proposed Changes; and (v) applications for payment. The Design-Builder also shall require all major subcontractors and subconsultants to utilize prolog for the Project.

## **SECTION 2 DESIGN AND PRECONSTRUCTION PHASE**

**Section 2.1 Design & Preconstruction Services.** The Design-Builder shall provide such design and preconstruction services as are necessary to properly advance the Project. It is understood that such services shall include, but not be limited to, design and engineering services, preparation of submittals and shop drawings, field verifications, scheduling, cost estimating, performing constructability reviews, and identifying any long-lead items. Within five (5) days of the issuance of a Notice to Proceed for Preconstruction Services, the Design-Builder shall submit to the Department for its approval a schedule of Project. Such schedule shall include construction and preconstruction activities.

**Section 2.1.1 Design Review and Verification.** During the Design & Preconstruction Phase, the Design-Builder shall review the Design Documents for accuracy, completeness and constructability and determine whether the Design Documents will deliver a fully complete and fully functioning Project. Among other issues, the Design-Builder shall confirm whether the Design Documents are appropriate in regards to (i) drainage; (ii) site elevations; (iii) retaining wall locations and design; (iv) access pathways and ADA compliance; and (v) electrical design. To the extent necessary, the Design-Builder shall perform such design and engineering services as are necessary to address any deficiencies in the Design Documents in order to deliver a fully complete and fully functioning Project.

**Section 2.1.2 Retaining Walls.** The parties acknowledge that the Design Documents

currently contemplate a single retaining wall between the competition field and the practice field. During the Preconstruction Phase, the Design-Builder shall confirm that the retaining wall as designed will provide sufficient lateral support. The Design-Builder has provided a deductive alternate price to construct two terraced retaining walls rather than a single retaining wall with their proposal. Such deductive/alternate price is set forth on Exhibit C. To the extent the Department desires to proceed with such deductive alternate, the Design-Builder shall perform the necessary design services. In addition, during the Preconstruction Phase, the Design-Builder shall determine what, if any, lateral supports are required at the northwest corner of the competition field. The Design-Builder has provided an add/alternate price for constructing what would be required for this wall if it is determined to be necessary. Offeror should also provide a description of what is included in such add/alternate price.

**Section 2.1.3 Design of Access Road.** The Design-Builder shall design a path for access between the competition (lower) field and the practice (upper) field by a utility vehicle to be constructed as part of the Project.

**Section 2.1.4 Field Verification of Excavation.** The parties acknowledge that certain of the excavation work required for the Project has already been completed. Further, the Design-Builder has made a good faith estimate of the remaining quantity of excavation and has included in the GMP the costs of the remaining excavation work based on such good faith estimate. Within five (5) days of notice to proceed, the Design-Builder shall verify in the field the extent of the excavation work that remains and submit to the Department a report documenting the existing work. Within five (5) days thereof, the Department and the Design-Builder shall negotiate an equitable adjustment for the difference in the quantity of excavation remaining. The Design-Builder has quoted unit rates for (i) excavation and removal of a cubic yard of soil/materials (including hauling off, if necessary); and (ii) disposal of a ton of contaminated soil/materials which shall serve as the basis for adjustment to the GMP based on the field verification of the complete excavation work. Such unit rates are set forth on Exhibit C.

**Section 2.1.5 Field Verification of Storm Water Management Work.** The parties acknowledge that certain of the stormwater structures have been set and tied-in, however, the extent of work already completed was unknown at the time of bid. Within five (5) days of notice to proceed, the Design-Builder shall verify in the field the extent of the work performed and submit to the Department a report documenting the existing work. Within five (5) days thereof, the Department and the Design-Builder shall negotiate a credit for the stormwater management work already in place. The parties acknowledge that the costs of all stormwater management work called for by the Design Documents is included in the GMP.

**Section 2.1.6** The Design-Builder shall submit to the Department for its review and approval any additional design documents prepared in connection with the project. All such reviews and approvals shall be made as an "end user" and not as a design professional of any kind.

**Section 2.2** On or before the dates specified in the approved detailed schedule (see Section 2.1), the Design-Builder shall submit the necessary design information (i.e. drawings,

shop drawings, submittals, sketches, etc.) to the Project Manager for his/her review and approval. Unless a different timeframe is established in the approved detailed schedule, the Project Manager shall have five (5) business days to review such documents. In the event the Project Manager finds such documents to be unacceptable, the Design-Builder shall be required to revise and resubmit such documents. The Design-Builder shall not commence construction activities unless and until such documents have been approved by the Project Manager. Any delays that result from design resubmissions shall be considered Non-Excusable.

**Section 2.3 Letter Contract.** It is understood that certain of the design preconstruction activities described above were performed while the Letter Contract was in place, and the terms of the Letter Contract shall merge into and be superseded by this Agreement upon the execution of this Agreement.

### **SECTION 3 GUARANTEED MAXIMUM PRICE**

**Section 3.1 Guaranteed Maximum Price.** Subject to additions and deductions which may be made only in accordance with this Agreement, the Design-Builder represents, warrants and guarantees to the Department that the total maximum cost to be paid by the Department for Design-Builder's complete performance under the Agreement, including, but not limited to, Final Completion of all Work, all services of Design-Builder under the Agreement, and all fees, compensation and reimbursements to Design-Builder, shall not exceed the Guaranteed Maximum Price set forth in Section A above. Costs which would cause the Guaranteed Maximum Price (as may be adjusted pursuant to the Agreement) to be exceeded shall be paid by the Design-Builder without reimbursement by the Department.

**Section 3.2 Nature of the Guaranteed Maximum Price.** The Design-Builder acknowledges and understands that the GMP is based on the Design Documents and the clarifications attached hereto as Exhibit \_\_. It is understood and agreed that the GMP represents the Design-Builder's offer to Fully Complete the Project. The parties acknowledge and agree that it is their intent to have the Design-Builder to construct and deliver a fully functional Project as contemplated in the Design Documents for the GMP and consistent with the Project Schedule. In furtherance of such intent, the Design-Builder hereby assumes the risks associated with and shall be responsible for (i) any changes in market conditions that affect the cost of labor or materials; (ii) coordination issues between the drawings; (iii) elements of work not shown on the Design Documents, but which are reasonably inferable therefrom or necessary for a fully functional Project; (iv) cost associated with acceleration of the work and expediting of materials necessary to meet the Project Schedule which are the result of anything other than an Excusable Delay; and (v) the risk of subcontractor default.

**Section 3.3 Risks Assumed by Design-Builder.** Execution of the Agreement by the Design-Builder is a representation that the Design-Builder has thoroughly examined the terms of this Agreement and the Design Documents and has visited the Project site and has become familiar with local conditions under which the Work is to be performed. The Design-Builder further represents that it has satisfied itself that it can undertake the work for the stated cost. Among other things, by entering into this Agreement, the Design-Builder assumes the following

risks: (1) the nature of the land and subsoil; (2) the form and nature of the site and surrounding areas; (3) details and levels of existing pipe lines, conduits, sewers, drains, cables or other existing services; (4) the quantities, nature and availability of the materials, tools, equipment and labor necessary for the completion of the Work; (5) the means of access to the site and any accommodation that may be required; (6) uncertainties of weather and physical conditions at the site; and in general to have itself obtained all necessary information as to risk contingencies, climatic, hydrological and natural conditions and other circumstances which may influence or affect his performance of the Work.

**Section 3.4 Allowances.** The GMP includes the allowances identified on **Exhibit D.** In the event that the cost of any Scope of Work to be covered by any allowance will exceed the amount of the allowance, the Design-Builder shall submit a Change Request in accordance with Article 8 of this Agreement for the difference. In the event that the cost of any Scope of Work to be covered by any allowance is less than the allowance, the savings in the allowance shall revert to the Department.

**Section 3.5 Asbestos Containing Pipe Insulation.** The parties acknowledge that a 12-inch diameter, below grade, pipe was discovered on the site and that such pipe contains two smaller 4-inch pipes, all of which are believed to run approximately 300 linear feet from the boiler room of the old school to the former free-standing shop building. The Design-Builder has quoted a unit rate for the abatement of a linear foot of such piping. To the extent the location or length of the piping deviates from that shown, the unit rate will serve as the basis for adjustment.

**Section 3.6 Unit Prices.** The Design-Builder has quoted a series of unit rates for work associated with excavation, abatement of asbestos containing pipe insulation. Such unit rates shall serve as the basis for adjustment of the GMP once the extent of remaining excavation work has been determined, and the length of the pipe insulated with asbestos containing materials is determined.

**Section 3.7 Tax Exempt Status.** The Department expects that the Project will qualify as tax-exempt under the applicable laws, and such tax exemption shall be reflected in the Guaranteed Maximum Price.

**Section 3.8** Subject to the terms and conditions of this Agreement, the Design-Build Fee Price shall be increased by ten percent (10%) if both of the objectives set forth below are met and shall be decreased by ten percent (10%) if either or both of the objectives set forth below are not met. The objectives are as follows:

- .1 **On-Time Completion.** Substantial Completion is achieved on or before August 1, 2016.
- .2 **Cost Control.** The total amount paid to the Design-Builder for Work performed under this Contract is less than or equal to the GMP adjusted as contemplated in Sections 2.1.4 and 2.1.5 but without regard to any other adjustments effectuated by subsequent Change Order, plus Four Hundred Thousand Dollars (\$400,000).

In determining whether these objectives have been met, the Department will evaluate whether the stated objectives have, in fact, been achieved. This decision shall be made regardless of the reason the objectives have or have not been met, and the Design-Builder acknowledges and agrees that the Design-Builder may lose entitlement to ten percent (10%) of the Design-Build Fee even if these objectives are not met due to the fault of the Department, the Architect/Engineer, the Code Official, events of force majeure or otherwise.

#### **SECTION 4 CONSTRUCTION PHASE**

**Section 4.1 General.** During the Construction Phase, the Design-Builder shall complete all work necessary to implement the work outlined in the Design Documents, including any work reasonably inferable therefrom or necessary to deliver a fully functioning Project. The Design-Builder shall provide all labor, materials, supervision, design services and other services as may be necessary to accomplish this task no later than August 1, 2016. The Construction Phase shall commence when the Department issues a written Notice to Proceed for Construction. It is understood that a limited notice to proceed with construction activities may be provided in the form of an amendment to the Letter Contract. Unless otherwise authorized by the Department, the execution of this Agreement shall serve as notice to proceed with the Construction Phase.

**Section 4.2 Mandatory Subcontract Provisions.** To the extent the Design-Builder intends to subcontract a portion of the Work, any subcontract in excess of Twenty Five Thousand Dollars (\$25,000) shall include the following provisions:

- .1 that, to the extent of the Work or supply within the Contract's scope, the Subcontractor or supplier is bound to the Design-Builder for the performance of all obligations which the Design-Builder owes the Department under the Contract;
- .2 that the Subcontractor or supplier is not in privity with the Department and shall not seek compensation directly from the Department on any third-party beneficiary, quantum meruit, or unjust enrichment claim, or otherwise, except as may be permitted by any applicable mechanic's lien law;
- .3 that the Department is a third-party beneficiary of the subcontract or supply agreement, entitled to enforce any rights thereunder for its benefit;
- .4 that the Subcontractor or supplier consents to assignment of its agreement to the Department, at the Department's sole option, if the Design-Builder is terminated for default;
- .5 that the Subcontractor or supplier shall comply immediately with a written order from the Department to the Design-Builder to suspend or stop work;

- .6 that the Subcontractor or supplier shall maintain records of all Work it is requested or authorized to do on a time and material or cost-plus basis, or with respect to claims that it has asserted on a time and materials or cost-plus basis, during the Project and for a period of time specified in the General Conditions and requiring the Subcontractor or supplier to make those records available for review or audit by the Department during that time;
- .7 that the Subcontractor shall obtain and maintain, throughout the Project, workers' compensation insurance in accordance with the laws of the District of Columbia. It is understood that this provision is not applicable to supply agreements;
- .8 that, if the Department terminates the Contract for convenience, the Design-Builder may similarly terminate the subcontract or supply agreement for convenience, upon seven (7) days' written notice to the Subcontractor or supplier, and that the Subcontractor or supplier shall, in such a case, be entitled only to the costs set forth in the Termination for Convenience provisions of this Agreement;
- .9 that the Department shall have the right to enter into a contract with the Subcontractor or supplier for the same price as its subcontract or supply agreement price less amounts already paid, if the Design-Builder files a voluntary petition in bankruptcy or has an involuntary petition in bankruptcy filed against it;
- .10 that the Subcontractor or supplier shall not be entitled to payment for defective or non-conforming work, materials or equipment, and shall be obligated promptly to repair or replace non-conforming work, materials or equipment at its own cost;

**Section 4.3 Certified Subcontractors.** The Design-Builder shall not substitute or replace any Subcontractor or supplier certified by the District of Columbia Department of Small and Local Business Development without the Department's prior written consent.

**Section 4.4 Payment by Joint Check in Certain Instances.** If it comes to the Department's attention that a Subcontractor or supplier has not been paid in timely fashion (other than for disputed amounts), and if the Design-Builder fails to cure the problem within five (5) calendar days after the Department gives it written notice of the failure to pay, the Department may make payments to the Subcontractor or supplier and Design-Builder by joint check.

**Section 4.5 Field Measurements.** The Design-Builder shall take field measurements and verify field conditions and shall carefully compare such field measurements and conditions and other information known to Design-Builder. Once work is started, the Design-Builder assumes the responsibility and costs for the work and the cost of correcting work previously installed. The parties acknowledge that concrete has been poured in the southeast corner of the work area, and that the concrete is cracking. The Design-Builder acknowledges that the scope of work includes removal and re-pouring of the cracked concrete as well as any corrective measures required to address underlying causes of cracking.

**Section 4.6 Warranty of the Construction Work.** The Design-Builder warrants to the Department that materials and equipment furnished under this Agreement will be of good quality and new unless otherwise expressly permitted in writing, that for the one (1) year period following the Substantial Completion Date the construction work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the approved design documents. The Design-Builder's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Design-Builder, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. The Design-Builder and a representative of the Department shall walk the Project together eleven (11) months after the Substantial Completion Date to identify any necessary warranty work.

**Section 4.7 Extent of Responsibility and Site Conditions.** The Design-Builder shall be entitled to make a Change Request for differing site or soils conditions only to the extent that: (i) the subsurface conditions on or adjacent to the Project site differ materially from those indicated in the geotechnical reports and the Design Documents; or (ii) such conditions could not have been discovered by a competent visual inspection of the site and are of unusual nature and differ materially from those ordinarily encountered and generally recognized as inhering to work of the character provided for in this Agreement (such circumstances, "Differing Site Conditions"). Any such Change Request shall be made pursuant to Article 8 of this Agreement.

**Section 4.8 Unsafe Materials and Hazardous Materials**

**Section 4.8.1** The Design-Builder shall not bring, spill or release onto the site asbestos, PCBs, or any other Hazardous Material that is not customarily used in a facility of the type and similar to the Project, and shall bring to the Department's attention any specification of such Hazardous Materials in the design documents. If the Design-Builder believes that anything in this Agreement would require that it use or bring onto the site asbestos, PCBs, or any Hazardous Material that is not customarily used in a facility of the type and similar to the Project, it shall immediately inform the Department and seek direction before proceeding.

**Section 4.8.2** If Hazardous Materials beyond those contemplated in the Scope of Work are discovered on the site, the Design-Builder shall immediately inform the Project Manager and the Department of such discovery. Unless abatement of such Hazardous Materials is expressly included in the Program of Requirements and the Concept Design or the Approved Design, the Design-Builder shall be entitled to submit a Change Request in accordance with Article 8 of this Agreement by virtue of such discovery. If the Design-Builder is required to abate hazardous materials, the Design-Builder shall comply with all laws, including, without limitation, the requirements of the EPA and all jurisdictional agencies as well as all laws relating to safety, health welfare, and protection of the environment, in removing, treating, encapsulating, passivating, and/or disposing of Hazardous Materials, including, but not limited to, removal, treatment, encapsulation, passivation, and/or disposal of the Hazardous Materials. If any notices to governmental authorities are required, the Design-Builder shall also give those notices at the appropriate times. The Design-Builder shall ensure abatement subcontractors and disposal sites are appropriately licensed and qualified. In addition, the Design-Builder shall ensure that any subcontractors involved in the abatement of hazardous materials maintain a contractor's

pollution legal liability insurance policy of at least Two Million Dollars (\$2,000,000) for the duration of the Project and a period of three (3) years after Substantial Completion of the Project, and that any disposal site to which hazardous materials are taken carries environmental impairment liability insurance for the duration of the Project and a period of three (3) years after Substantial Completion of the Project.

**Section 4.8.3** The Design-Builder shall keep detailed records documenting Work done so that the Department may independently verify compliance with all laws, the number of units actually removed, treated, and/or disposed of, and the appropriate unit price(s) applicable to the Work.

**Section 4.9** **Progress Meetings.** The Design-Builder shall schedule and conduct at a minimum progress meetings every two weeks at which the Department, the Program Manager and the Design-Builder and appropriate Subcontractors can discuss the status of the Work.

**Section 4.10** **Written Reports.** The Design-Builder shall provide written reports to the Program Manager on the progress of the entire Work in accordance at least every other week.

**Section 4.11** **Key Personnel.** To carry out its duties, the Design-Builder shall provide at least the key personnel identified in **Exhibit E** to this Agreement, who shall carry out the functions identified in **Exhibit E**. Among other things, the Key Personnel shall include the project managers that will be responsible for managing the Work related to the Project's structural, mechanical, electrical and special systems. It is contemplated that these project managers will work from the design stage, purchasing and throughout the bulk of the field work. The Design-Builder's obligation to provide adequate staffing is not limited to providing the key personnel, but is determined by the needs of the Project. The Design-Builder shall not replace any of the key personnel without the Department's prior written approval, which shall not be unreasonably withheld. If any of the key personnel become unavailable to perform services in connection with the Contract due to death, illness, discharge or resignation, then the Design-Builder shall promptly appoint a replacement acceptable to the Department. The Department shall be entitled to complete information on each such replacement, including a current resume of his or her qualifications and experience.

In each instance where the Design-Builder removes or reassigns one of the key personnel listed in **Exhibit E** (but excluding instances where such personnel become unavailable due to death, disability, or separation from the employment of the Design-Builder or any affiliate of the Design-Builder) without the prior written consent of the Department's Designated Representative, the Design-Builder shall pay to the Owner the sum of Twenty Five Thousand Dollars (\$25,000) as liquidated damages and not a penalty, to reimburse the Department for its administrative costs arising from the Design-Builder's failure to provide the key personnel. The foregoing liquidated damage amount shall not bar recovery of any other damages, costs or expenses other than the Department's internal administrative costs. In addition, the Department shall have the right, to be exercised in its sole discretion, to remove, replace or to reduce the scope of services of the Design-Builder in the event that a member of the key personnel has been removed or replaced by the Design-Builder without the consent of the Department. In the event

the Department exercises the right to remove, replace or to reduce the scope of services of the Design-Builder, the Department shall have the right to enforce the terms of this Agreement and to keep-in-place those members of the Design-Builder's team not removed or replaced and the remaining members shall complete the services required under this Agreement in conjunction with the new members of the Design-Builder's team approved by the Department.

**Section 4.12 Work by Separate Contractors.** The Department reserves the right to perform construction or operations related to the Project with the Department's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site.

**Section 4.13 Site Safety and Clean-Up.** The Design-Builder will be required to: (i) provide a safe and efficient site, with controlled access; (ii) provide wheel washing stations on site so as to prevent the accumulation of dirt and other refuse on the streets surrounding the Project site; (iii) be responsible for site security; and (iv) be responsible for the cost of temporary power used during the construction of the Project, including, but not limited to, the cost of installing such temporary wiring as may be required.

**Section 4.14 Close-out.** The Design-Builder shall be required to prepare and submit at close-out a complete set of product manuals, warranties, etc. The Design-Builder shall also provide the Department with a complete set of its Project files, including, but not limited to, shop drawings.

**Section 4.15 Salvaged and Stored Items.** The Design-Builder shall be responsible for salvaging and storing all items as identified by the Department.

**Section 4.16 Sediment and Erosion Control.** The Design-Builder shall be responsible for installing sediment and erosion control measures, inclusive of, but not limited to: silt fencing, inlet protection, stabilized construction entrances, and other control measures.

**Section 4.17 Cutting and Patching.** The Design-Builder shall be responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly. All areas requiring cutting, fitting and patching shall be restored to the condition existing prior to the cutting, fitting and patching. The Design-Builder shall not damage or endanger a portion of the Work or fully or partially completed construction of the Department or separate contractors by cutting, patching or otherwise altering such construction, or by excavation.

**Section 4.18 Correction of Work.**

**Section 4.18.1** The Department shall be at liberty to object and to require the Design-Builder to remove forthwith from the Project site and the Work and to promptly replace the Superintendent, any foreman, technical assistant, laborer, agent, representative, or other person used by the Design-Builder in or about the execution or maintenance of the Work, who in the sole opinion of the Department is misconducting himself or herself, or is incompetent or

negligent in the proper performance of his or her duties, or whose performance in the Work is otherwise considered by the Department to be undesirable or unsatisfactory, and such person shall not be again employed upon the Project without the written permission of the Department or.

**Section 4.18.2** The Design-Builder shall promptly correct Work rejected by Department for failing to conform to the requirements of the Approved Design or applicable law or regulations whether observed before or after the Project's completion and whether or not fabricated, installed or completed, and shall correct any Work found to be not in accordance with the requirements within a period of one (1) year from the date of completion or by terms of an applicable special warranty required by this Agreement.

**Section 4.18.3** If during the guarantee or warranty period, any material, equipment or system requires corrective Work because of defects in materials or workmanship, the Design-Builder shall commence corrective Work within forty-eight (48) hours after receiving the notice and work diligently until corrective Work is completed; provided, however, if such notice is received on the day before a weekend or a holiday, the Design-Builder will commence corrective Work on the next business day. If the Design-Builder does not, in accordance with the terms and provisions of the Contract Documents, commence all corrective Work within forty-eight (48) hours or if the Design-Builder commences such Work but does not pursue it in an expeditious manner, Department may either notify the bonding company (if any) to have such Work and/or obligations performed at no additional cost to Department or may perform such Work and/or obligations and charge the costs thereof to the Design-Builder.

**Section 4.19 Manufacturers' Warranties.**

**Section 4.19.1** The Design-Builder warrants that all manufacturers' or other warranties on all labor, materials and equipment furnished by the Design-Builder or a Subcontractor or supplier shall run directly to or will be specifically assigned to Department on demand or upon Project completion without demand. In the event any issue or defect which would be covered by any warranty arises but is not addressed by the grantor of the warranty, the Design-Builder shall be required to act as the guarantor of the obligations under the warranty and to perform under the terms of the warranty.

**Section 4.19.2** The Design-Builder warrants that the installation of all materials and equipment shall be in strict accordance with the manufacturers' requirements or specifications.

**Section 4.20 Tie-In to Existing Systems.** In constructing the Project, the Design-Builder will be required to tie into certain systems in the adjacent school building. The Design-Builder shall ensure that its work will not have any upstream or downstream affects on such systems and that such systems function, at a minimum, at the level of functionality that existed immediately prior to the construction of the Project. If any system affected by the Design-Builder's work functions at a lower level of functionality as a result of the Design-Builder's construction of the Project, the Design-Builder shall be back-charged the costs incurred by the Department in addressing the decreased functionality.

## **SECTION 5 CLAIMS FOR ADDITIONAL TIME**

**Section 5.1** Time is of the essence of this Contract.

**Section 5.2** The Design-Builder will perform the Work so that it shall achieve Substantial Completion by the Substantial Completion Date. Unless the failure to achieve Substantial Completion by the Substantial Completion Date is a result of an Excusable Delay, as defined in Section 5.3, the delay shall be deemed Non-Excusable and the Design-Builder shall not be entitled to an extension of time. Without limiting the generality of the foregoing, delays for the following reasons shall be regarded as Non-Excusable and shall not entitle the Design-Builder to an extension of time:

- .1 Delays due to job site labor disputes, work stoppages, or suspensions of work;
- .2 Delays due to adverse weather, unless the Design-Builder establishes that the adverse weather was of a nature and duration in excess of averages established by data from the U.S. Department of Commerce, National Oceanic and Atmospheric Administration for the Project locale for the ten (10) years preceding the effective date of the Contract;
- .3 Delays due to the failure of the Design-Builder or Subcontractors or material suppliers at any tier to perform in timely or proper fashion, without regard to concepts of negligence or fault; or
- .4 Delays due to Site conditions whether known or unknown as of the effective date of the Contract, foreseeable or unforeseeable at that time, naturally occurring or man-made; provided, however, that delays due to Differing Site Conditions or remediation of Hazardous Materials shall be deemed an Excusable Delay.

**Section 5.3** The Design-Builder shall be entitled to an adjustment in the Substantial Completion Date due to an Excusable Delay. The term "Excusable Delay" shall mean:

- .1 Delays due to adverse weather other than those that are classified as a Non-Excusable delay;
- .2 Delays due to acts of God, war, unavoidable casualties, civil unrest, and other similar causes of delay that are beyond the control of the Design-Builder; provided, however, that in no event shall a Non-Excusable delay or the action of the Design-Builder, or any of its employees, agents, Subcontractors or material suppliers be deemed an Excusable Delay; or
- .3 Delays caused by Differing Site Conditions or remediation of Hazardous Materials.

In addition to the forgoing, a delay shall be deemed to be an Excusable Delay only to the extent that such delay (i) warrants an extension in the Substantial or Final Completion Date; (ii) has not been caused by the Design-Builder or any of its employees, agents, Subcontractors or material suppliers; (iii) is of a duration of not less than three (3) days; (iv) is on Project's critical path; and (v) is in addition to any time contingency periods set forth in the critical path.

**Section 5.4** If the Design-Builder wishes to make a claim for an increase in the time to complete the Work required under this Agreement, written notice as provided herein shall be given. The Design-Builder's claim shall include an estimate of the cost and of the probable effect of delay on the progress of the Work. In the case of continuing delay, only one claim is necessary.

**Section 5.5** Acceleration. Subject to the terms of this Section 5.5, the Department shall have the right to direct the Design-Builder to accelerate the Work if, in the reasonable judgment of Department, the Design-Builder fails to: (i) supply a sufficiency of workers or to deliver the materials or equipment with such promptness as to prevent the delay in the progress of the Work; or (ii) the progress of the Work materially falls behind the projections contained in the then currently approved Project Schedule. In the event that the Department or its Program Manager determine that either of the events specified in the preceding sentence have occurred, the Department shall provide the Design-Builder with written notice of such event and the Design-Builder shall be required to provide the Department with a corrective action plan that is reasonably designed to address the concerns raised in such notice within three (3) days after receipt of such notice. If the Department and the Design-Builder are unable to agree on the terms of such corrective action plan within five (5) days after the issuance of the notice (i.e. with forty eight (48) hours after the receipt of the proposed corrective action plan), the Department shall have the right to direct such acceleration as the Department, in its reasonable judgment, deems necessary. Provided the notice provisions of this Section are complied with, the cost of any acceleration directed under this Section shall not justify an adjustment to the Guaranteed Maximum Price or the Substantial Completion Date.

**Section 5.6** Differing Site Conditions. The term Differing Site Conditions shall mean subsurface conditions on or adjacent to the Project site which differ materially from those indicated in the geotechnical reports prepared by the Design-Builder. The term Differing Site Conditions shall also include unknown physical conditions at the site of an unusual nature which differ materially from those ordinarily encountered and generally recognized as inhering to work of the character provided for in this Contract. During the Preconstruction Phase, the Design-Builder shall be required to conduct a thorough review of the Project site and the surrounding area and shall document its findings. In the event the Design-Builder fails to undertake and document such a thorough review, the Design-Builder shall be deemed to have known of those conditions which a thorough review would have detected.

## **SECTION 6 PAYMENT PROVISIONS**

### **Section 6.1 Compensation for Preconstruction Phase Services**

**Section 6.1.1 Preconstruction Fee.** The GMP includes a Preconstruction Fee in the amount set forth in Section A above. The Preconstruction Fee shall be the Design-Builder's sole compensation for Design Preconstruction Phase Services, other than for design and engineering services. Among other things, the Preconstruction Fee includes amounts necessary to compensate the Design-Builder for preconstruction reviews, field verifications, estimating, home office overhead and profit.

**Section 6.1.2 Design Fee.** The GMP includes a Design Fee in the amount set forth in Section A above. The Design-Builder shall be reimbursed at cost for the cost of design and engineering services; provided, however, that in no event shall the Design-Builder be entitled to receive more than the Design Fee for the cost of design and engineering services. For the avoidance of doubt, the parties acknowledge that the Design Fee is intended to serve as a line item guarantee for design and engineering services,

**Section 6.1.3** Payments for Preconstruction Phase Services shall be made monthly following presentation of the Design-Builder's invoice and shall be in proportion to services performed. In no event, however, will the aggregate of the Design-Builder's monthly invoices for Preconstruction Phase Services exceed the Preconstruction Fee and the Design Fee. Further, the Design-Builder shall not be paid more than one half of the Preconstruction Fee prior to the agreement on the adjustments to the GMP contemplated in Sections 2.1.4 and 2.1.5 of this Agreement. Payments are due and payable in accordance with Section 6.4 of this Agreement. Amounts unpaid after the date of which payments due shall bear interest in accordance with the Quick Payment Act.

## **Section 6.2 Compensation for Construction Phase Services.**

**Section 6.2.1 Design-Build Fee.** For Construction Phase Services, the Design-Builder's sole compensation other for the Cost of the Work shall be the Design-Build Fee set forth in Section A of this Agreement. The Design-Build Fee, as adjusted in accordance with Section 3.8, shall be the Design-Builder's sole compensation for Construction Phase Services. The Design-Build Fee shall include, but not be limited to, the Cost of General Conditions, as defined in Section 6.2.1.1 of this Agreement, as well as amounts necessary to compensate the Design-Builder for profit, home office overhead and home office staff.

**Section 6.2.1.1 Cost of General Conditions.** Items included in the Cost of General Conditions are all items necessary to perform Construction Phase Services described herein including, but not limited to:

- .1 Cost of construction staff
- .2 Fringe Benefits associated with field staff costs
- .3 Payroll taxes and payroll insurance associated with field staff costs
- .4 Staff costs associated with obtaining permits and approvals

- .5 Out-of-house consultants
- .6 Travel, Living and Relocation expenses
- .7 Job vehicles
- .8 Field office for CM including but not limited to: (i) trailer purchase and/or rent; (ii) field office installation, relocation and removal; (iii) utility connections and charges during the Construction Services Phase; (iv) furniture; (v) office supplies;
- .9 Office equipment including but not limited to: (i) computer hardware and software; (ii) fax machines; (iii) copying machines; (iv) telephone installation, system and use charges; (v) job radios
- .10 Local delivery and overnight delivery costs
- .11 Field computer network
- .12 First aid facility
- .13 Progress photos

**Section 6.2.2 Cost of the Work.** The term “Cost of the Work” shall mean the costs necessarily incurred by the Design-Builder in the proper performance of the Work and shall include only the following:

- .1 Payments made by the Design-Builder to Subcontractors and suppliers, but only in accordance with the subcontracts and supply agreements (“Subcontractor Costs”);
- .2 The cost of design and engineering services, subject however to the Design Fee;
- .3 All amounts due to the Design-Builder under the terms of the Department's written authorization for the Design-Builder to perform any portion of the Work as Self-Performed Work. If an authorization for the Design-Builder to engage in Self-Performed Work is not on a fixed-price basis, then, as to that Work, the following costs shall be within the Cost of the Work:
  - (a) **Labor.** Properly documented wages actually paid to Project foremen, construction workers, and other personnel in the direct employ of the Design-Builder, while engaged in approved Self-Performed Work, together with contributions, assessments, payroll taxes, or fringe benefits required by the laws or applicable collective bargaining agreements.

- (b) **Incorporated Materials.** The cost, net of trade discounts, of all materials, products, supplies and equipment incorporated into the Self-Performed Work, including, without limitation, costs of transportation and handling.
  - (c) **Unincorporated Materials.** The cost of materials, products, supplies and equipment not actually installed or incorporated into the Self-Performed Work, but required to provide a reasonable allowance for waste or spoilage, subject to the Design-Builder's agreement to turn unused excess materials over to the Department at the completion of the Project or, at the Department's option, to sell the material and pay the proceeds to the Department or give the Department a credit in the amount of the proceeds against the Cost of the Work.
- .4 Royalty and license fees paid for use of a design, process or product, if its use is required by this Contract or has been approved in advance by the Department;
  - .5 Fees for obtaining all required approvals or permits associated with the abatement, demolition, utilities abandonment, and utility relocation, as well as all trade permit fees.
  - .6 All fees and other costs necessarily incurred to carry out testing and inspection required by the Contract or applicable laws, or otherwise to maintain proper quality assurance. The costs the Design-Builder incurs to schedule and coordinate any additional testing and inspections the Department may decide to conduct itself shall be within Cost of the Work unless the additional testing establishes that the Work tested was defective or otherwise failed to satisfy Contract requirements, in which case the Design-Builder shall pay the costs, without reimbursement;
  - .7 All bonds to jurisdictional agencies (utilities, storm water management, land disturbance, and grading); and
  - .8 All performance and payment bonds and general liability insurance.

**Section 6.2.3 Costs Not to Be Reimbursed.** All costs not specifically listed in Section 6.2.2 as being within the Cost of the Work are excluded from the Cost of the Work. In particular, but without limitation, the Cost of the Work does not include any of the following:

- .1 Any personnel or labor costs other than those provided for in Section 6.2.2.3(a) or Section 6.2.1 of this Agreement.
- .2 Fees for any permits or licenses the Design-Builder requires to conduct its general business operations.

- .3 Capital expenses and interest on capital employed for the Work.
- .4 Direct or indirect costs of any kind, except those expressly included in Paragraph 8.1.
- .5 Sales or use taxes, unless the Design-Builder establishes that applicable law required payment of such taxes.
- .6 Costs due to the errors or omissions of the Design-Builder or its Subcontractors or suppliers at all tiers, negligent or otherwise.
- .7 Costs dues to breach of Contract by the Design-Builder or its Subcontractors or material suppliers at all tiers, including, without limitation, costs arising from defective or damaged Work or its correction, disposal of materials or equipment erroneously supplied, and repairs to property damaged by the Design-Builder or its Subcontractors or material suppliers at all tiers.
- .8 Any costs incurred in performing work of any kind before Notice to Proceed, unless specifically authorized by the Department.

**Section 6.3 Discounts, Rebates And Refunds**

**Section 6.3.1** Trade discounts, rebates, refunds and amounts received from sales of surplus materials (if paid for by the Department) and equipment shall accrue to the Department, and the Design-Builder shall make provisions so that they can be secured.

**Section 6.3.2** Amounts that accrue to the Department in accordance with the provisions of Subparagraph 8.4.1 shall be credited to the Department as a deduction from the Cost of the Work.

**Section 6.4 Payments.**

**Section 6.4.1 Progress Payments.** The Design-Builder shall be paid its compensation in a series of progress payments and a final payment, for Work completed in accordance with the Contract, and for which proper Applications for Payment have been submitted and approved. The amount of each progress payment shall be as follows:

The Costs of Work Completed to Date

Plus  $\frac{\text{Cost of Work for Pay Period}}{\text{Current approved estimated Cost of Work through completion}} \times \text{Design-Build Fee}$

Minus Applicable Retainage

Minus Amounts previously paid by the Department

**Section 6.4.2 Retention.** The Department shall withhold from each progress payment an amount equal to ten percent (10%) of the payment related to: (i) each Subcontract and supply agreement, (ii) the Preconstruction Fee, (iii) Design-Build Fee, and (iv) the Cost of the Work related to each item of Self-Performed Work, until such time as fifty percent (50%) of the then currently budgeted cost associated with each such an item has been invoiced at which point the Department may cease retaining against such item. The Department may elect to increase the retention on any trade subcontractor up to ten percent (10%) in the event the Department determines that the situation so warrants. The Department, in its sole and absolute discretion, may elect to reduce the retainage relating to a particular trade Subcontractor or the Cost of the Work related to a specific item of Self-Performed Work to zero upon: (x) satisfactory completion of such Work; (y) submission of all required warranties, certifications, and operating or maintenance instructions with respect to that Work; and (z) execution of appropriate waivers of lien and releases of claims. However, in no event shall the total retainage held by the Department be reduced to an amount that is less than two and one-half percent (2.5%) of the GMP.

**Section 6.4.3 Documents Required with Application for Payment.** Each Application for Payment shall be accompanied by the Design-Builder's job cost ledgers in a form satisfactory to the Department, the Subcontractors' and Suppliers' Applications for Payment on AIA Documents G702 and G703 or other form acceptable to the Department, and such other supporting documentation as the Department may reasonably request. Each Application for Payment shall include detailed documentation of costs as a condition to approving progress payments, but the Design-Builder shall nevertheless maintain complete documentation of the costs.

**Section 6.4.4 Stored Materials.** The Department shall not be required to pay for materials stored at the site or stored at other locations, absent its express agreement to do so, which determination shall be made in the Department's sole and absolute discretion. If the Department expressly agrees to pay for materials stored at the site but not yet incorporated into the Work, the Application for Payment may also include a request for payment of the cost of such materials, if the materials have been delivered to the site, and suitably stored. Such requests shall be documented by appropriate invoices and bills of sale. Payment for stored materials shall be conditioned also on the Design-Builder's representation that it has inspected the material and found it to be free from defect and otherwise in conformity with this Contract, and on satisfactory evidence that the materials are insured under the builder's risk policy. Further, if the

Design-Builder requests the Department to allow payments for storage of materials offsite, the Design-Builder shall be required, inter alia, to agree to execution of proper documentation to afford the Department a secured interest in the materials upon payment.

**Section 6.4.5 Design-Builder's Certification.** Each Application for Payment shall be accompanied by the Design-Builder's signed certification that all amounts paid to the Design-Builder on the previous Application for Payment that were attributable to Subcontractor Work or to materials or equipment being supplied by any supplier has been paid over to the appropriate Subcontractors and suppliers; that all amounts currently sought for Subcontractor Work or supply of materials or equipment are currently due and owing to the Subcontractors and material or equipment suppliers; and that all Work, materials or equipment for which payment is sought is, to the best of the Design-Builder's knowledge, free from defect and meets all of the Contract requirements. The Design-Builder shall not include in an Application Payment amounts for Work for which the Design-Builder does not intend to pay.

**Section 6.4.6 Lien Waivers.** Each Application for Payment shall be accompanied by written waivers of the right to file a mechanic's lien and all other claims, in a form substantially similar to **Exhibit I** for the Design-Builder and all Subcontractors and material suppliers at all tiers who have supplied labor or material or both for which payment is requested, subject only to receipt of payment. If the Department so requests, the Design-Builder shall also submit unconditional waivers of liens for itself and all Subcontractors and material suppliers at all tiers with respect to Work or materials or equipment for which payment has been previously made, and additional forms of waiver acknowledging receipt of final payment under the Contract, and providing final release of such liens.

**Section 6.4.7 Warranty of Title.** By submitting an Application for Payment, the Design-Builder warrants to the Department that title to all Work for which payment is sought will pass to the Department, without liens, claims, or other encumbrances, upon the receipt of payment by the Design-Builder. The Department may require execution of appropriate documents to confirm passage of clear title. Passage of title shall not operate to pass the risk of loss with respect to the Work in question. Risk of loss remains with the Design-Builder until Substantial Completion, unless otherwise agreed by the Department, in writing.

**Section 6.4.8 Submission.** On the twenty-fifth day of each month the Design-Builder shall submit to the Department (with a copy to the Program Manager) an Application for Payment, which Application for Payment shall cover the entire month during which the Application for Payment is submitted. All amounts formally submitted via Application for Payment and not disputed by the Department shall be due and payable on the last day of the month following submission or, if that is not a business day, on the following business day. If the Design-Builder and Department are unable to agree on the amounts properly due and owing, the Department shall pay in accordance with its good faith determination and the Design-Builder may protest and pursue a claim as provided in this Agreement.

**Section 6.4.9 Right to Withhold Payments.** The Department will notify the Design-Builder within fifteen (15) days after receiving any Application for Payment of any defect in the

Application for Payment or the Design-Builder's performance which may result in the Department's declining to pay all or a part of the requested amount. The Department may withhold payment from the Design-Builder, in whole or part, as appropriate, if:

- .1 the Work is defective and such defects have not been remedied; or
- .2 the Department has determined that the Design-Builder's progress has fallen behind the Project Schedule, and the Design-Builder fails, within ten (10) calendar days of the Department's written demand, to provide the Department with a realistic and acceptable plan to recover the delays; or
- .3 the Design-Builder's monthly schedule update reflects that the Design-Builder has fallen behind the Project Schedule, and the Design-Builder fails to include, in the same monthly report, a realistic and acceptable plan to recover the delays; or
- .4 the Design-Builder has failed to provide the monthly report in full compliance with Section 4.5 of this Agreement; or
- .5 the Design-Builder has failed to pay Subcontractors or suppliers promptly or has made false or inaccurate certifications that payments to Subcontractors or suppliers are due or have been made; or
- .6 any mechanic's lien has been filed against the Department, the site or any portion thereof or interest therein, or any improvements on the site, even though the Department has paid all undisputed amounts due to the Design-Builder, and the Design-Builder, upon notice, has failed to remove the lien, by bonding it off or otherwise, within ten (10) calendar days; or
- .7 the Department has reasonable evidence that the Work will not be completed by the Substantial Completion Date, as required, that the unpaid balance of the Guaranteed Maximum Price would not be adequate to cover actual or liquidated damages arising from the anticipated delay; or
- .8 the Department has reasonable evidence that the Work cannot be completed for the unpaid balance of the Guaranteed Maximum Price; or
- .9 the Design-Builder is otherwise in substantial breach of this Contract (including, without limitation, failures to comply with LSDBE Utilization requirements in Article 11).

**Section 6.4.10 Payment Not Acceptance.** Payment of any progress payment or final payment shall not constitute acceptance of Work that is defective or otherwise fails to conform to the Contract, or a waiver of any rights or remedies the Department may have with respect to defective or nonconforming Work.

**Section 6.4.11 Department Not Obligated to Others.** The Department shall have no obligation to pay or be responsible in any way for payments to a consultant or subcontractor performing portions of the Work. The Department shall have no obligation, after assignment of the Design Contract to the Design-Builder, to pay or be responsible in any way for payments to the Architect/Engineer.

**Section 6.4.12 Final Payment.** Final payment shall be made by the Department to the Design-Builder when (i) Final Completion has been achieved; and (ii) a final Application for Payment and a final accounting for the Cost of the Work have been submitted by the Design-Builder and reviewed by the Department's accountants. The Department shall make such final payment not more than thirty (30) days after the Department receives such report from its accountants.

**Section 6.4.12.1** The amount of the final payment shall be calculated as follows:

- .1 Take the sum of the Cost of the Work substantiated by the Design-Builder's final accounting and the Preconstruction Fee and the Design-Build Fee as adjusted to reflect whether the goals established in Section 3.8 and Section 11.2.3.2 have been met; but not more than the Guaranteed Maximum Price.
- .2 Subtract amounts, if any, for which the Department withholds pursuant to the Contract.
- .3 Subtract the aggregate of previous payments made by the Department. If the aggregate of previous payments made by the Department exceeds the amount due the Design-Builder, the Design-Builder shall promptly reimburse the difference to the Department.
- .4 The final payment shall take into account any savings accruing to the Department or the Design-Builder.

**Section 6.4.12.2** The Department's accountants will review and report in writing on the Design-Builder's final accounting within 30 days after delivery of the final accounting to the Department by the Design-Builder. Based upon such Cost of the Work as the Department's accountants report to be substantiated by the Design-Builder's final accounting, and provided the other conditions of Subparagraph 6.4.12.1 have been met, the Department will, within seven days after receipt of the written report of the Department's accountants, shall notify the Design-Builder of any amount that the Department will withhold and the reasons therefor. The time periods stated in this Paragraph 6.4.12 supersede those for typical progress payments.

**Section 6.4.12.3** If the Department's accountants report the Cost of the Work as substantiated by the Design-Builder's final accounting to be less than claimed by the Design-Builder, the Design-Builder shall be entitled to proceed in accordance with Section 6.4 without a further decision of the Department. Unless agreed to otherwise, the Design-Builder shall make a claim pursuant to Section 6.4 of the disputed amounts within 60 days after the Design-Builder's receipt of the Department's final payment. Failure to make such a claim within this 60-day

period shall result in the substantiated amount reported by the Department's accountants becoming binding on the Design-Builder. Pending a final resolution of the disputed amount, the Department shall pay the Design-Builder the amount that the Department determines to be appropriate.

**Section 6.5 Timely Payment of Subcontractors.** Within seven (7) days of receiving any payment from the Department including amounts attributable to Work performed, or materials or equipment supplied, by a Subcontractor or supplier, the Design-Builder shall either pay the Subcontractor or supplier for its proportionate share of the amount paid to the Design-Builder for the Subcontractor's or supplier's Work or materials or equipment, or notify the Department and the Subcontractor or supplier, in writing, of the Design-Builder's intention to withhold all or part of the payment and state the reason for the withholding. All monies paid to the Design-Builder under the Agreement shall be used first to pay amounts due to Subcontractors or suppliers supplying labor or materials for the Project and only money remaining after such payments are made may be retained by the Design-Builder. Monies paid by joint check shall be deemed to have been paid fully to the Subcontractor or supplier named as a joint payee, unless the Department agrees otherwise in writing. Any interest paid to Subcontractors or suppliers because the Design-Builder has failed to pay them in timely fashion shall not entitle the Design-Builder to a Change Order.

## **SECTION 7 INDEMNIFICATION.**

**Section 7.1** To the fullest extent permitted by law, the Design-Builder shall defend, indemnify and hold harmless the Department and the Department's consultants, agents and employees from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Design-Builder, a subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

## **SECTION 8 CHANGES CLAUSE**

**Section 8.1 Changes Authorized.** The Department may, without invalidating the Contract, and without notice to or approval of any surety, order changes in the Work, including additions, deletions or modifications. Any such change must be conveyed by the Department to the Design-Builder via written Change Directive or Change Order.

**Section 8.2 Executed Change Directive/Change Order Required.** Only a written Change Directive or Change Order, executed by the Department, may make changes to the Contract. In particular, but without limitation, a written Change Directive or Change Order executed by the Department is the only means by which changes may be made to the Substantial or Final Completion Date, or the Guaranteed Maximum Price.

**Section 8.3 Department-Initiated Changes.** If the Department wishes to make a change in the Work or to accelerate the Work, it will execute and issue to the Design-Builder a written Change Directive, either directing the Design-Builder to proceed at once with the changed Work or directing it to not to proceed, but to inform the Department, in writing, of the amount, if any, by which the Design-Builder believes that Substantial or Final Completion Date and/or the Guaranteed Maximum Price should be adjusted to take the Change Order or Change Directive into account.

**Section 8.4 Notice of Change Event.** The Design-Builder must give the Department written notice of any Change Event within ten (10) calendar days of the date on which the Design-Builder knew, or reasonably should have known, of the Change Event. To the extent available, the notice must state the nature of the Change Event and describe, generally, all changes in the Contract to which the Design-Builder believes it is entitled. Such notice is an express condition precedent to any claim or request for adjustment to the Substantial or Final Completion Date, or the Guaranteed Maximum Price arising from the Change Event and, if the notice is not given within the required time, the Design-Builder will have waived the right to any adjustment to the Substantial or Final Completion Date or the Guaranteed Maximum Price arising from the Change Event.

**Section 8.5 Detailed Change Request.** Within twenty (20) days after giving notice of a change event, the Design-Builder shall submit a written change request describing, in reasonable detail, all adjustments it seeks to the Substantial or Final Completion Date or the Guaranteed Maximum Price as a result of the Change Event. The change request shall include the same information as described in Section 8.4 with respect to any Contract changes the Design-Builder seeks due to the Change Event, and the amount of any requested adjustment to the Guaranteed Maximum Price shall be limited in accordance with that Subparagraph.

**Section 8.6 Markups.** For Changes to the Guaranteed Maximum Price, the following conditions shall apply:

- .1 For Work performed by a Subcontractor with its own forces, the Subcontractor shall be entitled to a mark-up of not more than fifteen percent (15%) (covering home office overhead, the cost of insurance and bonds, field supervision, general conditions and profit) on the Direct Costs of the Work. For Work that the Owner permits the Design-Builder to self-perform, the Design-Builder shall also be entitled to a mark-up of not more than fifteen percent (15%) of the Direct Cost of the Work. With regard to any such Work that is self-performed by the Design-Builder, the markup contemplated in this Section 7.4.11.1 shall be the Design-Builder's exclusive compensation and it shall not be entitled to the markup contemplated in Section 7.4.11.3;
- .2 Intervening tier Subcontractors shall be entitled to a mark-up of five percent (5%) (covering home office overhead, the cost of insurance and bonds, field supervision, general conditions and profit) on Work Performed by lower-tier

Subcontractors;

- .3 To the extent permitted by Section 7.4.8, the Design-Builder shall be entitled to an increase in its Design-Build Fee at a rate of Six Percent (6%) on work perform by Subcontractors. Such markup shall cover the same cost elements that were included in the Design-Build Fee;
- .4 In no event shall the maximum mark-up on the Direct Cost of the Work exceed twenty five percent (25%).

Direct Cost of the Work shall mean labor, material and other costs reasonably and necessarily incurred in the proper performance of the Work as approved by the Owner. Such costs do not include, however, home office overhead, field supervision, general conditions or profit of either the Subcontractor or the Design-Builder. No personnel above the level of a working foreman shall be considered a Direct Cost of the Work.

**Section 8.7 Failure to Agree.** If the Design-Builder claims entitlement to a change in the Contract, and the Department does not agree that any action or event has occurred to justify any change in time or compensation, or if the parties fail to agree upon the appropriate amount of the adjustment in time or compensation, the Department will unilaterally make such changes, if any, to the Contract, as it determines are appropriate pursuant to the Contract. The Design-Builder shall proceed with the Work and the Department's directives, without interruption or delay, and shall make a claim as provided in Article 12. Failure to proceed due to a dispute over a change request shall constitute a material breach of the Contract and entitle the Department to all available remedies for such breach, including, without limitation, termination for default.

**Section 8.8 Department's Designated Representative.** The Department designates Christopher Weaver, Director, Department of General Services, as its representative with express authority to bind the Department with respect to all matters requiring the Department's approval or authorization; provided, however, that Yinka T. Alao, Associate Director, Contracts and Procurement, shall have the express authority to bind the Department for matters that are administrative in nature or of a value no greater than Five Hundred Thousand Dollars (\$500,000); and futher provided, that James Marshall and Kimberly Gray, Contracting Officerst in Contracts & Procurement Division, shall have the express authority to bind the Department for matters that are administrative in nature or of a value no greater than One Hundred Thousand Dollars (\$100,000). These representatives shall have the exclusive authority to make decisions on behalf of the Department concerning estimates and schedules, construction budgets, changes in the Work, and execution of Change Orders or Change Directives, and shall render such decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Design-Builder. In order for the Department to effectively manage the Project and assure that the Design-Builder does not receive conflicting instructions regarding the Work, the Design-Builder shall promptly notify the Department's representative upon receiving any instructions or other communication in connection with the Design-Builder's Work from any employee of the Department or other purported agent of the Department other than the Department's representative.

## **SECTION 9 LIQUIDATED DAMAGES**

**Section 9.1** If the Design-Builder fails to achieve Substantial Completion by the Substantial Completion Date, the Parties acknowledge and agree that the actual damage to the Department for the delay will be impossible to determine, and in lieu thereof, the Design-Builder shall pay to the Department, as fixed, agreed and liquidated delay damages in the amount of set forth in the Project Information Section of this Agreement per day for each calendar day of delay for failure to meet the Substantial Completion Date. The Design-Builder and the Department agree that the liquidated damages do not constitute, and shall not be deemed, a penalty but represent a reasonable approximation of the damages to the Department associated with a delay in the Project.

## **SECTION 10 INSURANCE AND BONDS**

**Section 10.1** The Design-Builder will be required to maintain the following types of insurance throughout the life of the Contract. In the event that a claim for or related to the Project is made on any such policy or any other policy, the Design-Builder shall be responsible for the payment of any applicable deductible and shall not be entitled to an increase in Lump Sum for the costs of paying such deductible.

- .1** Commercial general public liability insurance (“Liability Insurance”) against liability for bodily injury and death and property damage, such Liability Insurance to be in an amount not less than One Million Dollars (\$1,000,000) for liability for bodily injury, death and property damage arising from any one occurrence and One Million Dollars (\$1,000,000) from the aggregate of all occurrences within each policy year. The policy should include completed operations coverage. Such coverage shall be maintained for the duration of the Project as well as three (3) years after Substantial Completion of the Project is achieved.
- .2** Workers’ compensation and Employers Liability coverage providing statutory benefits for all persons employed by the Design-Builder, or its contractors and subcontractors at or in connection with the Work.
- .3** Automobile Liability, including Hired and Non-Owned Auto Liability in the amount of at least One Million Dollars (\$1,000,000) for each occurrence for bodily injury and property damage.
- .4** Builder’s risk insurance written on an “all risk” basis and covering the value of the improvements being constructed. This coverage does not need to be maintained until such time as construction operations begin.
- .5** Excess umbrella liability coverage (on at least a follow form basis) and when combined with the general liability policy has an aggregate limit of at least Five Million Dollars (\$5,000,000).

- .6 Contractor's Pollution Liability coverage in the amount of at least Two Million Dollars (\$2,000,000) for each occurrence. Such coverage shall be maintain for the duration of the Project as well as three (3) years after Substantial Completion of the Project is achieved.
- .7 With respect to any design or engineering subconsultants, or the Design-Builder if the Design-Build is provided design or engineering services with its own staff, errors and omissions coverage written on a claims made basis and having an aggregate policy limit of at least Five Million Dollars (\$5,000,000).

**Section 10.2** Each insurance policy shall be issued in the name of the Design-Builder and shall name as additional insured parties the Department and the District of Columbia, and the officers, agents and employees of each. Such insurance policies shall not be cancelable or reduced without thirty (30) days prior written notice to the Department.

**Section 10.3** All such insurance policies shall contain a waiver of subrogation against the Department and the District of Columbia, and their respective agents.

**Section 10.4** All such insurance policies shall be written by a company that is rated at least A- by A.M. Best and having a surplus size rating of at least XV and is licensed/approved to do business in the District of Columbia.

**Section 10.5 Performance Bond and Payment Bond.** The Design-Builder shall, before commencing the Construction Phase, provide to the Department a payment bond and performance bond, each with a penal sum equal to the Guaranteed Maximum Price. Such bond shall remain in full force and effect until Final Completion is achieved and the Department shall be able to draw upon such bond regardless of the amount paid by the Department to the Design-Builder, even if such amount exceeds the penal value of such bond. Unless otherwise directed by the Department, the Design-Builder shall require all Subcontractors whose Subcontract prices exceed One Hundred Thousand Dollars (\$100,000) to provide payment and performance bonds, with a penal sum equal to one hundred percent (100%) of the subcontract price. All bonds must be in a form acceptable to the Department, its lenders or bond trustee, and issued by a surety authorized to do business in the District of Columbia and bonding company listed on the Department of Treasury's Listing of Approved Sureties. All subcontractors' bonds must include a dual obligee rider, naming the Design-Builder and the Department as dual obligees. If the Guaranteed Maximum Price is increased pursuant to the terms of the Contract, the Department may require that the amount of the bonds be increased in the amount of one hundred percent (100%) of the increase, and the Design-Builder shall promptly comply. The Design-Builder shall furnish a copy of its bonds to any potential beneficiary of the bonds, or permit that person or company to make a copy. If the bonds provided become unacceptable to the Department, the Design-Builder shall promptly provide substitute security acceptable to the Department. If the Design-Builder intends to exercise its rights as dual obligee under any trade Subcontractor's bond, it shall first give the Department twenty (20) days written notice, so that the Department may lodge any objection it may reasonably have to the proposed action.

## **SECTION 11 ECONOMIC INCLUSION REQUIREMENTS**

### **Section 11.1 LSDBE Utilization.**

**Section 11.1.1** The Design-Builder shall ensure that Local, Small and Disadvantaged Business Enterprises will participate in at least fifty percent (50%) of the Contract Work called for by this Agreement. Thirty-five percent (35%) of the Contract Work must be awarded to entities that are certified as either Small or Disadvantaged Business Enterprises by the District of Columbia Department of Small and Local Business Development and twenty percent (20%) of the Contract Work must be awarded to entities that are certified as Disadvantaged Business Enterprises. The LSDBE certification shall be, in each case, as of the effective date of the subcontract. Supply agreements with material suppliers shall be counted toward meeting this goal.

**Section 11.1.2** The Design-Builder has developed a LSDBE Utilization Plan that is attached hereto as **Exhibit H**. The Design-Builder shall comply with the terms of the LSDBE Utilization Plan in making purchases and administering its Subcontractors and Supply Agreements.

**Section 11.1.3** Neither the Design-Builder or a Subcontractor may remove a Subcontractor or tier-Subcontractor if such Subcontractor or tier-Subcontractor is certified as an LSDBE company unless the Department approves of such removal. The Department may condition its approval upon the Design-Builder developing a plan that is, in the Department's sole and absolute judgment, adequate to maintain the level of LSDBE participation on the Project.

### **Section 11.2 First Source Employment Act.**

**Section 11.2.1** The Design-Builder shall comply with applicable laws, regulations and special requirements of the Contract Documents regarding equal employment opportunity and affirmative action programs.

**Section 11.2.2** The Design-Builder shall ensure that at least fifty-one percent (51%) of the Design-Builder's Team and every subconsultant's and subcontractor's employees hired after the effective date of the Contract, or after such subconsultant or subcontractor enters into a contract with the Design-Builder, to work on the Project shall be residents of the District of Columbia. This percentage shall be applied in the aggregate, and not trade by trade. In addition, the Design-Builder shall use commercially reasonable best efforts to comply with the workforce percentage goals established by the recently adopted amendments to the First Source Employment Agreement Act of 1984 (D.C. Code §§ 2-219.01 *et seq.*) and any implementing regulations, including, but not limited to the following requirements:

- (i) At least 20% of journey worker hours by trade shall be performed by District residents;

- (ii) At least 60% of apprentice hours by trade shall be performed by District residents;
- (iii) At least 51% of the skilled laborer hours by trade shall be performed by District residents; and
- (iv) At least 70% of common laborer hours shall be performed by District residents.

**Section 11.2.3 Workforce Incentive Program.** In addition to the requirement imposed by Section 11.2.2, the Department has established a Workforce Utilization Goal which is set forth in Section 1.2.3.2 below for the labor hours on the Project. The Design-Builder shall ensure that the Workforce Utilization Goal is met. It is understood and agreed that: (i) the Design-Builder shall be entitled to an incentive payment as described in Section 11.2.3.2 if the Project's Workforce Goal is met; and (ii) that the Department shall pay to the Design-Builder for payment to each Trade Subcontractor an incentive payment as described in Section 11.2.3.1.

- .1 Each Trade Subcontractor shall be paid an amount equal to Ten Percent (10%) of the Bare Salary paid to employees who are (i) a bona fide resident of the District of Columbia; and (ii) working on the Project. Bare Salary shall mean wages paid to employees for work performed on the job site and excludes the cost of benefits or taxes associated with such employees. Only those employees who are directly employed on the job site shall count toward this calculation. Employees who work in home or regional offices and who support multiple projects shall not be eligible for this incentive. In calculating this incentive payment, the certified payrolls collected and maintained as part of the Davis-Bacon Act shall be used.
- .2 The Department has established a goal that at least forty percent (40%) of all hours worked on the Project shall be worked by District residents (such goal, the "Workforce Utilization Goal"). In the event the Project's Workforce Utilization Goal is met or exceeded, the Design-Builder's Design-Build Fee, as set forth in this Agreement, shall be increased by five percent (5%).

**Section 11.2.4** Thirty five percent (35%) of all apprentice hours worked on the Project shall be worked by District residents.

### **Section 11.3 Economic Inclusion Reporting Requirements**

**Section 11.3.1** Upon execution of the Contract, the Design-Builder and all its member firms, if any, and each of its Subcontractors shall submit to the Department a list of current employees and apprentices that will be assigned to the Contract, the date they were hired and whether or not they live in the District of Columbia.

**Section 11.3.2** The Design-Builder and its constituent entities shall comply with subchapter X of Chapter II Title 2, and subchapter II of Chapter 11 of Title 1 of the D.C. Code, and all successor acts thereto and the rules and regulations promulgated thereunder. The Design-

Builder and all member firms and Subcontractors shall execute a First Source Agreement with the District of Columbia Department of Employment Services (“DOES”) prior to beginning Work at the Project site.

**Section 11.3.3** The Design-Builder shall maintain detailed records relating to the general hiring of District of Columbia and community residents.

**Section 11.3.4** The Design-Builder shall be responsible for: (i) including the provisions of Section 11.3 in all subcontracts; (ii) collecting the information required in Section 11.3 from its Subcontractors; and (iii) providing the information collected from its Subcontractors in the reports required to be submitted by the Design-Builder pursuant to Section 11.3.

**Section 11.3 Compliance with the Apprenticeship Act.** The Design-Builder agrees to comply with the requirements of the Apprenticeship Act of 1946, D.C. Code §§ 32-1401, *et seq.* It is understood and agreed that thirty five percent (35%) of all apprentice hours for the Project must be District residents. If the Design-Builder or any of its subcontractors fail to use its best efforts to meet this goal, the Design-Builder or the subcontractor shall be subject to a penalty of five percent (5%) of the labor costs associated with the Contract, in accordance with D.C. Code § 32-1430 and implementing regulations.

## **SECTION 12 DISPUTE RESOLUTION**

**Section 12.1 Notice of Claim.** If the Design-Builder has complied with all provisions in Section 8.4 regarding changes, and the Department has denied the changes requested in a written Change Proposal, or has failed to respond to a written Change Proposal within thirty (30) days, and the Design-Builder wishes to pursue a claim over the disputed item, or if the Design-Builder wishes to assert a claim over a contract dispute not arising from matters related to a Change Event, Change Order or Change Directive, then the written notice of claim must be submitted to the Department pursuant to procedures set forth in section 4733 of the Department's procurement rules and section 908 of the District's *Procurement Practices Reform Act of 2010* (PPRA).

**Section 12.2 Contents of Notice of Design-Builder's Claim.** The notice of claim shall state the nature of the claim, the events or circumstances giving rise to the claim, the type of relief requested, and the amount of time or additional compensation, or other damages sought. If the amount of time, compensation, or other damages sought is not reasonably ascertainable at the time, the Design-Builder shall so state, explain why, and provide whatever estimates it can reasonably provide. The notice shall state clearly that the Design-Builder intends to assert a claim against the Department.

**Section 12.3 Appeal Procedures.** All claims arising under or in connection with the Agreement or its breach, or relating to the Project, whether framed in contract, tort or otherwise, and which are not resolved via the claims process may be resolved by filing an appeal with the District of Columbia Board of Contract Appeals in accordance with Title X of the PPRA. However, if a third party brings any claim against the Department, including, without limitation,

claims of infringement of patents, copyrights or other intellectual property rights, the Department may bring an action for defense or indemnification against the Design-Builder in the court in which such claim is being litigated.

## **SECTION 13 MISCELLANEOUS PROVISIONS**

**Section 13.1 Extent of Contract.** The Contract, which includes this Agreement and the other documents incorporated herein by reference, including, but not limited to the Exhibits attached hereto, represents the entire and integrated agreement between the Department and Design-Builder and supersedes all prior negotiations representations or agreements, either written or oral. The Contract may be amended only by written instrument signed by both the Department and Design-Builder. If anything in any document incorporated into this Agreement is inconsistent with this Agreement, this Agreement shall govern.

**Section 13.2 Ownership And Use of Documents.** The Drawings, Specifications and other documents prepared by the Architect/Engineer, and copies thereof furnished to the Design-Builder, are for use solely with respect to this Project. They are not to be used by the Design-Builder, Subcontractors, Sub-subcontractors or suppliers on other projects, or for additions to this Project outside the scope of the Work, without the specific written consent of the Department and the Architect/Engineer.

**Section 13.3 Governing Law.** The Contract shall be governed by and construed in accordance with the laws of the District of Columbia, without regard to its conflict of laws principles.

**Section 13.4 Buy American Act Provision.** The Design-Builder shall comply with the provisions of the Buy American Act (41 U.S.C. § 10a), including, but not limited to, the purchase of steel.

**Section 13.5 Davis-Bacon Act Provision.** The Design-Builder agrees that the construction work performed under this Contract shall be subject to the Davis-Bacon Act (40 U.S.C. §§ 276a-276a-7). The wage rates applicable to this Project are attached as **Exhibit H**. The Design-Builder further agrees that it and all of its subcontractors shall comply with the regulations implementing the Davis-Bacon Act and such regulations are hereby incorporated by reference.

**Section 13.6 False Claims Act.** The Design-Builder shall be governed by all laws and regulations prohibiting false or fraudulent statements and claims made to the government, including the prescriptions set forth in District of Columbia Code § 2-381.02.

**Section 13.7 No Third-Party Beneficiary Rights.** Nothing in this Agreement shall be construed as creating third-party beneficiary rights in any person or entity, except as otherwise expressly provided in this Agreement.

**Section 13.8 Limitations.** The Design-Builder agrees that any statute of limitations applicable to any claim or suit by the Department arising from this Contract or its breach shall

not begin to run, or shall be deemed to be tolled, until Final Completion or, with respect to latent defects or nonconformities, such later time as the Department knew or should have known of the defect or nonconformity.

**Section 13.9 Binding Effect; Assignment.** The Contract shall inure to the benefit of, and be binding upon and enforceable by, the parties and their respective successors and permitted assigns. The Design-Builder shall not assign its rights under the Contract, including the right to all or a portion of its compensation, without the Department's prior written consent. Any delegation or assignment made contrary to the provisions of this Paragraph shall be null and void.

**Section 13.10 Survival.** All agreements warranties, and representations of the Design-Builder contained in the Contract or in any certificate or document furnished pursuant to the Contract shall survive termination or expiration of the Contract.

**Section 13.11 No Waiver.** If the Department waives any power, right, or remedy arising from the Contract or any applicable law, the waiver shall not be deemed to be a waiver of the power, right, or remedy on the later recurrence of any similar events. No act, delay, or course of conduct by the Department shall be deemed to constitute the Department's waiver, which may be effected only by an express written waiver signed by the Department.

**Section 13.12 Remedies Cumulative.** Unless specifically provided to the contrary in the Contract, all remedies set forth in the Contract are cumulative and not exclusive of any other remedy the Department may have, including, without limitation, at law or in equity. The Department's rights and remedies will be exercised at its sole discretion, and shall not be regarded as conferring any obligation on the Department's to exercise those rights or remedies for the benefit of the Design-Builder or any other person or entity.

**Section 13.13 Entire Agreement; Modification.** The Contract supersedes all contemporaneous or prior negotiations, representations, course of dealing, or agreements, either written or oral. No modifications to the Contract shall be effective unless made in writing signed by both the Department and the Design-Builder, unless otherwise expressly provided to the contrary in the Contract.

**Section 13.14 Severability.** In the event any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement, and in lieu of each such invalid, illegal or unenforceable provision, there shall be added automatically as a part of this Agreement a provision as similar in terms to such invalid, illegal or unenforceable provision as may be possible and be valid, legal and enforceable; each part of this Agreement is intended to be severable.

**Section 13.15 Anti-Deficiency Act.** The Department's obligations and responsibilities under the terms of the Contract and the Contract Documents are and shall remain subject to the provisions of (i) the federal Anti-Deficiency Act, 31 U.S.C. §§1341, 1342, 1349, 1350, 1351, (ii)

the D.C. Code 47-105, (iii) the District of Columbia Anti-Deficiency Act, D.C. Code §§ 47-355.01 - 355.08, as the foregoing statutes may be amended from time to time, and (iv) Section 446 of the District of Columbia Home Rule Act. Neither the Contract nor any of the Contract Documents shall constitute an indebtedness of the Department, nor shall it constitute an obligation for which the Department is obligated to levy or pledge any form of taxation, or for which the Department has levied or pledged any form of taxation. **IN ACCORDANCE WITH § 446 OF THE HOME RULE ACT, D.C. CODE § 1-204.46, NO DISTRICT OF COLUMBIA OFFICIAL IS AUTHORIZED TO OBLIGATE OR EXPEND ANY AMOUNT UNDER THE CONTRACT OR CONTRACT DOCUMENTS UNLESS SUCH AMOUNT HAS BEEN APPROVED, IS LAWFULLY AVAILABLE AND APPROPRIATED BY ACT OF CONGRESS.**

**Section 13.16 Termination for Default.** The Department may terminate the Contract for default if the Design-Builder fails materially to perform any of its duties or obligations under the Contract. The Department must provide the Design-Builder with written notice of its intent to terminate the Contract under this provision seven (7) days before actually putting the termination into effect. If the Design-Builder has begun its curative action and has made progress satisfactory to the Department within the seven days, the Department may so notify the Design-Builder and the termination will not take effect. Otherwise, the termination shall take effect after seven days without further notice or opportunity to cure.

**Section 13.17 Termination for Convenience** The Department may, upon seven (7) days written notice to the Design-Builder, terminate the Contract in whole or specified part, for its convenience, whether the Design-Builder is in breach of Contract or not. The notice of termination shall state the effective date of termination, the extent of the termination, and any specific instructions. The Design-Builder shall be entitled to receive only the following with respect to the terminated portion of the Project: (1) Cost of Work performed up to the date of termination; (2) reasonable costs of terminating outstanding subcontracts and supply agreements and other similar wind-up costs in a reasonable amount; (3) a fair and reasonable portion of the overhead and profit attributable to the Work performed on the terminated portion of the Project, up to the time of termination. In the event of a termination for convenience, the Design-Builder shall not be entitled to profit on unperformed elements of the Work.

**Section 13.18 Anti-Competitive Practices and Anti-Kickback Provisions.**

**Section 13.18.1** The Design-Builder recognizes the need for markets to operate competitively and shall observe and shall comply with all applicable law, rules, and regulations prohibiting anti-competitive practices. The Builder shall not engage, directly or indirectly, in collusion or other anti-competitive practices that reduces or eliminates competition or restrains trade. The Department shall report to the appropriate authority any activity that evidences a violation of the antitrust laws, and take such other further action to which it is entitled or obligated under the law.

**Section 13.18.2** The Design-Builder shall observe and comply with all applicable law, rules, and regulations prohibiting kickbacks and, without limiting the foregoing, Design-Builder

shall not (i) provide or attempt to provide or offer to provide any kickback; (ii) solicit, accept, or attempt to accept any kickback; or (iii) include, directly or indirectly, the amount of any kickback in the contract price charged by Design-Builder or a Subcontractor of the Design-Builder to the Department. The Design-Builder shall have in place and follow reasonable procedures designed to prevent and detect possible violations described in this subparagraph in its own operations and direct business relationships. The Department may take any recourse available to it under the law for violations of this anti-kickback provision.

**Section 13.18.3** The Design-Builder represents and warrants that it did not, directly or indirectly, engage in any collusive or other anti-competitive behavior in connection with the bid, negotiation or award of the Contract.

**Section 13.19 Ethical Standards for the Department's Employees and Former Employees.**

**Section 13.19.1** The Department expects the Design-Builder to observe the highest ethical standards and to comply with all applicable law, rules, and regulations governing ethical conduct or conflicts of interest. Neither the Design-Builder, nor any person associated with the Design-Builder, shall provide (or seek reimbursement for) any gift, gratuity, favor, entertainment, loan or other thing of value to any employee of the District or the Department not in conformity with applicable law, rules or regulations. The Design-Builder shall not engage the services of any person or persons in the employment of the Department or the District for any Work required, contemplated or performed under the Contract. The Design-Builder may not assign to any former Department or District employee or agent who has joined the Design-Builder's firm any matter on which the former employee, while in the employ of the Department, had material or substantial involvement in the matter. The Design-Builder may request a waiver to permit the assignment of such matters to former Department personnel on a case-by-case basis. The Design-Builder shall include in every subcontract a provision substantially similar to this section so that such provisions shall be binding upon each Subcontractor or vendor.

**Section 13.20 Gratuities and Officers Not To Benefit Provisions.**

**Section 13.20.1** If it is found, after notice and hearing, by the Department that gratuities (in the form of entertainment, gifts, payment, offers of employment or otherwise) were offered or given by the Design-Builder, or any agent or representative of the Design-Builder, to any official, employee or agent of the Department or the District with a view toward securing the Contract or any other contract or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performance of the Contract, the Department may, by written notice to the Design-Builder, terminate the right of the Design-Builder to proceed under the Contract and may pursue such other rights and remedies provided by law and under the Contract.

**Section 13.20.2** In the event the Contract is terminated as provided in Section 13.20.1, the Department shall be entitled:

- .1 to pursue the same remedies against the Design-Builder as it could pursue in the event of a breach of the Contract by the Design-Builder; and
- .2 as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the Department) which shall be not less than ten times the costs incurred by the Design-Builder in providing any such gratuities to any such officer or employee.

**Section 13.20.3** No member of, nor delegate to Congress, Mayor or City Council Member, nor officer nor employee of the District, nor officer nor employee of the Department shall be admitted to any share or part of the Contract or to any benefit that may arise therefrom, and all agreements entered into by the authorized representative of the Department in which he or any officer or employee of the Department shall be personally interested as well as all agreements made by the Department in which the Mayor or City Council Member or officer or employee of the District shall be personally interested shall be void and no payments shall be made on any such contracts by the Department or by any officer thereof; but this provision shall not be construed or extend to the agreement if the share of or benefit to the member of, or delegate to Congress, Mayor or City Council Member, or officer or employee of the District is de minimus.

**Section 13.21 Covenant Against Contingent Fees Provisions.**

**Section 13.21.1** The Design-Builder warrants that no person or selling agency has been employed or retained to solicit or secure the Contract upon an agreement or understanding for a Commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Design-Builder for the purpose of securing business. For breach or violation of this warranty, the Department shall have the right to terminate the Contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of the Department, percentage, brokerage of contingent fee.

**Section 13.22 Conformance with Laws.** It shall be the responsibility of the Design-Builder to perform the Contract in conformance with the Department's Procurement Regulations (27 DCMR § 4700 *et seq.*) and all statutes, laws, codes, ordinances, regulations, rules, requirements and orders of governmental bodies, including, without limitation, the U.S. Government and the District of Columbia government; and it is the sole responsibility of the Design-Builder to determine the Procurement Regulations, statutes, laws, codes, ordinances, regulations, rules, requirements and orders that apply and their effect on the Design-Builder's obligations thereunder. This Section 13.22 shall apply during both the Preconstruction Phase and the Construction Phase.

**Section 13.23 Warranties and Representations**

**Section 13.23.1** All disclosures, representations, warranties, and certifications the Design-Builder makes in its proposal in response to the RFP shall remain binding and in effect

throughout the term of the Contract. The Design-Builder reaffirms that all such disclosures, representations, warranties, and certifications are true and correct.

**Section 13.23.2** If any disclosure, representation, warranty or certification the Design-Builder has made or makes pursuant to the RFP or the Contract, including, without limitation, representations concerning the Builder's construction or design experience and qualifications, claims or litigation history or financial condition, is materially inaccurate, that shall constitute a material breach of the Contract, entitling the Department to all available remedies.

**Section 13.23.3** The terms and conditions of Section 13.23 shall apply throughout the term of this Agreement.

**Section 13.24 Responsibility for Agents and Contractors.** At all times and during both the Preconstruction and Construction Phases, the Design-Builder shall be responsible to the Department for any and all acts and omissions of the Design-Builder's agents, employees, Subcontractors, Sub-Subcontractors, material suppliers, and laborers, and the agents and employees of the Subcontractors, Sub-Subcontractors, material suppliers, and laborers performing or supplying Work in connection with the Project. This Section 13.24 shall apply throughout the term of this Agreement.

**Section 13.25 Independent Contractor.** In carrying out all its obligations under the Agreement, the Design-Builder shall be acting as an independent contractor, and not as an employee or agent of the Department, or joint venturer or partner with the Department. The Design-Builder shall have exclusive authority to manage, direct, and control the Work, and shall be responsible for all construction means, methods, techniques, sequences, and procedures, as well as for Project safety.

**IN WITNESS WHEREOF**, the Parties have executed this Agreement as of the date first written above.

**DEPARTMENT OF GENERAL SERVICES**, an agency within the executive branch of the Government of the District of Columbia

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

**[NAME OF CONTRACTOR]**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

**Exhibit A**

*List of Design Documents*

**Exhibit B**

*Assumptions & Clarifications*

**Exhibit C**

*GMP Breakdown*

**Exhibit D**

*List of Unit Prices & Allowances*

**Exhibit E**

*Key Personnel*

**Exhibit F**

*LSDBE Utilization Plan*

**Exhibit G**

*Workforce Utilization Plan*

**Exhibit H**

*Davis Bacon Act Wage Determinations*

**Exhibit I**

*Form of Lien Waivers*