

**DESIGN-BUILD SERVICES AGREEMENT
FOR THE SAN ANTONIO WATER SYSTEM
NORTHEAST OPERATIONS CENTER PROJECT**

This Design-Build Services Agreement (“**Agreement**”) is made and entered into on this _____ day of _____, 20____ between the SAN ANTONIO WATER SYSTEM, a public water utility created pursuant to the provisions of Ordinance No. 75686 of the City of San Antonio, Texas, and Texas Local Government Sections 402.141 et seq., in the State of Texas (“**Owner**”) and _____, a _____, having its principal place of business located at _____ (the “**Design-Build Firm**,” as further defined below). Owner and Design-Build Firm are collectively referred to herein as the “Parties.”

RECITALS

This Agreement relates to the design and construction for Phase 3 of Owner’s Service Center Project, including the new Northeast Operations Center and related facilities (“**NEOC**”) and the demolition of certain existing facilities at the existing Northeast Service Center (“**Existing NESC**”), all of which are located on two different sites as described in the attached Design Criteria Package (“**DCP**”) (**Exhibit 1**), and which constitute the Project, as further defined below in the Definitions section of this Agreement.

Owner has, with the assistance of APSI CONSTRUCTION MANAGEMENT (“**Program Manager**”), undertaken a program for the design and construction of Owner’s Service Center Projects, including this Project. The Owner’s Program Manager will assist Owner with respect to the Design-Build Firm’s performance of this Agreement and assist Owner to ensure the Project conforms to the requirements of this Agreement.

Owner, based upon the recommendations of the Program Manager and its architectural subconsultant, H MUÑOZ AND COMPANY, INC. d/b/a Muñoz and Company, Inc. (“**Architectural Representative**”), has determined that the Project should be designed and constructed using the “**design-build**” delivery method in accordance with Chapter 2267, Section 3.01, et. seq. of the Texas Government Code (the “**Code**”).

Architectural Representative has been designated to act as the Owner’s design representative for the Project and has assisted Owner with preparation of the design criteria that Owner considers necessary to describe the Project.

Architectural Representative is registered as an architect under Chapter 1051 of the Texas Occupations Code, and was selected along with the Program Manager based upon the Program Manager’s and Architectural Representative’s demonstrated competence and qualifications in conjunction with the original procurement of the services of Program Manager and its subconsultants. The Architectural Representative will (i) act independently of the Design-Build Firm, (ii) provide Owner independent professional design services as required by the Code for the

delivery of the Project using the design-build delivery method; and (iii) assist Owner to ensure the Project conforms to the DCP.

Owner has, in accordance with the alternative project delivery procedures prescribed by the Code, determined that the Design-Build Firm is qualified to deliver the Project in conformity with the DCP and the requirements of this Agreement.

Owner and Design-Build Firm agree that the Design-Build Firm shall deliver the Project as described herein, according to the standards, requirements, processes, and procedures required herein, for which Owner has agreed to compensate Design-Build Firm for its Work and Services subject to the terms and conditions set forth below, which are hereby accepted by the Parties.

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I. Definitions

A. The following definitions apply in this Agreement:

1. **“Allowance”** a maximum amount expressly described in this Agreement as a sum that may be expended if necessary for certain Services and Work, the necessity and cost of which may be unknown or undetermined as of the Effective Date and/or commencement of the Construction Phase. An Owner’s Allowance may also be established by the Owner for Owner’s exclusive use in its sole discretion. Allowances shall be included in the Guaranteed Maximum Price in specific line items and in the Schedule of Values, and shall not be treated as a lump sum pay items. Allowances will be finally adjusted and set as part of establishing a Final GMP, as provided in Article IX.
2. **“Applicable Law(s)”** means the laws, rules, regulations, codes, including building and life safety code requirements, ordinances and restrictive covenants (whether federal, state or local) of any kind governing the Project or the development, design, construction, approval, use or occupancy of the Project.
3. **“Application(s) for Payment”** means the Design-Build Firm’s invoices for payment for Services and Work performed hereunder, to be prepared and submitted in accordance with Article XII. The term includes Applications for Progress Payments and the Application for Final Payment.
4. **“Approval” or “Approved”** means the written approval of Owner, and, as applicable, the Program Manager and/or Architectural Representative, where expressly required herein. Owner may exercise the right of Approval in its sole discretion. Owner’s Approval shall also require formal approval of Owner’s Board of Trustees whenever Board approval is expressly required by this Agreement, or is otherwise required by Owner’s policies. The act of an Approval shall not constitute a waiver of Owner’s rights hereunder or excuse the Design-Build Firm from fulfilling its obligations to perform in accordance with this Agreement.
5. **“Architectural Representative”** means H Muñoz and Company, Inc. d/b/a Muñoz and Company, Inc. (f/k/a Kell Muñoz Architects, Inc.), the firm designated by Owner to act as Owner’s independent representative for the duration of the Project.
6. **“As-Builts”** means the Design-Build Firm’s detailed record in the Building Information Model, and in AutoCAD format and in hard copy format, certified by the DPOR to show the accurate location of all elements of the Project as constructed, the delivery of which As-Builts shall constitute Design-Build Firm’s and the DPOR’s representation and warranty that such information is complete and accurate.
7. **“Authorities Having Jurisdiction” or “AHJs”** means any governmental agency, organization, the permitting offices of any public utility (including CPS Energy and

SAWS), and any of their authorized representatives responsible for enforcing the requirements of Applicable Law, or for approving equipment and materials to be incorporated into the Project, including the review of the Construction Documents for purposes of obtaining a building permit for the Project, or inspections to enforce compliance with life safety requirements of any code.

8. **“Board”** shall mean the San Antonio Water System Board of Trustees, which is the governing body of the Owner.
9. **“Bond, Payment”** means the Payment Bond securing the obligation of the Design-Build Firm to pay those providing labor, materials or other services for the Project. The Design-Build Firm shall deliver the Payment Bond to Owner in the form set forth in **Exhibit 7.1** after a Final GMP is established in accordance in Article IX. The penal sum of the Payment Bond excludes the Design Services Fee.
10. **“Bond, Performance”** means the Performance Bond securing the performance of the Design-Build Firm’s Work in accordance with this Agreement, including the Design-Build Firm’s warranty obligations. The Design-Build Firm shall deliver the Performance Bond in the form set forth in **Exhibit 7.2**, after a Final GMP is established in accordance in Article IX.
11. **“Bond, Security”** means the Security Bond securing the Design-Build Firm’s obligation to submit a Final GMP Proposal and, if Owner Approves the Final GMP Proposal, to execute a Contract Amendment to establish the amount of Final GMP proposed therein as the Guaranteed Maximum Price. The Design-Build Firm shall deliver the Security Bond in the form set forth in **Exhibit 7.3** in accordance in Article IX.
12. **“Building Information Model”** or **“BIM”** means a computable, parametric representation of all the physical and functional characteristics of the Project facilities and their related life-cycle information, to serve as a repository of related information, as required by the Building Information Modeling Protocols (**Exhibit 2**), for use by the Design-Build Firm and the Project Team during the Design Phase and Construction Phase of the Project, and for the Owner to continue to use and maintain the Project throughout its life-cycle.
13. **“CIP-Aces”** is a form of construction project management software that is part of the Owner’s Construction Project Management Software or CPMS system for this Project, as defined below, and which will be used by Owner, Program Manager and the Design-Build Firm to manage the Project via Owner’s Project-specific website and to make all Project records continuously available to Owner to view or print in electronic form from Owner’s offices and at any of the Worksites, including invoices for payment for the Work and Services.
14. **“Claim(s)”** shall mean any disputed liability, obligation, loss, harm, physical or economic damage, penalty, action, suit, judgment, cost, claim, expense or

disbursement or other claim of any form of liability of whatsoever kind and nature, whether founded or unfounded (including without limitation reasonable attorney fees, expert witness fees and expenses, costs of discovery, and all other costs of defense) arising out of or in any way relating to this Agreement, the Design-Build Firm Parties' operations in connection herewith, or the Work and Services, whether due to bodily injury, sickness, disease, or death to any person, or to injury to or destruction of property or the loss of use thereof.

15. **“Confidential Information”** means all data and information of Owner, including all Work Product, which Owner owns as its proprietary and/or confidential property, including but not be limited to, trade secrets, know-how, inventions, techniques, processes, algorithms, software programs, source code, schematics, designs (including the DCP), BIM data and models, contracts, vendor and contractor lists, financial information, operational processes, plans and schedules and any of the Owner's business information.
16. **“Conflict of Interest”** shall have the meaning set forth in Section VIII.A(12).
17. **“Construction Change Directive”** is a written order signed by Owner directing a change in the scope of the Services and/or Work, or granting an equitable adjustment to the Project Schedule and/or the Guaranteed Maximum Price following consideration of the DesignBuild Firm's Proposal Request therefor.
18. **“Construction Contingency”** means the contingency fund to be established in accordance with, and governed by, Section IX.D(1) of this Agreement.
19. **“Construction Documents”** (as a part of, but distinguished from, the **“Contract Documents”**) means the Design Professional of Record's final approved-for-construction Plans, Drawings, and Specifications, setting forth in detail the requirements for design and construction of the Project and the levels of quality and functionality for the materials and systems to be incorporated into the Project, as accepted by Owner, Program Manager and Architectural Representative. In accordance with the Project Schedule for the Design Phase, the Design-Build Firm shall prepare and submit sets of the Construction Documents for the two Worksites in accordance with the Contract Data Requirements List (**Exhibit 10**), which will be referred to herein as the Schematic Design Set of Construction Documents (or the 30% set), the Design Development Set of Construction Documents (or the 50% set), and the 90% and 100% Sets of Construction Documents, which is the DPOR's final, sealed set of approved-for-construction Construction Documents, respectively.
20. **“Construction Phase”** means that phase of the Project that follows completion of the Design Phase and is implemented by the Owner's Approval of a Final GMP, the subsequent delivery of the Bonds, and issuance of Owner's Notice to Proceed with the Construction Phase, and which the Work is performed by the Design-Build Firm, and at the conclusion of which Final Completion of the entire Project occurs.

21. **“Construction Project Management Software” or “CPMS”** means, collectively Owner’s CIP-Aces software management system, which, for purposes of this Project, also includes the Projectmates software system.
22. **“Contract Amendment(s)”** shall mean any written amendment to this Agreement, in the form of a Contract Amendment (**Exhibit 4**) or a Construction Change Directive, when executed by both Parties.
23. **“Contract Documents”** shall mean all of the Contract Documents comprising or made a part of this Agreement between the Owner and the Design-Build Firm, including the Exhibits to this Agreement, as more fully described in Section II.C, and includes any Contract Amendment signed by the Owner and the Design-Build Firm. Contract Documents shall also include, upon Owner’s Approval, the 100% Set of Construction Documents.
24. **“Control Estimate(s)”** means the series of working estimates, including the Final Control Estimate, which Design-Build Firm shall prepare during the Design Phase, in accordance with the Project Schedule and in the same format as shown in the Pricing Schedule (**Exhibit 3**). The Control Estimates shall not exceed the Initial Guaranteed Maximum Price. Each Control Estimate shall indicate either lump sum amounts or unit costs with quantities for all line items of Work. Amounts included for Construction Contingency or as an Allowance shall be included in the GMP and shown in separate line items but shall not be included in the Cost of Work until expended as a Cost of Work in accordance with the terms of this Agreement. The allocation of the Cost of Work to each line item in the Control Estimates shall be a complete estimate of the cost for such line item that does not, at the time of the submittal of the Control Estimate, presume or depend upon the use of any funds from any other line item. Design-Build Firm’s submission of any Control Estimate shall constitute Design-Build Firm’s representation that Design-Build Firm and its DPOR have reviewed it and confirmed to the best of their knowledge that the Control Estimate is a current, accurate and complete estimate of the total cost to deliver the Project that does not exceed the Initial Guaranteed Maximum Price.
25. **“Control Estimate, Final”** means the final Control Estimate that the Design-Build Firm prepares during the Design Phase, based on the 100% Set of Construction Documents, in the same format as shown in the Pricing Schedule (**Exhibit 3**). The allocation of cost to each line item in the Final Control Estimate shall be a complete estimate of the cost for such line item that does not, at the time of the submittal of the Final Control Estimate, presume or depend upon the use of any funds from any other line item. Design-Build Firm’s submission of the Final Control Estimate shall constitute Design-Build Firm’s representation that Design-Build Firm and its DPOR have reviewed and confirmed that, to the best of their knowledge, the Final Control Estimate is a current, accurate and complete estimate of the total cost to deliver the Project, for no more than the amount of the Initial GMP.

contracted to perform the Services and Work, including all providers of geotechnical, environmental, construction management, and other Services and Work performed by, for or on behalf of the Design-Build Firm for the Project. Design-Build Firm shall bind all Design-Build Firm Parties to the obligations stated herein.

33. **“Design-Build Firm’s Staffing Plan”** is the Design-Build Firm’s plan for staffing of the Project with the Design-Build Firm Parties, the costs for whose Construction Services and Design Services are included in the Design-Build Firm’s Fees, as shown on the Pricing Schedule, attached as **Exhibit 3**.
34. **“Design Criteria Package(s)”** or **“DCP(s)”** shall mean one or more sets of documents developed by the Architectural Representative, and Approved by Owner and Program Manager, to provide information to the Design-Build Firm that describes the design criteria for the Project, including, as appropriate, the legal description of the Worksites of the Project, site surveys, site development requirements and other information related to the Worksites of the Project, conceptual criteria for the Project, interior space requirements, special material requirements, material quality standards, special equipment requirements, performance specifications, item specifications, quality control requirements, applicable codes and ordinances, provisions for utilities, construction limits, block layouts showing affinities, or any other requirement applicable to the Project. The DCP shall control over the other provisions of this Agreement in the event of any inconsistency in the description of the Owner’s requirements for the Project. The Design-Build Firm must meet the DCP in its delivery of the Project to Owner.
35. **“Design Deliverable(s)”** means any design or design related information required to be submitted for Approval as required by this Agreement. For convenience, most Design Deliverables are listed or otherwise identified in the Contract Data Requirements List (**Exhibit 10**).
36. **“Design Phase”** means the Services required to be performed by the Design-Build firm to prepare the Design and the deliverables required to be prepared and delivered during the Design Phase in the Contract Data Requirements List (**Exhibit 10**), prior to Owner’s issuance of Notice to Proceed with the Construction Phase. Design-Build Firm shall perform such Services to the level of completion required for Design-Build Firm to prepare the Control Estimates and the Final GMP Proposal.
37. **“Design Professional(s) of Record”** or **“DPOR”** means, the architectural and/or engineering consultant selected by the Design-Build Firm, based on the DPOR’s demonstrated competence and qualifications, in the manner provided by Section 2254.004 of the Code, to perform all Design Services and to develop all design elements for the Project consistent with the Owner’s Design Criteria Package(s) and to prepare or cause to be prepared under the DPOR’s instruction, control, or supervision the architectural and engineering plans, Drawings, Specifications and

other Construction Documents for the construction of the Project in accordance with the requirements of this Agreement, the Standard of Care, and Applicable Law. For greater clarity, the DPOR is the member of the Design-Build Firm Parties responsible for performing and managing the performance of the Design Services throughout the Project to Final Completion. The Design-Build Firm and the DPOR are jointly and severally liable to Owner for the performance of the Services and the Work by either of them.

38. **“Design Services”** means all Services of the Design-Build Firm performed by its DPOR and the professional Design Services of all other Design-Build Firm Parties to prepare the Design for the Project, including, without limitation, the preparation of the architectural and engineering plans and all Drawings, Specifications, reviews and approvals of Submittals, BIM contributions, applications for governmental approvals and certifications (including the LEED Services required by **Exhibit 9**), reviews and responses to requests for information relating to design and Owner’s design review comments, and all other design-related documents and Design Deliverables, as required by Contract Data Requirements List (**Exhibit 10**) and inspections and evaluations of the Work throughout the Project, including reviews of Shop Drawing Submittals, responses to Requests for Information (“**RFI(s)**”), and clarifications of design intent while adhering to the DCP. The design phases for preparation of the Design are described as follows:
- (a) **“Schematic Design Phase”** means that phase of the Design Services required to fulfill the Project, that is managed by the Design-Build Firm, with continuous oversight, and performed by its DPOR, and that includes the DPOR’s preliminary evaluation of approaches to designing the Project and culminates in the completion of the Design Deliverables required in the Contract Data Requirements List (**Exhibit 10**) for this phase, including a schematic design package based on the input from Owner and its representatives, including the Program Manager and the Architectural Representative, and based on the DCP, and consisting of preliminary drawings and other documents illustrating the scale and relationship of the Project components, including a site plan and preliminary building plans, sections and elevations, study models, perspective sketches and/or digital modeling, material selections and other Design Phase deliverables as described in the Contract Data Requirements List (**Exhibit 10**).
 - (b) **“Design Development Phase”** means that phase of the Design Services required to fulfil the Project, that is managed by the Design-Build Firm, with continuous oversight, and performed by its DPOR, and that follows the Schematic Design Phase, resolves to Owner’s satisfaction all design review comments from Owner, Program Manager and the Architectural Representative during the Schematic Design Phase, and culminates in the completion of the Design Phase deliverables, as required in the Contract Data Requirements List (**Exhibit 10**) for this phase, including fully

developed design documents that fulfill the DCP, based on the input from Owner and its representatives, including the Program Manager and the Architectural Representative, as applicable, on the Schematic Design Phase documents, and consisting of drawings and other documents including plans, sections, elevations, typical construction details, and diagrammatic layouts of building systems to fix and describe the size and character of the Project as to architectural, structural, mechanical and electrical systems, and such other elements as may be appropriate, and specifications that identify major materials and systems and establish in general their quality levels for the Project.

- (c) **“Construction Documents Phase”** means that phase of the Design Services required to fulfil the Project, that is managed by the Design-Build Firm, with continuous oversight, and performed by its DPOR, and which follows the Design Development Phase, resolves to Owner’s satisfaction all design review comments from Owner, Program Manager and the Architectural Representative during the Design Development Phase, and culminates in the completion of the Design Phase deliverables, as required in the Contract Data Requirements List (**Exhibit 10**) for this phase, and including construction design documents, consisting of Drawings and Specifications setting forth in detail the quality levels of materials and systems and other requirements for the construction of the Work that fulfill the DCP, subject to additional information to be provided to or developed by Design-Build Firm based upon the Design Professional of Record’s review and approval of Shop Drawings Submittals. The Construction Documents Phase corresponds to the Services more particularly described in Section III.B(1)(g), below, captioned “Preparation of the Construction Documents.”
- (d) **“Construction Administration Phase”** means that phase of the Design Services that follows completion of the Construction Documents Phase, during which the DPOR continues to perform Design Administration Services.
39. **“Design Services Fee”** shall mean the Fee for the performance of the Design Services, in the amount set forth in Section IX.B(1). The Design Services Fee is a fixed fee, inclusive of all Design Services required to properly complete the Project in accordance with this Agreement. The Design Services Fee is a part of the Guaranteed Maximum Price, and is separate from the Construction Services Fee. The Design Services Fee is not part of the Cost of the Work, and shall not be used as a basis for the penal sum of the Payment Bond and Performance Bond.
40. **“Drawings”** means the graphic and pictorial portrayal of portions of the Construction Documents, and including all information required to maintain the

BIM, showing the design, location and dimensions of the Work, generally including plans, elevations, sections, details, schedules and diagrams.

41. **“Effective Date”** means the effective date of this Agreement as stated on the first line of this Agreement, above.
42. **“Enhanced Commissioning”** means a method Design-Build Firm may elect to use during the Schematic and Design Development Phases to achieve the Minimum Certification Level. If elected, the Design-Build Firm’s commissioning agent will review construction submittals and Construction Documents related to the systems to be commissioned and develop a commissioning checklist and commissioning specifications prior to the commencement of the Construction Documents Phase. If elected, Enhanced Commissioning shall also include Design-Build Firm’s development of a systems manual for Owner’s use to train its maintenance and operations personnel to understand and optimally operate the systems to be commissioned, and to verify their completion of such training, and to review performance of such systems at sixteen (16) months after Substantial Completion. For clarity, Enhanced Commissioning is distinguished from the Program Manager’s performance of fundamental commissioning, which includes development and implementation of a commissioning plan, verification of the installation and performance of the building systems, and delivery of a commissioning report.
43. **“Excusable Delay”** shall have the meaning set forth in Section VII.C.
44. **“Fee”** or **“Fees”** shall mean the:
 - (a) Design Services Fee (which includes the Design Administration Services Fee). Design-Build Firm agrees, and DPOR, by its joinder (**Exhibit 22**) agrees that the Design Services Fee shall remain fixed except as otherwise expressly permitted under this Agreement, and that any permitted adjustment to increase the Design Fee shall be limited to that amount derived by applying the hourly service rates originally fixed in the agreement between the DPOR and the Design-Build Firm, to the actual hours of performance of any additional Design Services for which an adjustment is expressly permitted hereunder, subject to any mutually agreed limit on such additional Design Services. Such hourly service rates shall remain fixed for the duration of the Project;
 - (b) the Construction Services Fee, which includes the following three (3) fixed components:
 - (i) the Pre-Construction Services Fee, for services related to pre-construction planning, design and scope development and definition, estimating, bidding, procuring, scheduling, value engineering, permitting, site evaluation, and other construction

management activities, as more particularly defined in the definition of Pre-Construction Services, below;

- (ii) the General Conditions Fee, for Design-Build Firm's direct project overhead costs and other so-called general conditions costs for the Project (for such things as salaries and labor costs for Design-Build Firm's field-based construction management, accounting and administrative personnel; jobsite trailers; temporary utilities; small tools; safety costs;; field computers, BIM services; dumpsters; clean-up; job signs; photographs; site security personnel and cameras; webpage and web camera; CPM scheduling; mobilization; street cleaning; and temporary toilets/water). The total of all costs of General Conditions itemized in the Pricing Schedule (**Exhibit 3**) shall be divided by the total number of days included in the Project Schedule to establish the Daily General Conditions Cost Rate for the Project. The Daily General Conditions Cost Rate may be used to calculate an adjustment to the General Conditions Fee for the number of days added to the Project Schedule, if any, as a result of an equitable adjustment to the Project Schedule when a commensurate adjustment to the General Conditions Fee is also expressly permitted under the terms of this Agreement; and
- (iii) the General Administrative Fee, for Design-Build Firm's profit and all other costs not otherwise specifically itemized on the Pricing Schedule (Exhibit 3) for the duration of the Project. The General Administrative Fee Percentage is the percentage factor that the amount of the original General Administrative Fee bears in relation to the original Cost of Work in the Guaranteed Maximum Price established as the Initial GMP. The General Administrative Fee Percentage may be used as a percentage factor to calculate an adjustment to the General Administrative Fee for adjustments allowed to increase the Guaranteed Maximum Price under the terms of this Agreement.

The above Fees are fixed, lump sum fees that are all-inclusive of all markups for overhead, profit and applicable taxes (if any). Detailed line items for each fee component and each element of fee are shown on the Pricing Schedule (**Exhibit 3**). All Fees are included in the Guaranteed Maximum Price, but are not included in the Cost of the Work. Fees shall also be included in the Schedule of Values, and earned according to Approved percentages of completion of the Services and Work, and supported by such data as Owner and Program Manager may require for substantiating the earning of the Fees, for purposes of administration of Owner's payments to the Design-Build Firm.

45. **“Final Completion”** means that phase of completion of the Project by which all Punch List Work and any deficiencies in the Work identified to the Design-Build Firm by the Owner, Program Manager, and/or Architectural Representative, as applicable, or by building inspectors or other governmental Authorities Having Jurisdiction, have been corrected, completed, or otherwise addressed to their respective satisfaction, as applicable, as evidenced by the issuance of a Final Certificate of Occupancy by the governmental authority having jurisdiction and the issuance of Owner’s Certificate of Final Completion after fulfillment of all other conditions precedent to Final Completion as set forth in Section XIII.C. For the avoidance of doubt, Final Completion of the Project cannot occur until both Operations Centers achieve Final Completion.
46. **“Final Completion, Certificate of”** shall mean the certificate prepared by the Program Manager, in the Approved form, stating the actual date of Final Completion of the Project, and signed by the Owner, Program Manager, and Design-Build Firm, confirming that Design-Build Firm has achieved Final Completion of the Project as of such date.
47. **“Final Completion, Scheduled Date of”** means the dates shown as the Final Completion Dates in the Project Schedule (**Exhibit 6**), by which dates all Services and Work of Design-Build Firm shall have been completed and accepted by the Owner, and the dates by which the Design-Build Firm is required to have achieved Final Completion of each of the Service Centers according to the Project Schedule, or any Approved update thereto.
48. **“Guaranteed Maximum Price”** or **“GMP”** shall mean the amount established in Article IX of this Agreement as the maximum sum Owner shall pay for the Project before issuance of Owner’s Notice to Proceed with the Construction Phase, including the Cost of the Design, the Cost of the Work, all Fees, the Construction Contingency, Allowances, and all other costs and expenses for the Design-Build Firm’s performance of this Agreement, in the same format as, and with the same line items as shown in, the Pricing Schedule (**Exhibit 3**) and the Control Estimates. The total payment obligations of Owner for the Design-Build Firm’s Services and Work to complete the Project shall not exceed the Guaranteed Maximum Price.
49. **“Guaranteed Maximum Price, Final”** or **“Final GMP”** shall mean the amount to be established as the Guaranteed Maximum Price for the Project after completion of the Design Phase, as set forth in Article IX.
50. **“Guaranteed Maximum Price, Initial”** or **“Initial GMP”** shall mean the amount established in Article IX as the Guaranteed Maximum Price for the Project as of the Effective Date, and before any commencement of the Services and Work.
51. **“Hazardous Substance(s)”** shall mean and include any element, constituent, chemical, substance, compound, or mixture, which are defined as a hazardous

substance by any local, state or federal law, rule, ordinance, by-law, or regulation pertaining to environmental regulation, contamination, clean-up or disclosure, including, without limitation, The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“**CERCLA**”), The Resource Conservation and Recovery Act (“**RCRA**”), The Toxic Substances Control Act (“**TSCA**”), The Clean Water Act (“**CWA**”), The Clean Air Act (“**CAA**”), and the Marine Protection Research and Sanctuaries Act (“**MPRSA**”), The Occupational Safety and Health Act (“**OSHA**”), The Superfund Amendments and Reauthorization Act of 1986 (“**SARA**”), or other state super lien or environmental clean-up or disclosure statutes including all state and local counterparts of such laws (all such laws, rules and regulations being referred to collectively as “**environmental laws**”). Hazardous Substance(s) is defined to include but is not limited to the following:

- (a) any asbestos or any material which contains any hydrated mineral silicate, including chrysolite, amosite, crocidolite, tremolite, anthophyllite or actinolite, whether friable or non-friable;
- (b) any polychlorinated biphenyls (“**PCBs**”), or PCB-containing materials, or fluids;
- (c) Dioxins;
- (d) radon;
- (e) any other hazardous, radioactive, toxic or noxious substance, material, pollutant, or solid, liquid or gaseous waste; any pollutant or contaminant (including but not limited to petroleum, petroleum hydrocarbons, petroleum products, crude oil or any fractions thereof, any oil or gas exploration or production waste, any natural gas, synthetic gas or any mixture thereof, lead, or other toxic metals) which in its condition, concentration or area of release could have a significant effect on human health, the environment, or natural resources;
- (f) any substance that, whether by its nature or its use, is subject to regulation or requires environmental investigation, monitoring, or remediation under any federal, state, or local environmental laws, rules, or regulations;
- (g) any underground storage tanks, as defined in 42 U.S.C. Section 6991(1)(A)(I) (including those defined by Section 9001(1) of the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901 et seq.;
- (h) the Texas Water Code Annotated Section 26.344 and Title 30 of the Texas Administration Code Sections 334.3 and 334.4, whether empty, filled or partially filled with any substance; and

- (i) any other hazardous material, hazardous waste, Hazardous Substance, solid waste, and toxic substance as those or similar terms are defined under any federal, state, or local environmental laws, rules, or regulations.
52. “**MasterFormat**” means the current edition of the MasterFormat specification-writing standards and section or division numbers and titles published by Construction Specifications Institute (CSI) and used in construction of commercial building design and construction projects to organize data about construction requirements, products and activities.
53. “**Minimum Certification Level**” means the Owner’s requirement that the Administration Building at NEOC be certified by the DPOR as equivalent to no less than the current **Silver** certification level recognized by the United States Green Building Counsel (“**USGBC**”) under the last Leadership in Energy and Environmental Design (“**LEED**”) New Construction and Major Renovations Rating System, as further described in the DCP (**Exhibit 1**). The foregoing notwithstanding, Design-Build Firm shall document that such facilities have achieved the equivalent to the last recognized LEED Silver level of certification.
54. “**Mockup(s)**” means Design-Build Firm’s construction of a portion of the Work, or an example of the construction thereof, for purposes of confirming and/or testing the appropriateness and performance of the design, materials and/or construction thereof, before continuing with the actual physical construction thereof.
55. “**Operations Center**” means the new Northeast Operations Center.
56. “**Owner**” means the San Antonio Water System and its authorized representatives, including its Board, and successors in interest.
57. “**Owner Indemnified Parties**” means Owner and Owner’s trustees, directors, officers, employees and any other persons or entities agents and employees or any third party under the Owner’s control or supervision, including Owner’s Program Manager and any other persons or entities expressly identified as Owner Indemnitees under Section XI.A. For the avoidance of doubt, Design-Build Firm, the DPOR and all other the Design-Build Firm Parties, are not Indemnified Parties.
58. “**Owner’s Notice to Proceed**” or “**Notice to Proceed**” or “**NTP**” means Owner’s written notice to the Design-Build Firm to proceed with and complete the Services and Work in accordance with this Agreement at each Worksite, or any other portion of an applicable Phase, as required in the Contract Data Requirements List (**Exhibit 10**).
59. “**Owner’s Project Manager**” means the employee of Owner assigned to act on Owner’s behalf to oversee and manage the Program Manager, the Design-Build Firm, and Owner’s Separate Contractors in connection with the management of the Project. The person designated as the Owner’s Project Manager pursuant to Section

XX.C, below, is authorized to act on behalf of Owner with respect to the day-to-day management of the Work and Services required under this Agreement. **“Pending Third Party Claim(s)”** means any Claim made or threatened by a third party against the Owner arising out of or relating in any way to the Project and/or this Agreement:

- (a) which has been identified in writing to Owner prior to Design-Build Firm’s submission of its Application for Final Payment; and/or
 - (b) which the parties have agreed in writing to allow to remain pending following and notwithstanding the issuance of Final Payment, in accordance with Section XIII.G, below.
60. **“Pre-Construction Services”** means all Services to be performed by the Design-Build Firm (as distinguished from the professional services of the DPOR for preparation of the Design) throughout the various design phases, including but not limited to: management of the DPOR; scheduling; constructability reviews to assess the feasibility and practicability of any proposed means and methods and the availability of labor, materials and equipment; analysis of building systems; identification of equipment, materials or systems that may involve long lead delivery times necessitating early placement of purchase orders; review and making of recommendations with respect to cost-sensitive aspects of the Design and other facts that may impact the Design-Build Firm’s ability to deliver the Project for a Final GMP that is no greater than the Initial GMP; development of Control Estimates for a Final GMP; preparation and organization of design packages for portions of the Work for bidding purposes; advertisement and distribution of, and solicitation of bids for, design packages for the Work; and community outreach and diversity efforts. The costs to perform Pre-Construction Services shall be included in the Pre-Construction Services Fee, which shall be shown as a separate line item in the Pricing Schedule (**Exhibit 3**), the Control Estimates, and the Final GMP Proposal.
61. **“Project”** means the design and new construction of Owner’s Northeast Operations Center and related facilities, and demolition of certain existing facilities and associated remediation and site construction at Owner’s Existing NESCC, located on different Worksites. As used in this Agreement, “Project” means and refers to the design, construction and/or demolition and associated remediation of facilities at each of the Worksites.
62. **“Project Management Plan” or “PMP”** is an overall management plan for the Project, developed by the Program Manager, which describes all protocols, processes and plans Design-Build Firm shall use on this Project in conjunction with CPMS. Design-Build Firm’s plans and points of contact shall be incorporated into the Project Management Plan prior to issuance of Owner’s Notice to Proceed with the applicable Phase of any Services or Work. The PMP is attached hereto as **Exhibit 8**.

63. **“Projectmates”** is a form of construction project management software that is a web-based collaborative sharing, project communication and information management system that is part of the Owner’s CPMS, which will be used by Owner and the Design-Build Firm for the Project, having the following features: communications and ‘ball-in-court’ tracking; collaboration capabilities allowing for upload and repository of CAD and BIM deliverables, submittals and Project progress photos; cost reporting; scheduling; cost budget management; resource allocation; RFI/ASK/submittal transaction recording, change request tracking, pay request tracking, quality management; and all other documentation associated with the Projects, all as more fully described in the PMP. For the avoidance of doubt, CPMS also includes all Work Product, Final As-Builts, and other Project-related information and data that is stored therein.
64. **“Project Schedule”** shall mean the Approved Critical Path Method (“CPM”) schedule set forth in **Exhibit 6**. The Substantial Completion Date and Final Completion Date established in the Project Schedule may only be adjusted by Construction Change Directive or Contract Amendment. No deviations from the Project Schedule shall be allowed to result from the submission of any update to the Project Schedule unless such deviation has been specifically reviewed and Approved by Owner.
65. **“Project Team”** means the Owner, Program Manager, Program Manager Personnel, Architectural Representative, and Design-Build Firm (including the DPOR and the other Design-Build Firm Parties). The Owner’s members on the Project Team may be modified from time to time by Owner, in its sole discretion. Subject to Approval, the Project Team members will designate their respective individual representatives to participate on the Project Team, who may be changed from time to time with Approval. The constitution of the Project Team may vary at different phases of the Project.
66. **“Program Manager”** means APSI Construction Management, doing business in Texas under the name of APSI Construction Management, Inc., a California corporation, having its principal corporate headquarters located at 8885 Research Drive, Irvine, California 92618.
67. **“Program Manager Personnel”** means and includes all Program Manager’s Approved subcontractors, subconsultants and vendors of any tier contracted by APSI to perform Program Manager’s Services hereunder, including the Architectural Representative.
68. **“Proposal Request”** means Design-Build Firm’s written request to adjust the Project Schedule and/or the Guaranteed Maximum Price in connection with (i) Owner’s request for an estimate of the cost to add Services and/or Work in connection with a Construction Change Directive, or (ii) Design-Build Firm’s request for equitable adjustment, but only where such equitable adjustment is expressly allowed by this Agreement. Design-Build Firm agrees that any Fee

adjustment sought in connection with Design-Build Firm's Proposal Request shall be limited to:

- (a) an adjustment to the Design Fee for the necessary additional Design Services required as a direct result of the Construction Change Directive or the permitted equitable adjustment, as applicable, derived by applying the DPOR's fixed hourly service rates to the actual hours of performance of such necessary additional Design Services, subject to any mutually agreed limitation on the cost of such additional Design Services;
- (b) an adjustment to the General Conditions Fee by an amount equal to the lesser of:
 - (i) the amount derived by multiplying the Daily General Conditions Cost Rate times the number of days, if any, that must be added to the Project Schedule; or
 - (ii) the amount of the increase, if any, in the general conditions costs identified on the Pricing Schedule (**Exhibit 3**) that Design-Build Firm necessarily and actually incurs, on the basis of the original rates or charges originally stated and fixed in the Design-Build Firm's Hourly Rate Schedule (**Exhibit 12**),

as a direct result of the Construction Change Directive or permitted equitable adjustment, as applicable; and

- (c) an adjustment to the General Administrative Fee by an amount derived by multiplying the General Administrative Fee Percentage times the increase in the Cost of the Work necessarily and actually incurred by the Design-Build Firm as a direct result of the Construction Change Directive or permitted equitable adjustment, as applicable.

69. **"Punch List"** or **"Punch List Work"** means a list of minor incomplete or incorrect items and/or repairs that must be done to achieve Final Completion, but which do not impair the Owner's beneficial use and occupancy of a field dispatch, fleet, supply operations, or civil/site works facility within a Worksite of the Project, or the safety of individuals, and which items are identified during inspection of the Work or any portion thereof, whether at or before Substantial Completion thereof, and which must be completed as a condition precedent to Final Completion.

70. **"Safety Incident"** means any failure of the Design-Build Firm or any of the Design-Build Firm Parties to safely manage performance of the Design-Build Firm Parties in accordance with Applicable Law and as necessary to recognize and successfully prevent or avoid casualty losses to property and injury or death to persons (each such failure being a Safety Incident), including but not limited to:

- (a) The reported observation of a potential safety hazard, unsafe work practice, or lapse in prudent safety management that can reasonably be expected to lead to injury or death to any person, or damage to any property;
 - (b) The presence of any unsafe working condition, including without limitation any unauthorized or improper usage of equipment or faulty equipment, that reasonably be expected to lead to injury or death to any person, or damage to any property; or
 - (c) The occurrence of bodily injury or death, or property damage arising out of or in connection with the Project or the performance of the Services and Work.
71. **“Schedule of Values”** means a schedule to be established in accordance with Section XII.A(2) for the calculation of and processing of the Design-Build Firm’s Applications for Payment. The Schedule of Values shall allocate and assign 100% of the Initial GMP to the same line items for all Services and Work, as shown in the Pricing Schedule (**Exhibit 3**).
72. **“Separate Contractor(s)”** means any contractor or other service provider engaged directly by the Owner (other than Design-Build Firm) to perform construction or other services relating to the Project or the operation or maintenance of Owner’s property.
73. **“Service Center Program”** means Owner’s program commenced in 2012 for the design, construction, renovation and delivery of all of Owner’s new and upgraded Operations Centers.
74. **“Services”** means, collectively, all Design Services, Construction Services, and all other services related to the engineering, design, procurement, and/or construction of the Project, including all consultancy, managerial, budgetary control, scheduling, and other Services (professional or otherwise) to be performed by or on behalf of Design-Build Firm hereunder, as necessary to the completion and delivery of the Project in accordance with the requirements of this Agreement.
75. **“Shop Drawings”** or **“Shop Drawing Submittals”** means all submittals of drawing details, diagrams, product data, samples, Mockups and similar items, and any supporting schedules and other data prepared to demonstrate or illustrate the manner of installation of the Work and how the Design-Build Firm proposes to construct certain portions of the Project to the requirements of, and the design concepts expressed in, the Contract Documents, to ensure conformity to the DCP. Shop Drawings Submittals are to be submitted to the DPOR for its review and approval. Shop Drawing Submittals and the DPOR’s approvals thereof shall be filed in CPMS.

76. “**Specifications**” means that portion of the Construction Documents prepared by the DPOR in the current MasterFormat, and consisting of the written technical requirements for materials, equipment, systems, standards and workmanship for the performance of the Work and Services, in accordance with the requirements of this Agreement.
77. “**Standard of Care**” shall have the meaning set forth in Section VIII.A(2).
78. “**Substantial Completion**” is the date on which the Project or a portion thereof is tendered by the Design-Build Firm as substantially complete and formally accepted by issuance of a Certificate of Substantial Completion. Partial use or occupancy shall not result in the Project being deemed substantially completed and shall not be evidence of Substantial Completion.
79. “**Substantial Completion, Certificate of**” shall mean a certificate prepared by the Owner’s Program Manager, in form Approved by Owner, stating the actual date of Substantial Completion for each portion of the Project, as shown thereon, and signed by the Owner, the DPOR, and also signed by the Program Manager or the Architectural Representative, confirming that Design-Build Firm has achieved Substantial Completion of the applicable portion of the Project, or the applicable portion thereof, as of such date, and that the same is sufficiently completed, inspected, and approved by the Program Manager’s commissioning agent and the appropriate regulatory authority or authorities as evidenced by issuance of a Certificate of Occupancy, for Owner’s occupancy or partial occupancy for its intended purposes, excluding only Punch List Work that remains unfinished pending Final Completion and final inspection.
80. “**Substantial Completion, Scheduled Dates of**” shall mean the dates shown as the Substantial Completion Dates in the Project Schedule (**Exhibit 6**), by which dates all Services and Work of Design-Build Firm shall have been completed and accepted by the Owner, and by which the Design-Build Firm is required to have achieved Substantial Completion of all Services and Work at NEOC and all Services and Work at the Existing NESC.
81. “**Value Engineering**” means the process for the Design-Build Firm’s continuous evaluation of the Drawings, Specifications, related design concepts and design documents, throughout the Design and Construction Phases of the Project, whereby the Design-Build Firm proposes value-added design substitutions or solutions, with the goal of an integrated design that encompasses life cycle cost analysis and functional analysis according to evaluation criteria established by the guidelines of the Society of American Value Engineers (SAVE).
82. “**Work**” (as distinguished from Design Services) means the performance of the physical construction and related Project management activities required by the Approved Contract Documents, to be performed and managed by and through the Design-Build Firm. The Work includes all labor, parts, supplies, skill, direct field

supervision, transportation, construction related activities, and all other items of cost or value, and other facilities and things necessary, proper or incidental and required or reasonably inferable to produce, construct and fully complete the Project in strict accordance with the requirements of this Agreement (as it may be modified or amended). The Work also refers to the procurement and incorporation of all material and equipment into the Project, the start-up, testing, and commissioning of the Project, and the provision of warranty services as required by the Construction Documents. The Work may refer to or describe the whole or a part of Work for the Project, as required by the Construction Documents.

83. **“Work Product”** shall mean all work product, including all Construction Documents, Design Submittals, Shop Drawing Submittals, Building Information Models, plans, data compilations or calculations, studies, reports, or other so-called instruments of service, in any form, including native format, and all ideas incorporated therein, and all intellectual property rights associated therewith, which are prepared by or on behalf of Design-Build Firm or any Design-Build Firm Parties in connection with the Project, PMP, the DCP, and/or the BIM, or other documents or information prepared in connection with the performance of the Work and Services hereunder, which Work Product shall be and remain, and is hereby assigned to Owner as its exclusive property, and which shall not be used by Design-Build Firm or Design-Build Firm Parties, except in connection with the Phase 3: Service Center Project, without the Owner’s prior written consent.
84. **“Worksites”** means the portion of the land(s) or area(s) (as indicated in the Contract Documents), at the NEOC and the NESC , upon which the Work is to be performed within the boundary limits of construction established in the DCP for each Worksite, and within which the Work shall be restricted, including rights-of-way and easements for access thereto, and such other lands furnished or designated by Owner for Design-Build Firm’s use at each Worksite, and any offsite location owned or leased by Owner as a location Owner has Approved for the performance of Work and Services hereunder. The Design-Build Firm shall design the sitework and other relevant features for the Project at each Worksite so as not to allow the Work to diminish, impair or restrict the use of or otherwise adversely affect Owner’s property, adjacent properties of others, or other areas outside the boundary limits of construction established for each Worksite, including any stream bed, waterway, drainage course.
85. **“Worksite Conditions”** shall mean all site conditions or other physical conditions, including subsurface conditions, at, near or related to or otherwise impacting the Worksites that may be encountered during the performance of the Construction Phase, or that may adversely affect the performance of the Work, including those identified in the Worksite Investigation Report as conditions for which there is a moderate or higher risk of an encounter, and for which the Worksite Conditions Allowance has been established.

86. **“Worksite Conditions Allowance”** means an allowance established in an amount set forth in Section IX.D(2) as reasonable and sufficient to resolve and overcome any Worksite Conditions, including those identified in the Worksite Investigation Report, as having a moderate or higher risk of encounter during the Construction Phase, which Allowance shall be available to the Design-Build Firm for its use in its reasonable discretion to pay the reasonable and necessary costs to resolve and overcome such Worksite Conditions.
87. **“Worksite Investigation Report”** means the Design-Build Firm’s report of the results of its pre-contract independent investigation of the Worksites, prepared by _____, dated _____, a copy of which is attached hereto (**Exhibit 23**). The Worksite Investigation Report has been considered by the Parties in establishing the Worksite Conditions Allowance.
88. **“Worksite Investigation Stipend”** means the sum Owner paid to Design-Build Firm to have _____, represented by Design-Build Firm and the DPOR to be a professional engineer knowledgeable and experienced in conducting site investigations for projects of a similar nature, conduct a pre-contract investigation of the Worksites using specific site risk assessment methodologies developed for the Worksite Investigation, and prepare and deliver the Worksite Investigation Report to Design-Build Firm and Owner prior to execution of this Agreement. Such engineer is a subconsultant to the DPOR and one of the Design-Build Firm Parties.

II. Project Description and Contract Documents

A. General Description of Project.

1. The Project includes all aspects required to complete the Project and fulfill the requirements of this Agreement, including the planning, development, design, engineering, procurement, demolition, and/or construction of the Existing NESC and related improvements, including but not limited to all architectural, engineering, geotechnical, environmental, construction, commissioning and other Services, all as more fully described in the DCP and Article III below. The Design-Build Firm acknowledges and understands the Owner’s requirement that certain facilities in the Project be designed and constructed equivalent to the standards of the current version of LEED New Construction and Major Renovations, as described in the DCP and the Scope of Design-Build Firm’s LEED Services and Work (**Exhibit 9**). Design-Build Firm’s failure to achieve an equivalent to such certification shall be considered a material breach of this Agreement. The foregoing notwithstanding, Design-Build Firm shall assist and, if requested prior to submission of the Construction Documents for Owner’s Approval, shall cause the DPOR to assist, the Owner to evaluate the feasibility of achieving the equivalent of a higher level of LEED certification for the Operations Center. Services to re-design to such higher level of certification shall be subject to the provisions for the Approval thereof as additional services.

2. The Project shall be implemented in accordance with the PMP and DCP. The Project is comprised of design, construction and demolition and associated remediation on two (2) separate and distinct Worksites, as described in the DCP.
 - (a) New North East Operations Center: The NEOC is to be comprised of a minimum of three (3) new freestanding buildings, a new fueling facility with Above Ground Tanks (“**AGT’s**”), truck scale, material bins, ice and water station structure, electric gates at main and secondary entries with gates and electronic key card access, designated areas and utilities provided for Owner’s OFOI concrete silo, security/IT facilities, storage areas, main access roads and drive lanes with turning radii for all of the aforementioned facilities, and associated sitework, including site parking and drainage, all as more fully described in the DCP.
 - (b) Existing Northeast Side Service Center: Work includes, demolition, fuel remediation and new site construction as required at the existing NESC. Demolition of the existing administration building, attached shed/structures, and all contents, as well as exterior concrete material storage bins, and demolition and remediation of two (2) separate fuel islands and existing underground fuel tanks (“**UGT’s**”) and associated pumps and utilities. All shall be completely demolished and removed. The fuel facility shall be remediated as required by all AHJ’s. Pavements shall be replaced, and installed in the footprint of the Administration Building and fuel islands. A new retaining wall and railing shall also be installed. New construction also includes new guardrails, bollards, railing and any other safety items and associated signage and traffic striping as required, as well as the demolition of the existing two (2) marquee signs and the installation of a new marquee and associated landscaping and lighting, with signage designating the site as the Naco Pump Station, as more fully described in the DCP.

B. Correlation and Intent of Agreement Documents.

The Contract Documents form the entire Agreement, and all are as fully a part of this Agreement as if attached hereto or repeated herein.

1. Unless otherwise stated in the Contract Documents, words which have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings. Wherever stated in this Agreement, the following general terms shall be interpreted as follows:
 - (a) The term “provide” means to furnish, install, fabricate, deliver and erect, including all Services, materials, appurtenances and all other expenses necessary to complete the Work in place and ready the Work for operation or use;

- (b) The term “shall” means the mandatory action of the Party to whom reference is made; and
 - (c) The terms “as required” and “as necessary” mean as prescribed in the Contract Documents, or by Applicable Law, or applicable construction codes.
 - (d) The term “notice” or “notify” shall mean to give written notice of an event and any related information as and within the time required by this Agreement.
2. If a conflict, ambiguity or inconsistency among the Contract Documents arises, the following order of precedence shall apply:
- (a) Contract Amendments to this Agreement;
 - (b) This Agreement;
 - (c) Exhibits to this Agreement; and
 - (d) Construction Documents.
3. The foregoing notwithstanding, the Contract Documents are complementary and intended to include all items required for the proper execution and completion of the Work. The enumeration of any portion of the Work shall not be construed to exclude other items contemplated by or reasonably inferable from the Contract Documents. Where provisions in two or more of the Contract Documents are complementary, the more detailed provision shall control over the more general provision. When specific products, systems or items of equipment are referred to in the Contract Documents, any ancillary devices necessary for proper functioning shall also be provided.
4. Design-Build Firm shall provide all materials and labor for the Work as shown or described in the Approved Construction Documents, or which is reasonably inferable therefrom as necessary to produce a finished and functional Project. The manner of organization of the Specifications into divisions, sections and articles, and arrangement of Drawings, does not control the Design-Build Firm’s division of the Work among Design-Build Firm Parties or any trade.
5. If the Contract Documents or the terms of any accepted written offer from Design-Build Firm contain differing descriptions of the Services and Work, then, notwithstanding Section II.B(2), and unless expressly excused by Owner in writing, the provision that establishes the higher quality, manner, method or standard of performing the Work, or are more advantageous or provide greater value to Owner, will prevail. The more stringent requirement shall govern as between the Contract Documents and any applicable standards, codes, and ordinances.

6. The most recently issued and Approved set of Construction Documents shall take precedence over previously issued sets. Dimensions on Drawings shall govern scale measurements. Items shown one place in the Drawings, but not another, or called for in the Construction Documents or the Specifications but not shown in the Drawings, or shown in the Drawings but not in another of the Construction Documents, are to be included. If existing conditions are inconsistent with dimensions shown on Drawings and Specifications, the Design-Build Firm shall notify Owner and present proposed solution and resolve such inconsistency prior to the time when the affected Work must be commenced.
7. The Design-Build Firm shall, in accordance with the Standard of Care, prepare the Design according to be consistent with the current edition of standards, codes, ordinances, manufacturers' instructions and guarantees, which shall govern even if the Contract Documents as prepared by the DPOR refer to a different or expired edition or no edition at all. If Design-Build Firm or the DPOR become aware that any requirements set out in the Contract Documents (including the Construction Documents) are or will be inconsistent with the current edition of applicable standards, codes, ordinances or manufacturer instructions and guarantees, the Design-Build Firm shall promptly notify the Owner and bring such inconsistency to the attention of the DPOR, Program Manager and Owner's Project Manager, and correct the inconsistency in accordance with this Agreement at no cost to Owner.

C. Exhibits to Agreement.

The Contract Documents include the following Exhibits, each of which are incorporated by reference as if fully stated herein:

1. Design Criteria Package for the Project, attached hereto as **Exhibit 1**;
2. Building Information Modeling Protocols, attached hereto as **Exhibit 2**;
3. Design-Build Firm's Pricing Schedule attached hereto as **Exhibit 3**, which covers and includes all of Design-Build Firm's Fees, hourly fee rates, and costs and expenses;
4. Form of Contract Amendment, attached hereto as **Exhibit 4**;
5. Design-Build Firm's Staffing Plan, which includes an organizational chart identifying all Design-Build Firm Parties in key positions and all subconsultants, attached hereto as **Exhibit 5**;
6. Project Schedule, attached hereto as **Exhibit 6**;
7. Bond Forms, attached hereto as **Exhibit 7**;

- (a) Form of Payment Bond, attached hereto as **Exhibit 7.1**;
 - (b) Form of Performance Bond, attached hereto as **Exhibit 7.2**; and
 - (c) Form of Security Bond, attached hereto as **Exhibit 7.3**;
- 8. Project Management Plan, attached hereto as **Exhibit 8**;
 - 9. Scope of Design-Build Firm's LEED Services and Work, attached hereto as **Exhibit 9**;
 - 10. Contract Data Requirements List, attached hereto as **Exhibit 10**;
 - 11. Design-Build Firm's Good Faith Effort Plan, attached hereto as **Exhibit 11**;
 - 12. Design-Build Firm's Hourly Rate Schedule, attached hereto as **Exhibit 12**;
 - 13. Owner's Requirements of Insurance, attached hereto as **Exhibit 13**;
 - 14. Design-Build Firm's Confidentiality Agreement, attached hereto as **Exhibit 14**;
 - 15. Resolution in Support of Design-Build Services Agreement, executed by Design-Build Firm's Governing Board of Directors, attached hereto as **Exhibit 15**;
 - 16. Prevailing Wage Rate Schedule, attached hereto as **Exhibit 16**;
 - 17. Release of Claims Forms, attached hereto as **Exhibit 17**;
 - (a) Affidavit of Payment of Debts and Claims, attached hereto as **Exhibit 17.1**;
 - (b) Conditional Waiver and Release on Progress Payment, attached hereto as **Exhibit 17.2**;
 - (c) Unconditional Waiver and Release on Progress Payment, attached hereto as **Exhibit 17.3**;
 - (d) Conditional Waiver and Release on Final Payment, attached hereto as **Exhibit 17.4**;
 - (e) Unconditional Waiver and Release on Final Payment, attached hereto as **Exhibit 17.5**;
 - 18. Warranty Protocol, attached hereto as **Exhibit 18**;
 - 19. Agreement to Adopt Dispute Resolution Procedures, attached hereto as **Exhibit 19**;

20. Owner's Confirmation of Funding, attached hereto as **Exhibit 20**; and
21. Owner's Security Procedures, attached hereto as **Exhibit 21**.
22. Joinder of Design Professional of Record (DPOR) agreeing to collateral assignment of agreement between Design-Build Firm and DPOR, attached hereto as **Exhibit 22**.
23. Worksite Investigation Report, dated _____, attached hereto as **Exhibit 23**.
24. Verification of Prohibition of Boycotting of Israel, attached hereto as **Exhibit 24**.
25. Design-Build Firm's Certification of compliance with Subchapter J, Chapter 552, of the Texas Government Code, relating to preservation and production of contracting information, attaches as **Exhibit 25**.

III. Scope of Services and Work

A. General Design-Build Services.

The Design-Build Firm has overall responsibility for and shall provide and complete the Design Services and Construction Services, and furnish all materials, equipment, tools and labor as necessary or reasonably inferable to complete the Project, or any phase of the Project, in accordance with the Owner's requirements and the terms of this Agreement.

1. **Commitment.** Design-Build Firm shall, in exchange for Owner's agreement to pay Design-Build Firm no more than the Guaranteed Maximum Price, perform in accordance with the Design-Build Firm's Standard of Care, and oversee the proper performance of, all Services and Work, including architectural and engineering, procurement, construction, and geotechnical Services, as necessary for the execution and completion of the Project.
 - (a) **Geotechnical Engineering and Surveying Services.** Design-Build Firm shall, with respect to its representation in Section VIII.A(24), provide all geotechnical engineering investigations necessary to support the successful planning, execution and completion of the Project, including but not limited to providing all geotechnical and subsurface reports, site surveys, environmental site assessments, tree surveys and topographical surveys, whether required by Applicable Law, or as otherwise necessary and appropriate for the completion of the Design Phase, and proper execution and completion of the Project.
 - (b) **Commissioning Support.** Design-Build Firm shall provide, and cause its subcontractors to provide, reasonable assistance to the Program Manager and Owner's Project Manager for the performance of certain independent commissioning services by the Program Manager for the completed Project

or systems therein, including the coordinating of subcontractor assistance and the sequencing and scheduling of commissioning activities to achieve Final Completion in accordance with the Project Schedule.

- (c) Selection of Design Professionals. To the extent required by Applicable Laws, each member of the Design-Build Firm who is an architect or engineer, or a provider of professional services, including geotechnical engineering, surveying or other professional services in connection with the performance of the Services and Work, shall have been selected by the Design-Build Firm in the manner provided by Section 2254, Subchapter A, of the Texas Government Code.
- (d) Public Outreach. Design-Build Firm shall include in the GMP an Allowance to attend, participate in, and support Owner's need for support in Owner-led public meetings, as requested by Owner, in the amount as set forth in Section IX.D(3). For the avoidance of doubt, such funds are set aside exclusively for the Owner's use and benefit and shall not be used to offset any cost of any Services or Work.
- (e) Meetings and Reports. The Design-Build Firm shall hold periodic meetings and conferences with the Owner and the Program Manager to verify and confirm that the performance of the Design Services:
 - (i) has the full benefit of the Owner's experience and knowledge of existing needs and facilities;
 - (ii) is consistent with the Owner's current policies and standards; and
 - (iii) is fully coordinated with the services being performed by the Program Manager and any other person engaged in performing work in connection with the Project or any related project.
- (f) The Design-Build Firm shall keep the Owner and the Program Manager regularly informed as to the progress of the Design Services through the submittal of a monthly progress reports in accordance with the Contract Data Requirements List (**Exhibit 10**). This report shall include the following:
 - (i) Status of the Design Deliverables, (including percent complete, missed deadlines and schedule delays);
 - (ii) Status of permits and approvals, and resolution of any logged corrective measures or substitutions;

- (iii) The DPOR's status of addressing any corrections to the Design Deliverables, and the impact such corrections may have on the Project Schedule;
- (iv) Detailed list and log of any deviations from the Owner's scope, the DCP, or specified equipment, materials or finishes from Owner's previously completed service centers constructed as a part of the Service Center Program; and
- (v) Quality control checking review dates and status of design quality control checks (including the responsible design professional assigned for checks) of Design Deliverables prior to the release thereof.

2. Methodologies, Systems and Practices. Design-Build Firm shall consider and use best industry practice methodologies, systems and practices, to the extent reasonably and commercially appropriate, for:

- (a) Contracting the design, construction and procurement services of the Design-Build Firm Parties;
- (b) Project communications, information management, and document control systems (to ensure full time, continuous communications of latest updated Project information among all participants in the Project, including Owner and Program Manager, and the maintenance of a log of the record date and time of transmittal and receipt of such information as between each sender and recipient, using CPMS);
- (c) Quality control and quality assurance processes, including compliance with applicable codes and standards, and adherence to the Standard of Care in the performance of all Services and Work, throughout the completion of the Project;
- (d) Cost and schedule performance reporting uploaded into CPMS, including the Critical Path Method Project Schedule, with the establishment of a baseline schedule and then subsequent revised dated schedules, with monthly status updates to the Approved Project Schedule, and cost/time impact, if any, summarized in narrative form; and
- (e) Preparing updates to the Project Schedule, which shall show all required Design Deliverables as indicated in the CDRL (**Exhibit 10**) and include detailed Construction Phase activity sequences, as indicated in Article VI of this Agreement. Updates to the Project Schedule shall be uploaded onto CPMS, and shall not indicate any deviations from the baseline Project Schedule that have not been Approved in advance.

3. Communication.

- (a) The Design-Build Firm has designated on Design-Build Firm's Staffing Plan (**Exhibit 5**) both a designated project manager to the Design-Build Firm, and a designated project manager to the DPOR, both of whom shall be licensed in their professions, each of whom shall be continuously involved in and remain fully familiar with the ongoing status of performance of the Services and Work, and be available throughout the Design and Construction Phases of the Project to act as the points of contact for all matters related to design and construction Services and the Project generally. These designated representatives shall not be changed without advance written Approval from the Owner, in accordance with Section VIII.A(3). In the event any such designated representative resigns from employment, his or her replacement shall be equally qualified to fulfill the departing representative's role, subject to advance Approval from the Owner. Design-Build Firm shall notify Owner in advance of, and provide written documentation to the Owner to confirm and attest that, such replacement has received adequate indoctrination on the current status of performance of the Services and Work and the requirements of this Agreement, including the DCP, at no additional cost to Owner.
- (b) Unless otherwise directed by the Owner, the Design-Build Firm shall cause all communications from the Design-Build Firm to the Owner to be directed to the Program Manager, who shall act as the single point of contact between the Owner and the Design-Build Firm. The Owner's Project Manager shall, however, be copied on all such communications. The Design-Build Firm shall not engage in any communication with Owner's employees, stakeholders, vendors, suppliers or Owner's Separate Contractors, and any communications concerning the foregoing persons or entities shall be directed solely to the Program Manager, with a direct contact copy to the Project Manager.
- (c) The foregoing provisions notwithstanding, Owner expressly reserves the right to communicate, and nothing in this Agreement shall be construed to limit or restrict the right of the Program Manager, Owner's Project Manager, Architectural Representative or other Owner representatives, to communicate directly, but jointly and simultaneously, with both the Design-Build Firm and the DPOR or any Design-Build Firm Parties at any time if Owner believes such direct communications will help to expedite or clarify communications for the benefit of the Project. All contracts with the Design-Build Firm Parties shall expressly acknowledge Owner's reservation of such right. In no event shall an election by Program Manager, Owner's Project Manager, Architectural Representative, or any other Owner representative to initiate any such communication be deemed or construed to be an interference with the contractual relationship or rights of

Design-Build Firm, the DPOR or any Design-Build Firm Parties, or an abrogation of any rights of Owner under this Agreement.

B. Description of Scope of Services and Work.

The Services and Work required of the Design-Build Firm for the Design and Construction Phases are described below according to the Pricing Schedule (**Exhibit 3**). The specific time limitations for completion of each Design Deliverable is set forth in the Project Schedule (**Exhibit 6**) and/or the Contract Data Requirements List (**Exhibit 10**). The Design-Build Firm shall employ and exercise the professional judgment of its experienced and qualified design and construction professionals to provide Owner confidence that the Project will be completed in conformity with design criteria and concepts established by the DCP and the Approved Construction Documents, and it is the intention of the parties that the Design-Build Firm shall, at all times, act in the Owner's best interests with respect to the performance of the Services and Work.

1. Design Phase:

- (a) The Design-Build Firm shall commence performance of the Design Services immediately after receiving Owner's Notice to Proceed therewith.
- (b) The DPOR and Design-Build Firm Parties shall develop full and complete designs for the Project, in accordance with the Design Criteria Package (**Exhibit 1**), for each element of the Work to be performed at the NEOC, and the Existing NESC Worksites. Design-Build Firm acknowledges that the requirements of the DCP are based in part on prior designs of Owner's previously completed Operations Centers constructed as a part of the Service Center Program. Design-Build Firm agrees that, although the DCP may include copies of or references to As-Builts, records or other design records for such previously completed Operations Centers as a means of describing Owner's criteria for this Project, Design-Build Firm shall independently develop the design for this Project and shall not assume or presume that portions of the design for this Project should be based on such prior designs of previously completed Operations Centers. While prior design information may be useful, Design-Build Firm shall exercise its independent professional judgment to fulfill its responsibility to prepare a total and independent design for this Project.
- (c) General Responsibilities.
 - (i) During each Design Phase, the Design-Build Firm shall provide, and cause the DPOR to oversee and manage, in accordance with the Standard of Care, the following Services as necessary or appropriate, and based upon the Design-Build Firm's independent investigation of the Worksite Conditions:

Design Services, generally;
LEED related evaluations;
Landscape design;
Geotechnical evaluations (including evaluation of the
Worksite Investigation Report);
Site assessments, including any environmental assessments
or monitoring;
Civil Engineering;
Structural Engineering;
Mechanical Engineering;
Electrical Engineering;
Fuel facility design;
IT and Audio/Visual Engineering;
Interior design;
Coordination with Owner-furnished FF&E, including the
providing of FFE drawings;
Construction Cost Estimating;
Scheduling;
Constructability Review analyses;
Fire Protection/Life Safety/Code reviews;
Permitting reviews and coordination with AHJs; and
Any other activities necessary or appropriate to prepare the
Design.

- (ii) The Design-Build Firm shall not proceed with any Phase of the Work and Services, including any phase of the Design, or any design submittal or deliverable as required in the CDRL (**Exhibit 10**) except as authorized by Owner's Notice to Proceed, failing in which Design-Build Firm shall solely bear the financial risk of corrections or modifications due to any errors or changes in the Construction Documents or the Work or any corrections required in order to achieve Owner Approval and subsequent NTP.
- (1) Design-Build Firm shall submit Drawings and Specifications to AHJ's for their preliminary plan reviews only after receiving Approval to do so;
- (2) Design-Build Firm's Design Approach Submittal as required by the CDRL (**Exhibit 10**). The Design-Build Firm will review the Owner's DCP and include in this Submittal the strategy for the performance of the Services and Work at each Worksite. The Design-Build Firm shall include in this Submittal a narrative description of the Design-Build Firm's approach for each Worksite, separately describing the major features of the facility, such as major materials to be used,

and any perceived risks to cost and schedule. The Design-Build Firm shall have thoroughly reviewed the DCP and shall provide any input, comments or Value Engineering to Owner's DCP, for review and comment by Owner and Program Manager. Facility designs and associated sitework, shall meet the design criteria set out in the Owner's DCP. Facility designs and associated sitework shall also be reasonably consistent with the designs of the Owner's previously completed service centers constructed as a part of the Service Center Program (which shall generally be referred to as "**Owner's prior service centers**") in order to provide Owner commonality and consistency of design across all of Owner's service centers facilities (which shall generally be referred to as "**program design consistency**") for purposes of efficiency in Owner's ongoing maintenance and operation of its service centers. The Design-Build Firm shall describe the rationale for all variances in or inconsistencies between Design-Build Firm's design approach, the DCP, and Owner's prior service centers. The Design Approach Submittal shall incorporate and reuse prior design decisions/specifications for Owner's prior service centers, as reflected in the DCP, as much as possible for program design consistency. Any proposed variances or inconsistencies in design from the DCP, the Design Approach Submittal, and Owner's prior service centers shall be organized in a spreadsheet with reference to drawing or specification section. Any variation of the Construction Documents from the DCP must be Approved in advance. Owner shall be given notice of and Approve the correction of any errors recognized within the DCP prior to addressing such errors in a submittal of a Design Deliverable or a Construction Documents Set. Approval of the Design Approach Submittal and any proposed variances from the DCP are required prior to issuance of an NTP from the Owner to proceed to the next deliverable in accordance with the CDRL (**Exhibit 10**).

- (3) Prepare Facility Designs. Owner requires the overall concept, appearance, and finishes for each Worksite and Operations Center facility to be, to the greatest extent possible, consistent with the DCP. Facility designs shall also be consistent with the designs of the Owner's prior service centers. Owner reserves the right to require the Design-Build Firm to identify, in a spreadsheet with reference to drawing or specification section, and resolve differences in

design from the DCP, the Owner's prior service centers, and the Design Build Firm's proposed designs for the Project, including concepts, appearances, and finishes as the designs for each Worksite and Operations Center facility are developed for the Project.

- (4) Drawings shall be produced in CAD/BIM, and the Drawings and Specifications shall be uploaded as BIM files to CPMS as they are updated. The Design-Build Firm shall assign a key team member as listed in the Design-Build Firm's Staffing Plan (**Exhibit 5**) as a sole point of contact to manage and maintain the architectural and engineering elements of the CAD/BIM electronic files on a daily basis, and all updates of these files. The Design-Build Firm shall verify to Owner's Program Manager at least weekly, in writing, that all of Design-Build Firm's design consultants have coordinated updates to respective drawings, communications and files in accordance with the Communication Plan, the BIM Execution Plan and the Design-Build Firm's Quality Control Plan.
- (5) The Design-Build Firm has concluded its own site investigation, and included the results of such investigation in the attached Worksite Investigation Report, dated _____, a copy of which report is attached hereto (**Exhibit 23**), including a geotechnical assessment and soils analysis report for the Worksites to be used in Design-Build Firm's geotechnical engineering for, and final design and construction of the Project. The Parties have relied upon the results of such Worksite Investigation Report to determine the potential risk of unforeseen Worksite Conditions and to establish the Worksite Conditions Allowance therefor.
- (6) The Design-Build Firm shall provide, or subcontract with a licensed surveyor as necessary in the Design-Build Firm's professional judgment to provide accurate and complete site surveys, tree surveys, topographical surveys as needed to properly identify all boundary constraints, easements, and other title exception conditions to be observed, avoided, or otherwise taken into consideration in the development of the Worksites in accordance with the DCP and the Construction Documents.
- (7) The Design-Build Firm shall develop and provide during the Design Phase a Permitting Plan and maintain a log reflecting status and resolution of all requirements of AHJs, which log

shall be kept up to date throughout the Project until Final Completion and shall copy Owner on all required submittals or other documentation submitted to the AHJs, as well as copies and receipt of all certificates of occupancy for the Project.

- (d) Design Coordination. Design-Build Firm shall adhere to the following coordination requirements throughout each Design Phase.
- (i) Review of Meeting Documentation. During the Design Phase, the Program Manager will prepare and distribute meeting agendas, and meeting minutes. The Design-Build Firm shall prior to each meeting, assist Program Manager with the development of the meeting agenda, and upon receiving the Program Manager's minutes of each meeting, the Design-Build Firm shall promptly review the meeting minutes and submit to the Program Manager any comments to such meeting minutes by the end of the second business day after receipt of such meeting minutes, failing in which such meeting minutes shall be deemed an accurate record of the decisions, action items and other outcomes of the meeting.
 - (ii) Weekly Reviews. The Design-Build Firm shall schedule and participate in weekly status meetings with Owner's Project Manager and Program Manager to review updated Control Estimates, Project Schedules and Design Deliverables.
 - (iii) Presentations. The Design-Build Firm shall allow time in the Project Schedule for as many as six (6) formal presentations for Owner's various stakeholders, such as Owner executives, Board members or other public officials or groups, during the Design Phase as requested by Owner. For such presentations, Design-Build Firm shall produce renderings in both physical boards, and a PowerPoint format, which include plans and elevations that clearly communicate the proposed design.
 - (iv) Design Deliverable Reviews. Owner shall have ten (10) business days to review each Design Deliverable. The Design-Build Firm and DPOR shall include in the Project Schedule adequate time for each of the following:
 - (1) Design-Build Firm and DPOR's internal Quality Control processes and control estimating prior to submission of a Design Deliverable for Owner's review;
 - (2) Owner's review of the Design Deliverables;

- (3) conducting of review meetings of the Owner, and Design-Build Firm and their respective consultants, in accordance with Section III.B(1)(d)(viii);
- (4) evaluation of any comments and questions Owner will log following the review meeting;
- (5) revising the Design Deliverables, including drawings and specifications, and BIM model to correct any noted errors, omissions, code violations, inconsistencies, or other deficiencies observed therein, and to resolve all comments and questions entered on Owner's review log; and
- (6) resubmitting the revised Design Deliverables for Owner's further review and Approval.

Design-Build Firm agrees that (i) the Project Schedule and the Scheduled Dates for Substantial Completion and Final Completion for the Project allow a reasonable time for Owner's review of Design Deliverables, (ii) Owner has the right to review, comment on, and log any and all errors, omissions, code violations, inconsistencies, or other deficiencies observed in the Design Deliverables, (iii) Owner's exercise of such right shall not be the basis of a claim of Owner interference or Excusable Delay, and (iv) the time required for Design-Build Firm to correct errors, omissions, code violations, inconsistencies, or other deficiencies in the Design Deliverables shall not be the basis of a claim of Owner interference or Excusable Delay.

- (v) Design Revisions. The Design-Build Firm shall be responsible for managing the DPOR and the delivery of Design Services and Design Deliverables so as to ensure that the Project is designed and constructed in accordance with the requirements of this Agreement, including the DCP, in accordance with the Project Schedule, and Applicable Law or construction codes, for an amount that is within the Guaranteed Maximum Price. The Design-Build Firm shall follow the Design-Build Firm's Quality Control Plan on an ongoing and continuous basis to coordinate and make the Drawings consistent with the Specifications, and each design discipline's drawings consistent with all other discipline's Drawings. Quality Control Procedures must include the use of a completion checklist for each document and these completed and signed checklists shall be turned over to the Owner with each Design Deliverable.

The Guaranteed Maximum Price and the Project Schedule shall cover the cost of and time for making, and allowing a reasonable time to make, revisions to Design Deliverables that are appropriate

to correct errors, omissions, inconsistencies or other deficiencies identified by either the Owner or Design-Build Firm through the design review process by entering them on Owner's log of design review comments, as described in Section III.B(1)(d)(v), above. Upon Notification to the Owner of required corrections to the Design deliverables, the Design-Build Firm shall also submit a recovery schedule depicting the manner in which the correction will be completed without impacting the Project completion dates. If, at any time, Design-Build Firm believes an Owner's design review comment or clarification, will result in a change in scope that may affect the Design-Build Firm's ability to adhere to the Project Schedule or require consideration of a request to increase the Guaranteed Maximum Price, the Design-Build Firm shall give Owner prompt written notice thereof, no later than five (5) business days after Owner's design review comment has been provided to Design-Build Firm, explaining with particularity the basis for such belief, and Design-Build Firm shall not proceed further with Services related to such design review comment without further direction from Owner. Design-Build Firm's notice must comply with the notice requirements of this Agreement in Section VII.E, below for making any claim to extend the Project Schedule for Excusable Delay and/or increase the Guaranteed Maximum Price. Failure to give such notice shall result in a waiver of Design-Build Firm's right to seek an extension of time or an adjustment to the Guaranteed Maximum Price.

- (vi) Meeting and Training on Owner's Construction Project Management Software Systems. The Design-Build Firm shall designate a member of the key personnel, as listed in **Exhibit 5** (Design-Build Firm's Staffing Plan), to be solely responsible for all updates to and management of documentation in the use of Owner's construction project management software systems defined in Section I.A.13. This designated individual shall attend training sessions with the Owner or Program Manager, as appropriate to understand and use each software system and shall receive access to each such software system. Owner reserves the right at any time to implement updates to, or use different, construction project management software systems, in order to manage the Project, in which case the Design-Build Firm shall undergo training sessions at its own cost in the use thereof. The Design-Build Firm's use of CPMS shall, with respect to Projectmates, be under the license of the Program Manager, for which the Design-Build Firm shall compensate the Program Manager based on the number of user seats the Design-Build Firm desires to have, which shall be based on the

Design-Build Firm's required number of seats (one minimum) and based on Projectmates' current annual rates.

(vii) Drawing and Compliance Reviews.

- (1) The Design-Build Firm, at its sole expense, shall provide Owner with the designated number of design document review sets required for each deliverable, as shown in the Project Schedule (**Exhibit 6**) and the Contract Data Requirements List (**Exhibit 10**). Design Deliverables shall be submitted in PDF format, in combined sets, and in accurate sheet order.
- (2) The Design-Build Firm shall pay all costs for plans, specifications and other design and construction documents used by the Design-Build Firm and Design-Build Firm Parties, and all documents produced for review by the Owner.
- (3) The Design-Build Firm shall incorporate into the documents all corrective revisions and design change revisions as necessary to complete each Design Deliverable in accordance with the Project Schedule (**Exhibit 6**) (as may be extended by design change revisions and the Contract Data Requirements List (**Exhibit 10**)). Any additional cost incurred due to Design-Build Firm's failure to promptly incorporate corrective revisions shall be borne solely by the Design-Build Firm, without adjustment to the Guaranteed Maximum Price.
- (4) The Design-Build Firm shall allow in its Project Schedule no less than 10 business Days for Owner's review of any Design Deliverable, and the Control Estimates and Final Control Estimate, shown in the Project Schedule (**Exhibit 6**) and the Contract Data Requirements List (**Exhibit 10**).
- (5) As the Design Phase proceeds, and unless otherwise provided with respect to the use of funds in the Construction Contingency or an Allowance, the Design-Build Firm may re-allocate cost within the Control Estimates of the Guaranteed Maximum Price from any one line item of cost to another, provided such reallocation does not cause the total cost of the Project to exceed the Initial GMP. If a Final GMP is Approved and Owner issues the Notice to Proceed with the Construction Phase, the Design-Build Firm shall not thereafter re-allocate costs among line items without

Owner's Approval. If any Control Estimate, including the Final Control Estimate, exceeds the Guaranteed Maximum Price for any reason not otherwise expressly excused by the terms of this Agreement, the Design-Build Firm shall re-design the Project at its own expense and re-submit the Design Deliverables for another review. The Owner may consider an extension to the Project Schedule in order for the Design-Build Firm to make such corrections, but any time or services required to make revisions to align the Design Deliverables within the Guaranteed Maximum Price, including time required for further design review meetings, permitting and processing of such revisions shall not be considered as a basis for adjusting the Guaranteed Maximum Price. In such event, Design-Build Firm shall also provide a recovery schedule, as required in Section VII.E, below.

(6) If at any time during any Design Phase the Owner determines in its review of any Design Deliverable that the project size is less than the space program provided within the Design Criteria Package (**Exhibit 1**) or that any space designed by Design-Build Firm is less than that depicted in the DCP or that a performance criteria within the DCP is exceeded, ignored or not met, the Design-Build Firm shall, unless otherwise expressly excused by the terms of this Agreement, re-design the Project at its own expense, without adjustment to the Guaranteed Maximum Price. The Design-Build Firm may request, and Owner may in its sole discretion consider and grant an extension to the Project Schedule in order for the Design-Build Firm to make such corrections, but any additional time or services allowed to make such revisions shall not be considered a basis for adjusting the Guaranteed Maximum Price. In such event, Design-Build Firm shall also provide a recovery schedule, as required in Section VII.E, below.

(viii) Pre-Construction Meeting(s). The Design-Build Firm, including the DPOR, shall schedule and participate in pre-construction meetings as necessary to provide advice and consultation to the Program Manager and Owner regarding: site usage; earthwork; methods of delivery of materials, systems and equipment; construction sequencing; confining the Work to the construction limit boundaries of the sites; availability of materials, equipment, utilities and labor; time requirements for delivery, installation and construction; safety precautions and programs; temporary facilities; equipment, materials and services for common use by the Design-Build Firm,

Design-Build Firm Parties and any Separate Contractors; cost savings opportunities such as costs of alternative materials or designs; and any other matters pertaining to the performance of the Work. All such information shall be provided in a timely manner to allow sufficient time for review and discussion while taking into account the overall Project Schedule.

(e) Schematic Design Phase.

- (i) The Design-Build Firm shall review the Owner's scope, the DCP, specified equipment, materials and finishes, and the approaches to design and construction of the Project from Owner's previously completed service centers and review them with the Owner, and shall include whole building energy analysis of the various alternatives through use of energy modeling software. The Design-Build Firm shall prepare Schematic Design documents and a coordinating Control Estimate and submit them to the Owner for Approval.
- (ii) The Design-Build Firm shall, and shall direct and cause its DPOR to, develop and prepare the Schematic Design documents for the Project, which documents shall include civil, structural, architectural, mechanical, electrical, landscape, interior, and Audio/Visual drawings and specifications.
- (iii) The design shall be illustrated sufficiently and in a manner so that the Owner can readily understand the proposed design and site development:
 - (1) These drawings and specifications shall provide information on selected or acceptable types of construction as well as types of mechanical, electrical, plumbing, and structural systems, and civil engineering and landscaping aspects of the proposed design.
 - (2) Any special or other critical elements of the proposed design shall be illustrated or described by Design-Build Firm at a preliminary level during this phase of design.
- (iv) The Design-Build Firm shall prepare the required Design Deliverables as listed in the Project Schedule (**Exhibit 6**) and the Contract Data Requirements List (**Exhibit 10**), including but not limited to the following:
 - (1) Drawings and other documents will indicate the scale and relationship of project components.

- (2) Conceptual renderings including perspective and isometric views of exterior façade, primary interior spaces and floor plans for Owner's use in presentations to the public, the Board, and Owner's management.
 - (3) Conceptual site plan showing land use, general building location, general parking arrangement, and major site features and proximity to major thoroughfares and highways to adequately depict egress/ingress and traffic patterns.
 - (4) Conceptual building plans showing major plan components, including structural and MEP components, with designations of user departments and departmental blocking and stacking.
 - (5) For each major building façade, generally indicating fenestration, entrances, and design vocabulary.
 - (6) Conceptual building section to illustrate building shape or spatial features.
 - (7) Conceptual drawings and specifications for the following disciplines: civil, structural, architectural, mechanical, electrical, landscape, interior, and Audio/Visual.
 - (8) Control Estimate with quantities for major components such as concrete, roofing, exterior wall, windows, paving, utility lines, and approximate finish surfaces, and lump sum allocations for yet to be developed elements.
 - (9) An updated Project Schedule for each standalone building or site works/utility segment organized under the MasterFormat divisions (except division 00).
 - (10) Any Worksite Conditions encountered during the Construction Phase, and any AHJ requirements applicable thereto, that relate to or vary from the Worksite Conditions identified to have a moderate or higher risk of encounter in the Worksite Investigation Report.
- (v) Before proceeding to the Design Development Design Phase, the Design-Build Firm shall obtain Owner's Notice to Proceed and the Owner's Approval of the Control Estimate and Project Schedule based on the Schematic Design Deliverables.

(f) Design Development Phase.

- (i) Upon Owner's Notice to Proceed with the Design Development Services and based on the review of the Schematic Design documents and any adjustments to the Project scope or to the Control Estimate authorized by the Owner, the Design-Build Firm shall, and shall cause its DPOR to, prepare Design Development documents and an updated Control Estimate, and submit them to the Owner for review. The Design Development Documents shall fix and describe the size and character of the entire Project, including site work, architectural, structural, mechanical and electrical systems, materials and such other elements as may be appropriate. The Control Estimate shall confirm adherence to the Guaranteed Maximum Price.
- (ii) The Design-Build Firm shall direct and oversee the DPOR and its other design professionals in the preparation of performance Specifications for all engineered systems required for the Project. Drawings shall illustrate the engineered systems, showing locations and types of HVAC equipment and devices, fleet garage crane and lift equipment, electrical systems and equipment, fire/life safety systems, building management systems, plumbing systems, showing compliance with the DCP.
- (iii) These drawings shall be accompanied by a list of proposed materials, methods and systems ("**Design Development Specifications**") that describe all major cost elements of each MasterFormat division (except Division 00). Provide short form MasterFormat (except Division 00) specification describing primary materials and building systems.
- (iv) The Design-Build Firm shall prepare and provide the required Design Deliverables according to the Contract Data Requirements List (**Exhibit 10**), including but not limited to the following:
 - (1) Space assignments, sizes and locations of installed and moveable equipment and labeling of net and gross areas for all Projects that fully account for all space identification/allocations in the DCP.
 - (2) Scaled site plan with building locations dimensionally established in relation to benchmarks shown on Design-Build Firm's civil drawings. Site plans shall include street lines, drives, parking lots, property lines, sidewalks, paving materials, setbacks and easements (survey required), underground structures, and entry/exits. Preliminary grades shown on site plan shall be reviewed by the Design-Build

Firm's civil engineer. All of the above shall include coordination with the surveys developed or verified by the Design-Build Firm's civil engineer.

- (3) Floor plans, including enlarged floor plans, with dimensions for major typical elements. On each floor plan, doors and window systems shall be keyed, and all rooms shall be labeled and numbered. All floor plans shall show structural columns and grids as coordinated with the structural drawings.
- (4) Reflected ceiling plans to define/locate major design elements, ceiling grids and lights fixtures, HVAC grilles, security cameras, and other equipment, coordinated with Owner as required.
- (5) All building facades, provide exterior elevations indicating material, fenestration, entrances, awnings, special features, floor levels and plate heights, and vertical dimensions.
- (6) Enlarged elevation plans to define major critical elements.
- (7) Full-height building sections showing building configurations for predominant or typical locations. Indicate relationship in section to the adjacent site grades, as well as building materials, structure, foundations, ceilings and ceiling and plate heights and include room number labels that correspond with the floorplans.
- (8) Enlarged details for typical roof, wall (top and sill), grade, and special elements including overhead doors, canopies, bridge crane at fleet, pit and lift at fleet, truck dock, site plan detail at site vehicular entries, and other specialty items as required to communicate the details for construction.
- (9) Door and window schedules to define general door and window types showing hardware sets, and security swipes and equipment.
- (10) Room finish schedule.
- (11) Partition schedule and interior partitions shown at scale.
- (12) Casework and millwork schedules and material selection.
- (13) Plumbing fixture and toilet accessory schedule.

- (14) Major M/E/P systems determined (rooms, shafts, etc.) as indicated.
 - (15) Fire, security, and alarm system layout, external link specifications, and specification of major component selections and testing/maintenance regimens.
 - (16) A three dimensional computer model in rendered format with images around the overall site, exterior and interior of primary spaces and facades for the buildings, including all major materials and building systems.
 - (17) Current Control Estimate based on the Design Deliverable Phase documents, according to CDRL (**Exhibit 10**)
 - (18) Project Schedule updated to the current Control Estimate according to CDRL (**Exhibit 10**) for each standalone building or site works/utility segment showing the control milestones and all open/incomplete Design Deliverables according to CDRL (**Exhibit 10**) required to meet the completion dates listed in the Project Schedule (**Exhibit 6**).
 - (19) Comprehensive, thorough Quality Assurance checklist confirming the Design Build Firm's and the DPOR's representations all previous Owner comments from the Schematic Design Phase have been addressed and resolved in the Design Deliverables required for this Design Deliverable Phase.
 - (20) Constructability review report and Value Engineering of the designs prepared by DPOR and the Design-Build Firm Parties.
- (v) Before proceeding to the Construction Documents Design Phase, the Design-Build Firm shall obtain Owner's Notice to Proceed and the Owner's Approval of the Control Estimate and Project Schedule based on the Design Deliverables.

(g) **Construction Documents Phase.**

- (i) **General Requirements for Preparation of Construction Documents.** Upon Owner's Notice to Proceed with preparation of the Construction Documents, and consistent with prior reviews of the Design Deliverables and any previous adjustments to the Control Estimate Approved by the Owner, Design-Build Firm shall proceed to prepare and submit Design Deliverables, as further described in the CDRL. The Construction Documents shall fix and describe in

detail the requirements for construction of the Project, including the size and character of the entire Project, including site work, civil, architectural, structural, mechanical and electrical systems, materials, and other elements of the Work. The Construction Documents shall provide for the construction of the Project in accordance with the Project Schedule and within the Guaranteed Maximum Price.

(ii) **The 50% Set of Construction Documents and related Design Deliverables.** The Design-Build Firm shall, in accordance with the Project Schedule (**Exhibit 6**) for the Design Phase, prepare and timely submit for Approval the 50% Set of Construction Documents and related Design Deliverables, all as required by the CDRL (**Exhibit 10**), as follows:

- (1) The 50% Set of Construction Documents shall show all final space areas and wall locations, have a draft finish table indicating all surfaces, locate and describe all door types, show layout and sizing of all MEP systems ducts, pipes, cable trays, panel boards, fixtures, piping in chases, civil shows all final elevations and structural/paving details, final location and sizing of all utility lines including irrigation, data, security and lighting. The 50% Set of Construction Documents shall represent a complete design (design analysis, specifications, and drawings), pending final detail adds or revisions, with no clouds other than as to notes, and no strike-through text changes/revisions, and suitable for permit review and construction, without further design effort. The 50% Set of Construction Documents shall include annotated specifications and design submittal review comments to answer and/or incorporate all design review comments previously logged by Program Manager, including any comments resulting from any prior Approved AHJ reviews;
- (2) All necessary permit applications, in form have been initiated and this process is underway, and ready for pending Approval to submit for AHJ review in the next 90% and 100% deliverables;
- (3) BIM model (for NEOC only) in rendered format with images around the overall site, exterior and interior of the buildings, including all major materials and building systems, complete and suitable for Owner use after Substantial Completion and compliant with BIM Protocols (**Exhibit 2**) with all elements

dimensionally fixed;

- (4) Two-dimensional CADD files and a full size set of PDF files, with each CADD drawing file being free standing and independent, containing no references or cross-references to separate files;
- (5) Updated Control Estimate, submitted according to CDRL (**Exhibit 10**), based on the 50% Construction Documents and related Design Deliverables;
- (6) Updated Project Schedule according to CDRL (**Exhibit 10**) for each standalone building or site works/utility segment showing the control milestones and all open/incomplete Design Deliverables according to CDRL (**Exhibit 10**) required to meet the completion dates listed in the Project Schedule (**Exhibit 6**);
- (7) Comprehensive, thorough Quality Assurance checklist confirming the Design-Build Firm's and the DPOR's representations that all previous Owner comments from the Design Deliverable Phase have been addressed and resolved in the Design Deliverables required for this Construction Documents Phase;
- (8) A submittal report listing all design narrative chapters, drawings and specifications being delivered.

(iii) **The 90% Set of Construction Documents and related Design Deliverables.** The Design-Build Firm shall, in accordance with the Project Schedule (**Exhibit 6**) for the Design Phase, prepare and timely submit for Approval the 90% Set of Construction Documents and related Design Deliverables, all as required by the CDRL (**Exhibit 10**), as follows:

- (1) The 90% Set of Construction Documents, which shall be essentially complete, but not signed and sealed. The 90% Set of Construction Documents shall represent a complete design (design analysis, specifications, and drawings), which shall be clean of all revisions, with no clouds other than as to notes, and no strike-through text changes/revisions, and suitable for permit review and construction, without further design effort. The 90% Set of Construction Documents shall include annotated design submittal review comments to answer and/or incorporate all

design review comments previously logged by Program Manager, including any comments resulting from any prior Approved AHJ reviews;

- (2) All necessary permit applications, in form complete and ready for Approval to submit for AHJ review.
- (3) BIM model (for NEOC only) in rendered format with images around the overall site, exterior and interior of the buildings, including all major materials and building systems, complete and suitable for Owner use after Substantial Completion and compliant with BIM Protocols (**Exhibit 2**) with all elements dimensionally fixed;
- (4) Two-dimensional CADD files and a full size set of PDF files, with each CADD drawing file being free standing and independent, containing no references or cross-references to separate files;
- (5) Updated Control Estimate, submitted according to CDRL (**Exhibit 10**), based on the 90% Construction Documents and related Design Deliverables;
- (6) Updated Project Schedule according to CDRL (**Exhibit 10**) for each standalone building or site works/utility segment showing the control milestones and all open/incomplete Design Deliverables according to CDRL (**Exhibit 10**) required to meet the completion dates listed in the Project Schedule (**Exhibit 6**);
- (7) Comprehensive, thorough Quality Assurance checklist confirming the Design-Build Firm's and the DPOR's representations that all previous Owner comments from the prior Phases have been addressed in the 90% Set of Construction Documents, and that the 90% Set of Construction Documents and all associated Design Deliverables have captured all and satisfactorily resolved all such comments;
- (8) A submittal report listing all design narrative chapters, drawings and specifications being delivered;
- (9) A statement signed by both the authorized representative of the Design-Build Firm and its DPOR confirming that the Design-Build Firm has thoroughly reviewed the Construction Documents, that all rights of ownership to the

use of the Construction Documents have been transferred to the Owner, and that such Documents are free from errors, omissions and defects.

(iv) **The 100% Set of Construction Documents and related Design Deliverables.** The Design-Build Firm shall, in accordance with the Project Schedule (**Exhibit 6**) for the Design Phase, prepare and timely submit for Approval the 100% Set of Construction Documents and related Design Deliverables, all as required by the CDRL (**Exhibit 10**), as follows:

- (1) The 100% Set of Construction Documents shall be complete, signed and sealed, including all Drawings and Specifications, clean of all revisions, with no clouds other than as to notes or clouds required to address requirements of AHJs, and no strike-through text changes/revisions, and suitable for permit review and construction, and suitable and ready for issuance of permits and construction of the entire Project, without further design effort or further review by permitting Authorities Having Jurisdiction;
- (2) Proof that AHJ's have completed their preliminary plan reviews of the Drawings and Specifications Approved for AHJ review, and that all AHJ comments have been satisfactorily resolved and all necessary permit applications are prepared and ready to submit to all AHJs as required to commence construction upon Owner's Notice to Proceed with the Construction Phase;
- (3) BIM model (for NEOC only) in rendered format with images around the overall site, exterior and interior of the buildings, including all major materials and building systems, complete and suitable for Owner use after Substantial Completion and compliant with BIM Protocols (**Exhibit 2**) with all elements dimensionally fixed;
- (4) Two-dimensional CADD files and a full size set of PDF files, with each CADD drawing file being free standing and independent, containing no references or cross-references to separate files;
- (5) Final Control Estimate submitted according to CDRL (**Exhibit 10**) based on the 100% Construction Documents and related Design Deliverables;

- (6) Updated Project Schedule according to CDRL (**Exhibit 10**) for each standalone building or site works/utility segment showing the control milestones and all open/incomplete Design Deliverables according to CDRL (**Exhibit 10**) required to meet the completion dates listed in the Project Schedule (**Exhibit 6**).
 - (7) A statement signed by both an authorized representative of the Design-Build Firm and its DPOR confirming that the Design-Build Firm has thoroughly reviewed the Construction Documents, and that all rights of ownership to the use all Construction Documents have been transferred to the Owner, and that such Documents are, to the best of their knowledge, free from errors, omissions and defects, and adequate for construction in accordance with the terms of this Agreement.
2. Construction Phase: The Services and Work to be performed during the Construction Phase include the following:
 - (a) The Design-Build Firm shall fully construct a minimum of three (3) new freestanding buildings, a new fueling facility with AGT's, truck scale, material bins, ice and water station structure, electric gates at main and secondary entries with gates and electronic key card access, designated areas and utilities provided for Owner's OFOI concrete silo, security/IT facilities, storage areas, main access roads and drive lanes with turning radii for all of the aforementioned facilities, and associated sitework, including site parking, all as more fully described in **Exhibit 1: Design Criteria Packet**.
 - (b) The Design-Build Firm shall demolish at the NESC site the existing administration building, attached shed/structures, and all contents, as well as exterior concrete material storage bins, and all Work shall include the demolition and remediation of two (2) separate fuel islands and existing UGT's and associated pumps and utilities. All shall be completely demolished and removed. The fuel facility shall be remediated as required by all AHJ's. Pavements shall be replaced, and installed in the footprint of the Administration Building and fuel islands. A new retaining wall and railing shall also be installed. New construction also includes new guardrails, bollards, railing and any other safety items and associated signage and traffic striping as required, as well as the demo of the existing two (2) marquee signs and the installation of a new marquee sign and associated landscaping and lighting, with signage designating the site as the Naco Pump Station. as more fully described in the applicable DCP **Exhibit 1: Design Criteria Packet**.

(c) Construction Authorization.

- (i) Commencement of Construction Phase Services. The Construction Phase shall be deemed to commence upon the date specified in Owner's Notice to Proceed, and shall continue until Final Completion of all Work. Upon issuance of the Owner's Notice to Proceed, the Design-Build firm shall proceed to undertake, perform and complete the Work in accordance with and subject to this Agreement.
- (ii) Issuance of Owner's Notices to Proceed. Design-Build Firm acknowledges that Owner intends to issue separate Notices to Proceed with the Construction Phase at each of the Worksites, according to the CDRL (**Exhibit 10**).
- (iii) Early Work Package Amendments. Design-Build Firm shall consider and recommend for Owner Approval issuance of early work design packages ("**Early Work Packages**") for purchase of long lead Items to support the Project Schedule and obtain early pricing commitments to protect against cost escalation. Owner's Approvals of Early Work Packages shall coincide with Owner's budget plan for funding the Project. In such event, Design-Build Firm shall submit signed and sealed Construction Documents for such portions of the Work and an Early Work Package proposal to the Owner, which proposal amount shall not, for each cost item listed in such proposal, exceed the Approved amount for such cost items in the current Approved Control Estimate or Final Control Estimate. If the Early Work Package proposal is acceptable to Owner, Owner shall issue a limited Notice to Proceed to Design-Build Firm for the Approved portions of the Work. Any compensation amounts Approved in connection with an Early Work Package shall be included in each subsequent Control Estimate or Final Control Estimate.
- (iv) Overlap of Design and Construction Phases. Design-Build Firm shall continue to provide Design Services, including specifically the Design Administration Services, necessary to fulfill Design-Build Firm's responsibilities under this Agreement. Design-Build Firm shall not incur any costs for construction of the Work at a Worksite before Owner issues its Notice to Proceed with such construction.

(d) Construction Planning.

- (i) Assignment of Personnel. The Design-Build Firm has identified on the Design-Build Firm's Staffing Plan (**Exhibit 5**) the personnel, including the Design-Build Firm's project manager, design manager

and all Design-Build Firm Parties, who Design-Build Firm will employ or otherwise engage for the Project. Design-Build Firm shall be responsible for the day-to-day management of the Project and the assignment of its personnel to the performance of the Services and the Work.

- (ii) Long Lead Items. The Design-Build Firm shall identify all materials, equipment and other items requiring extended delivery times and shall recommend the early procurement of long lead items to the Program Manager and the Owner, as appropriate, in accordance with the Project Schedule and the Materials and Equipment Management Plan. Design-Build Firm shall be responsible to absorb the added cost of any long lead item that results from a need to Approve a substitution to overcome the Design-Build Firm's lack of diligence in placing order for such long lead item. Any determination to proceed with the early procurement of long lead items shall be made in accordance with this Section III.B(2)(d)(ii) through the execution of an Early Work Package Amendment. Upon execution of the associated Early Work Package Amendment, the Design-Build Firm shall be responsible for expediting the procurement of such long lead items, including the preparation of all associated procurement documents and the overall management of the procurement, to ensure their delivery by the required dates. The Design-Build Firm shall conduct and manage any such procurement in accordance with the applicable terms and conditions of the Contract Documents.
- (iii) Temporary Project Site Facilities. The Design-Build Firm shall be responsible for ensuring that adequate temporary facilities are provided as necessary to enable Design-Build Firm Parties to perform their Work and provisions have been made for all Project Site facilities necessary for the Design-Build Firm to manage, inspect and supervise the Work. These temporary facilities shall include a mutually acceptable work space for the Owner's Program Manager. The Design-Build Firm shall plan for the provision of such temporary facilities during the performance of the Design Services so that such temporary facilities do not interfere with Owner's ongoing operations at the Worksites. Design-Build Firm shall ensure that all such temporary facilities remain available as necessary during the performance of the Construction Work.

3. Documents and samples at the Site.

- a. Design-Build Firm shall maintain, on the Site and for Owner all documents required by the Contract Data Requirements List (**Exhibit 10**), and including without limitation the following categories of documents:

- (i) Daily log of progress of the construction, in Approved format, to be updated no less frequently than weekly for the immediately preceding week, submitted in CPMS;
- (ii) Daily record of photographs to record progress of the construction, updated no less frequently than weekly for the immediately preceding week, submitted in CPMS;
- (iii) Original and updated or amended Subcontracts, Drawings, Specifications, procurement transaction documents, operating and maintenance manuals (“**O&M Manuals**”) and instructions, and other construction related documents, including all changes and revisions, submitted in CPMS;
- (iv) Directory of all of Design-Build Firm’s Personnel, including all Subcontractors and Suppliers on the Project, submitted in CPMS;
- (v) Project correspondence, inspection procedures (as prepared by others), testing laboratory reports (as prepared by others), submitted in CPMS;
- (vi) Current documents of record, including Drawings, Specifications, Addenda, Construction Change Directives and other records of modifications, Submittal Log, Shop Drawings, Product Data, Samples and other similar submittals, current Project Schedule and all Application for Payment to date, all meeting minutes applicable to the Project. RFI’s, instructions from Program Manager or Owner, and As-Built, and Project Manual data, all in good order and marked to currently reflect field changes and selections made during construction and all information from Subcontractors and Suppliers referenced in or otherwise used to maintain and update the same, submitted in CPMS;
- (vii) This Agreement and all related GMP Amendments and other amendment documents, including backup information and Project records reflecting Schedules, Construction Change Directives, progress payments, inspections, and acceptances or certificates relating to Substantial Completion or Final Completion of the Work or any portion thereof;
- (viii) Warranties and guarantees related to the Work, and all documents pertaining to warranty claims, repairs, replacements, and related Work;
- (ix) Other job records, including, but not limited to, invoices, payment records, payroll records, daily reports, logs, diaries, RFI’s, and all

meeting minutes applicable to the Project. Design-Build Firm shall make such reports and records available for review by the Owner and/or its respective agents during normal business hours upon request by Owner.

4. Performance of the Work. In performing the Work generally, the Design-Build Firm shall, in accordance with the DCP, the Construction Documents, and this Agreement, supervise and direct the Work, using the Design-Build Firm's best skill and attention in accordance with the Standard of Care. This shall include Design-Build Firm's obligation to:
- (a) Manage and construct the Work in strict accordance with the DCP, Construction Documents and Specifications within the time required by the Approved Project Schedule;
 - (b) Timely obtain all permits, and coordinate all required governmental inspections and approvals of their Work in accordance with the Project Schedule;
 - (c) Adhere to procedures for coordination among the Project Team with respect to all aspects of the construction of the Project, and implement such procedures as required in the PMP;
 - (d) Organize and maintain a competent, full-time staff at the Project site with clearly defined lines of authority and communication as necessary to coordinate construction activities, and monitor and direct progress of the Work;
 - (e) Unless otherwise provided in the Contract Documents, provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and Services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work, in strict accordance with the requirements of the Contract Documents;
 - (f) Coordinate delivery of Owner's furniture, fixtures and equipment ("**Owner's FFE**") with Owner's vendor(s), identified depicted to scale in CADD files and on designated FFE sheets to be produced by the DPOR and included into the Construction Documents and provide all required utilities, in-wall blocking, or any other fixed parts of the facility or Worksite, that are required to connect to or support Owner's FFE, which items shall be clearly depicted to scale in CADD files and coordinated with the Construction Documents. During the Construction Phase, the Design Build Firm shall coordinate with Owner's FFE delivery schedule and, if

previously agreed upon Project schedule dates are not achieved by the Design-Build firm, the Design-Build Firm, shall receive, off-load and store, at Approved staging or storage areas, and provide for the storage, security and protection of Owner's FFE pending installation thereof by others;

- (g) Perform all necessary site preparation, clearing, tree abatement, surveying and excavation activities; including coordination with all Applicable Laws in regard to tree abatement. Demolish and remove any existing items as needed to fulfill the Work, as required by the Construction Documents; modify, re-route, repair, extend or replace any utilities, as needed to fulfill the Work, as required by the DCP and Construction Documents; remove from the site and dispose of any demolition or construction debris resulting from the performance of the Work, and any unused soil excavated there from in an environmentally safe manner;
- (h) Provide for all cutting, fitting or patching required to complete the Work or to make its parts fit together properly;
- (i) Conduct regular site visits and inspections of the Work, as reasonably necessary to monitor and observe, and verify with reasonable certainty that the Design-Build Firm Parties are accurately reporting, the progress of and quality of the performance of the Services and Work. Design-Build Firm's executive management shall frequently participate in such visits and inspections to periodically verify all Work is being performed in accordance with the Approved Construction Documents, the Standard of Care, and the other requirements of this Agreement;
- (j) Inspect portions of Work already performed to determine which such portions are in proper condition to receive subsequent Work;
- (k) Review the submittals or other Services or Work of any Design-Build Firm Parties to confirm it is appropriate to produce a completed, functioning Project that conforms to the DCP and the requirements of this Agreement. Evaluate and determine the suitability and acceptability of any substitute or "or-equal" materials and equipment proposed by any Design-Build Firm Parties for conformance with the requirements of, and compatibility with the Approved Construction Documents and the DCP, recording such evaluation and rejection/decisions in CPMS; and
- (l) Promptly, but in no event later than ten (10) business days after receipt of an Owner's request, respond to Owner's written request related to proposed and enacted Contract Amendments, Construction Change Directives, Proposal Request, or updates to the Project Schedule, or other information that Owner may reasonably request in relation to the Project.

5. Shop Drawings Submittals.

- (a) Shop Drawing Submittals are not Contract Documents. Their purpose is to demonstrate, for those portions of the Work for which Submittals are required by the Contract Documents, the way by which Design-Build Firm proposes to conform to the information given and the design concept expressed in the Contract Documents. Any review by Owner, Program Manager or Architectural Representative of Shop Drawing Submittals shall not relieve Design-Build Firm of its obligations to strictly comply with the terms, conditions and requirements of the Contract Documents.
- (b) Design-Build Firm shall review for compliance with the Contract Documents all required Shop Drawing Submittals with reasonable promptness and in such sequence so as to cause no delay in the Project. The Design-Build Firm shall be responsible to correct any defect, error or omission in the Work as a result of any failure to comply with the Contract Documents.
- (c) Design-Build Firm's approval of Shop Drawing Submittals shall constitute Design-Build Firm's representation that it has determined and verified materials, field measurements and filed construction criteria and coordinated with other trades related thereto, or will do so, and has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.
- (e) Design-Build Firm shall perform no portion of the Work without the DPOR's review and approval of the related Shop Drawing Submittals. Owner shall have ten (10) business days after Design-Build Firm has posted submittals to CPMS to review them. Design-Build Firm shall not be excused from responsibility for errors or omissions, or deviations in the submittals from requirements of the Contract Documents that may not be identified through Owner's review of the submittals. Design-Build Firm may only proceed with a deviation that has been Approved prior to submission thereof for Owner's and Program Manager's review.
- (f) Design-Build Firm shall give, and cause the Design-Build Firm Parties to give, specific attention to any comments of the Owner, Program Manager, Architectural Representative or DPOR to a Shop Drawing Submittal. The resubmission of a Shop Drawing Submittal in and of itself shall not constitute Owner's acceptance of the revisions to address such comments.
- (g) Substitutions. If Design-Build Firm elects to propose to Owner a substitution of materials that departs from the DCP, or from the Approved

Construction Documents, such substitution shall only be considered by Owner after Design-Build Firm has submitted the following documentation:

- (i) a written request for Approval of the substitution, including a complete description of the proposed substitution, including any deviation from the Construction Documents associated therewith, and a written explanation of the reasons the substitution is necessary, including any and all benefits or risks associated with such substitution and any impact to cost or schedule;
- (h) a submittal of all supporting data, including technical information, catalog cuts, warranties, test results, installation instructions, operating procedures and other like information necessary for a complete evaluation of the substitution; and
- (i) Correspondence between the Design-Build Firm and the DPOR confirming the DPOR's review of the substitution and Approval.

A proposed substitution shall be submitted to Owner and Program Manager in sufficient time to allow no less than twenty-one (21) business days for their review. Owner in its sole discretion may reject any substitution submitted by Design-Build Firm.

6. Use of Worksite.

- (a) Design-Build Firm shall confine operations to such areas within the Worksite as are permitted by law, ordinances, permits and the Contract Documents, and shall not unreasonably congest or encumber the Worksite with obstructions, materials or equipment;
- (b) Design-Build Firm shall schedule and perform the Work in a manner that does not disrupt or interfere with Owner's ongoing operations at a Worksite;
- (c) Design-Build Firm will abide by all of Owner's applicable rules, regulations, guidelines and procedures with respect to the conduct of Design-Build Firm and Design-Build Firm Parties, including Owner's drug and tobacco policies, parking of vehicles, security regulations and entry into any adjacent facilities owned or occupied by Owner;
- (d) Design-Build Firm shall not load or unload or permit any part of any structure to be loaded or unloaded in any manner that will endanger the structure, nor shall Design-Build Firm subject any part of the Work or adjacent property to endangering stresses or pressures;
- (e) Only materials and equipment to be used directly in the Work shall be brought to and stored on the Worksite by the Design-Build Firm. Any

materials and equipment no longer required for the Work shall be promptly removed from the Worksite;

- (f) Design-Build Firm is solely responsible for protection of all stored construction materials and equipment from weather, theft, damage or other harm;
- (g) The Design-Build Firm shall not erect any sign on or relating to the Worksite, or permit others to do so, without Owner's Approval;
- (h) Within ten (10) Days after the Effective Date, Design-Build Firm shall erect and maintain at each Worksite a Project bulletin board accessible to all Design-Build Firm Parties' employees, upon which Design-Build Firm shall post and maintain, throughout the Project's duration, all employment and safety information required by Applicable Law and information listing Design-Build Firm's bonding and insurance agencies/providers, to include agency contact names, addresses and telephone numbers;
- (i) Design-Build Firm shall ensure that the Work, at all times, is performed in a manner that affords safe and reasonable vehicular and pedestrian access through or around the Worksites and all adjacent areas. The Work shall be performed in such a manner that any areas outside the limits of the Worksites shall be free from all debris, building materials and equipment. Design-Build Firm shall not cause any interference with the occupancy or beneficial use of any area or buildings adjacent or in close proximity to the Worksites;
- (j) The Design-Build Firm shall keep the premises and surrounding area free from accumulation of waste materials or rubbish; and
- (k) Design-Build Firm shall establish, record, protect, preserve and reestablish when required any temporary benchmarks and/or baselines for each Worksite. Construction staking and tolerances shall be in accordance with the Manual of Practice for Land Surveying in the State of Texas, Category 5.

7. Administration of the Project.

- (a) The DPOR, and Design-Build Firm's consultants, shall periodically inspect and observe the progress and quality of the Work at the Worksites as appropriate to monitor and confirm that the type and quality of construction and the progress of the Work is proceeding in accordance with this Agreement, including the Construction Documents and the Project Schedule, and they shall endeavor to protect Owner against defects and deficiencies.

- (b) In addition to site visits for general inspection and observation, the DPOR shall visit the site for specific purposes related to certification of progress payments, start-up or mock-up reviews for significant work activities and for formal inspections of the Work by others. The DPOR shall provide written reports of all site visits to the Owner, the Program Manager and the Design-Build Firm within three (3) business days.
- (c) The Design-Build firm shall establish and maintain a numbering and tracking system for all project records, including requests for information, submittals, and supplementary instructions and shall provide updated records at each progress meeting and when requested. DPOR shall post all RFI, ASK, and submittal transactions, including approvals within the Design-Build Firm's chain of command/authority in CPMS.
- (d) The DPOR shall promptly respond to any RFI's as necessary for the proper execution or progress of the Work and shall provide consultation for the purpose of clarification and interpretation of the intent and scope of the Construction Documents. The DPOR's interpretations and recommendations shall be consistent with the intent of, and reasonably inferable from, the Contract Documents, including the Approved Construction Documents. The DPOR's interpretations shall be made in written and/or graphic form including, if necessary or appropriate, supplemental documents to amplify or clarify portions of the Construction Documents and uploaded to CPMS. Design-Build Firm shall cause its DPOR to obtain Approval for any RFI response that deviates from the Approved 100% Set of Construction Documents or DCP, or will result in or require revision or re-permitting through the AHJ of the Approved 100% Set of Construction Documents.
- (e) The DPOR shall, in accordance with the Standard of Care, perform construction administration for the fulfillment of Design-Build Firm's contracts with Owner and others. DPOR shall review, approve and take all appropriate action to assure that the Design-Build Firm's RFI responses, (the DPOR's architectural supplemental instructions ("ASIs")), revisions to the Construction Documents, site visit reports, submittals, substitutions, and pay applications, shop drawings, product data and samples are prepared in accordance with the requirements of this Agreement.
- (f) The Design-Build Firm shall identify to the Program Manager potential opportunities for cost savings or accelerating the Project Schedule based on submittal alternatives.
- (g) All proposed changes to Construction Documents during the Construction Phase, regardless of how initiated, shall be fully described by the DPOR in a revision to depict changes to the scope of Work added, removed, or changed. All such revisions shall be separately recorded on media

acceptable to Owner, including, without limitation, BIM and CAD. Such revisions shall be clearly indicated and a current revision date shall be included on the reproducible copy. Revisions to the Construction Documents shall be consecutively numbered and dated. Revisions to Construction Documents will be identified by date of the revision, revision number and other customary identification references. Each areas affected by the revision will be clouded. Each revision to a Construction Document that results in issuance of an addendum shall remove all clouds from previous revisions to such Construction Document so that only the changes associated with the latest addendum are clouded.

- (h) The DPOR shall participate in concealed space inspections, systems start-up inspections, Substantial Completion and Final Completion inspections to determine the dates of Substantial Completion and Final Completion including obtaining Certificates of Occupancy and turnover of all or a portion of the Project to the Owner. The DPOR and the key representative from the Design-Build Firm shall also participate in the Owner's final walk through inspection eighteen (18) months after Final Completion, and shall administer all needed warranty Work according to the PMP, and at that time, resolve all warranty claims in consultation with the Owner and Program Manager.
- (i) Prior to submission to the Program Manager, the Design-Build Firm shall review, for conformance with the Contract Documents, all guarantees and warranties.
- (j) The Design-Build Firm and DPOR shall review final As-Builts for accuracy and completeness in the representation of the as-built conditions of the Work and for compliance of the completed Work with the Contract Documents and shall deliver the As-Builts at Final Completion.
- (k) DPOR shall prepare a Punch List of all items, which Punch List shall include and provide for resolution of all comments from the Owner, Program Manager, and/or Architectural Representative. The resolution of Punch List items may include the reports of government Authorities Having Jurisdiction that Punch List items have been satisfactorily corrected or completed in accordance with the Contract Documents.
- (l) Prior to submission to the Program Manager, the Design-Build Firm shall review all submissions of operating and maintenance instructions, and all manuals, brochures, drawings, and all other close-out documentation furnished by the Design-Build Firm or Design-Build Firm Parties, and shall confirm to the Owner in writing all such documentation conforms to the requirements of the Contract Documents.

IV. Subcontracting

Design-Build Firm shall award and enter into all subcontracts and purchase orders as necessary and appropriate to provide all labor and materials for the construction of the Project in accordance with this Agreement, and shall coordinate, monitor and inspect the Work of Design-Build Firm Parties to ensure conformance with the Contract Documents.

A. Unauthorized Assignments Void.

Design-Build Firm shall not assign this Agreement in whole or in part or assign any monies due or to become due to Design-Build Firm, or delegate any of its duties and obligations hereunder, without Approval and the written assumption by the Approved assignee of all of Design-Build Firm's duties and obligations hereunder. Design-Build Firm shall bind Design-Build Firm Parties to this Agreement, including the Dispute Resolution Procedures with respect to any disputes arising out of this Agreement. Where appropriate, Design-Build Firm shall require each of its Design-Build Firm Parties to enter into similar agreements with their sub-sub-consultants and sub-subcontractors. Any assignment or attempted assignment without Owner's prior written Approval shall be void. No assignment or delegation by Design-Build Firm shall relieve Design-Build Firm of its obligations hereunder to Owner.

B. Collateral Assignments of Agreements.

In addition to the collateral assignment of its agreement with the DPOR, in accordance with Section IX.G, Design-Build Firm hereby grants, transfers, and assigns to Owner all the right, title, and interest of Design-Build Firm in, to, and under any and all subcontracts, purchase orders or other agreements executed by or on behalf of the Design-Build Firm for the furnishing of any materials, supplies, and equipment which are to be incorporated into the Work and, to the extent assignable, all leases entered into for equipment to be used in connection with the performance of the Work. Such assignments shall be exercisable by Owner, at its election, in the event that Design-Build Firm is in default hereunder and Owner has exercised its right to terminate the Work or this Agreement in whole or in part, or to take control of the Project. Owner may reassign such subcontracts, purchase orders or other agreements to another construction manager or any other person or entity as necessary to continue with the Work in such event, and such assignee may exercise Owner's rights in the contracts and Design-Build Firm shall cause each contract to so provide. Design-Build Firm shall ensure that each such subcontract or other agreement relating to the Work with Design-Build Firm Parties or other entity contains the consent of such Design-Build Firm Parties or entity to the foregoing assignment, by insertion of the following provision, as appropriately modified with Owner's Approval to conform the context thereof:

“*[INSERT NAME OF SUBCONTRACTOR OR OTHER ENTITY]* (“**Lower-Tier Provider**”) hereby irrevocably and collaterally assigns to San Antonio Water System (as “**Owner**”) this [Subcontract or Purchase Order] between Design-Build Firm and Lower Tier Provider to secure Design-Build Firm's obligations to perform under the Design-Build Services Agreement, Contract No. , dated [INSERT DATE], between Design-Build Firm and Owner in connection with the Project. Lower-Tier Provider hereby consents to this assignment, and shall execute all documents reasonably required to

evidence or facilitate the effectiveness of such assignment. Such assignment shall not, however, become effective until Owner delivers notice of intent to Lower-Tier Provider that Owner has elected to accept and assume such assignment, whereupon Owner may elect in writing within thirty (30) Days thereof, to require Lower-Tier Provider to (a) cease Work on and/or vacate the Project, or (b) continue performance hereunder. The Lower-Tier Provider agrees to notify Owner simultaneously with its issuance of any notice to the Design-Build Firm of the circumstances relating to the occurrence of any material default by the Design-Build Firm in its obligations to Lower-Tier Provider hereunder, which may lead to Lower-Tier Provider's election to exercise any right to suspend or terminate hereunder, and Owner shall have an opportunity to cure such default by the Design-Build Firm, provided that such cure is effected within a reasonable period of time, but in no event later than thirty (30) Days after the date of Owner's receipt of such default notice. The Lower-Tier Provider further agrees to extend to Owner directly any warranties and remedies required of Lower-Tier Provider hereunder; provided however, the foregoing shall not change Lower-Tier Provider's rights and obligations hereunder, other than to provide to Owner the right to directly enforce against Lower-Tier Provider such warranties and remedies."

C. Design-Build Firm's Good Faith Effort Plan.

Throughout the Project, the Design-Build Firm shall in good faith strive to adhere to the Design-Build Firm's Good Faith Effort Plan (**Exhibit 11**).

V. Construction by Owner or By Separate Contractors

A. Duty of Cooperation with Owner's Separate Contractors.

Design-Build Firm shall afford Owner's Separate Contractors reasonable opportunity for the introduction and storage of their materials and equipment, and for the performance of their construction or operations. Design-Build Firm also shall properly coordinate its Work with that of the Separate Contractors, and cooperate in all respects with them. The Separate Contractors will be required to similarly cooperate with Design-Build Firm in all such respects. If any part of the Work depends upon proper performance of the construction or operations of Separate Contractors, Design-Build Firm shall inspect and promptly report to Owner any apparent discrepancies or defects that render the Work unsuitable. Failure of Design-Build Firm to so report shall constitute an acceptance of the Separate Contractor's construction or operations as fit to receive the Work, except for:

1. Defects which may develop in the Separate Contractors' construction or operations after the performance of the Work; or
2. Defects in the Separate Contractors' construction or operations of which Design-Build Firm gives Owner notice immediately upon discovery and without then proceeding with the Work affected.

If Design-Build Firm or others engaged by or under the control of Design-Build Firm cause(s) physical damage to the construction or property of any Separate Contractor, the Design-Build Firm, upon notice from Owner, shall remedy such damage at its sole expense. If a dispute arises between Design-Build Firm and any Separate Contractor as to each other's responsibility for cleaning up, Owner may clean up and charge the cost to Design-Build Firm or the Separate Contractor as Owner shall determine to be just.

- (a) Owner's Right to Perform Construction and to Award Separate Contracts.
 - (i) Owner reserves the right to perform construction or operations related to the Project with Owner's own forces and to award separate contracts in connection with other portions of the Project or other construction or operations on the site.
 - (ii) Owner shall provide for coordination of the activities of the Separate Contractors and the Work of the Design-Build Firm and Design-Build Firm shall cooperate with the Separate Contractors. Design-Build Firm shall participate with the Owner and its Separate Contractors in reviewing construction schedules when directed by Owner to do so. Design-Build Firm shall make any revisions to the Project Schedule as deemed necessary after a joint review and mutual agreement with all such parties.

- (b) Responsibility to Coordinate with Owner's Separate Contractors.
 - (i) Design-Build Firm shall afford Owner and Owner's Separate Contractors reasonable opportunity for the introduction and storage of their materials and equipment and performance of their activities, and shall coordinate the Design-Build Firm's construction and operations with theirs as required herein and, as applicable, by the contract documents applicable to Owner's Separate Contractors.
 - (ii) If part of Design-Build Firm's Work depends, for proper execution or results, upon the construction or operations by Owner or Owner's Separate Contractors, Design-Build Firm shall, prior to proceeding with that portion of the Work, promptly report to Owner apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of Design-Build Firm to so report shall constitute an acknowledgment that Owner's or Owner's Separate Contractors completed or partially completed construction is fit and proper to receive Design-Build Firm's Work, except as to defects not then reasonably discoverable.

- (iii) Design-Build Firm shall reimburse Owner for costs incurred by Owner and which are payable to Owner's Separate Contractors because of delays, improperly timed activities or defective construction of Design-Build Firm.
 - (iv) Design-Build Firm shall promptly remedy any damage wrongfully caused by Design-Build Firm Parties to any completed or partially completed construction or to property of Owner or Owner's Separate Contractors, as provided herein.
- (c) Owner's Right to Clean Up. If a dispute arises among or between Owner, Design-Build Firm or Owner's Separate Contractors, as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, Owner may clean up and those clean-up costs will be allocated by Owner amongst those responsible, in Owner's sole discretion.

VI. Scheduling of Services

Throughout the Design or Construction Phases, Design Build Firm shall submit Project Schedule updates as detailed in the CDRL (**Exhibit 10**). Project Schedule updates, regardless of whether submitted during the Design Phase or the Construction Phase, shall show all required activity sequences during the Construction Phase, including precedence relationships and durations for all activities in an Approved critical path format that coordinates and integrates the development of Construction Documents and Design-Build Firm's other Services, the Services and Work of all Design-Build Firm Parties, and any activities Owner and any Separate Contractors planned on the Project. The Design-Build Firm shall regularly review the Project Schedule for any Services and Work that have not been started when scheduled or are behind schedule, and identify and notify Owner and Program Manager of any potential or actual variance between any scheduled and probable completion date for such Services and Work, and recommend to the Owner scheduling adjustments to adhere to and/or recover the Project Schedule. The Project Schedule shall:

- A.** Provide a graphic representation of and incorporate all activities and events that will occur during performance of Work, including all activities of the Design-Build Firm Parties, as well as others affecting the progress of the Work;
- B.** Incorporate activity time sequences and durations, for processing, review and Approvals of Shop Drawings, Submittals, expediting and delivery of long lead items, and Owner's planned occupancy activities;
- C.** Identify each task required for the for the performance and completion of the Services and Work at each Worksite, and for Owner's occupancy of the NEOC;

- D.** Set forth dates that are critical to ensuring the timely and orderly completion of the Services and Work in accordance with the the CDRL (**Exhibit 10**) and the control milestones in the Approved Project Schedule;
- E.** Provide for regular monitoring of construction progress, and preparing current Project Schedule updates at least monthly or more frequently if Owner considers this to be reasonably necessary;
- F.** Schedule updates shall be submitted with summary reports notifying Owner of each update and explaining all variances from the Project Schedule, for which Approval shall be required.
- G.** Schedule updates shall incorporate current status for all activities, sequences, and durations, by Design Package, in relation to the milestone dates and Scheduled Substantial and Final Completion Dates, including:
 - 1. Submittal bid preparation and bidding activities for each of Design-Build Firm's design packages, bid packages, bid dates, bid analysis, and award decision-making;
 - 2. Commencement and completion times for all activities of the Design-Build Firm Parties;
 - 3. Permit applications and submittals and related permitting tasks, including time for permit reviews, corrections, resubmittals and approval processes of all AHJs, their respective departments, TCEQ, and other agencies and local utilities; and
 - 4. Deliveries of materials and equipment, including items requiring long lead times to procure, including delivery dates and coordinating and expediting activities.

**VII. Time for Performance; Excusable Delay; Schedule Limitations;
Remedies for Inexcusable Delay; and Cost Limitations**

A. Time for Performance.

Design-Build Firm shall diligently prosecute and complete the Services and Work in accordance with the Project Schedule. Design-Build Firm shall notify Owner and Program Manager immediately upon Design-Build Firm obtaining knowledge of circumstances indicating the Services and Work are, or are substantially at risk of, not being timely performed according to the Project Schedule, and provide Owner with a recovery schedule as required by Section VII.E. Such notification shall state with particularity the circumstances and reasons for any delay, and attach copies of any documents relevant thereto . Failure to provide such notice and information shall be a deemed a material breach of this Agreement. Design-Build Firm shall use its best efforts to re-sequence or accelerate portions of the Work as and when necessary or appropriate to overcome and/or mitigate, to the greatest practicable extent, the effect of any delays. Costs incurred to resequence or

accelerate the Work to overcome or mitigate delays may be included in the Cost of the Work, but only to the extent such delays were not caused or contributed to, in whole or in part, by the negligence or fault of any Design-Build Firm Parties, and only to the extent such costs do not exceed the Guaranteed Maximum Price for the Project.

B. Time is of the essence.

Time is of the essence with respect to all key dates in the Project Schedule, including the Substantial Completion Dates and Final Completion Dates, dates for Design Deliverables, and intermediate control milestone dates shown therein. The Design-Build Firm's failure to achieve any of these dates shall constitute a repudiation of Design-Build Firm's obligations hereunder. The Design-Build Firm's failure to achieve the applicable Dates of Substantial Completion or Dates of Final Completion shall result in the assessment of Delay Liquidated Damages applicable to each such event under Sections VII.F and VII.G below, respectively. Design-Build Firm acknowledges and accepts as reasonable and appropriate the scheduling and cost constraints established by this Agreement.

C. Excusable Delay.

Except as otherwise provided below, delays to Work on the critical path of the Project that are due to any circumstances that are beyond a Party's reasonable control to avoid or mitigate, including, but not limited to, strikes, riots, wars, fires, flood, explosion, acts of nature, acts of government, and labor disturbances may constitute Excusable Delay. It shall be the Design-Build Firm's responsibility to include in the Project Schedule the dates by which pricing and delivery commitments to purchase equipment, materials or other goods must be obtained to avoid the risk of delay due to unavailability thereof. Design-Build Firm shall not be entitled to claim Excusable Delay due to such unavailability to the extent that such delay should have been anticipated by Design-Build Firm in the exercise of the Standard of Care. Design-Build Firm shall not be entitled to an equitable adjustment to the extent that an otherwise Excusable Delay was foreseeable and/or avoidable. Design-Build Firm shall keep Owner advised of any delay, whether or not it constitutes an Excusable Delay, which may affect the Project Schedule or any completion date. Except as otherwise expressly provided below, equitable adjustment to the Project Schedule shall be the Design-Build Firm's sole remedy for Excusable Delay, and the Parties shall have no liability to each other for, and each Party shall bear its own costs (including any so-called general conditions costs incurred by Design-Build Firm) due to the impact of, Excusable Delay in the performance of their respective obligations under this Agreement.

D. Equitable Adjustments.

1. **Adverse Weather Delays.** Except for the use of Construction Contingency for certain increased general conditions costs in accordance with Section IX.D(1), an equitable adjustment to the Project Schedule as set forth below shall be the Design-Build Firm's sole remedy for Excusable Delay due to adverse weather conditions. The Design-Build Firm shall anticipate and include in the Project Schedule for each portion of the Project the number of adverse weather delay days that should be

anticipated according to the 5-year climatic averages as determined by the National Oceanic and Atmospheric Administration (NOAA) at the NOAA weather observation station nearest to each such portion of Project. Design-Build Firm has anticipated in the Project Schedule an aggregate of _____ (___) adverse weather delay day(s) for the entire Project, based on an average of ___ adverse weather days per month. Design-Build Firm shall only be entitled to claim Excusable Delay with respect adverse weather delay days that exceed the foregoing number of adverse weather delay days anticipated in the Project Schedule and that meet the conditions of this provision. Adverse weather conditions may include severe rain events and resulting mud, snow, ice, freezing temperatures, and excessive wind storms, that prevent vehicular access to the Worksite or preclude safe continuation of any Work in the critical path despite Design-Build Firm's reasonable measures to mitigate the delay. The occurrence of adverse weather conditions must occur and be contemporaneously recorded to have precluded progress of the Work on the critical path, and must be further supported by data recorded by the Local Climatological Data Station of the National Oceanic and Atmospheric Administration nearest to the Project. To be considered Excusable Delay, adverse weather conditions must occur after Notice to Proceed with the Construction Phase, and must have precluded Work on the critical path under the Project Schedule. Interior Work, even if on the critical path, will not be considered for Excusable Delay unless adverse weather conditions prevented vehicular access to the Worksite to preclude such interior Work. Days when work on the critical path can be performed for more than four (4) hours before being delayed by adverse weather conditions shall not be considered for Excusable Delay. Days lost due to adverse weather or the effects thereof shall be documented daily, reported weekly in Project Meetings, and reported monthly in the Design-Build Firm's monthly status report. Failure to record and report adverse weather delays as required above shall result in waiver of the Design-Build Firm's right to extend the Project Schedule.

2. **Notice.** Design-Build Firm's timely submission of the written notice required by this Section VII.D is an absolute condition precedent to the Design-Build Firm's entitlement to present an Excusable Delay Claim. Failure to provide such notice shall result in waiver of the right to seek adjustment for an otherwise Excusable Delay. Design-Build Firm's notice must be delivered to Owner and Program Manager as soon as practicable, but no later than thirty (30) Days after the day that Design-Build Firm knew of or, in the exercise of reasonable diligence, should have recognized, the occurrence thereof, stating with particularity all appropriate action required to reasonably mitigate or end such delay. Design-Build Firm shall not be entitled to an equitable adjustment to the extent that an unforeseeable and unavoidable delay continues because the Design-Build Firm failed to state the appropriate action required to reasonably mitigate or end such delay. Owner, in its sole but reasonable discretion, shall determine whether a delay constitutes an Excusable Delay and whether an equitable adjustment to the Schedule should be granted, as hereinafter provided. Owner's determination shall be final unless it is

judicially determined that Owner, in the exercise of its judgment hereunder, refused in bad faith to acknowledge the occurrence of an Excusable Delay.

3. **Remedies for Excusable Delay – Equitable Adjustment to Project Schedule.** Except as provided in Section VII.D(4), below, equitable adjustment to the Project Schedule shall be the Design-Build Firm’s sole remedy for Excusable Delay. Equitable adjustment to the Project Schedule shall be limited to the extent such Excusable Delay is not caused or contributed to by the Design-Build Firm, and could not have been anticipated by the Design-Build Firm, or limited or avoided by the Design-Build Firm’s delivery of timely notice to the Owner of the delay or reasonable likelihood that a delay will occur. Owner shall make no adjustment to the Project Schedule for any delay having a duration less than one-half (½) of one Day when any Work is performed. Design-Build Firm shall reimburse Owner for any costs directly incurred by Owner as a result of any delay determined by Owner, in its sole but reasonable discretion, to have been due to the Design-Build Firm’s failure to fulfill the requirements of this Agreement.

4. **Remedies for Excusable Delay – Equitable Adjustment to Guaranteed Maximum Price.** Apart from any adjustment to the Project Schedule permitted for Excusable Delay, as provided above, but subject to the additional conditions precedent stated below, Design-Build Firm may be entitled to seek an equitable adjustment to increase the Guaranteed Maximum Price to cover any reasonable additional costs that have exhausted the Construction Contingency and that exceed the Guaranteed Maximum Price, but only for one of the events described in Section VII.D(4)(a) or (b) below. Any request by Design-Build Firm for an equitable adjustment to increase the Guaranteed Maximum Price must also include a Proposal Request, with supporting backup documentation, stating in detail (i) the reasons why the Design-Build Firm believes adjustment to the Guaranteed Maximum Price is warranted, and (ii) the amount of the adjustment requested. Notice of such request shall be delivered to Owner and Program Manager as soon as practicable, but no later than thirty (30) Days following the date when Design-Build Firm knew of or, in the exercise of reasonable diligence should have known, of the occurrence of one of the events described in Section VII.D(4)(a) through (c) below. Design-Build Firm’s failure to provide such notice under this Section VII.D(4) shall result in waiver of the right to seek an equitable adjustment to the Guaranteed Maximum Price hereunder.
 - (a) **Equitable Adjustment Due to Owner’s Intentional Interference.** Subject to and without waiving the requirement for the giving of the notices required under this Section VII.D, Design-Build Firm may seek an equitable adjustment to the Guaranteed Maximum Price for its extended performance to the extent caused by the Owner’s intentional interference with the Design-Build Firm’s performance of this Agreement. Owner’s intentional interference shall mean interference through action by Owner made with actual awareness that such action (i) is without any legal right of Owner to

do so, and (ii) will materially and significantly hinder the continuation of Design-Build Firm's performance hereunder. If Design-Build Firm has delivered to Owner and Program Manager written notice of the occurrence, impact consequences, and recommendations for the elimination of such intentional interference, and Owner, without legal right or reasonable justification, fails thereafter to cease such intentional interference, then Design-Build Firm may claim an equitable adjustment to the Guaranteed Maximum Price for the Design-Build Firm's reasonable additional costs of performance during the extended period of the Design-Build Firm's performance, commencing on the business day next following Owner's receipt of such notice and ending on the day that such interference ends. Adjustment to the Guaranteed Maximum Price shall, in any event, be based solely upon the actual, reasonable and necessary increase in the Cost of the Work that Owner determines to be: (i) reasonable and necessary as a result of the intentional interference, (ii) not otherwise reasonably avoidable by the Design-Build Firm, and (iii) directly attributable to such intentional interference. Design-Build Firm agrees that any Fee adjustment due to Owner's intentional interference shall be limited to:

- (1) an adjustment to the Design Fee for the necessary additional Design Services required as a direct result of such intentional interference, derived by applying the DPOR's fixed hourly service rates to the actual hours of performance of such necessary additional Design Services; and
- (2) an adjustment to the General Conditions Fee by an amount equal to the lesser of (i) the amount derived by multiplying the Daily General Conditions Cost Rate times the number of days, if any, that must be added to the Project Schedule, or (ii) the amount of the increase in the general conditions costs identified on the Pricing Schedule (**Exhibit 3**) that Design-Build Firm necessarily and actually incurs, using rates or charges no greater than those originally stated and fixed in the Design-Build Firm's Hourly Rate Schedule (**Exhibit 12**), as a direct result of such intentional interference; and
- (3) an adjustment to the General Administrative Fee by an amount derived by multiplying the General Administrative Fee Percentage times the increase in the Cost of the Work necessarily and actually incurred by the Design-Build Firm as a direct result of such intentional interference. Design-Build Firm shall not proceed with any verbal or other request that would constitute a change to the scope of Services and Work included in the Guaranteed Maximum Price, as applicable, or to the Project Schedule, unless it has obtained Owner's Construction Change Directive to do so, and shall only proceed with any Services and Work related to a dispute over Owner

intentional interference in accordance with Owner's written order to do so.

- (b) **Equitable Adjustment Due to Owner Requests to Change Design.** Subject to and without waiving the requirement for the giving of the notices required under this Section VII.D, Design-Build Firm may seek an equitable adjustment to the Guaranteed Maximum Price to the extent that the Design-Build Firm demonstrates it must incur additional cost as a result of Owner's written request to make a design change to the 100% Set of Construction Documents to increase the Scope of the Work on the Project after Owner has issued Notice to Proceed with the Construction Phase for such Work. Design-Build Firm must provide Owner a Proposal Request for equitable adjustment to the Guaranteed Maximum Price for such design change within ten (10) business days after receipt of Owner's request. Adjustment to the Guaranteed Maximum Price shall be based solely upon the actual, reasonable and necessary additional costs of design and construction. Design-Build Firm shall also be entitled to an adjustment to its so-called general conditions costs to the extent that performance of Work on the critical path has been delayed or extended by the Owner's requested design change. The amount of any equitable adjustment to the Guaranteed Maximum Price shall be determined by Owner in its sole but reasonable judgment to be: (i) quoted in Design-Build Firm's Proposal Request, (ii) reasonable and necessary for such design change, (iii) not otherwise reasonably avoidable, and (iv) directly attributable to such requested design change. Design-Build Firm agrees that any Fee adjustment due to Owner's changes to the 100% Set of Construction Documents to increase the Scope of the Work on the Project after Owner has issued Notice to Proceed with the Construction Phase for such Work shall be limited to:
- (1) an adjustment to the Design Fee for the necessary additional Design Services required as a direct result of such changes in Design, derived by applying the DPOR's fixed hourly service rates to the actual hours of performance of such necessary additional Design Services; and
 - (2) an adjustment to the General Conditions Fee by an amount equal to the lesser of (i) the amount derived by multiplying the Daily General Conditions Cost Rate times the number of days, if any, that must be added to the Project Schedule, or (ii) the amount of the increase in the general conditions costs identified on the Pricing Schedule (**Exhibit 3**) that Design-Build Firm necessarily and actually incurs, using rates or charges no greater than those originally stated and fixed in the Design-Build Firm's Hourly Rate Schedule (**Exhibit 12**), as a direct result of such changes to the Design; and

- (3) an adjustment to the General Administrative Fee by an amount derived by multiplying the General Administrative Fee Percentage times the increase in the Cost of the Work necessarily and actually incurred by the Design-Build Firm as a direct result of such changes to the Design. Design-Build Firm shall not proceed with any verbal or other request that would constitute a change to the scope of Services and Work included in the Guaranteed Maximum Price, or to the Project Schedule, unless it has obtained Owner's Construction Change Directive to do so, and shall only proceed with any Services and Work related to a dispute over Owner design changes in accordance with Owner's written order to do so.

E. Recovery Schedule.

Upon receiving Design-Build Firm's notification as required under Section VII.A, above, of circumstances indicating the Services and Work are, or are at risk of, not being performed according to the Project Schedule, or if Owner believes Design-Build Firm, for any reason, is more than thirty (30) Days behind schedule, Owner may direct Design-Build Firm to promptly prepare and submit for Approval a recovery schedule meeting all the requirements for the Project Schedule under Article VI, above, together with backup documentation to support such recovery schedule (including Subcontractors' agreements necessary to support the recovery schedule) and Design-Build Firm's written explanation of how Design-Build Firm intends to perform all remaining Work to regain compliance with the Project Schedule as soon as practicable. Such recovery schedule shall be submitted to Owner for review as soon as practicable, but in no event later than ten (10) Days after Design-Build Firm's receipt of Owner's notice. Design-Build Firm's submission of a recovery schedule that extends beyond the Scheduled Date of Substantial Completion and Scheduled Date of Final Completion due to delay attributable to Design-Build Firm's failure to fulfill its obligations under this Agreement shall constitute Design-Build Firm's agreement that Design-Build Firm shall be liable for Delay Liquidated Damages in accordance with Section VII.G, below.

F. Substantial Completion; Delay Liquidated Damages.

1. Schedule for Achieving Substantial Completion. The Design-Build Firm shall achieve Substantial Completion by the applicable Scheduled Date of Substantial Completion to be established for NEOC and NESC, as shown in the Project Schedule (**Exhibit 6**). In the event of Excusable Delay, the Scheduled Date of Substantial Completion shall be adjusted by adding the resulting aggregate number of days of Excusable Delay. In such event, Delay Liquidated Damages shall accrue from the Scheduled Date of Substantial Completion, as the same may be extended. Owner may deduct and offset from and against any amounts due Design-Build Firm a sum equal to the amount of any Delay Liquidated Damages due Owner through the date that Final Completion is achieved.

2. Substantial Completion Achieved Prior to Scheduled Substantial Completion Date. In the event that Substantial Completion occurs on or prior to the Scheduled Date of Substantial Completion, the Design-Build Firm shall have no obligation to pay Delay Liquidated Damages under this Section VII.F.
3. Substantial Completion Achieved Subsequent to Scheduled Substantial Completion Date; Delay Liquidated Damages. In the event that Substantial Completion occurs subsequent to the Scheduled Date of Substantial Completion, the Design-Build Firm shall pay Owner Delay Liquidated Damages in accordance with this subsection for each Day that the Substantial Completion is delayed beyond the Scheduled Date of Substantial Completion and continuing until the earlier of (i) the actual achievement of the Substantial Completion, or (ii) termination of this Agreement for default. The amount of Delay Liquidated Damages payable by the Design-Build Firm pursuant to this Section VII.F shall accrue as follows for each Operations Center:
 - (a) **NEOC Construction:** \$1,991.00 for each Day of unexcused delay in achieving Substantial Completion; and
 - (b) **Existing NESC Construction:** \$1,991.00 for each Day of unexcused delay in achieving Substantial Completion.

Delay Liquidated Damages for failure to achieve Substantial Completion shall commence to accrue on the first Day of an unexcused delay and continue to accrue each month thereafter. Owner may choose to assess and/or seek to recover, offset or withhold Delay Liquidated Damages at any time prior to issuance of the Certificate of Final Completion.

G. Final Completion Delay Liquidated Damages

1. Schedule for Achieving Final Completion. The Design-Build Firm shall achieve Final Completion by the applicable Scheduled Date of Final Completion to be established for each Service Center in the Project Schedule (**Exhibit 6**), which dates may be extended in accordance with this Section VII.G. In the event of Excusable Delay, the applicable Scheduled Date of Final Completion shall be extended by adding the resulting aggregate number of days of Excusable Delay. In such event, Delay Liquidated Damages shall accrue from the Scheduled Date of Final Completion Date, as the same may be extended.
2. Final Completion Achieved Prior to Scheduled Final Completion Date. In the event that Final Completion occurs on or prior to the applicable Scheduled Date of Final Completion, the Design-Build Firm shall have no obligation to pay Delay Liquidated Damages under this Section.
3. Final Completion Achieved Subsequent to Scheduled Final Completion Date; Delay Liquidated Damages. In the event that Final Completion occurs subsequent to the applicable Scheduled Date of Final Completion, the Design-Build Firm shall

pay Owner Delay Liquidated Damages in accordance with this subsection for each Day that the applicable Final Completion Date falls after the Scheduled Final Completion Date and continuing until the earlier of (i) the actual achievement of Final Completion, or (ii) any termination of this Agreement for default. The amount of Delay Liquidated Damages payable by the Design-Build Firm pursuant to this Section VII.G shall accrue as follows for each Operations Center:

- (a) **NEOC Construction:** \$1,936.00 for each Day of unexcused delay in achieving Final Completion; and
- (b) **Existing NESC Construction 5:** \$1,936.00 for each Day of unexcused delay in achieving Final Completion.

Delay Liquidated Damages for failure to achieve Final Completion shall commence to accrue on the first Day of an unexcused delay and continue to accrue each month thereafter. Owner may choose to assess and/or seek to recover, offset or withhold Delay Liquidated Damages at any time prior to issuance of the Certificate of Final Completion.

4. The foregoing notwithstanding, if Design-Build Firm fails to timely achieve both the Scheduled Substantial Completion Date and the Scheduled Final Completion Date with respect to a Worksite, Delay Liquidated Damages shall accrue at a single rate not greater than the Delay Liquidated Damages rate established below for failure to achieve the Scheduled Date of Final Completion.

H. Delay Liquidated Damages Not a Penalty.

Each Party agrees that Owner's actual damages for delay under the circumstances contemplated herein would be difficult or impossible to ascertain, and that the Delay Liquidated Damages provided for herein with respect to each such specific circumstance are intended to place Owner in the same economic position as it would have been in had the particular circumstance not occurred. Specifically, the Parties agree as follows:

1. The Delay Liquidated Damages provided herein are not a penalty, are fair and reasonable, and payment thereof would represent a reasonable estimate of fair compensation for the losses that may reasonably be anticipated from the specific circumstance associated with the Delay Liquidated Damage. Specifically, Design-Build Firm acknowledges and agrees that unexcused delay in achieving Substantial Completion of the Project will result in increased costs to Owner for extended services and performance of Owner's management employees dedicated to management of the Project, Owner's Program Manager, Owner's Information Technology ("IT") Personnel, Owner's Migration Consultant, in the performance of their services relating to the Project, and other increased Project costs, such as insurance, temporary power, and the like, for which Design-Build Firm will be responsible to pay Delay Liquidated Damages for a period of inexcusable delay, and that such costs have been appropriately taken into consideration in establishing the foregoing amounts of Delay Liquidated Damages; and

2. In recognition of the acknowledgments above, the Design-Build Firm is expressly estopped from asserting, and waives any rights it may have to assert, that the Delay Liquidated Damages provided for herein are a penalty or that they are not enforceable.

The Delay Liquidated Damages set forth above shall constitute the only damages payable by the Design-Build Firm to Owner to compensate Owner for damages for the period of delay associated with the specific circumstance, regardless of legal theory. This limitation, however, is only intended to cover the period of delay during which the Design-Build Firm is permitted by Owner to continue performance to achieve Substantial Completion or Final Completion, as applicable, and is not intended to limit or preclude Owner's other remedies for breach specifically provided for in this Agreement, including Owner's remedies associated with a termination of Design-Build Firm for default. The Parties acknowledge and agree that Owner's damages associated with Design-Build Firm's termination for default are not liquidated hereunder and that the additional remedies specifically provided for in this Design-Build Firm Agreement in the event of a termination for default are intended to address harms and damages which are separate and distinct from those which the Delay Liquidated Damages are meant to be a remedy for the period of delay prior to a termination for default.

VIII. Standard of Care, Representations and Warranties

- A. The Design-Build Firm hereby makes, and agrees Owner has entered into this Agreement based upon, and in reasonable reliance upon, the following representations, warranties and certifications:

1. **Familiarity with Project and the Worksites.** Design-Build Firm has thoroughly reviewed the Request for Qualifications No: [REDACTED] for Design-Build Phase 3 Service Center Project dated [REDACTED], 2020, and the Request for Proposal No: [REDACTED], dated [REDACTED], 2020, the PMP, the Scope of Services and Design Criteria Package(s) for the Project, and visited, examined and investigated the history of the Worksites, including any publicly available information related thereto, and reviewed all such information available to it prior to executing this Agreement. Design-Build Firm is thoroughly familiar with the Worksite and the local conditions under which the Services and Work are to be performed. The Design-Build Firm acknowledges receipt of Owner's payment of the Worksite Investigation Stipend to compensate the Design-Build Firm to investigate the Worksites to determine the feasibility of implementing the Project as proposed and to determine the potential for encountering the Worksite Conditions, the results of which investigation have been included in the Design-Build Firm's Worksite Investigation Report (**Exhibit 23**). Design-Build Firm enters into this Agreement on the basis of its own examination, investigation and evaluation of the Worksite Conditions to estimate the difficulty, cost and expense of performing this Agreement, and to deliver the Project to Owner in exchange for payment of the

Guaranteed Maximum Price. Design-Build Firm represents it is not relying upon any information provided by Owner with respect to the risk of encountering Worksite Conditions that may affect the performance or the cost of performing this Agreement. Design-Build Firm has had an ample opportunity to examine all of the Contract Documents, including without limitation the DCP, and to independently investigate the Worksites and their surroundings. Design-Build Firm has obtained and carefully studied with its own consultants any and all information it considers necessary and appropriate to assess the risk of encountering Worksite Conditions and to achieve a full understanding of the risk of difficulties that may be encountered in performing the Work. Design-Build Firm agrees that the Worksite Conditions Allowance is a sufficient and reasonable sum upon which Design-Build Firm will rely, and upon which it is prepared to assume all financial risk with respect to any Worksite Conditions or other factors related to the Worksites that may adversely affect Design-Build Firm's ability and/or cost of performance. Design-Build Firm agrees it shall not be entitled to request an increase in the GMP to pay for unanticipated costs to overcome any difficulties associated with any Worksite Conditions if the Worksite Conditions Allowance is insufficient to cover such costs.

2. Design-Build Firm's Standard of Care. **DESIGN-BUILD FIRM WILL PERFORM, OR CAUSE TO BE PERFORMED EXPEDITIOUSLY ALL SERVICES AND WORK REQUIRED HEREUNDER, AND IN NO EVENT LATER THAN IS REQUIRED TO CONFORM TO THE PROJECT SCHEDULE, AND DESIGN-BUILD FIRM SHALL DO SO WITH THAT DEGREE OF PROFESSIONAL SKILL AND CARE PRACTICED, AND IN ACCORDANCE WITH INDUSTRY STANDARDS CUSTOMARILY ADHERED TO, BY OTHER FIRMS EXPERIENCED IN THE PERFORMANCE OF SERVICES AND UNDERTAKINGS OF THE SAME OR SIMILAR NATURE FOR OTHER SERVICE CENTERS AND FLEET FACILITIES OF COMPARABLE VALUE. DESIGN-BUILD FIRM AGREES THAT PROVISIONS DESCRIBING THE STANDARD OF CARE IN THIS AGREEMENT REQUIRE THE DESIGN-BUILD FIRM TO PERFORM ITS OBLIGATIONS HEREUNDER WITH THAT DEGREE OF PROFESSIONAL SKILL AND CARE ORDINARILY PROVIDED BY COMPETENT DESIGN-BUILD FIRMS PRACTICING UNDER THE SAME OR SIMILAR CIRCUMSTANCES AND PROFESSIONAL LICENSE, AND AS EXPEDITIOUSLY AS IS PRUDENT CONSIDERING THE ORDINARY PROFESSIONAL SKILL AND CARE OF A COMPETENT DESIGN-BUILD FIRM. DESIGN-BUILD FIRM WAIVES THE RIGHT TO REQUIRE OWNER TO FILE A CERTIFICATE OF MERIT UNDER CHAPTER 150 OF THE TEXAS CIVIL PRACTICE AND REMEDIES CODE IN ANY ACTION OR PROCEEDING AGAINST DESIGN-BUILD FIRM TO RECOVER DAMAGES ARISING OUT OF THE PROVIDING OR FAILURE TO PROVIDE THE PROFESSIONAL SERVICES REQUIRED THIS AGREEMENT.**

3. Design-Build Firm Parties. All Design-Build Firm Parties performing Services under this Agreement shall at all times be under Design-Build Firm's exclusive direction and control and Design-Build Firm shall be responsible for proper supervision and examination of the performance of the Services and Work by the Design-Build Firm Parties consistent with the requirements of this Agreement. Design-Build Firm Parties assigned to the Projects shall possess sufficient skills and professional expertise as required to satisfactorily meet all obligations and requirements of this Agreement. Owner retains the right to reject or require Design-Build Firm to remove any Design-Build Firm Parties who Owner determines in its sole judgment and discretion to fail to meet the standards for qualifications and performance established for performance of the Services hereunder. Owner hereby approves of the key positions listed on Design-Build Firm's Staffing Plan (**Exhibit 5**) as the key positions to be occupied by Design-Build Firm Parties, and Design-Build Firm's assignments to such positions as shown thereon. Owner reserves the right to participate in the interview process and review resumes of all other Design-Build Firm Parties who are being considered by Design-Build Firm for assignment to such key positions in the performance of Services hereunder. Design-Build Firm agrees that it will obtain the written consent of Owner and Program Manager prior to the assignment of any individual to such key positions for the performance of Services under this Agreement. Individuals of Design-Build Firm or Design-Build Firm Parties assigned to such key positions shall not, without Owner's prior written consent, be removed from their positions or reassigned except in the case of an employee's voluntary or involuntary termination of employment, or due to serious illness, death, or a bona fide family emergency. Upon Design-Build Firm becoming aware of an individual's imminent or actual vacancy from the Project for one of the foregoing reasons, Design-Build Firm shall notify Owner and Program Manager within three (3) Days of learning thereof.

4. Familiarity with Applicable Laws, Rules, and Regulations. Design-Build Firm is knowledgeable of Applicable Laws and will diligently use all reasonable care to ensure that it and all its Design-Build Firm Parties perform all of the Services and Work required hereunder in compliance therewith. Each of Design-Build Firm's design submittals will be coordinated with all associated local, state, and federal agencies as required, including but not limited to City of San Antonio (CoSA), Texas Department of Licensing and Regulation (TDLR), Bexar County, Texas Department of Transportation (TxDOT), and Texas Commission on Environmental Quality (TCEQ), as applicable.

5. No Material Change in Design-Build Firm's Responses to Owner's Requests Qualifications or Proposals. All information contained in Design-Build Firm's Statement of Qualifications and Proposals, and all other information Design-Build Firm has furnished Owner in pursuit of this Agreement following Owner's Request for Qualifications Solicitation No: _____ for Design Build Phase 3 Service Center Project, dated _____, 2020 _____, and Owner's Request for Proposals RFP# _____, dated _____, 2020, including but not limited

to Design-Build Firm's statements and representations as to its history, experience, capabilities, litigation disclosure, financial information, project approach, its ability to deliver the Project within the GMP, and other qualifications are accurate and complete, and no material change in circumstances has occurred that would cause Design-Build Firm's qualifications and proposal responses to be untrue or materially different than what was originally stated.

6. Financial Ability, Insurance and Bonds. Design-Build Firm is financially solvent and possesses or is able to engage sufficient working capital to complete the Services as required by this Agreement. Design-Build Firm's insurance policies and bonds are and will be maintained in the form required under the Owner's Requirements of Insurance (**Exhibit 13**) and Design-Build Firm's Bond Forms (**Exhibits 7.1, 7.2 and 7.3**). Design-Build Firm's insurance policies contain no exclusions or exceptions to coverage other than those allowed by Owner's Requirements of Insurance (**Exhibit 13**) all certificates of insurance, in strict accordance with the insurance requirements set forth in the Request for Qualifications for Design-Build Services Solicitation No: _____, dated _____, 2020 and in Owner's Requirements of Insurance (**Exhibit 13**).
7. Qualifications of Design-Build Firm Parties. Design-Build Firm has taken into consideration the availability and adequacy of the types of personnel and prevailing wage scales relevant to the Project, and presently employs or is able to engage sufficient qualified and experienced Design-Build Firm Parties as needed to perform this Agreement.
8. General and Professional Licensing. Design-Build Firm and all Design-Build Firm Parties and their respective employees and representatives hold in its and/or their names all current licenses and permits required to render the Services and Perform the Work required hereunder, and each of them is duly licensed as required by Applicable Law to perform the Services required hereunder. The Design-Build Firm's design team includes LEED-certified professionals qualified to develop and administer all pertinent LEED requirements and stipulations to ensure the Project achieves the Minimum Certification Level.
9. Performance of Professional Services. Design-Build Firm has engaged the DPOR and other qualified professionals listed in Design-Build Firm's Staffing Plan (**Exhibit 5**) as required for the performance of the professional design Services required herein. The Design-Build Firm certifies that the DPOR and all other professional consultants have been selected on the basis of demonstrated competence and qualifications in accordance with Section 2254 of the Texas Government Code.
10. Conflicts of Interest; Solicitation. Design-Build Firm represents that it has advised Owner in writing of any past or present relationship or dealing between the Design-Build Firm, the DPOR, or Design-Build Firm Parties and any third party, including competitors of Owner or Design-Build Firm, which could or could be perceived to

impair or interfere with the their exercise of independent judgment and discretion in professionally and ethically rendering the Services and performing the Work for the sole benefit and enjoyment of Owner under this Agreement or which could cause Owner to change its evaluation of Design-Build Firm and the decision to enter into this Agreement with Design-Build Firm (“**Conflict of Interest**”). A Conflict of Interest shall be deemed to exist when, because of undisclosed activities or relationships with any a third party, Owner determines in its sole discretion that Design-Build Firm or the Design-Build Firm Parties is/are unable to render impartial assistance, advice, or Services to Owner, or if the Design-Build Firm’s objectivity in performing the Services and the Work required hereunder is or might be otherwise impaired, or the Design-Build Firm gains an unfair advantage or receives undisclosed profits or benefits in addition to compensation for its performance of Services and Work under this Agreement. Design-Build Firm shall at all times during the performance of this Agreement remain free of any obligation of any kind to any person other than Owner where such obligation may cause or require Design-Build Firm to compromise or otherwise be in breach of its obligations to Owner, including without limitation its obligations with respect to proprietary rights and confidentiality and conflicts of interests. Design-Build Firm has not undertaken, and during the period covered by this Agreement, Design-Build Firm shall not undertake any relationship with any third party that could give rise to such a Conflict of Interest without the prior written consent of Owner. Design-Build Firm shall immediately advise Owner of any relationship that may give rise to a Conflict of Interest during the term of this Agreement. If Owner becomes aware of any such relationships, through Design-Build Firm’s disclosure or otherwise, Owner shall have the option to terminate this Agreement in whole or in part without further liability to Design-Build Firm.

Design-Build Firm acknowledges that Owner adheres to the ethical requirements of the Charter of the City of San Antonio and its Ethics Code. Accordingly, no officer or employee of the San Antonio Water System shall have a financial interest, directly or indirectly, in any contract with the San Antonio Water System, or shall be financially interested, directly or indirectly, in the sale to the San Antonio Water System of any land, materials, supplies or service, except on behalf of the San Antonio Water System as an officer or employee. Design-Build Firm represents and certifies that it and its Design-Build Personnel, including the DPOR, and their respective officers, employees and agents are not members, officers or employees of the City or the San Antonio Water System or its Board. Design-Build Firm further represents and certifies that is has tendered to the San Antonio Water System all necessary disclosures and other documents in compliance with the City’s Ethics Code, including, without limitation, a Discretionary Contracts Disclosure Statement. Design-Build Firm agrees that Owner has entered into this Agreement based upon, and that it is made in reasonable reliance upon, Design-Build Firm’s foregoing representations and certification.

The Design-Build Firm represents and certifies that it and its Design-Build Personnel, the DPOR, and their respective officers, employees and agents have not employed or retained any company or person other than a bona fide employee working solely for the Design-Build Firm, to solicit or secure this Agreement, nor paid or agreed to pay any company or person, other than a bona fide employee working solely for the Design-Build Firm, any fee, commission, percentage, brokerage fee, gift, or any other consideration, contingent upon or resulting from the award or making of this Agreement. In the event of a breach of this covenant by Design-Build Firm, the Owner shall have the right to terminate this Agreement under the provisions of Section XVII.A below, in addition to Owner's other rights and remedies under this Agreement.

Design-Build Firm and all Design-Build Firm Parties shall report any suspected ethics violations impacting Owner by calling the Owner's ethics hotline number, which is 1-800-687-1918.

11. Protection of Confidential Information. All Owner's information is confidential and shall be protected by Design-Build Firm and the Design-Build Firm Parties, unless otherwise communicated by Owner in writing to Design-Build Firm. Design-Build Firm shall ensure that all Design-Build Firm Parties execute and comply with the same form of Confidentiality Agreement in favor of Owner, obligating them to similarly protect Owner's proprietary information in accordance with the terms and conditions of this paragraph and such Confidentiality Agreement (**Exhibit 14**). Owner has a proprietary interest in this Agreement and in the advisory and consulting services provided by Design-Build Firm. Accordingly, this Agreement, the Services, and any information obtained by Design-Build Firm through Owner in connection with its performance hereunder shall not be disclosed to any third party. In the event Design-Build Firm or Design-Build Firm Parties is/are or may be subject to the Texas Public Information Act, upon receipt of a request for any information obtained by Design-Build Firm in the performance of this Agreement, Design-Build Firm shall provide written notice to Owner of the request along with a copy of the request, and give Owner the opportunity to respond to the request prior to its release by Design-Build Firm. In no event shall Design-Build Firm or Design-Build Firm Parties provide or participate in any public presentations or prepare or present any papers for public dissemination concerning any Project, or with information obtained in connection with any Project, without receiving the prior written Approval from the Owner, which Approval may be withheld in the sole and absolute discretion of the Owner. Design-Build Firm represents that it has at all times remained, and required and caused the Design-Build Firm Parties to remain, in compliance with the requirements of this provision, has not disclosed to third Parties any information concerning any Project, and will not do so without Owner's prior written consent.

12. Execution of Agreement Duly Authorized. Design-Build Firm's execution and adoption of this Agreement has been duly authorized, approved and/or ratified, as

set forth in the Resolution in Support of Construction Agreement, signed by Design-Build Firm's members or its governing board of directors, confirming the authority of the person executing this Agreement on behalf of the Design-Build Firm to bind the Design-Build Firm to this Agreement (**Exhibit 15**).

13. Compliance with Applicable Laws. Design-Build Firm warrants that all Services and Work shall be performed in strict compliance with all Applicable Laws and regulations and all other laws and regulations dealing with employer-employee relations, including, as amended, the "Fair Labor Standards Act" of 1938, the "Walsh-Healy Act," and "Nondiscrimination in Employment," Executive Order No. 11246 of September 24, 1964, and all codes laws and regulations required to be incorporated in a contract of this character are hereby incorporated herein by reference. Compliance with the above shall include the adoption of all programs, making of all certifications and filing of all reports as required thereby, and as necessary to achieve issuance of a final certificate of authority from the applicable AHJ. All terms included in any of the foregoing laws are hereby incorporated herein by reference. Design-Build Firm shall execute and deliver to Owner such documents as may be required to effect or evidence compliance with Applicable Laws. To the extent the Construction Documents specify any particular building products, materials, or methods for the Service Center Program and this Project, Design-Build Firm agrees the same are voluntarily established contractual requirements that are not the result of Owner's adoption of any regulations or standards applicable to Owner's use of building products, materials or methods for Owner's building construction projects generally.
14. Workforce/Employee Composition. It is the policy of the Owner to assist in increasing the competitiveness and qualifications of Small, Minority and Women-Owned Businesses ("SMWB") to afford greater opportunity for such groups to obtain and participate in Owner's contracts. Design-Build Firm agrees to comply with its Good Faith Effort Plan (**Exhibit 11**). Design-Build Firm shall maintain records of all SMWB contracts and programs applicable to this Project, and shall submit a vendor/subcontractor report form to the Owner when submitting any Applications for Payment to the Owner. Design-Build Firm shall remain responsible for requiring the DPOR and the DPOR's subconsultants and all of the Design-Build Firm's Subcontractors, to submit monthly subcontractor payment information utilizing the Subcontractor Payment and Utilization Reporting ("S.P.U.R.") system, as required by the RFP, which shall remain an ongoing obligation hereunder, and to comply with any other obligation of this Agreement that expressly requires compliance by any entity that is a party to an agreement with the Design-Build Firm that relates to such party's performance of any of the Work and Services required for this Project.
15. Prevailing Wage Rate and Labor Standard Provisions. Design-Build Firm acknowledges and understands that the provisions of Chapter 2258 of the Texas Government Code, and the "Wage and Labor Standard Provisions" amended in

City of San Antonio Ordinance 2008-11-20-1045, expressly are made a part of this Agreement. In accordance therewith, Design-Build Firm warrants and represents that it will comply with the Prevailing Wage Schedule (**Exhibit 16**). Design-Build Firm, in the execution of this Project, agrees it shall not discriminate in its employment practices against any person because of race, color, creed, sex, or origin. Design-Build Firm agrees it will not engage in employment practices which have the effect of discriminating against employees or prospective employees because of race, color, creed, national origin, sex, age, handicap or political belief or affiliation. This provision shall be included in its entirety in all agreements with Design-Build Firm Parties entered into by the Design-Build Firm or by any lower tier contractor or subcontractor employed on the Project. In addition, Design-Build Firm shall thoroughly review and submit using LCP tracker, as described in this Section VIII.A(15), its certified payrolls, and cause each of the Design-Build Firm Parties who is an independent contractor to also submit in LCP tracker confirm such Design-Build Firm Parties' payment records support its certifications related to payment of at least the General Prevailing Wages required by **Exhibit 16**. Design-Build Firm shall cause each of the Design-Build Firm Parties who are independent contractors to directly submit their certified payrolls and labor compliance documentation electronically utilizing the LCP Tracker web-based application as of the first Certified Payroll Report ("CPR") and with every CPR thereafter. Design-Build Firm and each such independent contractor will be provided with a logon identification and password to access Owner's LCP Tracker reporting system. Training on the use of this system will be coordinated by Owner through the use of the LCP Tracker telephone support and online webinars. Electronic submittals will require data entry of weekly payroll information; employee identification, labor classification, total hours worked and hours worked on the Project, wage and benefit rates paid, etc. This electronic submission requirement also applies to Design-Build Firm and all such independent contractors. Additional information on the LCP Tracker Software can be found at www.lcptracker.com.

16. Royalties and Licenses to Use Intellectual Property. Design-Build Firm shall ensure that Owner shall at all times have a non-exclusive right to use all software used in the planning, design, construction, maintenance, operation and use of the Project at no additional cost to Owner. Design-Build Firm shall pay all royalties and license fees due in connection with the Services. Design-Build Firm warrants that neither the Services nor use of Design-Build Firm's Work Product will infringe any patent or other proprietary right. Design-Build Firm shall provide to Owner the Design-Build Firm's proprietary information, data or systems used for, and hereby grants to Owner a license to enable Owner to use the same in connection with, the delivery, operation, use and/or maintenance of the Project, which license is non-exclusive and perpetual. Design-Build Firm shall, through agreement with the developer of any proprietary software system used by Design-Build Firm for the performance of the Services and Work, transfer of a non-exclusive right to use

such software to the Owner without any limitation of Owner's right of use thereof at no additional cost to Owner.

17. Independent Contractor Status of Design-Build Firm. In performing the Services, Design-Build Firm shall operate as and have the status of an independent contractor and shall not act as or be an agent or employee of Owner.

18. Thorough and Careful Review of Construction Documents, Project Schedule and other Contract Documents. Before starting each portion of the Work, and throughout the performance of the Work, the Design-Build Firm shall carefully study and compare the various Construction Documents and other Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner, shall take field measurements of any existing conditions related to that portion of the Work, and shall investigate and observe any conditions at the Worksite that may affect performance of the Work. Such review and comparison shall be managed for the accomplishment of the Work in a manner that it is in accordance with the requirements of the Contract Documents and the DCP. These obligations are for the purpose of assuring the completeness, suitability and accuracy of the Construction Documents; any errors, inconsistencies or omissions discovered by the Design-Build Firm shall be reported promptly to the Owner and Program Manager. The Design-Build Firm shall be liable to the Owner for the costs of correcting and any damages resulting from errors, inconsistencies or omissions in the Contract Documents that Design-Build Firm should have avoided, discovered and reported, in the exercise of the Standard of Care, for which the Design-Build Firm may make use of Construction Contingency in accordance with Section IX.D(1). Design-Build Firm shall ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations, but any nonconformity discovered, or which, in the exercise of the Standard of Care, reasonably should have been discovered, by the Design-Build Firm, or which is made known to the Design-Build Firm shall be reported promptly to the Owner and Engineer. Following commencement of the Work, the Design-Build Firm and its Design-Build Firm Personnel, as appropriate, shall continue to evaluate and satisfy themselves as to the conditions and limitations under which the Work is to be performed, including:
 - (a) the location, condition, layout and nature of the Worksite and impacts to the Worksite by surrounding areas;
 - (b) generally prevailing climatic conditions;
 - (c) anticipated labor supply and costs;
 - (d) availability and cost of materials, tools and equipment; and
 - (e) other similar issues.

19. Title to Goods, Materials, Equipment and Work. The Design-Build Firm warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. All Work specially fabricated for the Project shall be identified to this Contract as the property of Owner no later than the time of any payment made therefor, including any such Work constituting goods not yet delivered to the Worksite. The Design-Build Firm further warrants that upon submittal of its Application for Payment, all Work is and shall remain free and clear of liens, Claims, security interests or encumbrances in favor of the Design-Build Firm and any Design-Build Firm Parties, or other persons or entities who might otherwise have any Claim by reason of having provided labor, materials and equipment relating to the Work.
20. Authority to Enter into Agreements; Legal Establishment of Business Entities. The Design-Build Firm, and all Design-Build Firm Parties, with respect to their portions of the Services and the Work, are fully authorized to assume their contractual obligations to perform the same, and that each of them, with respect to its portion of the Services and the Work, is fully licensed, certified and authorized to perform the same as contemplated by the Contract Documents and any other Work performed on the Project, and will provide evidence of the same to Owner upon request. Neither the execution and delivery of this Agreement by Design-Build Firm nor the performance of its obligations hereunder will result in the violation of any provision, if a corporation, of its articles of incorporation or by-laws, if a limited liability company, of its articles of organization or regulations, or if a partnership, of any partnership agreement by which Design-Build Firm is bound, or any agreement, including a "Company Agreement" as defined under the applicable Texas Statutes, by which Design-Build Firm is bound, nor will it result in conflict with any order or decree of any court or governmental instrumentality relating to Design-Build Firm.

Each of the Design-Build Firm and the Design-Build Firm Parties:

- (a) if a corporation or limited liability company, is duly organized, validly existing and in good standing under the laws of the State of Texas, or a foreign corporation or limited liability company duly authorized and in good standing to conduct business in the State of Texas, having all necessary corporate power and having received all necessary corporate approvals required to execute and deliver their respective contracts (including this Agreement), and each of the individual signing such contracts (including this Agreement) has been duly authorized to act for and bind the entity for whom such signature is made; or
- (b) if a joint venture, partnership, limited partnership, or limited liability partnership, has all necessary partnership power and has secured all necessary approvals to execute, deliver and perform all the obligations assumed under such contracts (including this Agreement) as such entity. The individual executing this Agreement on behalf of Design-Build Firm,

and the individual executing any agreement with Design-Build Firm to assume any obligation under this Agreement, has been duly authorized to act for and bind its applicable principal(s), who shall be jointly and severally liable to Owner for the performance of this Agreement.

21. Taxes and Federal Compliance. Design-Build Firm, whether a corporation, partnership, or sole owner, is current on its property taxes. If commercial personal property is located in any jurisdiction in Texas, current renditions of these properties have been filed with the Chief Appraiser, as required by Chapter 22, Section 22.01, of the “Texas Property Tax Code,” and Design-Build Firm is current on all applicable ad valorem taxes owing to the appropriate jurisdiction. Design-Build Firm certifies it is not presently debarred, suspended for debarment, declared ineligible, or excluded from covered transactions by any Federal department or agency.
22. Access for Worksite Investigation conditions. Design-Build Firm represents it has been provided unrestricted access to the Worksite for purposes of conducting the Worksite Investigation and preparing the Worksite Investigation Report prior to execution of this Contract. Design-Build Firm represents it has investigated to its satisfaction the risk of encountering Worksite Conditions. The Design-Build Firm has relied and shall continue to rely solely upon its own Worksite Investigation in establishing the Worksite Conditions Allowance in the, which Design-Build Firm shall be entitled to use in accordance with Section IX.D(2). Design-Build Firm agrees to rely solely upon such Worksite Conditions Allowance, as stated in Section IX.D(2), and shall not make or be entitled to claim any adjustment to the Project Schedule and/or the Guaranteed Maximum Price for the encounter of Worksite Conditions that differ from those anticipated or from those indicated in any information known or available to the Design-Build Firm as of the Effective Date. Design-Build Firm assumes full and complete responsibility for any conditions pertaining to the Work, the Worksites or their surroundings and all risks in connection therewith, notwithstanding anything in any of the Contract Documents or in any representations, statements or information made or furnished by Owner or its representatives.

IX. Design-Build Firm’s Compensation

A. Guaranteed Maximum Price: Initial GMP and Final GMP.

On the Effective Date, the Guaranteed Maximum Price is initially established in the amount of the Initial Guaranteed Maximum Price (“Initial GMP”) set forth in Section IX.B below. The Initial GMP will be superseded, but not exceeded, by a Final Guaranteed Maximum Price (“Final GMP”) to be established after Approval of the 100% Set of Construction Documents and the Final Control Estimate, submittal of the Design-Build Firm’s Final GMP Proposal, and negotiation of the Final GMP, as further described below. Owner is under no obligation to accept Design-Build Firm’s Final GMP Proposal or to Approve a Final GMP. Approval of the Final GMP shall not become effective until Owner executes

a Contract Amendment to Approve a Final GMP, and Payment and Performance Bonds are thereafter delivered to Owner in accordance with the requirements of Article XVI. If the Parties are unable to agree upon a Final GMP, and Owner exercises its right to terminate this Agreement for its convenience in accordance with Section IX.F, Owner shall not be obligated to pay Design-Build Firm for more than the value of Services that have been completed as of the date of such termination in accordance with the requirements of this Agreement. If the parties are able to agree upon a Final GMP, the Guaranteed Maximum Price thereby established shall become the maximum sum that Owner shall pay to Design-Build Firm for Design-Build Firm's performance of the Services and Work in accordance with this Agreement. Establishment of Initial GMP (if applicable). The Initial GMP is hereby established in the sum of _____ and NO/100 Dollars (\$_____.00), which includes the Design Services Fee and the Construction Services Fee, as set forth below. Until a Final GMP is established, Design-Build Firm shall provide and maintain a Security Bond, as required by Section XVI.A. Each Control Estimate shall provide pricing for the performance of all Services and Work as required hereunder, and for delivery of the completed Project, for an amount not exceeding the Initial GMP.

B. Fees to be Included in GMP.

The Fees set forth below and each of their components are to be included in the GMP and shown as separate line items in the Pricing Schedule (**Exhibit 3**), and shall be similarly shown as separate line items in all Control Estimates and the Final GMP Proposal.

- 1. Design Services Fee.** The Design Services Fee is a fee that is fixed at the time of this Agreement, in the amount of _____ and NO/100 Dollars (\$_____.00), which includes a fixed Design Administration Services Fee in the amount of _____ (\$_____.00). The Design Services Fee covers all administrative, supervisory, and management personnel costs, and all direct overhead, and other on-site and off-site costs and expenses to be incurred by the Design-Build Firm to have the DPOR perform the Design Services, as described in the definition of Design Services, above and in Article III, above, and identified in the Pricing Schedule (**Exhibit 3**).
- 2. Construction Services Fee.** The Construction Services Fee is a fee that is fixed at the time of this Agreement, in the amount of _____ and NO/100 Dollars (\$_____.00), which includes a Pre-Construction Services Fee in the amount of _____ (\$_____.00) and a General Administrative Fee in the amount of _____ (\$_____.00). The Construction Services Fee covers all administrative, supervisory, and management personnel costs, and all direct overhead, and other on-site and off-site costs and expenses to be incurred by the Design-Build Firm, including all pre-construction services and construction administrative and management services and other so-called general conditions, for the performance of this Agreement, as identified in the Pricing Schedule (**Exhibit 3**). Any so-called general conditions costs associated with the performance of Construction Services shall be limited to those shown on the Pricing Schedule (**Exhibit 3**), and which costs shall be included only in the

General Administrative Fee, and not in the Cost of the Work.

3. **Fees Inclusive of Administration Expenses, Profit and Overhead.** Design-Build Firm's Fees set forth above cover and shall include the following:
- (a) All Design Services for the Project, including Design Administration Services;
 - (b) All construction administration and construction management costs for the performance of the Work on the Project;
 - (c) Expenses related to each of the foregoing, including expenses to provide a fully equipped and functioning on-site office for Design-Build Firm's use commencing no later than thirty (30) Days from the issuance of an Owner's Notice to Proceed with the Construction Phase. Such office shall include reasonable and fully equipped and functioning office space for use by Owner and Program Manager;
 - (d) All Profit;
 - (e) All Overhead for home office support from the home offices of the Design-Build Firm and the DPOR;
 - (f) Expenses for all equipment, computers, software (and licenses for the use thereof), land line telephones, mobile or cellular telephones, radios or other communication needs, all operating supplies and office-related consumables, and office facilities, including all office relocation costs;
 - (g) All costs of travel and subsistence in the performance of this Agreement; Design-Build Firm Personnel's travel outside of San Antonio or their respective home office-bases in the performance of this Agreement shall require advance Approval and shall be in conformity to Owner's published reimbursement policies; and
 - (h) All other costs of the Project that are not otherwise specifically identified in the Pricing Schedule (**Exhibit 3**) as either a component of the Fees or a component of the Cost of the Work.

Fees shall be earned only to the extent of those Services and Work actually performed and completed in accordance with this Agreement and the Schedule of Values. All supporting documentation reflecting the earned amount of Fees shall be reviewed with the Owner and Program Manager on a monthly basis. Design-Build Firm shall document and report monthly to Owner the value of all subcontracts, purchase orders and other cost commitments affecting the actual Cost of the Work for comparison to the sum of such costs shown in the Pricing Schedule (**Exhibit 3**), Control Estimates and Final GMP Proposal.

Owner shall be provided reasonable opportunity to examine and give input into Design-Build Firm's evaluation and selection of bids and proposals for all subcontracting packages and purchase orders. Costs and Fees that cause the GMP to be exceeded shall be borne solely by the Design-Build Firm without reimbursement or additional compensation by the Owner.

C. Sales and Use Taxes are to be Excluded from GMP.

Design-Build Firm acknowledges and agrees that Owner is a local government entity that qualifies for exemption from state and local sales and use taxes. Owner will, upon request by the Design-Build Firm, furnish the Design-Build Firm with a tax exemption certificate, whereupon Design-Build Firm shall use such certificate to claim exemption from such taxes to the maximum extent permitted by law, and Design-Build Firm shall not invoice or charge Owner for any sales and use taxes avoidable by such claim of exemption. It is the Design-Build Firm's responsibility to claim exemption from payment of applicable state and local sales taxes by complying with such procedures as may be prescribed by the Texas State Comptroller of Public Accounts for separated contracts. The Design-Build Firm has not included, and will not include, in the Final GMP or any modification thereto, any amount for sales, use or similar taxes for which Owner is exempt.

D. Contingency and Allowances.

The amounts set forth below for Construction Contingency and Allowances shall be included in the GMP and shown as separate line items in the Pricing Schedule (**Exhibit 3**), all Control Estimates, and the Final GMP Proposal. Design-Build Firm shall give Owner written notification of its intent to use funds from the Construction Contingency or an Allowance and submit to Owner upon request additional information justifying the appropriateness of the use thereof. Within __ (__) Days after its receipt of such notification and any requested information, Owner may object to the use of funds in the Construction Contingency or an Allowance and, unless otherwise agreed, the Parties shall resolve such objection prior to the use thereof, through the dispute resolution process if necessary. Funds to be expended from the Construction Contingency or Allowances may only be applied to pay for the items described therein, and Design-Build Firm shall bear any cost therefor that exceeds the maximum allowable amount available in the Construction Contingency or Allowance. Expenditures from Contingency or Allowances for materials and equipment shall be based on the actual value thereof when delivered at the site, including shipping costs, but not costs to unload, store or stage at the Worksite. In no event shall an expenditure of funds from the Construction Contingency or an Allowance be permitted if such expenditure will cause the GMP to be exceeded. Upon Substantial Completion of the Project (or at such earlier time as otherwise provided below, the GMP shall be adjusted (reduced) to exclude amounts of the Construction Contingency and Allowances that have not been expended in accordance with this Agreement.

1. **Construction Contingency.** The Construction Contingency is an amount that will be established as a part of the Guaranteed Maximum Price upon execution of a

Contract Amendment to Approve a Final GMP that will be available for use during the Construction Phase. The need for Construction Contingency and the amount to be established therefor shall be continuously re-evaluated by the Parties during the Design Phase, and set forth in the Final GMP Proposal as a part of the Guaranteed Maximum Price that the Design-Build Firm proposes to remain available to pay for unexpected costs of Work arising during the Construction Phase due to circumstances that, despite the exercise of the Standard of Care, could not have been anticipated to arise from further design development and completion of the Construction Documents at the time of the Design-Build Firm's submission of the Final GMP Proposal, and that do not arise from errors, omissions or discrepancies in the 100% Construction Documents Set, all of which must have been resolved during the Design Phase, and that do not arise from material changes to the scope of the affected Work. The Construction Contingency will be used only for unexpected costs arising directly from the following circumstances:

- (a) estimating errors in or scope gaps between portions of the Work delegated to Subcontractors;
- (b) unanticipated changes in market conditions affecting the price of materials to be installed in the Project or commodities used in the performance of the Work;
- (c) rework due to worker mistakes, when and if Approved by Owner; and
- (d) for Adverse Weather Delay Days that exceed by more than seven (7) Days the allowance for Adverse Weather Delay Days set forth in Section VII.D(1), for an adjustment to the General Conditions Fee by an amount equal to the lesser of (i) the amount derived by multiplying the Daily General Conditions Cost Rate times the number of such excessive Adverse Weather Delay Days, if any, that must be added to the Project Schedule a direct result of adverse weather conditions in accordance with Section VII.D(1), or (ii) the amount of the increase in the general conditions costs identified on the Pricing Schedule (**Exhibit 3**) that Design-Build Firm necessarily and actually incurs as a direct result of such excessive Adverse Weather Delay Days, using rates or charges no greater than those originally stated and fixed in the Design-Build Firm's Hourly Rate Schedule (**Exhibit 12**).

If funds available in the Construction Contingency account are exhausted, Design-Build Firm shall bear the cost to complete the Services and Work required to resolve the circumstances for which the Construction Contingency was established, without reimbursement. Construction Contingency shall not be used, however, if Owner determines in the exercise of its commercially reasonable judgment that the unexpected costs due to the above circumstances are:

- (i) due to Design-Build Firm's negligence in performing its duties hereunder;
- (ii) preventable by the exercise of reasonable diligence with respect to causes that the Design-Build Firm could have reasonably foreseen and avoided;
- (iii) able to be mitigated by Design-Build Firm's exercise of reasonable diligence;
- (iv) costs that should be paid from an Allowance; or
- (v) costs that are already accounted for in another line item in the Approved Final Control Estimate and the Final GMP Proposal.

At such time as Owner reasonably determines the unexpended balance of the Construction Contingency is no longer needed to be used, Owner shall have the option to either (i) reduce the GMP by the amount of such unexpended balance, or (ii) retain the unexpended balance as an Owner-controlled contingency fund available to Owner to use to pay costs of Owner's Construction Change Directives.

2. **Worksite Conditions Allowance.** The Worksite Conditions Allowance is _____ and NO/100 Dollars (\$_____.00). The Worksite Conditions Allowance is reserved exclusively for Design-Build Firm's use in its reasonable discretion to pay the reasonable and necessary costs to resolve and overcome Worksite Conditions encountered during the Construction Phase, including those listed below, for which a moderate risk of an encounter during the Construction Phase has been determined to exist in the Worksite Investigation Report: *[insert as appropriate]*

- (a) _____;
- (b) _____; and
- (c) _____.

The Design-Build Firm shall not be entitled to charge for costs to resolve a Worksite Condition in excess of the Worksite Conditions Allowance, or to adjust to the Guaranteed Maximum Price therefor. The Design-Build Firm agrees the Worksite Conditions Allowance is a reasonable and sufficient allowance to be available to reimburse the Design-Build Firm's reasonable and necessary costs to resolve and overcome the risk of encountering Worksite Conditions, and to enable Design-Build Firm to assume all differing site condition risks not otherwise covered by the Worksite Conditions Allowance. Design-Build Firm may request to use funds from the Worksite Conditions Allowance to resolve an unforeseeable

Worksite Condition not identified in the Worksite Investigation Report, but agrees that Owner shall be entitled to exercise its sole and exclusive judgment in deciding whether to Approve, and Owner shall be under no obligation to Approve, the use of any funds in the Worksite Conditions Allowance to pay, or to otherwise fund, any cost to resolve or overcome a Worksite Condition not identified in the Worksite Investigation Report. Following completion of all site work at the Worksites, Owner shall have the option to either (i) reduce the GMP by the amount of the unexpended balance of the Worksite Conditions Allowance that has not been used to resolve and overcome any Worksite Conditions, or (ii) retained by Owner as an Owner-controlled contingency fund available to Owner to use to pay costs of Owner's Construction Change Directives. Owner shall not be required to pay any increase in Fees in connection with the use of this Allowance.

3. **Allowance for Public Outreach.** An Allowance for public outreach support, in the sum of Ten Thousand and No/100 Dollars (\$10,000.00), shall be included in the Guaranteed Maximum Price, to be available for use by Design-Build Firm to compensate the DPOR at the additional services rates included in the agreement between the Design-Build Firm and the DPOR, for the Design-Build Firm and the DPOR to attend, participate in, and support Owner's need for support at up to three (3) Owner-led public meetings, as requested by Owner, to provide public information publications, responses to media requests, and public outreach, including participation in such meetings and the preparation of necessary supporting documentation. The Design-Build Firm and DPOR shall cooperate with Owner and its designated representatives to plan and develop a public outreach campaign that will promote and manage the establishment of positive community relations and public awareness about the Project within the community and with appropriately targeted audiences of community constituents in a manner that is appropriate to the success of the Project. Owner shall not be required to pay any increase in Fees in connection with the use of this Allowance.

4. **Allowance for Owner's Dispute Resolution Costs in Mediation.** An Allowance for Owner's Dispute Resolution Costs of Mediation, in the sum of Twenty Five Thousand and No/100 Dollars (\$25,000.00) shall be included in the Guaranteed Maximum Price, to be used by Design-Build Firm to issue payment for Owner's share of any reasonable and necessary dispute resolution costs of mediation upon Design-Build Firm's receipt of Approval of the invoice of the Mediator. Design-Build Firm shall promptly issue payment of such invoices for Owner's share of such dispute resolution costs, upon Approval. Payment of Owner's share of any such Approved dispute resolution costs shall be considered a reimbursable cost to be invoiced to Owner and paid by Owner in accordance with the terms of this Agreement. For the avoidance of doubt, such allowance does not represent funding the Design-Build Firm may claim it is entitled to use to offset any cost for performance of any Services or Work if the allowance is not required or used, such allowance being set aside exclusively for the Owner's use and benefit. Owner shall

not be required to pay any increase in Fees in connection with the use of this Allowance.

If an Allowance provided for above is exhausted, Design-Build Firm shall not be entitled to use funds from any other Allowance or from Construction Contingency to complete Work and Services for which the exhausted Allowance was established, and Design-Build Firm shall bear all such costs without reimbursement.

E. Requirements for Final GMP Proposal Submittal. In accordance with the Project Schedule, but no later than twenty (20) Days after Approval of the 100% Set of Construction Documents and Final Control Estimate, Design-Build Firm shall submit its Final GMP Proposal to Owner, in accordance with the requirements set forth below. The Final GMP Proposal must be based upon the Approved 100% Set of Construction Documents and the Approved Final Control Estimate.

The Final Control Estimate shall show changes to each of the following:

1. total pricing for all items comprising the Cost of the Work for the Project, including all materials and labor, organized by trade, and including Approved Allowances and any taxes not avoidable by exemption;
2. total of all Fees earned and remaining to be earned for the performance of this Agreement, including a breakdown of allowable general conditions, as listed in the Pricing Schedule (**Exhibit 3**);
3. the amount of the Construction Contingency; and
4. the amount of any Allowances.

The Final GMP Proposal shall be based on competitive bids received from Subcontractors for the Project, and which Final GMP Proposal shall not exceed the Initial GMP, if any, established by this Contract. All the foregoing shall be based upon the scope of Services and Work required under the 100% Set of Construction Documents, including the Project Schedule. The Design-Build Firm shall review with Owner the Final Control Estimate, and compare it with earlier Control Estimates.

In addition to the other requirements of this Article IX, the Final GMP Proposal shall:

- (i) include the same level of detail as the Design-Build Firm's prior Control Estimates;
- (ii) include proposed dates for Owner's Notices to Proceed with each Stage of the Project, the Scheduled Date of Substantial Completion, and the Scheduled Date of Final Completion;

- (iii) separate the cost of materials and tangible equipment from skill, labor and other associated costs of construction as required for Design-Build Firm to claim the maximum tax exemption allowed by the Texas Tax Code for the materials, consumables and other items to be used to construct the Project;
- (iv) be deemed complimentary to the Approved 100% Set of Construction Documents and the Approved Final Control Estimate (and any ambiguity or conflict between or among such deliverables shall be interpreted to require the Owner be provided the higher quality);
- (v) offer to complete the Project in accordance with this Agreement for a Final GMP that is no greater than the Initial GMP; such offer shall not be withdrawn for ninety (90) Days following the date set in the Project Schedule for its submission to Owner for negotiation.

F. Failure to Comply with Requirements for GMP Proposal Submittal.

If Design-Build Firm submits a Final GMP Proposal that fails to satisfy the above requirements, and Design-Build Firm fails or refuses to resubmit the same in a form that complies with such requirements within ten (10) Days after receipt of Owner's notice of non-compliance, Owner may declare Design-Build Firm in material breach of and terminate this Agreement for cause in accordance with Article XVII. If Design-Build Firm submits a Final GMP Proposal when required for an amount that is no more than the IGMP, and the Parties are unable to agree on a Final GMP within such ninety (90) day period, or unable to agree in writing to extend such period, the Owner may terminate the further performance of this Agreement for convenience in accordance with Article XVII without prejudice to Owner's other rights and remedies under this Agreement. Upon termination of this Agreement for any of the foregoing reasons, and without waiving Owner's other rights and remedies under this Agreement, Owner may exercise the right to accept and assume the collateral assignment of the Design-Build Firm's agreement with the DPOR as provided below, and Owner shall have no liability to pay Design-Build Firm any more than the earned portion of Design Services Fee and the Pre-Construction Services Fee only.

G. Owner's Right to Collateral Assignment of DPOR's Consulting Agreement with Respect to Completion of Design Services.

Design-Build Firm shall provide for the conditional assignment to Owner of the Design-Build Firm's agreement with the DPOR as additional security for the performance and completion of the Design Services for delivery of the Project through an alternate procurement process if the Design-Build Firm fails to submit a Final GMP Proposal in accordance with the requirements of this Agreement and/or Parties cannot agree on a Final GMP. The Owner has reviewed and Approved the terms and conditions of the Design-Build Firm's agreement with the DPOR, the DPOR's Joinder (**Exhibit 22**), and the

DPOR's commitment to perform all Design Services, which agreement has provided for Owner's right to assume the collateral assignment thereof to Owner by including the following provision *verbatim*:

" _____, as the Design Professional of Record ("DPOR"), and _____, as the Design-Build Firm, acknowledge and hereby agree to irrevocably assign to SAWS ("Owner") as collateral to secure the Design-Build Firm's obligations to perform the Design Administration Services, the right to require DPOR to continue to perform the Design Administration Services for the Project in accordance with the terms of Design-Build Services Agreement between Design-Build Firm and Owner, Contract No. _____. Such assignment shall not, however, become effective until Owner delivers to Design-Build Firm and DPOR written notice of Owner's election to accept and assume such assignment, whereupon Owner may elect in writing to require DPOR to (a) continue and complete performance of the Design Services, (b) cease further performance of all Design Services and vacate the Project, or (c) enter into a new agreement directly with the DPOR on the same terms and conditions, and at the same hourly professional service rates, originally stated and fixed herein with respect to the performance of and compensation of the DPOR for the Design Services after the date of such notice, in connection with the re-procurement of construction services for the Project. The DPOR hereby consents to this collateral assignment and shall execute all documents reasonably required to evidence or facilitate its effectiveness. The Owner may notify Design-Build Firm and DPOR simultaneously of its written election to accept and assume this assignment. The DPOR further agrees to give Owner written notification of any material breach its obligations and duties to the DPOR hereunder, and to provide Owner opportunity to cure, and be subrogated to the DPOR's rights with respect to, such material breach by the Design-Build Firm, provided that Owner's cure of such material breach is effected within a reasonable period of time, but in no event later than thirty (30) Days after the date of Owner's receipt of such notice of material breach. The DPOR further agrees that, upon Owner's written election to accept and assume such assignment, all warranties, rights and remedies hereunder with respect to the DPOR's performance of the Design Services and Design Administration Services shall be extended to and may be enforced by Owner."

Design-Build Firm represents and warrants to Owner that the agreement between Design-Build Firm and the DPOR is in the same form as reviewed and Approved by Owner, and that such form of agreement embodies all of the terms and conditions of their agreement, and that it has not been changed or varied in any way from the Approved form.

X. Safety of Persons and Property

- A.** Design-Build Firm shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to property.

1. Such precautions shall protect:
 - (a) Design-Build Firm Parties on or in the vicinity of the Worksite and all other persons who may be affected thereby;
 - (b) The Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Design-Build Firm and the Design-Build Firm Parties, and including any portions of the Work that may be occupied or used by Owner prior to Final Completion and transfer of the risk of loss to Owner; and
 - (c) Other property at the Worksite or adjacent thereto, such as trees, shrubs, lawns, walks, groundwater sources, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.
2. Design-Build Firm shall give notices and comply with Applicable Laws bearing on safety of persons or property or their protection from damage, injury or loss.
3. The Design-Build Firm shall, in accordance with Approved site plans and Applicable Laws pertaining to construction safety on the Worksite, erect and maintain reasonable safeguards for safety and protection, including posting of danger signs and other warnings or barriers to protect against, and to appropriately notify owners and users of adjacent sites and utilities of, safety hazards. The Design-Build Firm shall also be responsible for all measures necessary to protect any property adjacent to the Project and improvements therein against loss or damage that may arise from the Design-Build Firm's operations, the reasonable cost of which shall be included in the Cost of the Work. Any damage to such property or improvements shall be promptly repaired by the Design-Build Firm at its expense.
4. Use or storage of explosives or other hazardous materials or equipment or unusual methods that are necessary for execution of the Work shall require advance Approval, in which event the Design-Build Firm shall exercise utmost care and carry on such activities under supervision of properly qualified personnel. The Design-Build Firm shall give the Owner and Program Manager reasonable advance notice of the presence or use of such materials, equipment, or methods.
5. The Design-Build Firm shall, in addition to any other of its obligations with respect thereto, promptly remedy any damage and loss to property caused in whole or in part by Design-Build Firm or Design-Build Firm Parties, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable.
6. Design-Build Firm shall be responsible for institution and enforcement of appropriate safety measures for the prevention of accidents at the Worksite.

7. The Design-Build Firm shall not endanger the safety of the construction or the Worksite while conducting or permitting others to conduct loading or off-loading activities.
8. When all or a portion of the Work is suspended for any reason, the Design-Build Firm shall do all things necessary to protect the Project, the Owner's premises and all persons from damage and injury.
9. The Design-Build Firm shall promptly report in writing to the Owner and Program Manager all accidents arising out of or in connection with the Work which cause death, personal injury, or property damage, giving full details and statement of any witnesses. In addition, if death, serious personal injuries, or serious property damages are caused, the accident shall be reported immediately by telephone or messenger to the Owner and the Program Manager. Design-Build Firm shall at its own expense cooperate with Owner's request to consider the appropriateness of and establish as appropriate a joint defense agreement to enable the Parties to conduct joint investigation of such an accident.
10. Design-Build Firm may, by written subcontract, delegate primary safety responsibility to its Design-Build Firm Parties; provided, however, such delegation shall in no way diminish Design-Build Firm's responsibility for safety on the Project, the Design-Build Firm's duty to immediately and at all times require its Design-Build Firm Parties to comply with applicable safety requirements, the Design-Build Firm's regulatory responsibility under the Occupational Safety and Health Act or the regulations promulgated to enforce the same, or Design-Build Firm's obligations to indemnify, defend and hold the Owner Indemnitees harmless from liability arising out the Work in accordance with Article XI.
11. Design-Build Firm is responsible for reviewing all emergency management plans included in the Safety Policy prepared for the Project and for obtaining Approval prior to commencing any Work in any area that Design-Build Firm knows or should know to contain asbestos or other hazardous materials. Design-Build Firm agrees that it shall not transport to, use, generate, dispose of, or install at the Worksite any Hazardous Substance, except in accordance with applicable environmental laws. Further, in performing the Work, Design-Build Firm and Design-Build Firm Parties shall not cause any release of Hazardous Substances into, or contamination of, the environment, including the soil, the atmosphere, any water course or ground water, except in accordance with applicable environmental laws. In the event Design-Build Firm wishes to conduct any inspection or testing at the Project, it shall ensure that Owner is properly notified and gives Approval thereof.
12. Owner may, in its sole discretion, at any time, order in writing a temporary stand-down of Design-Build Firm's performance of the Services ("**Safety Stand-Down Order**") as a result of any one or more Safety Incidents, whereupon Design-Build Firm shall immediately direct all Design-Build Firm Parties to stop all Services and Work and to require Design-Build Firm to conduct a comprehensive review of

Design-Build Firm's safety management plan and any site conditions affecting safety at any Project site, for the purpose of (i) identifying any safety hazards and unsafe working conditions, (ii) conducting safety training of the Design-Build Firm Parties involved in performance of the Services who were or may have been exposed to harm in connection with such Safety Incident(s), and (iii) taking any corrective action that Design-Build Firm determines to be necessary and appropriate to fulfill its obligations in accordance with this Agreement. Upon receipt of Owner's Safety Stand-Down Order, Design-Build Firm shall not resume performance of the Services and Work until it has issued to Owner a written report, which shall be due within forty-eight (48) hours of the receipt of Owner's Safety Stand-Down Order, detailing the course of action that Design-Build Firm has taken, or plans to take, to resolve the Safety Incident(s) described therein, and to prevent the recurrence thereof. After reviewing such course of action with Owner, Design-Build Firm shall, in the exercise of the Design-Build Firm's reasonable judgment, propose the date by which Design-Build Firm will complete all corrective action. Services and Work shall resume only upon Owner's delivery of further written notice to Design-Build Firm withdrawing the Owner's Safety Stand-Down Order, which notice of withdrawal shall not be issued until the Owner is reasonably satisfied that Design-Build Firm has sufficiently implemented all appropriate corrective action as necessary to enable Design-Build Firm to safely resume Services and Work, fulfill its contractual obligations set forth in this Agreement, and thereby avoid recurrence of the Safety Incident(s). Design-Build Firm shall not be entitled to an adjustment of the Design-Build Firm's compensation, or the Project Schedule, as the result of Owner's issuance in good faith of a Safety Stand-Down Order. If Design-Build Firm fails to implement the corrective action in the manner proposed by Design-Build Firm and determined by Owner to be reasonably acceptable, such failure shall be deemed a material breach of this Agreement and Owner may, without further notice, terminate this Agreement for cause. In responding to any Safety Stand-Down Order, Design-Build Firm's evaluation of the need for, and its plan of, corrective action shall be undertaken as an independent contractor, pursuant to this subsection, and nothing herein shall be construed or interpreted to mean that Owner has assumed or agreed to assume any duty of care to the Design-Build Firm Parties, or to provide guidance or instruction as to the Design-Build Firm's means and methods for managing safety as required by this Agreement. Any action taken by Owner hereunder to enforce Owner's rights to require Design-Build Firm to fulfill its safety obligations under this Agreement shall be deemed to be undertaken solely for the purpose of fulfilling Owner's contractual expectation of results in terms of delivery of the Projects without causing injury or harm to persons or property.

13. In the event Design-Build Firm encounters on the Worksite any significant Worksite Finds or Hazardous Substances, or what Design-Build Firm may reasonably believe to be Hazardous Substances existing on, at or near the Worksite, or at risk of being released into the environment as a result of any continuation of the performance of the Work, and the presence of which is inconsistent with any of

the information available to Design-Build Firm's site evaluation or any other information available to Design-Build Firm as of the Effective Date, Design-Build Firm shall immediately stop the Work in the area affected and report the same to Owner and Program Manager in writing, and, if required by Applicable Law, to the appropriate governmental regulatory authorities. The Work in the affected area shall not thereafter be resumed except by written authorization of Owner and Program Manager if in fact Worksite Finds or Hazardous Substances have been encountered, the presence of which have not been resolved, managed or rendered harmless, as applicable. Design-Build Firm shall be responsible for the consequences of any failure to stop Work under this Section X.A(13). Design-Build Firm's right to seek an adjustment to the GMP or the Project Schedule due to encountering such conditions shall be subject to Design-Build Firm's strict adherence to the requirements of this Section X.A(13).

14. Design-Build Firm shall be responsible to resolve, manage, remediate and/or render harmless any Worksite Finds or Hazardous Substances, the presence of which it knew or should have known prior to execution of this Agreement, and shall not resume Work in any area affected by Worksite Finds or Hazardous Substances until such time as the same have been resolved, managed and/or remediated and/or rendered harmless, as applicable.
15. It is the Design-Build Firm's responsibility to comply with all requirements of this Agreement relating to any Worksite Finds or Hazardous Substances based on Applicable Law in effect at the time the Services and Work are rendered and to comply with any amendments to Applicable Law pertaining to such matters for all Services and Work rendered after the Effective Date.

XI. Indemnity, Insurance and Liability

A. General Indemnity.

TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW IN EFFECT AS OF THE EFFECTIVE DATE, DESIGN-BUILD FIRM AND ALL DESIGN-BUILD FIRM PARTIES SHALL FULLY DEFEND, INDEMNIFY AND SAVE HARMLESS OWNER AND ITS OFFICERS, DIRECTORS, BOARD MEMBERS, EMPLOYEES AND AGENTS (HEREINAFTER COLLECTIVELY AND SEVERALLY REFERRED TO AS "OWNER INDEMNITEES") FROM AND AGAINST ALL LOSSES, EXPENSES, LIENS, CLAIMS, DEMANDS, DAMAGES AND CAUSES OF ACTION OF EVERY KIND AND CHARACTER WHATSOEVER, FOR INJURY TO OR DEATH OF ANY THIRD PARTY PERSONS (INCLUDING BUT NOT LIMITED TO THE DESIGN-BUILD FIRM PARTIES AND EMPLOYEES OF OWNER INDEMNITEES) AND/OR DAMAGE TO ANY PROPERTY (INCLUDING BUT NOT LIMITED TO PROPERTY BELONGING TO THE DESIGN-BUILD FIRM PARTIES AND OWNER INDEMNITEES) AND/OR ANY OTHER LIABILITY, DAMAGES, FINES OR PENALTIES (EXCEPT WHERE

REIMBURSEMENT FOR FINES OR PENALTIES IS PROHIBITED BY APPLICABLE LAW), INCLUDING ALL COSTS OF DEFENSE, ATTORNEY'S FEES AND SETTLEMENTS ARISING OUT OF OR IN ANY WAY CONNECTED WITH DESIGN-BUILD FIRM'S AND/OR ALL DESIGN-BUILD FIRM PARTIES' NEGLIGENCE, GROSS NEGLIGENCE, WILLFUL MISCONDUCT, OR BREACH OF ITS OBLIGATIONS HEREUNDER, OR OTHERWISE ARISING OUT OF OR IN ANY WAY CONNECTED WITH THE SERVICES AND WORK OR THE PERFORMANCE OR FAILURE TO PERFORM THE SERVICES AND WORK, INCLUDING ALL OF THE FOREGOING TO THE EXTENT CAUSED BY, RESULTING FROM OR IN ANY WAY CONNECTED WITH THE CONCURRENT, BUT NOT SOLE, NEGLIGENCE OF AN OWNER INDEMNITEE. THE OBLIGATIONS OF DESIGN-BUILD FIRM HEREUNDER SHALL SURVIVE TERMINATION OF THIS AGREEMENT FOR ANY REASON. THE FOREGOING NOTWITHSTANDING, IT IS AGREED THAT, WITH RESPECT TO ANY STATUTORY RESTRICTIONS AFFECTING THE VALIDITY OR ENFORCEABILITY OF THE INDEMNIFICATION AND DEFENSE OBLIGATIONS HEREIN, THIS PROVISION SHALL BE SUBJECT TO SUCH RESTRICTIONS, AND THE INDEMNIFICATION AND DEFENSE OBLIGATIONS HEREIN SHALL BE DEEMED TO BE AMENDED, TO THE MINIMUM EXTENT NECESSARY TO CONFORM THEREWITH, AND SHALL OTHERWISE CONTINUE IN FULL FORCE AND EFFECT.

B. Other Indemnity and Defense Obligations of Design-Build Firm Parties.

Design-Build Firm shall notify Owner and Program Manager immediately upon knowledge of circumstances indicating a Claim has arisen, or is likely to arise, out of Design-Build Firm's operations related to the performance of this Agreement. In addition Design-Build Firm shall indemnify, defend and hold the Indemnified Parties harmless from and against any and all Claims due to or arising out of the duty of the Design-Build Firm, hereby assumed, and the Design-Build Firm Parties, who shall be required to the duty to their failure to:

1. Observe, and to not infringe upon, misappropriate, or violate any trade secret, copyright, trademark, trade name, service mark, patent or other intellectual or intangible property right in connection with this Agreement. Design-Build Firm shall, at its sole cost and expense, defend the Owner Indemnitees against, hold them harmless from, and indemnify, pay and discharge them in all suits, actions and proceedings for any actual or alleged infringement caused or permitted by Design-Build Firm's acts or omissions and shall pay and discharge any and all judgments or decrees which may be rendered therein against them or any of them arising from such infringement;
2. Timely pay any Pending Third Party Claims for materials and equipment furnished and/or work and/or labor performed hereunder, or to prevent the imposition or attempted imposition or filing of any lien or encumbrance affecting the Project or

other property associated therewith (failing in which Design-Build Firm shall also be liable for and pay promptly upon demand any cost Owner incurs to remove it);

3. Obtain and pay for all permits, licenses and official inspections necessary to the performance of the Work, failing in which Design-Build Firm shall also be liable for and shall pay promptly to Owner upon written demand, all costs required to overcome such failure (in addition to any actual damages for resulting delay that may be assessed hereunder);
4. Comply with all laws, ordinances and regulations bearing on the conduct of the Work, including any state or federal anti-discrimination law, or any anti-harassment policy (failing in which Design-Build Firm shall also be liable for and shall pay promptly to Owner upon written demand, all costs, including costs of any penalties, fines, levies, or sanctions, resulting from such failure); or
5. Comply with any other provision or covenant of this Agreement.

C. Actual Damages of Owner.

Design-Build Firm acknowledges, understands and agrees that the Owner will incur significant costs and damages if the Design-Build Firm fails to achieve Substantial Completion and Final Completion by the applicable dates established by Contract Amendment, including but not limited to costs and damages for the following in the event of Owner's termination of Design-Build Firm for default:

1. Increased costs to complete the Project, including costs to re-procure services of others, and additional premiums for insurance and bonding for such services, for such completion;
2. Maintaining or retaining Owner's personnel at a Worksite or another site beyond the time scheduled for relocation of such personnel to a completed Worksite;
3. Temporary relocation costs for displaced operations, personnel and equipment of Owner;
4. Increased costs related to additional permitting costs, temporary facilities, additional public relations costs, additional costs to correct deficiencies in the Work, extended costs for Owner's staff, including but not limited to personnel of Owner (including senior management) and the Program Manager and its subconsultants, financing and accounting personnel;
5. Extended or additional costs for Owner's design team, consultants, engineers and inspectors, including costs of professional services to correct errors or omissions in the design;
6. Extended or additional costs for Owner's facilities trailer, equipment rental, on-site computers, and related technology charges; and

7. Extended or additional vehicle, gasoline, and maintenance costs.

D. Insurance.

Design-Build Firm shall provide insurance coverage in accordance with the Owner's Requirements of Insurance (**Exhibit 13**). Design-Build Firm shall not commence Services under the Agreement until it has obtained all required insurance and until such insurance has been reviewed and Approved. Approval of such insurance shall not relieve nor decrease the liability of the Design-Build Firm hereunder. Prior to commencing any of the Services, Design-Build Firm shall provide evidence satisfactory to Owner that all insurance coverages for the limits and forms of coverage required under Owner's Requirements of Insurance (**Exhibit 13**) are in full force and effect.

1. Maintenance of Insurance. Design-Build Firm shall not cause or allow any of its insurance to be cancelled, nor permit any insurance to lapse during the term of the Agreement or as required in the Agreement.
2. Right to Review Policies. Owner reserves the right at any time to review the policies of insurance required hereunder, and all endorsements thereto. Owner may request reasonable adjustments to the insurance coverages and the limits of coverage on such policies when deemed necessary and prudent by the Owner, including endorsements for the deletion, or revision or modification of particular policy terms, conditions, limitations, or exclusions, except where policy provisions are established by law or regulation to be binding upon either of the Parties to such policies. If Owner determines that any policy of insurance required hereunder is deficient, Design-Build Firm shall reimburse Owner, or cause Owner to be reimbursed, for all costs Owner incurs, including fees of outside counsel, to evaluate and resolve such deficiencies, and Owner may withhold from payment due hereunder all such costs. Actual losses not covered by insurance as required by this Section XI.D shall be paid by the Design-Build Firm. The reasonable additional premium cost of any insurance requested by Owner to be borne by Design-Build Firm that is in addition to the coverages stated in the Insurance Requirements (**Exhibit 13**) shall be reimbursed by Owner.
3. Pre-Condition to Commencement of Services. The Design-Build Firm shall not knowingly, except by specific agreement or instruction of the Owner in writing, commence Services or Work prior to the date Design-Build Firm has fulfilled the Insurance Requirements (**Exhibit 13**).

E. Owner's Right to Approve Counsel and Participate in Defense of Claims.

Except to the extent that a pre-existing policy condition precludes Design-Build Firm's right to approve legal counsel appointed by its insurer to defend a Claim against an Owner Indemnitee, the Design-Build Firm shall confer upon the Owner Indemnitee the

right to Approve such appointed counsel. If an Owner Indemnitee does not have the right to approve of such appointed legal counsel, the Owner Indemnitee shall have the right, at its sole cost and expense, to have independent legal counsel of its own choice participate with the appointed legal counsel in the defense of the Claim. In addition to the foregoing, an Owner Indemnitee shall have the right to assert against any third party any and all cross claims and counterclaims that an Owner Indemnitee has against the third party claimant, and to attend and participate in all conferences concerning the defense and or settlement of the Claim against the Owner Indemnitee through the Owner Indemnitee's independent counsel and/or its own designated management representative; however, to the extent such participation is not otherwise required or requested by appointed counsel for the defense of the Claim, such participation shall be at Owner's expense.

XII. Processing of Payments

A. Apportionment of Payments.

1. Fees. Owner shall pay Design-Build Firm the Fees for performing Design Services and Construction Services as delineated in Section IX.A, the sum of which shall constitute a lump sum fee. Within each applicable monthly Application for Payment to Owner, Design-Build Firm shall specifically itemize and include appropriate documentation of the payment requested for Services.
2. Payments for Construction. Within fourteen (14) Days after the Effective Date, the Design-Build Firm shall submit to the Program Manager for review and Approval an updated Schedule of Values fairly allocating payment of the Guaranteed Maximum Price, less amounts included therein for contingency.
 - (a) The Schedule of Values will be prepared in such form and supported by such data to substantiate its accuracy as is reasonably required by the Owner and Program Manager. The Schedule of Values shall not overvalue early Work activities. Once established, the Schedule of Values having been reviewed and Approved and in conformance with the GMP, shall not change throughout the completion of the Project.
 - (b) The Approved Schedule of Values shall not be considered evidence of market or other value, but shall also be used as the basis for reviewing the Design-Build Firm's Applications for Payment.
 - (c) In determining the percentage of completion of the Work and Services, Design-Build Firm shall use the lesser of the percentage of the Work and Services actually completed for each classification on the Approved Schedule of Values, or the percentage of the Guaranteed Maximum Price allocable to that item that has been actually incurred and demonstrated as a cost incurred by the Design-Build Firm, in either case not to exceed the line item value for such Work included in the Guaranteed Maximum Price. The

Schedule of Values shall be maintained based on the Approved values therein for each Work and Service classification line item. The format, tracking method, and adjustment of the Schedule of Values shall be subject to Approval. If at any time, the amount shown on the Schedule of Values exceeds the Guaranteed Maximum Price the amount payable to Design-Build Firm by Owner shall exclude the amount of such excess. The total of all sums to become payable according to the Schedule of Values to perform the uncompleted and unpaid portion of the Work and Services (including applicable amounts of Fee) shall not exceed the unpaid balance of the Guaranteed Maximum Price (less retainage on Work previously completed) for the Project.

3. Retainage. Retainage of 5% will be withheld on each Application for Payment until Final Completion has been achieved for the Work and Services or portion thereof and the Owner issues Final Payment to the Design-Build Firm. In addition, (i) Owner may withhold the value recommended by Program Manager for all Punch List Work, plus an additional amount necessary to protect Owner, in Owner's sole discretion, against any loss or damage which may result from negligence by Design-Build Firm or failure of Design-Build Firm to perform Design-Build Firm's obligations under this Agreement, and (ii) in no event shall Retainage, as defined in Section XII.C.(4), withheld by Owner at any given time be less than 5% of the value of the Work completed and materials stored to date but not yet installed, until Design-Build Firm has achieved Final Completion of the Project.

B. Applications for Payment.

1. On or before the tenth (10) Day of each month during the performance of the Services and the Work, Design-Build Firm shall submit to Owner and Program Manager a monthly Progress Report and a complete and accurate Application for Payment for any Services and Work referenced in the Approved Schedule of Values that has been completed during the previous calendar month. Each Application for Payment shall have attached a sworn certification by Design-Build Firm that:
 - (a) the applicable activities have been achieved;
 - (b) the quality of all Services and Work for which payment is requested is in accordance with this Agreement;
 - (c) Design-Build Firm is entitled to payment of the amount invoiced less Retainage;
 - (d) All Design-Build Firm Parties who have provided Services for which the payment is sought have assigned to Owner, without limitation, the entire right, title and interest in and to the exclusive use or reuse of all Work Product created or contributed by them in the performance of such Services, and that they have acknowledged such Work Product shall be and remain

the exclusive property of Owner, in accordance with the requirements of Section XX.A of this Agreement. Design-Build Firm shall furnish evidence of such assignments to Owner upon request;

- (e) title to all materials and equipment invoiced has passed or will pass to Owner in accordance with this Agreement;
 - (f) all Design-Build Firm Parties have been paid in full or will be paid in accordance with the terms of their subcontracts, purchase orders or other agreements from the proceeds of the amount invoiced; and
 - (g) upon receipt of the amount invoiced, the Worksite will be free of liens for the Services and Work invoiced.
2. Tasks for which payment is requested must be 100% complete or the task must be quantified into verifiable increments for partial payment to be due. Applications for Payment shall be prepared to include any amount authorized as an equitable adjustment to the GMP that is Approved by Owner's Construction Change Directive or other Contract Amendment. Applications for Payment must reference any applicable Purchase Order Number. Each Application for Payment shall be submitted by the Design-Build Firm with the following supporting documentation:
- (a) Summary of control milestones and items from Schedule of Values fully completed (100%) during the applicable payment period;
 - (b) Issues requiring resolution, including outstanding RFI's, Construction Change Directives and "ball-in-court" items;
 - (c) Two week look-ahead schedule;
 - (d) Any Design-Build Firm Parties arrivals, departures, or substitutions;
 - (e) Safety report and project cumulative metrics (lost time, injuries);
 - (f) Quality control report (findings, corrective actions, metrics by MasterFormat division);
 - (g) Updated Project Schedule with status date matching pay request date and summary describing any logic changes, activity additions/deletions, or negative float at control milestones or potential impact to Scheduled Date of Substantial Completion; and
 - (h) Signed by authorized executive of the Design-Build Firm, Partial or Final Claim Release, as applicable, by Design-Build Firm and all Design-Build Firm Parties in the form required by **Exhibit 17**.

3. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Design-Build Firm with procedures satisfactory to the Owner to establish the Owner's title to such materials and Equipment or otherwise protect the Owner's interest, and shall include applicable insurance, storage and transportation to the site for such materials and Equipment stored off the site.
4. The Design-Build Firm warrants that title to all Work covered by a payment will pass to the Owner no later than the time of payment. The Design-Build Firm further warrants that upon submittal of a payment, all Services and Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Design-Build Firm's knowledge, information and belief, be free and clear of liens, claims for payment of compensation, security interests or encumbrances in favor of the of the Design-Build Firm and Design-Build Firm Parties, and other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Project. However, a Certificate for Payment or partial or entire use or occupancy of the Project by the Owner shall not constitute Owner's acceptance of the Work.

C. Payment by Owner.

1. Design Build Firm's monthly Applications for Payment shall be complete and accurate to be certified by the Program Manager or Architectural Representative. The Program Manager or Architectural Representative shall within ten (10) business days after receipt certify on the Application for Payment whether it has been determined to be properly due and payable under this Agreement, resulting in a certified Application for Payment. If the Program Manager, Architectural Representative and/or Owner believe payment should be withheld in whole or in part, the Design-Build Firm shall be so notified that it shall be required to correct and resubmit the corrected Application for Payment, upon which the Program Manager or Architectural Representative shall within ten (10) business days review and certify on the Application for Payment whether it has been determined to be properly due and payable under this Agreement.
2. The issuance of a certified Application for Payment will not constitute a representation to Design-Build Firm that the Program Manager or Architectural Representative has:
 - (a) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work;
 - (b) reviewed construction means, methods, techniques, sequences or procedures;
 - (c) reviewed copies of requisitions received from Design-Build Firm Parties and other data requested by the Owner to substantiate the Design-Build Firm's right to payment; or

- (d) made examination to ascertain how or for what purpose the Design-Build Firm has used money previously paid on account of the Cost of the Work and/or Design-Build Firm's compensation.

The issuance of the certified Application for Payment shall only constitute a recommendation to the Owner in respect to the amount to be paid, which is not binding on the Owner if Owner knows of other reasons why payment should be withheld under this Agreement.

3. Upon certification of the Application for Payment, the Program Manager or Architectural Representative shall forward to Owner the certified Application for Payment. Upon such certification, the Design-Build firm shall enter that data into CPMS, as a request for payment on a certified Application for Payment. Design-Build Firm expressly agrees that such Application for Payment shall be deemed submitted and received only upon Design-Build Firm's entry thereof into CPMS for processing of payment.
4. Within thirty (30) Days after Owner's receipt of the certified Application for Payment and the Design-Build Firm's entering the pay request data into CPMS, the Owner shall pay Design-Build Firm the amount set forth therein, less amounts withheld in accordance with this Agreement. Owner shall withhold an amount equal to five percent (5%) of the amount invoiced ("**Retainage**") which shall be released as set forth in Section XII.A(3). Amounts shall be paid via electronic means (i.e., ACH or Federal Reserve Wire transfer of funds). The electronic payment shall be sent to Design-Build Firm's account designated by Design-Build Firm in writing to Owner within the time stated above.

D. Decisions to Withhold Certification or Payment.

1. The Owner and/or Program Manager may withhold issuance of a certified Application for Payment in whole or in part, or to withhold payment thereon, to the extent reasonably necessary to protect Owner, if in the Owner's or Program Manager's opinion, the representations to Owner in connection with the Design-Build Firm's Application for Payment are not correct.
2. The Owner shall be entitled to deduct amounts for the following items from any Application for Payment or from the request for Final Payment submitted by the Design-Build Firm:
 - (a) The fair market value of all tools, surplus materials, construction equipment, and temporary structures that were charged to the Work (other than rental items) but were not consumed during construction or retained by the Owner. Upon completion of the Work or when no longer required, Design-Build Firm shall either credit the Owner for the fair market value (as Approved by the Owner) for all surplus tools, construction equipment

and materials retained by the Design-Build Firm or, at Owner's option, use commercially reasonable efforts to sell the surplus tools, construction equipment and materials for the highest available price and credit the proceeds to the Owner's account.

- (b) Discounts earned by the Design-Build Firm through advance or prompt payments funded by the Owner. The Design-Build Firm shall obtain all possible trade and time discounts on bills for material furnished, and shall pay bills within the highest discount periods. The Design-Build Firm shall purchase materials for the Project in quantities that provide the most advantageous prices to the Owner.
 - (c) Rebates, discounts, or commissions obtained by the Design-Build Firm from material suppliers or Subcontractors, together with all other refunds, returns, or credits received for materials, bond premiums, insurance and sales taxes. Trade discounts, rebates, refunds, and amounts received from sales of surplus materials and equipment shall accrue to Owner, and Design-Build Firm shall make provisions and take such actions so that they can be obtained.
 - (d) Deposits made by Owner and forfeited due to the fault of the Design-Build Firm.
 - (e) Balances remaining on any allowances, the Construction Contingency, or any other identified contract savings.
3. If the Program Manager or Architectural Representative are unable to certify payment in the amount shown on the Application for Payment, the Program Manager will notify the Design-Build Firm to revise the Application for Payment. If the Design-Build Firm and Program Manager or Architectural Representative cannot agree on a revised amount, the Owner will cause Program Manager or Architectural Representative to promptly issue a certified Application for Payment for that amount the Program Manager is able to certify to the Owner. The Program Manager may also withhold a certified Application for Payment because of subsequently discovered evidence, or Owner's reports of dissatisfaction with the Work, which may nullify the whole or a part of a previously certified Application for Payment, to such extent as may be necessary in the Program Manager's or Architectural Representative's opinion to protect the Owner from loss for which the Design-Build Firm is responsible, including loss resulting from acts and omissions because of:
- (a) Defective Work not remedied;
 - (b) Third Party Claims filed or reasonable evidence indicating probable filing of such Claims unless security acceptable to the Owner is provided by the Design-Build Firm;

- (c) Failure of the Design-Build Firm to make payments properly to Design-Build Firm Parties or for their labor, materials or equipment;
- (d) Persistent and uncured Design-Build Firm non-compliance with the administrative provisions of the Contract Documents including, but not limited to, failure to electronically submit monthly subcontractor payment information utilizing the Subcontractor Payment and Utilization Reporting (S.P.U.R.) system;
- (e) Reasonable evidence that the Work cannot be completed for the unpaid balance of the Guaranteed Maximum Price;
- (f) Damage to the Owner or to the Work of a Separate Contractor;
- (g) Reasonable evidence that the Work will not be completed on time, or that the unpaid balance would not be adequate to cover actual damages and any Delay Liquidated Damages for an anticipated delay;
- (h) Delay Liquidated Damages accrued pursuant to Article VII;
- (i) Substantial failure to carry out the Work in accordance with the Contract Documents;
- (j) Persistent and uncured Design-Build Firm non-compliance with the administrative provisions of the Contract Documents including, but not limited to, failure to obtain and properly maintain certified payrolls from Design-Build Firm Parties, which shall be submitted bi-weekly in accordance with Section VIII.A(15).

Any applicable Delay Liquidated Damages shall be deducted and offset from and against any amount otherwise due on a certified Application for Payment.

4. When Owner agrees the above reasons for withholding payment are removed, the Application for Payment shall be resubmitted to the Program Manager, for recertification within ten (10) Days after resubmission for amounts previously withheld due to such reasons.
5. If the Owner is entitled to reimbursement or payment from the Design-Build Firm under or pursuant to the Contract Documents, such payment shall be made as soon as reasonably practicable, but in no event later than thirty (30) Days after written demand by the Owner. Sums not reimbursed or paid to Owner when due shall accrue interest at the maximum rate allowed by Applicable Law. Notwithstanding anything contained in this Agreement to the contrary, Owner shall have a right to offset such amount against payment otherwise due to the Design-Build Firm if Design-Build Firm fails to promptly make such payment to Owner or if Owner incurs any cost and expense to cure a default of the Design-Build Firm or to correct

defective Work. In such event, the Owner will deduct an amount equal to that which the Owner is entitled to deduct from any payment then or thereafter due to Design-Build Firm.

E. Payments to Design-Build Firm Parties.

1. The Design-Build Firm shall, in accordance with Chapter 2251 of the Texas Government Code, upon receipt of payment from the Owner, promptly pay the payments to Design-Build Firm Parties, in the amount to which they are entitled out of the amount paid to the Design-Build Firm on account of their Services and Work, reflecting any retainage withheld from Design-Build Firm on account of their portion of the Work. The Design-Build Firm shall require each of its Design-Build Firm Parties to similarly make and record payments to their sub-subcontractors and suppliers.
2. The Design-Build Firm shall report the actual payments to all Design-Build Firm Parties and electronically submit monthly Design-Build Firm Parties payment information utilizing the Owner's Subcontractor Payment and Utilization Reporting (S.P.U.R.) system, beginning with the first payment for Services or Work under the Contract, and with every payment thereafter (for the duration of the Contract). Electronic submittal of monthly Design-Build Firm Parties payment information will be accessed through a link on Owner's "Business Center" web page. The Design-Build Firm and Design-Build Firm Parties will be provided a unique log-in credential and password to access the Owner's S.P.U.R. system. The link may also be accessed through the following internet address: <https://saws.smwbe.com/>. Training on the use of the system will be provided by Owner. After the Design-Build Firm receives payment from Owner, Design-Build Firm shall electronically enter the amount paid to each Design-Build Firm Parties listed on the Design-Build Firm's Good Faith Effort Plan (**Exhibit 11**). This information will be utilized for subcontractor participation tracking purposes, and any inexcusable failure by Design-Build Firm to comply with the committed SWMB levels may be considered a breach of this Agreement. Notwithstanding the foregoing, Owner is not obligated to monitor payments to Design-Build Firm Parties, and nothing in this Section XII.E(2) shall create any right on the part of Design-Build Firm or its Design-Build Firm Parties against Owner, Program Manager or the Architectural Representative.
3. The Program Manager will, upon request, furnish to Design-Build Firm information regarding percentages of completion or amounts applied for by the Design-Build Firm on account of Work done by any of its Design-Build Firm Parties.
4. Neither Owner nor Program Manager shall have any obligation to pay or see to the payment of any money to any of Design-Build Firm Parties.
5. Certificates for Payment, progress payments, and partial or entire use or occupancy of the Project by Owner shall not constitute acceptance of Work not in accordance with the Contract Documents.

6. Design-Build Firm shall not withhold or permit the withholding from any Design-Build Firm Parties retainage of a greater percentage on their payments than the percentage Owner is entitled to withhold as retainage from payments to the Design-Build Firm.

XIII. Substantial Completion and Final Completion of the Work

A. Substantial Completion of the Work.

1. The Services and Work with respect to the Project, including each Service Center and its applicable facilities (including any areas of a site within the designated limits of construction), shall be considered to have achieved Substantial Completion when:
 - (a) all Project systems included therein are operational;
 - (b) all required governmental inspections and certification required therefore have been made and posted;
 - (c) any required initial instruction or training of Owner's personnel in the operation of the systems has been completed;
 - (d) all the finishes required therefore are in place;
 - (e) Owner has received Commissioning Agent's report that all exceptions have been resolved and all systems and equipment are in proper operating order;
 - (f) Design-Build Firm has provided Owner confirmation of the submission of all documentation necessary to obtain the Minimum Certification Level for the applicable facilities of the Project;
 - (g) A Certificate of Occupancy has been issued for the NEOC;
 - (h) All required POV parking and Owner's fleet parking is complete and striped as required to accommodate the vehicles to operate this facility; and
 - (i) A Certificate of Substantial Completion has been issued for the Project, including the NEOC and any of its related facilities, and the NESC, as applicable, fully executed and signed by the Owner, the DPOR, and also signed by the Program Manager or the Architectural Representative, confirming that the Substantial Completion thereof has been achieved.
2. The remaining Work to achieve Final Completion shall be Punch List Work only, so that the Owner may occupy the applicable portions of the Project, pending the completion of the Punch List Work by the Design-Build Firm, the completion of which shall not materially interfere with or hamper the Owner's operations. As a further condition of Substantial Completion of the Work or designated portion thereof, the Design-Build Firm shall certify that all remaining Punch List Work

with respect thereto will be completed within the time required for Final Completion.

3. When the Design-Build Firm considers that the Project, or a Service Center and its applicable facilities (including any areas of a site within the designated limits of construction), is Substantially Complete, the DPOR shall prepare for Program Manager's review and Owner's Approval a comprehensive list of items to be completed or corrected as Punch List Work prior to final payment. Failure to include an item on such list does not alter the responsibility of the Design-Build Firm to complete all Work in accordance with the Contract Documents.
4. When the Work or designated portion thereof has achieved Substantial Completion, the Program Manager or Architectural Representative will prepare a Certificate of Substantial Completion as soon as reasonably practicable thereafter, establishing the date of Substantial Completion, as Approved by Owner, and the respective responsibilities of the Owner and Design-Build Firm for security, maintenance, heat, and utilities, transfer of the risk of loss and insurance, and stating the time within which the Design-Build Firm shall finish all items on the Punch List accompanying the Certificate. The Design-Build Firm shall keep all required insurance in full force at least until the Certificate of Final Completion is issued, or any later date as otherwise required by this Agreement or Construction Change Directive.
5. The Work will not be considered suitable for tender as having achieved Substantial Completion until all mechanical, electrical, plumbing and other building systems included in the Work are operational as designed and scheduled, all designated or required inspections and certifications by governmental authorities have been made and posted, designated instruction of Owner's personnel in the operation of systems has been completed, and all final finishes required by the Contract Documents are in place. In general, the only remaining Work shall be minor in nature, so that Owner's use or occupancy thereof, and the Design-Build Firm's completion of the remainder of the Work therein, would not materially interfere or hamper the Owner's operations.
6. Notwithstanding the foregoing, the Owner may refuse to make payment on any Certificate of Substantial Completion or any Application for Payment (including, without limitation, the final Application for Payment) for any default of the Design-Build Firm. The Owner shall not be deemed in default by reason of withholding payment or exercising its right to require correction of any defect or deficiency in the Services and Work as a condition of any acceptance of the Project, or a Service Center or any of its applicable facilities.

B. Partial Occupancy or Use.

1. The Owner may, as hereinafter provided, occupy or use any completed or partially completed portion of the Project, or a Service Center or any of its related facilities

(including any areas of a site within the designated limits of construction) at any stage when such portion is sufficiently complete to enable Owner to commence such occupancy or use, provided such occupancy or use is consented to by Design-Build Firm and the Owner's insurer as required under Section XIII.C(1) and **Exhibit 13** and authorized by public Authorities Having Jurisdiction over the Work. Such partial occupancy or use may commence whether or not the portion is substantially complete. Any modification in the responsibilities of Owner and Design-Build Firm with respect to payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, or the period for correction and Final Completion of the Work required by the Contract Documents shall be established either by Contract Amendment or Owner's Construction Change Directive.

2. When the Project, a Service Center or any of its related facilities (including any areas of a site within the designated limits of construction) are sufficiently complete, or considered to have achieved Substantial Completion, Owner or Design-Build Firm may notify Program Manager and/or Architectural Representative, as appropriate, to schedule a site visit to confirm whether Owner may commence to make partial use or occupancy thereof. The scheduling of such a site visit with respect to a Service Center or any of its related facilities shall be limited to the extent to which Owner desires to assume partial use or occupancy thereof prior to Substantial Completion of the entire Project. If, following completion of a site visit of a Service Center or any of its related facilities for partial use or occupancy, Substantial Completion thereof has been determined to have been achieved, a Certificate of Substantial Completion shall be processed in accordance with this Contract. Owner's partial use or occupancy of a Service Center or any of its related facilities prior to Substantial Completion of the entire Project and issuance of Final Payment shall not be deemed an acceptance of the Services and Work as finally complete nor shall such occupancy create an independent obligation of Owner to make Final Payment. If Owner elects to make partial use or occupy a Service Center or any of its related facilities prior to Substantial Completion of the rest of the Project, the two-year warranty period shall commence to run in accordance with Section XV.B, below.
3. If, as a result of the inspection of any portion of the Project to determine whether Owner may commence partial use or occupancy thereof, the Program Manager and/or Architectural Representative identify any item, whether or not included on the list of Punch List Work, which does not conform to the requirements of this Agreement, so that the Owner can occupy or utilize the Work or designated portion thereof for its intended use, and the Design-Build Firm shall promptly correct such deficiency. Following correction, Design-Build Firm shall submit such portion for another site visit by the Program Manager and/or Architectural Representative, as appropriate, to determine whether the Owner may commence partial use or occupancy thereof. Design-Build Firm shall, upon demand, pay or reimburse Owner the amount of any additional fees, and/or other damages that Owner

reasonably incurs or sustains due to Design-Build Firm's failure to have promptly corrected any such deficiencies or non-conformities.

C. Final Completion of the Work.

1. Upon receipt of written notice that the Project has achieved Final Completion and upon receipt of a final Application for Payment, the Program Manager and/or Architectural Representative, as appropriate, will promptly make a site visit and review the completeness of the Project. The Work shall be considered to have achieved Final Completion when the Owner and Program Manager find the Services and Work, including all Punch List items, to have been completed in accordance with the Contract Documents, all data deliverables made and accepted, and the Contract fully performed, and all close out procedures and requirements have been met, as described below, and Owner has Approved the termination of coverage under the Builders' Risk Insurance and the transfer of the risk of loss to the Project to Owner as described in **Exhibit 13**. Thereafter, the Program Manager or Architectural Representative will prepare Certificate of Final Completion stating that to the best of the Program Manager's or Architectural Representative's knowledge, information and belief, and on the basis of the Program Manager's on-site visits, the Services and Work have been completed in accordance with terms and conditions of the Contract Documents and that the balance found to be due the Design-Build Firm is correctly stated on the final Application for Payment, and it is certified to be due and payable. Payment of the Design-Build Firm's final Application for Payment shall occur within thirty (30) Days after the Certificate of Final Completion has been signed by the Owner, Program Manager, and Design-Build Firm, confirming that Design-Build Firm has achieved Final Completion of the Project as of such date and Design-Build firm has entered the final pay request in CPMS.
2. The Design-Build Firm shall follow the Owner's Approved process for Project close-out, which shall include the following:
 - (a) Inform Owner and Program Manager when Substantial Completion of the Project, or completion of Work for significant Project components has been achieved in relation to the schedule milestones established therefor;
 - (b) Arrange for final inspections or tests of the Work of service providers for the Projects, and receive, review and comment on all certificates of inspections, tests and approvals required by Applicable Laws and Regulations or the applicable contracts for the Project;
 - (c) Participate with Owner and Program Manager in Substantial Completion inspections and preparation of consolidated Punch Lists of items needed for Final Completion for the Project;

- (d) Cooperate with the Program Manager and Owner's commissioning agent to complete all commissioning activities, including submission of all commissioning reports, plans and other verification documents needed to facilitate Owner's taking of possession of the Project or completed portions thereof;
 - (e) Complete all Punch List items and participate in Final Completion inspections;
 - (f) Tender to Owner in writing Design-Build Firm's confirmation of Final Completion of the Project;
 - (g) Conduct all required training of Owner management personnel responsible for operation and maintenance of the Project in accordance with the Approved training plan;
 - (h) Deliver all warranties and guarantees, and Project Manuals related to the Project and all equipment and products incorporated therein;
 - (i) Manage the warranty protocol included in **Exhibit 18** throughout the warranty period to identify, enforce and promptly resolve all warranty claims in consultation with the Owner. If Design-Build Firm, within a seventy-two (72) hour period after its receipt of notice of a defect covered by warranty, fails to correct or commence to the reasonable satisfaction of Owner diligent action on site to correct the defect, the warranty period for such item shall be extended, day-for-day, for each day beyond of such period until Design-Build Firm has commenced such appropriate corrective efforts;
 - (j) Cause and facilitate the transfer of operation of the Project to Owner, including the acquisition and transfer of ownership of all Work Product, Record Documents, project documentation, and BIM models from Project Team members to Owner;
 - (k) Prepare and timely submit, and obtain certifications or approvals from all utility operators and local, state, and federal authorities as required for Owner's use and operation of the Project;
 - (l) Develop and submit any documentation required to certify the Project is asbestos-free.
3. Neither final payment nor any remaining retained percentage shall become due until the Design-Build Firm submits to the Program Manager:
- (a) a notarized affidavit in the form of affidavit included herewith as **Exhibit 17.1** stating under oath that all subcontractors, vendors, and other persons

or firms who have furnished or performed labor or furnished materials for the Work have been fully paid or satisfactorily secured and that payrolls, bills for materials and equipment, and other indebtedness connected with the Services and Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, and all accrued Delay Liquidated Damages have been paid (whether by direct payment from the Design-Build Firm or by deduction and offset from and against any amount otherwise due on an Application for Payment);

- (b) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least thirty (30) Days prior written notice has been given to the Owner;
 - (c) a written statement that the Design-Build Firm knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents;
 - (d) consent of surety to final payment in a form acceptable to Owner, signed by the surety company who provided the Payment Bond for the Work, to the effect that such surety company consents to Final Payment to the Design-Build Firm); and
 - (e) if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner.
4. As a condition precedent to issuance of Final Payment, the Design-Build Firm shall simultaneously furnish to Owner and Program Manager:
- (a) Design-Build Firm's Application for Final Payment, resolving to the Owner's reasonable satisfaction any charges determined by audit to be contrary to the provisions of this Agreement;
 - (b) Certificate of Final Completion signed by the Owner, Program Manager and Design-Build Firm, certifying that the Project is finally complete and that all Punch List Work has been satisfactorily performed;
 - (c) As-Builts produced by updating the BIM, accurately showing the Project as constructed in the format designated by the Owner, and delivered in BIM format that can be read by BIM viewable software, and also delivered in Two-dimensional CADD files and a full size set of digital files in PDF format, with each CADD drawing file being free standing and independent, containing no references or cross-references to separate files. Such As-

Builts shall be rendered so as to show applicable adjacent pre-existing conditions remaining as a part of the Project, and all modifications to existing conditions incorporated into the Project, and all new construction;

- (d) Hard copy sets of As-Built Drawings and Specifications and any other requirements as identified in the CDRL (**Exhibit 10**) and the Project Management Plan (**Exhibit 8**);
- (e) Certified copies of reports of all tests performed by or for the Design-Build Firm and the Design-Build Firm Parties, as applicable;
- (f) All warranties, guarantees and bonds required by and in compliance with the Contract Documents shall remain in effect and shall be managed throughout the warranty period to identify, enforce and resolve all warranty claims in consultation with the Owner in accordance with the warranty protocol included in **Exhibit 18**;
- (g) All operations and maintenance (“**O&M**”) data and/or other data and “closeout” documents required under the Contract Documents or otherwise reasonably required by Owner in binder form (2 copies of each) and in digital form delivered on USB drives with three (3) copies of each in a searchable and tabbed PDF document, which may be broken into PDF files that align with the O&M physical binders;
- (h) Design-Build Firm’s written confirmation that all operations and maintenance training has been completed and recorded as movie files (in digital Microsoft AVI format, and delivered to Owner on USB files or uploaded to CPMS);
- (i) Other data establishing payment or satisfaction of obligations such as receipts, final releases and waivers of liens, claims, and security interests or encumbrances arising out of the Agreement, including final releases of Design-Build Firm Parties, all of which shall be in the form set forth in **Exhibits 17.4 and 17.5**. Provided, however, Design-Build Firm may submit its final Application for Payment with provision for Pending Third Party Claims that Owner has previously Approved to leave pending after issuance of Final Payment, which agreement shall include acceptable provisions for Owner Indemnitees to be fully defended, indemnified, and held harmless from such Pending Third Party Claims;
- (j) The surety’s or sureties’ written consent with respect to the release of such final payment for purposes of the release of each Payment Bond and Performance Bond securing the obligations to perform the Services and Work related to the Project;

- (k) Receipt of evidence of the submission of complete documentation necessary to be prepared and submitted by Design-Build Firm in order to enable Program Manager to confirm in writing to Owner that the applicable facilities of the Project are capable of achieving no less than the Minimum Certification Level.
- 5. Acceptance of Final Payment by the Design-Build Firm shall constitute a waiver of Claims by Design-Build Firm except for any Pending Third Party Claims then pending in accordance with Section XIII.G.
- 6. Suppliers, any subcontractors, and persons claiming to have performed any labor, or to have supplied any equipment and materials toward the performance of this Contract, and who claim not to have received proper compensation from Design-Build Firm or Design-Build Firm Parties for same, shall be instructed by Design-Build Firm that written and documented claims must be sent directly to Design-Build Firm and its surety in accordance with Chapter 2253, Texas Government Code. Upon written request by a claimant to Owner pursuant to Chapter 2253, Texas Government Code, a copy of the Design-Build Firm's Payment Bond and Contract will be furnished to claimant. **The Owner shall further furnish a statement to claimants that claimants are cautioned that no legal or equitable lien exists on Owner's funds yet unpaid to Design-Build Firm, and that reliance on notices sent only to the Owner may result in loss of claimant's rights to timely perfect recovery against Design-Build Firm and/or its surety. The Owner is not responsible in any manner to a claimant for collection of unpaid bills, and accepts no such responsibility because of any unauthorized representation by any agent or employee of Owner to the contrary.**

D. Owner's Right to Withhold Final Payment.

Any provision hereof to the contrary notwithstanding, Owner shall, to the extent reasonably required to protect Owner, be entitled to withhold Final Payment if any one or more of the following conditions exists:

- 1. Design-Build Firm is in breach or default under this Agreement;
- 2. Any part of the Final payment is attributable to Services or Work not performed strictly in accordance with this Agreement; provided, however, such payment shall be made as to the part thereof performed strictly in accordance with this Agreement; or
- 3. Release of the Final Payment would exceed the Final Guaranteed Maximum Price for the Project, which shall in no event be more than the Guaranteed Maximum Price for the Project.

E. Final Payment Subject to Final Accounting.

In addition to the procedures contained in other provisions of this Agreement, Owner shall have no obligation to make Final Payment until Owner and Program Manager have received and verified the accuracy of the Design-Build Firm's final accounting of the entire Cost of the Services and Work and all Fees as within the Guaranteed Maximum Price for the Project. Owner will complete the process of verifying the Design-Build Firm's final accounting of the Cost of the Work and Fees within a reasonable time, not to exceed ninety (90) Calendar Days, after the Design-Build Firm has submitted a complete final accounting to the Program Manager and Owner. The aggregate total of all payments to Design-Build Firm for all Services and Work under this Agreement, including all Fees, shall be limited to the GMP. Following the Final Completion of the Work, Owner shall be entitled to a credit for any savings realized upon on amounts included in the GMP, including any unused Construction Contingency and any unused savings on subcontracted Work not used to offset cost increases for other subcontracted Work within the GMP. If any payments are made to Design-Build Firm that exceed the GMP, then Design-Build Firm shall promptly refund to Owner, and shall be deemed to have released Owner from liability for, any such excess payment.

F. Owner's Right to Audit Design-Build Firm's Books and Records.

The Design-Build Firm shall keep full, auditable and detailed accounts and exercise such cost controls as may be necessary for proper financial management under this Agreement. The accounting and control systems shall be satisfactory to Owner, provided Owner's Approval shall not be unreasonably withheld if the same conform to generally approved accounting practices. Owner, Owner's accountants, Owner's agents, or its authorized representative shall be afforded reasonable access upon Owner's request, at reasonable times, as determined by Owner, to all records of Design-Build Firm and Design-Build Firm Parties relating to the Project, and the Design-Build Firm shall preserve these for a period of three (3) years after final payment, or for such longer period as may be required by law. In addition to the foregoing:

1. The Design-Build Firm's records shall include accounting records (hard copy, as well as computer readable data), written policies and procedures, subcontract files (including proposals of successful and unsuccessful bidders, bid recaps, etc.); original estimates; estimating work sheets; correspondence; Contract Amendment files (including documentation); general ledger entries detailing cash and trade discounts earned; insurance rebates and dividends; and any other supporting evidence necessary to substantiate charges related to this Agreement (all foregoing hereinafter referred to as "**records**"). All such records shall be opened to inspection and subject to audit and/or reproduction by Owner's agent or its authorized representative to the extent necessary to adequately permit evaluation and verification of Design-Build Firm's compliance with this Agreement.

Those records which relate solely to the cost of items included in Design-Build Firm's Fees that are fixed by this Agreement will not be subject to audit; provided, however, Design-Build Firm's records necessary to evaluate and verify the Cost of the Services and Work and the allocations of Design-Build Firm's Fees as they may apply to the Cost of the Work, shall be subject to audit;

2. Such audits may require inspection and copying from time-to-time and at reasonable times and places of any and all such information, materials and data as set forth above of every kind and character;
3. Owner's agent or its authorized representative shall have reasonable access at reasonable times to the Design-Build Firm's facilities, shall be allowed to interview all current or former employees to discuss matters pertinent to the performance of this Agreement, may contact Design-Build Firm Parties or other vendors related to the Project, shall have access to all necessary records, shall be provided adequate and appropriate work space in order to conduct audits in compliance with this Section XIII.F, and will be provided support from the Design-Build Firm's staff as required. In the event that Design-Build Firm does not provide such access and/or all necessary records or support upon reasonable notice to Design-Build Firm by Owner (at least seven (7) business days), Design-Build Firm shall be responsible for the reasonable actual cost of Owner's fees and any associated expenses for any attempted audit which cannot be completed for such reasons;
4. Owner shall, subject to the provisions of Section XIII.E, above, be entitled to recognize and recover 100% of any savings identified by cost review or audit at any time, before or after Final Payment; and
5. If at the conclusion of any audit performed as set forth herein, the audit discloses overcharges by the Design-Build Firm to the Owner that are:
 - (a) proven; and
 - (b) in excess of one half percent (0.5%) of the total Cost of the Work;

then the reasonable actual cost of the Owner's audit shall be reimbursed to the Owner by the Design-Build Firm within thirty (30) Days of submission. Any adjustments and/or records due to the overcharges shall be made within a reasonable amount of time (not to exceed ninety (90) Days) from presentation of Owner's findings to Design-Build Firm.

- G. Acceptance of Final Payment Constitutes Release.** Design-Build Firm's or Design-Build Firm's successors' acceptance of Final Payment under this Agreement, shall constitute a full and complete release of Owner from any and all Claims whatsoever, which Design-Build Firm or Design-Build Firm's successors or assigns have or may have against Owner under the provisions of this Agreement, except for any Pending Third Party Claims that Owner has Approved to leave pending pursuant to Section XIII.C(4)(a), above.

XIV. Uncovering and Correction of Work

A. Uncovering of Work.

1. If a portion of the Work is covered contrary to the Program Manager's request or the requirements specifically expressed in the Contract Documents, it must, if required in writing by the Program Manager, be uncovered for the Owner's, Program Manager's and/or Architectural Representative's examination and be replaced at the Design-Build Firm's expense without change in the Scheduled Date of Substantial Completion.
2. If a portion of the Work has been covered which the Program Manager has been notified of, but not specifically requested, the opportunity to examine a portion of the Work prior to its being covered, the Program Manager may request to see such Work and it shall be uncovered by the Design-Build Firm. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall be at the Owner's expense and shall be added to the GMP. If such Work is not in accordance with the Contract Documents, correction shall be at the Design-Build Firm's expense unless the condition was caused by the Owner or a Separate Contractor in which event the Owner shall be responsible for payment of such costs. All nonconforming Work shall be retested after it has been corrected at the Design-Build Firm's expense. Reasonable architectural or engineering services required to analyze and correct nonconforming Work shall be at the Design-Build Firm's expense.

B. Correction of Work.

1. Before or After Substantial Completion. The Design-Build Firm shall promptly correct Work rejected by the Program Manager for failing to conform to the requirements of the Contract Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing, inspections and architectural or engineering services made necessary thereby, shall be at the Design-Build Firm's expense.
2. After Substantial Completion.
 - (a) Pursuant to the Design-Build Firm's warranty obligations under Article XV, if, within two (2) years after:
 - (i) the date of Substantial Completion of the Project, or Substantial Completion of any Service Center (if Owner elects to occupy such Service Center or any of its related facilities), or
 - (ii) the date for commencement of warranties established under Article XV.

or any special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of this Agreement, the Design-Build Firm shall, subject to the provisions of Section XIV.B(6), below, correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Design-Build Firm Approval of such non-conforming condition. The Owner shall give such notice promptly after discovery of the nonconforming condition. If the Design-Build Firm fails to correct nonconforming Work within a reasonable time after receipt of notice from the Owner or Program Manager, the Owner may correct it in accordance with Article XV. The foregoing notwithstanding, nothing in this Agreement shall be construed as a waiver by Owner of its right to assert a claim for breach of contract with respect to any breach hereof, including any latent defect in Design-Build Firm's Services and Work, if the same was not actually discovered by Owner in sufficient time to report the same to Design-Build Firm during the applicable warranty period.

- (b) The two (2) year warranty period (or other applicable warranty period) shall be extended with respect to portions of Services and Work performed after the Scheduled Date of Substantial Completion by the period of time between Scheduled Date of Substantial Completion and the date that Substantial Completion is actually achieved with respect to such portions.
 - (c) The two (2) year warranty period (or other applicable warranty period) shall be extended for a like period from the date of correction to apply to any corrective warranty Services and Work performed by the Design-Build Firm, pursuant to Section XV.C.
3. The Design-Build Firm shall remove from the Worksite portions of the Work that are not in accordance with the requirements of the Contract Documents and are neither corrected by the Design-Build Firm nor Approved by the Owner.
 4. Subject to the provisions of Section XIV.B(6), below the Design-Build Firm shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of the Owner or Separate Contractors caused by the Design-Build Firm's alteration of such construction contrary to the requirements of the Contract Documents. Nonconforming construction of Owner or Separate Contractors shall be corrected by Design-Build Firm at its expense, if such nonconforming construction was the result of, Design-Build Firm's failure to perform its obligations under this Agreement.
 5. Nothing contained in this Article XVI shall be construed to establish a period of limitations with respect to any of Owner's rights in connection with this Agreement. Nothing contained in this Article XVI is intended to limit or modify any of Design-Build Firm's obligations under the law or under the Contract Documents, including any warranty obligations, expressed or implied.

6. Design-Build Firm's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Design-Build Firm, failure of Owner to maintain or operate in accordance with Approved O&M Manuals, or normal wear and tear and normal usage.
7. Prior to any legal action against Design-Build Firm to recover damages arising out of a defect in the Work, Owner will provide Design-Build Firm a written statement of the known nature of the defect that has been reviewed by and prepared with the input of the Owner's relevant design consultant and its relevant engineering subconsultants, describing the defect with reasonable particularity, and including copies of any photographs, records, or reports concerning the defect in Owner's possession, and any known modifications, maintenance activities, or repairs made by Owner after Final Completion to that portion of the Work affected by the defect. Design-Build Firm will provide a copy of such statement to each Subcontractor or Supplier who performed labor and/or provided materials related to such portion of the Work. Within a reasonable time, but not more than ten (10) business days after receiving such statement, Design-Build Firm shall commence to exercise due diligence to complete an inspection of the defect, and permit Owner's representative(s) to observe and document the nature and results of such inspection. If requested by Owner, the Design-Build Firm shall engage the services of one or more qualified, independent professional consultants acceptable to Owner to attend and participate in the inspection, who shall render as soon as possible an independent report of the observations from the inspection and the independent consultant's professional opinions based on such observations, including the independent consultant's findings and recommendations with respect to the reasonable likelihood of cause(s), the alternatives for remediation, and the range of estimated cost, to remedy such defect(s). Owner and Design-Build Firm agree that such consultants shall not be required to assume legal liability for the ultimate outcome of the parties' actions taken to remedy, or the means and methods of remedying, such defect(s). Owner shall be given reasonable notice of, and opportunity to participate in, any discussions or meetings with such consultant(s) concerning such defect. A copy of any such independent consultant's report shall be furnished simultaneously to Owner and Design-Build Firm. Within five (5) business days after the diligent completion of the inspection, and in no event later than five (5) business days after Design-Build Firm's receipt of any such independent consultant's report, the Design-Build Firm shall deliver to Owner Design-Build Firm's proposal for remediation of the defect. Such proposal shall include a schedule to remedy the defect(s) as soon as reasonably possible and the reasonable cost to remedy the defect(s). Design-Build Firm shall confirm whether Design-Build Firm will bear the cost of such remediation if the consultant has concluded that the Design-Build Firm or its Sub-Design-Build Firms or Suppliers are responsible for remedying the defect. If Design-Build Firm fails to fulfill any of the requirements of this Section XIV.B(7) within the applicable time provided above, Owner shall be entitled to immediately take any action Owner deems necessary to remedy the defect (and any other related defects discovered during the

course of the inspection) and to otherwise protect Owner's interests. Owner shall not be required, and to the maximum extent allowed by law Design-Build Firm waives any requirement or right to receive any other notice or be provided other opportunity to investigate or cure, or to require Owner to obtain any certificate of merit in support of any legal action against Design-Build Firm to recover damages for, any such defects. The party responsible for causing such construction defect(s) shall pay the reasonable costs incurred by the parties to investigate and remedy the defect(s). Nothing herein shall preclude Owner from (i) making emergency repairs necessary to protect the Project or the health, safety, and welfare of the public or a building occupant, or (ii) exercising any other rights or remedies available to Owner at law, or under any other provision of this Contract, all of which remedies shall be cumulative and in addition to the remedies afforded to Owner by this Section XIV.B(7).

B. Acceptance of Nonconforming Work.

If the Owner prefers to accept Work which is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Design-Build Firm's compensation will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made for such Work.

XV. Design-Build Firm's Warranty Obligations

A. Design-Build Firm's Warranty for Services and Work.

Design-Build Firm warrants all Services rendered and Work performed hereunder shall be performed in accordance with Design-Build Firm's Standard of Care, all Applicable Laws, and the requirements of this Agreement and any Contract Amendment or Construction Change Directive. Except as otherwise provided in Section XV.B, below, with respect to Owner's partial use or occupancy of a Service Center or any of its related facilities prior to Substantial Completion of the rest of the Project, Design-Build Firm shall re-perform, at no cost to Owner, any Services and Work in accordance with this Agreement as required to correct any error, omission, defect or deficiency arising within a period of two (2) years (or such other longer warranty period as required by the Contract Documents), following Final Completion of all Services and Work required hereunder to the extent any such error, omission, defect or deficiency arises as a result of Design-Build Firm's failure to so perform the Services and Work as required hereunder. Owner shall have the right to reject any defective design Services or other defective Work on the Project of which Owner becomes aware and the Design-Build Firm shall promptly correct any such defect at the Design-Build Firm's expense. Should any portion of the Project Work be damaged or defective due to an error or omission in the design Services, including errors or omissions in any plans, drawings, specifications, and other construction document materials prepared or furnished by the Design-Build Firm, the Design-Build Firm shall promptly correct any such damage or defect at no additional cost to the Owner. Should the Design-Build Firm refuse or neglect to correct any such damage or defect within a reasonable time after notice,

Owner may cause the damage or defect to be corrected and withhold payment or collect monetary damages equal to the cost of replacing or repairing the defective Work.

B. Design-Build Firm's Warranty and Warranty Period.

The Design-Build Firm warrants to the Owner the Services and Work will be performed and completed in a good and workmanlike manner and in accordance with the Contract Documents. For a period of two (2) years from Substantial Completion (or such other longer warranty period of time as required by the Contract Documents), the Work, and all materials and equipment furnished under the Agreement will be of good quality and new unless otherwise required or permitted by the Contract Documents, and will be free from defects and will conform to the requirements of, and reasonably inferable from, the Contract Documents. If, pursuant to Section XIII.B, above, Owner elects or agrees to assume partial use or occupancy of an Operation Center or any of its related facilities prior to Final Completion of the applicable portion of Project, the two-year warranty period shall commence to run with respect to the Operations Center and all of its related facilities upon Final Completion thereof, and such warranty period shall run independently of the two-year warranty period with respect to the other portions of the Project, which warranty period shall remain in effect and not be reduced or diminished by Owner's partial use or occupancy. If Owner elects to issue to Design-Build Firm a Certificate of Final Completion and/or Final Payment for the Work prior to Design-Build Firm's delivery of all of the documents required as a condition precedent to issuance of Final Payment under Section XIII.C(3)(c) and (d), the issuance of either of the foregoing shall not relieve Design-Build Firm of its obligation or be deemed to waive its duty to deliver all such documents, which shall remain a continuing obligation and duty until fulfilled; furthermore, and notwithstanding the Design-Build Firm's failure to have earlier delivered such documents, commencing on the expiration of thirty (30) Days after issuance of the Certificate of Substantial Completion, the warranty periods established by this Agreement for the Work and for any item of equipment or component of the Work, shall be deemed to be extended day for day for each day following the issuance of the Certificate of Substantial Completion until such documents have been delivered to Owner.

C. Design-Build Firm's Duty to Remedy Defects and Warranty of Repaired or Replaced Work.

Subject to Section XIV.B(6), the Design-Build Firm shall, at the Owner's reasonable election, either repair or replace any defects in any of the Design-Build Firm's Work, Services or related Design Deliverables as soon as the Design-Build Firm becomes aware of such defects or is notified of such defects. Should the Design-Build Firm refuse or neglect to make good such defects within a reasonable time after receiving notice requesting such remedial warranty Work, then the Owner shall be entitled to make good such defective Work, Services or related Design Deliverables at the Design-Build Firm's expense. Design-Build Firm's obligation hereunder is in addition to, and not in substitution of, any other remedy the Owner may have hereunder, or at law or in equity. Any warranty repair or replacement shall comply with the requirements of this Agreement and shall be

verified by the Design-Build Firm's performance of testing as Owner may require. All costs incidental to such repair, replacement, and testing, including the removal, replacement and reinstallation of equipment and materials necessary to gain access to concealed areas, shall be borne by the Design-Build Firm. Design-Build Firm warrants such repaired or replaced Work against defective materials, and workmanship for a like period of warranty from the Owner's acceptance thereof. Should Design-Build Firm fail to promptly make the necessary repair, replacement, and testing, Owner may perform or cause to be performed the same at Design-Build Firm's expense. Design-Build Firm shall be liable for the satisfaction and full performance of the warranties required by the Contract Documents. The foregoing notwithstanding, if this Agreement has been terminated for any reason hereunder, Design-Build Firm shall remain liable to Owner for all reasonable costs Owner incurs to repair or replace defective Work discovered after termination, including reasonable fees and costs of Owner's staff, its attorneys and consultants to determine the nature of and to correct such defective Work, inclusive of all material and labor costs to remedy such defective work, which liability shall survive termination hereof for any reason and shall be a continuing obligation covered by the Performance Bond.

D. Design-Build Firm's Ancillary Warranty Obligations.

All warranties include all Services and Work, and shall be in writing signed by the Design-Build Firm and countersigned by the Design-Build Firm Parties performing the same and/or the manufacturer thereof, as applicable, and delivered to Owner prior to final payment. All original Shop Drawings, warranties, and operation manuals as required by the Specifications shall be electronically included in the BIM model six (6) months prior to completion of the Work for all new construction, or as soon thereafter as is reasonably practicable. As of the time of Final Completion of the Work, the Design-Build Firm agrees to assign to Owner any and all Design-Build Firm Parties' and any manufacturers' warranties relating to labor, equipment and materials installed in the Work. Design-Build Firm further agrees to perform the Work in such manner so as to preserve any and all such manufacturers' warranties. In addition to the foregoing, the Design-Build Firm shall comply with all other warranties referred to in any other provision of the Contract Documents. Where more than one warranty obligation applies hereunder, the more stringent warranty obligation shall govern.

XVI. Design-Build Firm's Bonds

A. Security Bond Required Pending Establishment of Final Guaranteed Maximum Price.

Within ten (10) Days following the Effective Date of this Agreement, Design-Build Firm shall provide a Security Bond (**Exhibit 7.3**) in the form of such Exhibit for an amount not less than the Initial GMP less the amount of the Design Services Fee, which amount is the construction budget for the Project that is specified in the DCP. The Security Bond shall meet the same requirements as set forth for Payment Bond and Performance Bond. Owner shall be entitled to retain the Security Bond, which shall remain in effect, until Owner has Approved a Final GMP, as provided in Section XVI.B, below. If the Security Bond is

cancelled, Design-Build Firm shall replace the Security Bond, or provide other financial security under terms substantially the same as the Security Bond and otherwise acceptable to Owner, in Owner's sole discretion, within thirty (30) Days of Owner's receipt of the surety's notice of cancellation, failing which, Design-Build Firm shall be deemed to be in default of its obligations hereunder and to have committed a material breach of this Agreement, and Owner may proceed in accordance with the provisions of Section XVII.A, and/or be entitled to enforce any other remedy or right the Owner may have hereunder in relation to a breach of this Agreement by Design-Build Firm.

B. Payment and Performance Bonds Required.

Payment and Performance Bonds shall be delivered to Owner within ten (10) Days following the Effective Date of this Agreement in the form required by Texas Government Code Section 2269.311, in the forms prescribed in **Exhibits 7.1 and 7.2**. Such Bonds shall be:

1. Issued with the Owner as the named obligee;
2. Executed by a corporate surety company authorized to do business in the State of Texas with such financial standing to have a rating from A.M. Best Company (or other equivalent rating company) equal to or better than "A-" and on the current list of sureties published by the United States Department of Treasury and shall have a Power of Attorney attached. If the A.M. Best Company rating for a surety issuing either of said bonds falls below "B+," Design-Build Firm shall replace the original bonds with bonds from a surety meeting the requirements of this Section XVI.B;
3. Issued in compliance with Texas Government Code Section 2269, et seq.;
4. Issued each with the penal sums equal to the portion of the Guaranteed Maximum Price that applies to the sum of the Cost of the Work and the Construction Services Fee, only, and excludes the Design Services Fee, for the Project;
5. Maintained for the benefit of the Owner;
6. Furnished before any Work in the performance of the Construction Services is commenced; and
7. Bond premiums shall be included in and charged as part of the General Administrative Fee at no more than the best rate available to Design-Build Firm for a project of similar magnitude, but in any event not to exceed 2.5% of the penal sum for the bonds established below.

C. Performance Bond Requirements.

Performance Bonds shall cover Design-Build Firm's warranty obligations for a period not to exceed two (2) years from each applicable Scheduled Date of Substantial Completion for the Project. Owner shall have no obligation to pay or to reimburse to Design-Build Firm for performance bond premiums for the issuance of subcontractor default insurance or bonds of subcontractors for the performance of the Services and the Work, which shall not be charged as a Cost of the Work.

D. Payment Bond Requirements.

Design-Build Firm's Payment Bond shall be provided for one hundred percent (100%) of the value of the Guaranteed Maximum Price established for the Project. Owner shall have no obligation to pay or to reimburse to Design-Build Firm for any additional costs for subcontractor payment bond premiums, which shall not be charged as a Cost of the Work. Owner shall not be charged for payment bonds of Design-Build Firm's subcontractors if required by Design-Build Firm.

E. Subcontractor Bond and Security Costs.

If the Design-Build Firm chooses to purchase subcontractor default insurance, or to require bonds of its subcontractors, the Design-Build Firm shall pay for such insurance and bonds out of its Fees. Performance by a surety of any of the obligations of Design-Build Firm set forth in the Agreement shall not relieve Design-Build Firm of any of its obligations hereunder.

F. Additional Security.

If Owner receives notice of a Pending Third Party Claim that the third party claimant has acquired by assignment the right to receive payment of the Design-Build Firm's receivables as they become due and payable under this Agreement, Design-Build Firm agrees that, as a condition of its right to continue to perform under this Agreement, Design-Build Firm shall furnish to Owner as security for the performance of its obligations hereunder an irrevocable standby letter of credit in favor of Owner issued by a national bank in form reasonably acceptable to Owner, in an amount equal to the sum of the current unpaid balance of the Contract plus any amounts in excess thereof that may be owed to Owner as a result of Design-Build Firm's delay, deficiency, or failure to perform its obligations hereunder.

XVII. Suspension and Termination

A. Right of Either Party to Terminate for Cause.

This Agreement may be terminated for cause by either Party for material breach by the other Party to perform (through no fault of the terminating Party) in accordance with the terms of this Agreement.

1. Design-Build Firm's Default.

- (a) Material breach by Design-Build Firm shall include, but is not limited to the following:
- (i) Design-Build Firm has made, or allows to be made, any material misrepresentation with respect to the Agreement;
 - (ii) Design-Build Firm materially fails to timely perform any obligation or duty of Design-Build Firm under this Agreement;
 - (iii) Design-Build Firm materially fails to timely cure any default or breach in accordance with the terms of this Agreement;
 - (iv) Design-Build Firm assigns its rights and/or obligations under this Agreement without the prior written consent of the Owner;
 - (v) Design-Build Firm ceases to continue to do business as a going concern employing the personnel performing Services on the Project; or
 - (vi) Design-Build Firm violates any rule, regulation or law applicable to the Project and/or the Agreement and fails to timely correct such violations following receipt of notice by Owner.
- (b) When any of the reasons described herein exist, Owner may, without prejudice to any other rights or remedies, and after giving Design-Build Firm the notice required hereunder, and Design-Build Firm's failure to cure, terminate this Agreement in whole or in part and do any one or more of the following, at the sole discretion of the Owner:
- (i) take possession of all Work Product, including all documents and materials related to the Project or this Agreement that is in the possession of the Design-Build Firm;
 - (ii) accept assignment of contracts relating to the Design-Build Firm's Services on terms and conditions acceptable to Owner;
 - (iii) finish the Design-Build Firm's Services and Work by whatever reasonable method Owner may deem expedient, in which event, upon written request of the Design-Build Firm, Owner will furnish the Design-Build Firm with an accounting of the costs incurred by Owner in finishing Design-Build Firm's Services; or
 - (iv) recover from the Design-Build Firm, or deduct from any sums then owed to the Design-Build Firm, the losses, costs and damages

incurred by Owner, directly or indirectly arising from Design-Build Firm's default, including attorneys' fees.

If Owner terminates this Agreement for cause as set forth above, any amounts due for Services and Work performed shall be subject to offset in satisfaction of all amounts and damages due Owner.

2. Owner's Default. Design-Build Firm may terminate this Agreement by written notice to Owner upon Owner's failure to cure default as hereinafter provided, if:
 - (a) Owner fails to timely pay Design-Build Firm any sums due under the Agreement, which are not then the subject of a good faith dispute;
 - (b) the Owner fails to timely cure any noticed default or breach under this Agreement; or
 - (c) the Owner fails to timely perform any obligation or duty of the Owner under this Agreement, which is not then the subject of a good faith dispute between Owner and Design-Build Firm.

3. Notice and Opportunity to Cure Default. The Party not in default of this Agreement shall send the defaulting Party written notice of the alleged default. The Party alleged to be in default shall have a period of fifteen (15) business days from the date notice is received to cure the default. If the default is not cured within the fifteen (15) business day period, then the other Party may thereafter terminate the Agreement by sending the defaulting Party notice of termination, which termination is effective upon sending of the notice.

B. Right of Owner to Terminate for Convenience.

The Owner reserves the right to terminate this Agreement in whole or in part for the convenience of the Owner by issuing a signed, written notice of termination for convenience, which termination shall become effective on the twentieth (20th) Day following receipt of notice, or upon the scheduled completion date of the milestone, task, or phase or stage of the Project in which Design-Build Firm is then currently authorized to perform Services, whichever occurs first.

C. Right of Owner to Suspend Services.

The Owner reserves the right to suspend Services under this Agreement in whole or in part at any time and from time-to-time for the convenience of the Owner by issuing a written notice of suspension (citing this paragraph), which notice outlines the reasons for the suspension and the then estimated duration of the suspension. The Owner's estimated duration of the suspension shall in no way constitute a representation or guarantee of the total number of days of suspension. Such suspension shall take effect immediately upon the date specified in the notice and if no date is specified, then the date the notice of

suspension is received by the Design-Build Firm. Upon receipt of a notice of suspension in excess of one hundred twenty (120) consecutive Days, the Design-Build Firm shall have the right as its sole and exclusive remedy, to terminate this Agreement by written notice to the Owner. Design-Build Firm may exercise this right to terminate any time after a suspension has continued for more than one hundred twenty (120) consecutive Days, but before the Owner gives Design-Build Firm written notice to resume the Services. Termination (under this paragraph) by Design-Build Firm shall be effective immediately upon the Owner's receipt of written notice from Design-Build Firm.

D. Legal Prohibition.

If any state or federal law, rule or regulation is enacted, promulgated or interpreted to prohibit or preclude completion of the Project under normal expectations, then either Party may terminate this Agreement by giving the other Party not less than twenty (20) Days prior written notice of the effective date of termination. Design-Build Firm shall, to the extent permitted by Applicable Law, be paid for the portion of the Services completed through date of termination.

E. Procedures Design-Build Firm shall Follow upon Notice of Termination.

1. Upon receipt of any notice of termination, unless the notice otherwise directs, Design-Build Firm shall immediately begin the phase out and the discontinuance of all Services and Work in connection with the performance of this Agreement and, unless otherwise directed by Owner, shall proceed to promptly cancel all existing orders and contracts insofar as such orders and contracts are chargeable to the Owner under this Agreement. Within thirty (30) Days after receipt of such notice of termination, the Design-Build Firm shall submit a statement showing in detail the Services and Work performed under this Agreement prior to the effective date of termination. The Owner shall have the option to grant a written extension to the time period for submittal of such statement.
2. All completed or partially completed designs, plans, specifications and reproducibles prepared under this Agreement, as well as all other documents, property records, tests, charts, reports and other materials, or information pertaining to the Project and/or Design-Build Firm's Services and Work hereunder, including the Design-Build Firm's most current documents stored in CPMS (the "**Project Documents**"), shall be delivered to the Owner without further cost or charge to the Owner. Further payment to the Design-Build Firm is conditioned upon delivery of all such documents to the Owner.
3. Upon the above conditions being met and Application for Payment being Approved, the Owner shall pay the Design-Build Firm in the event of a termination for convenience within thirty (30) Days following receipt of certified Application for Payment. Payment shall be limited to the unpaid portion of the Contract Price certified by the Program Manager or Architectural Representative to be due for Services and Work actually performed in accordance with the terms and provisions

this Agreement to the date of the termination for convenience. If the termination is by the Owner for cause, further payment may be offset as provided above, or withheld, in whole or in part, until the Owner has achieved Final Completion of the Project by other means, paid all costs to achieve Final Completion, provided Design-Build Firm written notice of such costs, and determined whether the total of all costs and damages to achieve Final Completion following the termination is less than the amount withheld from Design-Build Firm's payments due on Design-Build Firm's prior Approved Applications for Payment.

4. Failure of the Design-Build Firm to comply with the above requirements in this Section XVII.E shall constitute a waiver by the Design-Build Firm of any and all rights or claims to collect monies that Design-Build Firm may rightfully be entitled to for services performed under this Agreement.

F. Procedures Design-Build Firm shall Follow upon Notice of Suspension.

1. Upon receipt of written notice of suspension the Design-Build Firm shall, unless the notice otherwise directs, immediately begin to phase out and discontinue all Services and Work in connection with the performance of this Agreement and proceed to promptly cancel all existing orders and contracts insofar as such orders and contracts are chargeable to the Owner under this Agreement.
2. Design-Build Firm shall prepare a statement showing in detail the Services and Work performed by Design-Build Firm under this Agreement prior to the effective date of suspension and deliver the same to Owner within thirty (30) Days after the date of the suspension.
3. Copies of all completed or partially completed designs, plans, specifications, RFI's, ASKs, submittals, O&M manuals, warranties, and reproducibles prepared under this Agreement, prior to the effective date of suspension, and all other Project Documents shall be prepared for delivery to the Owner but shall be retained by the Design-Build Firm until such time as Design-Build Firm or the Owner may exercise the right to terminate this Agreement.
4. In the event that Design-Build Firm exercises the Design-Build Firm's right to terminate this Agreement for cause or following a suspension, Design-Build Firm shall submit to the Owner an updated final statement showing in detail the Services and Work performed under this Agreement prior to the effective date of suspension.
5. Upon the above conditions being met, and the final determination that Design-Build Firm has the right to terminate for cause or as a result of such suspension, which final determination, to the extent possible, will be made within sixty (60) Days following the effective date of termination, the Owner shall promptly pay the Design-Build Firm the unpaid proportion of the Contract Price for the Services and/or Work actually performed in accordance with the terms and provisions of this

Agreement. Final payment shall be made within thirty (30) Days of delivery of all Project Documents, the delivery of which shall be a pre-condition to final payment.

G. Remedies.

The Owner's termination of this Agreement, whether for cause or otherwise, shall not be an election of remedies. In addition to any right of termination, the Owner shall at any time be entitled to exercise and enforce any other right or remedy available by contract, law or at equity, including the right to pursue damages. Design-Build Firm covenants and agrees that it shall not claim or assert Design-Build Firm detrimentally relied upon Owner's exercise of any one remedy to limit or preclude Owner's exercise of any other remedy. No termination of this Agreement shall relieve or excuse Design-Build Firm or any of Design-Build Personnel of its obligations and liability for violations of this Agreement, or for any act or omission, or negligence of Design-Build Firm with respect to the Services performed prior to the date of termination. The remedies of the Owner set forth in this Agreement shall not be restrictive but shall be cumulative and in addition to all other remedies of Owner hereunder and under applicable state laws, including all laws related to fraud or latent defects. Nothing herein shall restrict, limit or otherwise diminish in any way the liability of the Design-Build Firm for errors, omissions, defects or deficiencies under the statutory and common laws of the State of Texas. Notwithstanding anything in this Agreement to the contrary, Design-Build Firm shall not be entitled to lost or anticipated profits should the Owner choose to exercise its option to terminate this Agreement for cause or convenience.

H. Owner, as a public entity, has a duty to document the expenditure of public funds. Design-Build Firm acknowledges this duty on the part of the Owner. To this end, Design-Build Firm understands that failure of Design-Build Firm to substantially comply with the requirements of this Agreement for the preparation and submittal of statements and documents required by this Agreement shall constitute a waiver by the Design-Build Firm of any portion of its Fees applicable to the preparation and submittal thereof.

XVIII. Equal Employment Opportunity and Other Regulatory Requirements

A. The Design-Build Firm agrees not to engage in employment practices which have the effect of discriminating against any employee or applicant for employment; and, will take affirmative steps to ensure that applicants are employed and employees are treated during employment without regard to their race, color, religion, national origin, sex, age, handicap, or political belief or affiliation. Specifically, the Design-Build Firm agrees to abide by all applicable provisions of the Nondiscrimination Clause and the Small and Minority Business Advocacy Clause as contained in the City of San Antonio's current Affirmative Action Plan on file in the City Clerk's Office. In the event non-compliance occurs, the Design-Build Firm shall, upon written notification by the Owner, commence compliance procedures within thirty (30) Days.

B. Design-Build Firm confirms for itself and all Design-Build Firm Parties that Design-Build Firm and each of the Design-Build Firm Parties who is an employer has an equal

employment opportunity policy ensuring equal employment opportunity without regard to race, color, national origin, sex, age, religion or handicap; and that Design-Build Firm and each of such Design-Build Firm Parties maintain no employee facilities segregated on the basis of race, color, national origin, sex, age, religion or handicap.

- C. The Design-Build Firm agrees to comply with the State of Texas prohibition on boycotting Israel, as set forth in **Exhibit 24**.
- D. The Design-Build Firm agrees to comply with Subchapter J, Chapter 552, of the Texas Government Code, and certifies it will fulfill its obligation to preserve and produce contracting information in accordance therewith, as stated in the attached **Exhibit 25**.

XIX. Dispute Resolution Procedures

A. Dispute Resolution Generally.

The Design-Build Firm shall continue to timely and properly perform all Services and Work, and Owner will continue to pay for all Services and Work properly performed, in accordance with the requirements of this Agreement during the pendency of dispute resolution proceedings. The Parties agree that, except as provided in Section XIX.B, below, they shall attempt to resolve any dispute arising out of or related to this Agreement in accordance with the Dispute Resolution Procedures (**Exhibit 19**).

B. Exceptions to Dispute Resolution Procedures.

The foregoing notwithstanding, the Dispute Resolution Procedures may be discontinued or disregarded by Owner at any time for the purposes of taking any action, including seeking immediate judicial relief, in order to pursue, enforce, enjoin or otherwise take action in regard to:

1. Liens filed or threatened against the Project or the Worksite;
2. Insurance claims for any loss or liability of Owner or an Owner Indemnitee;
3. Obligations to indemnify or defend an Owner Indemnitee against Pending Third Party Claims;
4. Warranty Claims;
5. Termination for default, including any termination for failure to deliver documents required to be furnished to Owner hereunder;
6. Claims for fraud, trespass, conversion, intentional destruction of property or violation of trade secrets;
7. Claims for abandonment; and

8. Unsafe or illegal conduct of the Design-Build Firm or those for whom Design-Build Firm is responsible.

C. Prevailing Party.

In any dispute arising under this Agreement, the following shall apply in the determination of which Party is the prevailing Party. If a Party claiming a right to payment of an amount in dispute is awarded all or substantially all of such disputed amount, then such claiming Party shall be the prevailing Party. If a Party defending against such claim is found to be not liable to pay all or substantially all of the disputed amounts claimed by the claiming Party, then the Party so defending against such claim shall be the prevailing Party. If both Parties prevail with respect to different claims by each of them, then the Party who is prevailing with respect to the substantially greater monetary sum shall be deemed the prevailing Party; otherwise, if both Parties prevail with respect to monetary sums on different claims, neither of which sums is substantially greater than the other, the tribunal having jurisdiction over the controversy, claims or actions shall in rendering the award determine in its discretion whether and to what extent either Party should be entitled to recover any portion of its attorney fees. The prevailing Party shall be entitled to recover reasonable attorney fees and costs to the extent provided in the Dispute Resolution Procedures (**Exhibit 19**).

XX. Miscellaneous

A. Applicable Law.

All questions relating to the validity, interpretation or performance of this Agreement shall be determined in accordance with the laws of the State of Texas, disregarding any conflict of law rules which may dictate the application of the laws of any other jurisdiction. Venue for any action or proceedings arising under or pertaining to this Agreement shall be in Bexar County, Texas.

1. **Work Product.** Design-Build Firm assigns, and shall cause Design-Build Firm Parties to assign, to Owner without limitation the entire right, title and interest in and to the exclusive use or reuse of all Work Product, which shall be and remain the exclusive property of Owner; however, Design-Build Firm shall have no liability to Owner for Owner's reuse of Work Product by others without the involvement of Design-Build Firm. Upon request of Owner, Design-Build Firm shall execute, assign to and assist Owner to pursue, apply for, obtain, register and enforce for Owner's benefit all patents, copyrights, and other intellectual property rights, and all applications therefore, in and to the Work Product in any and all countries. Work Product shall be and remain Owner's exclusive property, and shall not be used by Design-Build Firm or Design-Build Firm Parties, except in connection with the Project or except as expressly provided further below, without the Owner's prior written consent. If Design-Build Firm is selected to provide Design Services for a future project for the Owner based upon the Design Services developed by the Design-Build Firm for this Project, the Design-Build Firm agrees that it will only charge Owner Fees related to and reasonably necessary to modify

its Work Product for the future development of the design criteria, scope of work, and or designs for the future project.

2. The Owner acknowledges and agrees that Design-Build Firm shall, subject to the conditions in Subparagraph (2) below, have a right of co-ownership allowing Design-Build Firm to generally use, display or make reference to designated and identifiable design features or concepts included in the Work Product for the Project that Design-Build Firm has prepared and that are not specially unique to Owner's Project, but rather are design features or concepts that are ordinary and customary, and generally used in the construction of industrial facility projects, and as to which disclosure will not reveal information or details that could in any way jeopardize security in the construction, operation and use of the Project, or reveal information that could compromise, diminish or impair the value of any aspect of Owner's operations. Design-Build Firm shall not release or distribute to any third party copies of any design or design related information in digital form or other format that contain any references identifying the Owner and/or the Project without Owner's full and express prior written consent, including but not limited to all Work Product used in marketing documents, press releases, brochures, websites, and all other documents or information sent to or accessed by third parties.
3. The Design-Build Firm's right of co-ownership in the Work Product described in Subparagraph (1) above shall, however, be subject to Design-Build Firm's remaining in compliance with, and not defaulting in, its obligations to Owner under this Agreement. In addition, Design-Build Firm shall defend, indemnify and hold Owner Indemnified Parties harmless from and against all claims arising from use of such Work Product by Design-Build Firm, Design-Build Firm Parties, or any third party to whom Design-Build Firm distributes the Work Product, for any purposes unrelated to this Project.

B. Authority to Execute Contract.

Each Party represents to the other that it has the power and authority to enter into this Agreement, and that the person executing this Agreement on its behalf has to power to do so and to bind it to the terms of this Agreement.

C. Notices.

Any notice, approval, or other communication or directive provided for or required of the Parties pursuant to this Agreement shall be in writing and shall be deemed to have been properly given and effective upon receipt, if such notice shall have been:

1. delivered by hand; or
2. mailed, postage prepaid, registered or certified, addressed to the following individuals, or any other person designated by either Party's written notice to the other Party, each of whom shall be the Parties' respective authorized agents:

To Owner and Program Manager, as follows:

Julie Valadez, RA, AIA
Project Manager
San Antonio Water System
2800 U.S. Hwy 281 North
San Antonio, Texas 78212

Steve Gatto
Senior Project Manager
APSI Construction Management, Inc.
12902 Elmington Drive
Cypress, Texas 77429

With a copy to:

Nancy Belinsky
Vice President and General Counsel
San Antonio Water System
2800 U.S. Hwy 281 North
San Antonio, Texas 78212

Andrea L. H. Beymer
Vice-President, Engineering & Construction
San Antonio Water System
2800 U.S. Hwy 281 North
San Antonio, Texas 78212

To Design-Build Firm:

With copies to:

D. Third Party Beneficiaries.

No provision of this Agreement shall confer or be construed to create any right or benefit in any third party, including any Design-Build Firm Parties or any other entity which has

assumed any of Design-Build Firm's obligations hereunder, or in any way inure to the benefit of any third person (including the public at large) so as to constitute any such person a third-party beneficiary of the Agreement or of any one or more of the terms hereof, or otherwise give rise to any cause of action in any person not a party hereto. Design-Build Firm shall be solely responsible for all contractual obligations to the Design-Build Firm Parties, and shall pay for the Services and Work of its Design-Build Firm Parties in accordance with Applicable Laws. Design-Build Firm shall provide that the Owner, the San Antonio Water System, may, at its election, assume the status of a third party beneficiary to any contracts, subcontracts, consulting agreements, purchase orders and other agreements executed by Design-Build Firm in connection with this Agreement and/or the Project, which election may be exercised as to any such agreement by Owner's issuance of written notice of such election to the other party or parties to such agreement.

E. Non-Waiver.

Failure of Owner to insist upon strict performance of any of the terms and conditions hereof, or Owner's failure or delay to exercise any rights or remedies provided herein or to properly notify Design-Build Firm in the event of breach, or the acceptance of or payment for any of the Services and Work hereunder, or approval of any design or work product, shall not release Design-Build Firm of any of Design-Build Firm's warranties, responsibilities or other obligations under this Agreement and shall not be deemed a waiver of any right of Owner to insist upon strict performance hereof or any of its rights or remedies as to the Services and Work, regardless when performed or accepted, or as to any prior or subsequent default hereunder, nor shall any purported oral modification or rescission of this Agreement by Owner operate as a waiver of any of the terms hereof. Design-Build Firm agrees that Owner does not waive sovereign immunity except to the extent required by the laws of Texas in effect as of the time of any claim or dispute hereunder.

F. Severability.

Except as otherwise expressly provided in this Agreement, if any provision in this Agreement is held to be unenforceable, the remainder of this Agreement, shall continue in full force and effect and, to the maximum extent permitted by Applicable Law. This Agreement shall be interpreted so as to give the effect to the original written intent of the Parties. If any portion of a provision is held to be unenforceable, the remainder shall be reformed to provide Owner the greatest rights allowed by Applicable Law, and thereafter enforced to the maximum extent allowed by Applicable Law to give effect to the original written intent of the Parties.

G. Non-Appropriation.

Design-Build Firm agrees that the Owner has projected costs for this Agreement and Owner expects to pay all obligations of this Agreement from projected revenues of the Owner. All obligations of the Owner are subject to annual appropriations by its Board. Accordingly, notwithstanding anything in this Agreement to the contrary, in the event that

the Owner should fail to appropriate funds to pay any of Owner's obligations under the terms of this Agreement, then the Owner's obligations under this Agreement shall terminate, this Agreement shall be rendered null and void to the extent funds are not available, the Design-Build Firm's sole option and remedy shall be to terminate this Agreement by written notice to Owner, and neither the Owner nor the Design-Build Firm shall have any further duties or obligations hereunder, except those which expressly survive. Owner agrees to use good faith efforts to provide written notice to Design-Build Firm when funds have been appropriated for expenditure under this Agreement, and if expected funds are requested and not appropriated, Owner agrees to use good faith efforts to provide written notice to the Design-Build Firm of the non-appropriation. Owner has obtained approval from its Board for funding for this Agreement, to the extent set forth in Owner's Confirmation of Funding, attached hereto as **Exhibit 20**.

- H. Security Procedures.** Design-Build Firm shall comply with all security procedures set forth in Owner's Security Procedures, attached hereto as **Exhibit 21**.
- I. Approval Not Release.** Approval by the Owner shall not constitute nor be deemed a release of the responsibility and liability of Design-Build Firm, or the Design-Build Firm Parties for the accuracy and competency of the Services, Work and Work Product; nor shall such approval be deemed to be an assumption of such responsibility by the Owner for any defect, error or omission in the Services, Work or Work Product or other documents prepared by Design-Build Firm, Design-Build Firm Parties, or their employees, subcontractors, agents and consultants. Owner's approval or acceptance of Design-Build Firm's tasks and/or Services or Work will not release Design-Build Firm from any liability for such tasks and/or Services or Work because Owner is, at all times, relying upon Design-Build Firm's skill and knowledge in performing the Services and Work.
- J. Entire Agreement and Amendments.** This Agreement has been the result of joint negotiation of the Parties, each of whom has experience in the evaluation and assumption of risks and liabilities of the nature provided for herein, and each of whom has been represented and advised by legal counsel. This Agreement constitutes the entire agreement between the Parties pertaining to the subject matter hereof and shall not be construed more severely against one Party than against the other. This Agreement supersedes all prior or contemporaneous agreements and negotiations between them, and may not be modified orally or otherwise, other than by written instrument executed on behalf of each Party by its duly authorized representatives. Owner shall not be bound by or be liable for any statement, representation, promise, inducement, or understanding of any kind not expressly set forth herein and Design-Build Firm agrees is it not acting in reliance on any such extraneous matters.

[SIGNATURES APPEAR ON THE FOLLOWING PAGE]

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized officers and made effective as of the day and year first written above.

Executed and Binding as of the Effective Date stated Above.

OWNER: San Antonio Water System

DESIGN-BUILD FIRM:

By: _____

By: _____

Robert R. Puente,
President and CEO

Its: _____