

# DESOTO INDEPENDENT SCHOOL DISTRICT

200 E. Belt Line Road  
DeSoto, Texas 75115  
Phone: 972-223-6666 ext. 213  
Facsimile: 972-274-8041

## **REQUEST FOR QUALIFICATIONS FOR A COMPREHENSIVE ENERGY CONSERVATION SERVICES PROGRAM**

Pursuant to Texas Education Code section 44.901, the **DeSoto Independent School District (DeSoto ISD)** is accepting submissions in response to this **Request for Qualifications (RFQ) for a Comprehensive Energy Conservation Services Program**. Submissions must be mailed to DeSoto ISD, 200 W Parkerville Road, DeSoto, Texas 75115 to the attention of the Energy Management Coordinator. Requested information must be received by **Tuesday, September 27, 2016 at 3:00 p.m.** at which time they will be opened and names of those submitting read. The opening will take place in the office of the Plant Services Training Room at 200 W Parkerville Road, DeSoto, TX 75115.

**Envelopes must be plainly marked with the RFQ description for the attention of the Energy Management Coordinator.** Submitters must provide one **original and two copies**. The Energy Management Coordinator's Office may open unmarked submissions to properly identify them. Submitters are therefore advised to correctly mark their submissions in order to protect the integrity of their information and fully avail themselves of the process.

All deviations from these specifications must be clearly stated in the requested information. Any significant limitations of coverage, restrictive conditions, etc., must be clearly described.

*THESE SPECIFICATIONS ARE NOT INTENDED TO BE RESTRICTIVE WITH RESPECT TO ANY INNOVATIVE TECHNIQUES FOR RATING OR FOR PROVIDING COVERAGE IF A DISTINCT ADVANTAGE CAN BE DEMONSTRATED. REQUESTED INFORMATION FAILING TO MEET ALL SPECIFICATIONS WILL NOT NECESSARILY BE REJECTED, BUT ANY DEVIATIONS MUST BE CLEARLY NOTED TO BE CONSIDERED.*

Submitters accept all responsibility for forwarding the requested information to the address above within the specified time. If the envelope does not reflect a return address, it will be opened for the sole purpose of obtaining the return address.

The DeSoto ISD reserves the right to accept or reject any or all requested information in the best interest of the district and to waive any formalities or irregularities in the process.

**Contact: Terry Sanders, Energy Management Coordinator  
DeSoto ISD  
200 W. Parkerville Road  
DeSoto, Texas 75115**

The following information **must be returned** along with any other information that you feel would be of benefit for your submission.

## **Request for Qualifications**

### **QUALIFICATIONS FOR A DISTRICT-WIDE ENERGY CONSERVATION SERVICES PROGRAM**

Name of Company: \_\_\_\_\_

\_\_\_\_\_ **Affidavit of Non-Collusion, Non-Conflict of Interest, Anti-Lobbying  
(Page17) please sign and return**

\_\_\_\_\_ **Felony Conviction Notice (Page18) please sign and return**

\_\_\_\_\_ **Proposal Document and Addendum (Page19) please sign and return**

\_\_\_\_\_ **Quotation Forms (Page14) please return**

\_\_\_\_\_ **Statement of Responsibility (Page15) please return**

\_\_\_\_\_ **Project Staffing Plan (Page16) please return**

\_\_\_\_\_ **No Proposal at this time, please keep my company on your proposal  
list.**

**Purpose: To Implement a Comprehensive Energy Conservation Services Program**

**TABLE OF CONTENTS**

Section		Page
I.	Purpose of Solicitation	4
II.	Background	5
III.	Services Requested	6
IV	M/WBE Participation	7
V.	Selection Process	7
VI.	Schedule of Events	8
VII.	Selection Criteria	8
VIII.	Response Format and Contents	9
	Appendix A - Proposal Forms	13
	Appendix B -M/WBE Compliance Guidelines	22
	Appendix C - Contract Forms	27

## **PURPOSE OF SOLICITATION**

### **I. PURPOSE OF SOLICITATION:**

Pursuant to Texas Education Code section 44.901, the intent of this Request for Qualifications (RFQ) is to solicit requested information from Energy Services Companies (ESCOs). For the purpose of this RFQ, “ESCO” refers to any company that is qualified to provide a turnkey energy conservation program that includes all services listed in this RFQ. Responses to this RFQ shall describe the ESCO’s capability to identify the need for, design, install, maintain, monitor, and arrange the financing of a large-scale, comprehensive energy-conservation program that includes the services listed herein. DeSoto ISD, intends to select an ESCO and award contract(s) to perform cost- effective energy conservation retrofits or reject all proposals.

Please note that responses to this RFQ must be received Tuesday, September 27, 2016 by 3:00 p.m. at the address below. **One original and two (2) copies of the response must be sealed and delivered to:**

**DeSoto ISD  
200 W. Parkerville Road  
DeSoto, Texas 75115  
Attention: Energy Management Coordinator**

**Re: Proposal on Qualifications for a Comprehensive Energy Conservation Services Program**

DeSoto ISD reserves the right to reject any and all responses resulting from this RFQ. Late responses will not be accepted and will be returned to the submitting company unopened. **DeSoto ISD is not liable for any cost incurred by any person or firm responding to this RFQ.**

DeSoto ISD reserves the right to reject as non-responsive any response to this request for qualifications that does not contain the information requested in Section VII and Appendix A of this RFQ. Additionally, DeSoto ISD reserves the right to reject as non-responsive any information that is not organized and formatted as described in this RFQ.

By providing a submission, each respondent agrees to waive any claim it has or may have against the DeSoto ISD, its trustees, agents and employees, and any reference sources, arising out of or in connection with the administration, evaluation or recommendation of any response; waiver of any requirements under the proposal documents; acceptance or rejection of any proposal; and award of any contract. The DeSoto ISD shall have no contractual obligation to any respondent, nor will any respondent have any property interest or other right in the proposal or contract being proposed unless and until the contract is unconditionally executed and delivered by all parties, and all conditions to be fulfilled by the respondent have been fulfilled by the respondent.

Any and all questions regarding this RFQ and the program it represents must be submitted in writing to:

terry.sanders@desotoisd.org

**All questions will be answered and emailed to all interested parties.**

## II. BACKGROUND

DeSoto ISD proposes to address all water, gas and electric utility uses in all of its facilities listed below for this conservation program. Additionally, DeSoto ISD intends to upgrade outdated and obsolete building equipment and perform property improvements through the program.

The DeSoto ISD buildings to be included in the project follow:

Amber Terrace DDECA	224 Amber Lane	DeSoto
Cockrell Hill Elementary	425 S. Cockrell Hill	DeSoto
The Meadows Elementary	1016 The Meadows Pkwy	DeSoto
Frank D. Moates Elementary	1500 Heritage Blvd.	Glenn Heights
Northside Elementary	525 Ray Street	DeSoto
Woodridge Elementary	1001 Woodridge	DeSoto
Ruby Young Elementary	707 Young Blvd.	DeSoto
DeSoto East Middle School	601 E. Belt Line Road	DeSoto
McCowan Middle School	1500 Majestic Meadows	Glenn Heights
DeSoto West Middle School	800 N. Westmoreland	DeSoto
DeSoto Freshman Campus	620 S. Westmoreland	DeSoto
DeSoto High School	600 Eagle Dr.	DeSoto
DeSoto AEP	204 E. Belt Line Rd.	DeSoto
Service Center	200 W Parkerville Rd.	DeSoto
New Barn Building	1150 S Hampton Rd.	DeSoto
Instructional Support Center	200 E. Belt Line Rd.	DeSoto
All Athletic Facilities	Various	Various

DeSoto ISD anticipates a major reduction in annual utility costs through the implementation of this energy conservation program. The ESCO will provide a written guarantee of all utility reduction and provide all financing for the project. The contract life of the program is expected not to exceed twenty (20) years. DeSoto ISD intends to structure the program's implementation schedule in a manner to minimize the program's financed capital needs. In addition, DeSoto ISD reserves the right to implement the program over multiple phases if it is deemed in the best interest of the district.

Respondents to this Request for Qualifications (RFQ) shall identify their experience and qualifications to design, install and manage major Energy Savings Performance Contract projects that have involved energy conservation measure (ECM) implementation which address the following building components and applications: lighting, space heating, ventilation, air-conditioning, envelope, heat recovery, energy management systems, environmental system controls, motors, domestic water heating, fuel switching, air distribution systems, power factor correction and water consumption systems. DeSoto ISD is also interested in the respondents' qualifications and experience related to programs designed to train building occupants and maintenance workers in energy conservation awareness.

### III. SERVICES REQUESTED

Request the identification, engineering, design, installation, training, maintenance and financing of approved ECMs for all DeSoto ISD facilities on a performance contracting basis. DeSoto ISD has the option to contract all or some of the services listed above.

Financing for this project shall be structured so that annual payments **never exceed annual savings**. Services will be required to provide the financing in such a manner as to ensure that all costs are paid for from **only** the utility savings associated with the energy conservation program. Operational savings will not be allowed as part of annual savings. The ESCO must make available a program that guarantees the energy savings of the energy conservation services financed. The ESCO's demonstrated ability to provide this guarantee **will be an evaluation criterion**.

It is expected that at a minimum, the following energy conservation techniques will be investigated on an individual basis or in combination with other techniques and implemented, if deemed cost effective by DeSoto ISD and the ESCO:

- Energy management control system
- Large-scale lighting control
- Individual room lighting control (motion sensors)
- Optical reflectors for fluorescent light fixtures
- Fluorescent lamp and ballast replacement
- Incandescent to florescent lighting conversion
- Conversion from HID to high-bay fluorescent
- Motion sensor control
- Day lighting control
- Exit sign conversion
- Other lighting modifications
- Air conditioning unit replacement
- Environmental system control replacement
- Heating, ventilating and air conditioning system modifications
- Fuel conversion
- Building envelope improvements
- Domestic hot and cold water systems
- Air management systems
- Power Factor Correction
- Energy conservation awareness training
- Water conservation retrofits

Any other ECMs proposed by the ESCO will also be considered. All ECMs considered shall be proven, commercially available and result in verifiable energy savings.

All equipment provided by the ESCO for this program shall have a history of successful operating experience in similar installations and shall be in new and unused condition. This equipment shall be state-of-the-art with readily available replacement parts. All equipment used for this program shall be approved by DeSoto ISD prior to installation.

IV. M/WBE PARTICIPATION - GUIDELINES AND FORMS

It is a continuing goal of the district to involve minority and women-owned businesses (M/WBE) in all facets of the district's contracting and purchasing activities. Information and forms must be filled out and returned with proposal.

**M/WBE Compliance Guidelines and forms in Appendix B.**

V. SELECTION PROCESS

QUALIFICATION EVALUATION

Interested ESCOs responding to this RFQ must provide the information required to complete the forms included in Appendix A. DeSoto ISD will evaluate submittals and choose them most highly qualified ESCO.

CONTACTS WITH SCHOOL DISTRICT PERSONNEL

No contacts with other School District employees, officials, or board members are to be made by responding ESCOs during the entire selection process without express permission from Dr. Gabrielle Lemonier, Associate Superintendent. Any unauthorized contact may result in disqualification of the ESCO.

ENGINEERING PROPOSAL

Upon completion of the evaluation, DeSoto ISD and the ESCO will design a Letter of Agreement which, when approved by DeSoto ISD, will allow the ESCO to proceed with the energy analysis, feasibility study, conceptual engineering design and permitting plan for a District-Wide Energy Conservation Program.

Upon acceptance of the Letter of Agreement by the Board of Trustees, DeSoto ISD and the ESCO will sign the agreement, thereby requiring the ESCO to proceed. If during this phase, it is determined that the program options identified by the ESCO do not fall within mutually agreed upon acceptable financing requirements and project scope, the Letter of Agreement will be terminated with no financial liability to DeSoto ISD.

NEGOTIATING AND SIGNING OF CONTRACT

Upon the determination that the project is feasible and acceptable to DeSoto ISD, DeSoto ISD will enter an agreement with the ESCO. The form of Agreement shall be AIA Document A141, as modified by the DeSoto ISD. A copy of the form of agreement is attached as Appendix B. Respondents may submit proposed changes to the form of Agreement, in writing, with its response, but DeSoto ISD reserves the right to reject any changes which materially change the Agreement. All engineering, design and permitting costs incurred by the ESCO under the Letter of Agreement will be incorporated into the ESA. Upon acceptance of the ESA by the Board of Trustees, the ESA will be signed and the program will commence.

## VI. SCHEDULE OF EVENTS

The following time frame is expected to be followed when evaluating responses to this RFQ:

August 29, 2016	Release of RFQ
September 27, 2016	RFQ received – 3:00p.m.
October 4, 2016	Vendor selected (tentative)
October 14, 2016	Letter of Agreement approved by Board of Trustees

(tentative)

This is a tentative schedule and dates are subject to change.

## VII. SELECTION CRITERIA

Qualifications of all business entities that respond to this solicitation, including any subcontractors to be used, will be evaluated using the following selection criteria. (Percentage weighting among categories of selection criteria is noted.)

### A. Business and Financial Qualifications (20% maximum)

1. Business unit dedicated to performance contracting.
2. Business unit dedicated to ensuring project performance
3. Years in business
4. Affiliation with energy and/or business organizations (including ISO certification and EPA or DOE affiliations)
5. Demonstrable ability to bond savings through a third party surety
6. Financial viability of entity proposed to provide technical and financial guarantees
7. Financing capability and lines of credit
8. Product Independence

ESCO will provide financial statements including income statement, balance sheets and statements of changes for the most recently completed fiscal year. The ESCOs will provide information documenting the source(s) of proposed financing.

### B. Personnel Qualifications (15% maximum)

1. Quality of personnel assigned to this project and degree of pertinent experience.

### C. Project Management Plan (15% maximum)

1. Comprehensiveness & rationale of project management plan, based on:
  - Approach to project management, including staffing and contractor - oversight
  - Ability to successfully complete projects on time and to customer satisfaction.
2. Method employed to establish baseline energy use in individual buildings and facility-wide
3. Method of measurement and verification used to demonstrate energy use reduction and cost savings as guaranteed



- D. Prior Project Performance (15% maximum)
  - 1. Experience with energy conservation projects of a similar type to that proposed for DeSoto ISD
  - 2. Experience taking responsibility for the full range of roles contemplated for this project (e.g. identification and analysis of ECMs, design, installation, operation, training, financing, savings verification, etc.)
  - 3. Performance on prior capital based energy performance contracting projects, including data on projecting, achieving, documenting, and verifying energy savings in order to ascertain accuracy of projections. Non capital based programs such as behavioral and/or operational based programs will not be considered.
  - 4. References from prior and current customers
- E. M/WBE Participation Percentage (15% maximum)
- F. Best Overall Value to the District (20% maximum)
  - 1. Describe how your overall approach will provide the best value for the district, including pricing, design, implementation, measurement and verification.

VIII. RESPONSE FORMAT AND CONTENTS

The responses to this Request for Qualifications will consist of ten (10) specific information subject areas which **must be completed and returned** in the order indicated below with each section divided and tabbed with the appropriate section title. Forms for certain of these information areas (as detailed below) are provided in Appendix A. For areas that do not require a form, the ESCO shall provide specific information directly addressing the information requested in that section. DeSoto ISD may, during the course of the evaluation process, request additional information to supplement and/or clarify the information provided by any ESCO. Any additional information not specifically requested in this RFQ must be put in a separate Appendix at the end of the response. Additionally, all supplemental materials (brochures, product information sheets, etc.) not specifically tailored to this response must be placed in the Appendix. Responses must include a table of contents.

COVER LETTER

The ESCO's information will include a cover letter at the beginning. The cover letter shall provide a summary of the information presented in the proposal; names and telephone and fax numbers of persons authorized to provide any clarification required; and a statement accepting the terms of this solicitation or noting specific exceptions taken to any of the terms and conditions specified in this document. This cover letter shall also include the name of the person(s) authorized to conduct final contract negotiations on behalf of the ESCO.

A. INTRODUCTION

TABLE OF CONTENTS

The ESCO's information should include a Table of Contents referencing each information section of this RFQ. The Table of Contents should be further subdivided to describe information included within each section of the proposal.

EXECUTIVE SUMMARY

The ESCO will provide an Executive Summary highlighting the ESCO's unique qualifications and value proposition for this project. The Executive Summary must not exceed two (2) pages in length.

STATEMENT OF RESPONSIBILITY

**The respondent must be the Prime Contractor.** The Prime Contractor will be responsible for all work and subcontractors involved in the project. The Prime Contractor will submit a list of all participants in the project prior to the actual contract negotiations. If some or all of the participants are not known at this stage, a selection strategy shall be identified noting which participants have not been selected. A statement of responsibility must be provided, using **FORM A** in the Appendix.

B. PERSONNEL

Each ESCO will attach a Project Staffing Plan, as shown in **FORM B** in the Appendix. The proposed plan will include a description of proposed staffing showing the project organization, supervisory responsibilities, and lines of authority. Identify the corporate affiliation for each staff member listed in the Project Staffing Plan. Attach resumes of all individuals who will have a role in the project.

Provide a graphical representation (organizational chart) of the participants listed in the ESCO's information and their responsibilities in the program. The chart is to be used to show the company and personnel responsible for each phase of the project, lines of authority and relationships between prime contractor and subcontractors.

C. PROJECT MANAGEMENT

Describe respondent's approach to project management, including: coordination with subcontractors, division of responsibility among project staff, and interaction with DeSoto ISD representatives. Include a sample of any contracts and/or agreements between the respondent and subcontractor(s) that would be used in this project.

D. FINANCIAL GUARANTEES

Explain in detail how you will guarantee the savings associated with this project.

Discuss the following areas in detail:

- Frequency of reconciliation
- Repayment of missed savings
- Treatment of “Operational” (non-utility) savings as they pertain to the guarantee
- Any situations that would void the guarantee
- If measured specific guarantees are or are not used, explain how  
And to what extent

Include a sample contract for (1) a detailed (investment grade) audit and (2) for design and implementation in the Appendix to this response. Failure to include a sample contract will be viewed as unresponsive.

E. REFERENCES

Provide information on at least five (5) energy savings performance contracts implemented with school districts similar in size and scope to the project proposed for DeSoto ISD that the respondent has successfully implemented within the last ten years. References shall include:

- Customer Name
- Name and Telephone Number of Contact
- Brief Description of the Project
- Specific ECMs installed
- Project Cost and term in years
- Guaranteed annual utility savings
- If applicable, amount of operational & maintenance savings associated with each project
- If applicable, state what percentage was used as an annual escalating factor for the savings associated with the project (Energy/Water, Operational & Maintenance, etc.)

F. EQUIPMENT & TRAINING

The ESCO shall describe any relationships with manufacturers of energy equipment, including those manufactured by the respondent or listed subcontractors. ESCO’s who are owned by or affiliated with controls or HVAC equipment manufacturers will not be considered.

The ESCO shall outline any training proposed as part of the project, including the subject, duration, and location of training. Respondent shall also describe the relationship with the organization providing training, if not provided by the prime contractor.

Respondent shall describe any customer support programs provided in the project. The ESCO shall detail the availability, duration, and services provided through the customer support program, if applicable. If the ESCO proposes a maintenance program, information must be provided detailing services provided and terms of contract, if any. The ESCO should also provide the justification for any proposed customer support or maintenance program.

G. PROJECT NON-PERFORMANCE

Provide a complete list of all performance contracting projects that in the last 10 years:

- Have canceled or non-appropriated a performance contract with the respondent (list reason); or
- Have past or pending lawsuits or litigation regarding a performance contract (list reasons); or
- Have been reimbursed for non-performance on guaranteed savings (Include short fall amount on a yearly basis).

If any of the above do not apply, provide an acknowledgment letter stating each that does not apply, signed by an officer of the respondent company (Please include title of company officer). Failure to provide accurate and complete information as requested is grounds for disqualification.

H. COMPANY FINANCIAL INFORMATION

The ESCO shall include the company's annual report, audited financial statements, or equivalent showing information for the past complete financial year period. If a bound document (such as annual report) is included, it must be placed in the response's Appendix section.

ESCOs shall also provide information documenting source(s) and levels of financing (e.g. a letter from a financial institution describing a relationship with the ESCO and indicating the magnitude of the line of credit; copies of limited partnership agreements; a statement of public holdings; etc.). The ESCO shall also describe in detail how they intend to secure the annual savings project guarantee. DeSoto ISD may, during the course of the evaluation process, request additional financial information to supplement and clarify the information provided in this response.

**APPENDIX A**

**REQUEST FOR  
QUALIFICATIONS  
FOR A  
DISTRICT-WIDE ENERGY  
CONSERVATION  
SERVICES PROGRAM**

# **QUOTATION FORMS**

## **PROPOSALCHECKLIST AND OUTLINE**

_____	Cover Letter
_____	Introduction
_____	Table of Contents
_____	Executive Summary
_____	Statement of Responsibility
_____	Project Team
_____	Project Staffing Plan
_____	Pro Personnel Resumes
_____	Project Team Organizational Chart
_____	Project Management Plan
_____	Sample Subcontract
_____	Financial Guarantees
_____	Sample Contract
_____	References
_____	Equipment, Training & Support
_____	Equipment
_____	Training
_____	Customer Support
_____	Prior Project Non-Performance
_____	Company Financial Information
_____	Appendix A & Appendix B

**Statement of Responsibility–Form A**

**Statement of Responsibility**

1. Prime Contractor (ESCO or Contractor);

Name: \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(Please note possession of any license or registration pertinent to this project.)

Area of Responsibility: (Describe in detail duties and responsibilities applicable to this project.)

## Project Staffing Plan –Form B

**RESPONDENT:** \_\_\_\_\_

AREA OF RESPONSIBILITY	NAME	AFFILIATION
OVERALL PROJECT MANAGEMENT		
BUILDING AUDITING		
BASELINE ENERGY USE DEVELOPMENT		
ECME VALUATION:		
LIGHTING		
HVAC		
EMS		
OTHER		
ECM SAVINGS VERIFICATION		
ENERGY USAGE MONITORING		
ENERGY EVALUATION		
FINANCING		
ANNUAL SAVINGS GUARANTEE		
FINANCIAL AFFILIATION		
SUBCONTRACTORS		



**AFFIDAVIT OF NON-COLLUSION, NON-CONFLICT OF INTEREST, ANTI-LOBBYING PROPOSAL**

By submission of this proposal, the undersigned certifies that:

1. Neither the Proposal Submitter's officers, partner, owners, agents, representatives, employees, or parties in interest, has in any way colluded, conspired, or agreed, directly or indirectly with any person, firm, corporation or other proposal submitter or potential proposal submitter any money or other valuable consideration for assistance in procuring or attempting to procure a contractor fix the prices in the attached proposal or the proposal of any other submitter and further states that no such money or other reward will be hereinafter paid.
2. No attempt has been or will be made by this company's officers, employees, or agents to lobby, direct or indirectly, the DESOTO Independent School District Board of Trustees between proposal submission date and award by the DESOTO Independent School District Board of Trustees.
3. No officer, or stockholder of the proposal submitter is a member of the staff, or related to any employee of the DESOTO Independent School District except as noted herein below:

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The undersigned certifies that he/she is fully informed regarding the accuracy of the statements contained in this certification, and that the penalties herein are applicable to the submitter as well as any person signing in his/her behalf.

Signature/Title: \_\_\_\_\_

**THIS PAGE MUST BE SIGNED AND RETURNED WITH YOUR PROPOSAL**

**FELONY CONVICTION NOTICE**

State of Texas Legislative Senate Bill No. 1, Section 44.034, Notification of Criminal History, Subsection (a), states “a person or business entity that enters into a contract with a school district must give advance notice to the district if the person or owner or operator of the business entity has been convicted of a felony. The notice must include a general description of the conduct resulting in the conviction of a felony”.

Subsection (b) states “a school district may terminate a contract with a person or business entity if the district determines that the person or business entity failed to give notice as required by Subsection (a) or misrepresented the conduct resulting in the conviction. The district must compensate the person or business entity for services performed before the termination of the contract.”

**THIS NOTICE IS NOT REQUIRED OF A PUBLICLY-HELD CORPORATION.**

I, the undersigned agent for the firm named below, certify that the information concerning notification of felony convictions has been reviewed by me and the following information furnished is true to the best of my knowledge.

**COMPANY NAME:** \_\_\_\_\_  
Print or type

**AUTHORIZED COMPANY OFFICIAL’S NAME:** \_\_\_\_\_  
Print or type

**\*\*\*\*\* Sign only A, B, or C \*\*\*\*\***

A. My firm is publicly held corporation therefore, this reporting requirement is not applicable.

\_\_\_\_\_  
Signature of Company Official

B. My firm is not owned nor operated by anyone who has been convicted of a felony.

\_\_\_\_\_  
Signature of Company Official

C. My firm is owned or operated by the following individual (s) who has/have been convicted of a felony.

Detail of Conviction: \_\_\_\_\_

Signature of Company Official \_\_\_\_\_

**THIS PAGE MUST BE SIGNED AND RETURNED WITH YOUR PROPOSAL**

**PROPOSAL DOCUMENT AND ADDENDUM**

Having carefully examined the Proposal Notice, General Terms and Conditions, and Specifications, the undersigned Submitter’s Agent hereby proposes and agrees to furnish goods/service in strict compliance with the term, conditions, and specifications at the prices quoted. The Submitter affirms that, to the best of his knowledge, the bid has been arrived at independently and is submitted without collusion with anyone to obtain information or gain any favoritism that would in anyway limit competition or give them an unfair advantage over other submitters in the award of this proposal.

It is understood that the owner reserves the right to accept or reject any or all bids and alternates, and waive all irregularities. It is further agreed that this bid shall be completed within the timeframe set forth and at no additional cost to the district for unexpected or unforeseen circumstances.

If you have received an addendum to this bid, please acknowledge receipt by initialing the number of the addendum below. **Addenda will be posted on the district website, [www.DeSoto ISD.org](http://www.DeSoto ISD.org). Failure to acknowledge outstanding addenda is cause for disqualification.**

Addendum #1. \_\_\_\_\_ 2. \_\_\_\_\_ 3. \_\_\_\_\_ 4. \_\_\_\_\_ 5. \_\_\_\_\_ 6. \_\_\_\_\_  
.....

Company Name: \_\_\_\_\_  
Please print or type

Name and Title of Person Authorized to sign proposal: \_\_\_\_\_  
Name – please print or type

Authorized Signature: \_\_\_\_\_

Date of signature: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State \_\_\_\_\_ ZipCode: \_\_\_\_\_

Phone Number: \_\_\_\_\_ Fax Number: \_\_\_\_\_

Email address: \_\_\_\_\_

**THIS PAGE MUST BE SIGNED AND RETURNED WITH YOUR PROPOSAL.**

## **INSTRUCTIONS FOR THE DISCLOSURE OF INTERESTED PARTIES**

In accordance with Legislative House Bill 1295, the successful Proposer will be required to submit electronically a Certificate of Interested Parties form 1295 within 30 days after signing any potential contract which is completed as a result of this bid. This form which applies to contracts signed after January 1, 2016 will ensure that all persons satisfying the “interested party” definition under the statute and rules promulgated by the Texas Ethics Commission (TEC) are disclosed since the form is signed under oath and penalty of perjury.

“Interested Party” is defined as (1) a person who has a controlling interest in a business entity with whom a governmental entity or state agency contracts; or (2) a person who actively participates in facilitating a contract or negotiating the terms of a contract with a governmental entity or state agency, including a broker, intermediary, adviser or attorney for the business entity

**CERTIFICATE OF INTERESTED PARTIES**

**FORM 1295**

Complete Nos. 1 - 4 and 6 if there are interested parties. Complete Nos. 1, 2, 3, 5, and 6 if there are no interested parties.		<b>OFFICE USE ONLY</b>	
<b>1</b> Name of business entity filing form, and the city, state and country of the business entity's place of business.			
<b>2</b> Name of governmental entity or state agency that is a party to the contract for which the form is being filed.			
<b>3</b> Provide the identification number used by the governmental entity or state agency to track or identify the contract, and provide a description of the goods or services to be provided under the contract.			
4 Name of Interested Party	City, State, Country (place of business)	Nature of Interest (check applicable)	
		Controlling	Intermediary
<b>5</b> Check only if there is NO Interested Party. <input type="checkbox"/>			
<b>6 AFFIDAVIT</b> <span style="float: right;">I swear, or affirm, under penalty of perjury, that the above disclosure is true and correct.</span>			
AFFIX NOTARY STAMP / SEAL ABOVE		_____ Signature of authorized agent of contracting business entity	
Sworn to and subscribed before me, by the said _____, this the _____ day of _____, 20____, to certify which, witness my hand and seal of office.			
_____ Signature of officer administering oath	_____ Printed name of officer administering oath	_____ Title of officer administering oath	
<b>ADD ADDITIONAL PAGES AS NECESSARY</b>			

**THIS FORM WILL BE COMPLETED ELECTRONICALLY BY THE  
SUCCESSFUL PRIME CONTRACTOR AND IS INCLUDED FOR  
INFORMATION PURPOSES ONLY**

**APPENDIX B**

**REQUEST FOR  
QUALIFICATIONS  
FOR A  
DISTRICT-WIDE ENERGY  
CONSERVATION  
SERVICES PROGRAM  
  
M/WBE COMPLIANCE  
GUIDELINES AND FORMS**

## M/WBE Compliance Guidelines and Forms

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### PLEASE READ BEFORE COMPLETING THE M/WBE COMPLIANCE GUIDELINES AND FORMS

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- It is the objective of the district to increase competition and promote the long-term competitive capacity of local firms and historically underutilized businesses (HUBs) owned or operated by minorities or women by encouraging and providing information and access to compete in all facets of the District's procurement opportunities.
- A HUB shall be defined as a business formed for the purpose of making a profit in which at least 51 percent of the business is owned, operated, and controlled by one or more of the following: (1) Minority-Owned Business Enterprise, (2) Minority Individual, (3) Woman-Owned Business Enterprise, or (4) Small Business Enterprise.
- The District's expectation is that a minimum of 30 percent of all District work advertised for competitive procurement shall be performed by HUBs as prime contractors or as subcontractors. This expectation is applicable to any change orders, modifications, and/or revisions to the original award. However, nothing in this policy shall operate in violation of law, including the provisions of the revised civil statutes of Texas, Texas Education Code Section 44.031, or any other provision of state or federal law.
- A vendor does not have to be certified as a HUB to participate in the District's procurement activities; however, only "certified HUBs may be counted toward meeting the District's HUB goal at the subcontracting level.
- A bidder/proposer may not apply one of its subsidiary companies or its own workforce towards meeting its HUB subcontracting goals.
- The district shall recognize certifications issued by the North Central Texas Regional Certification Agency (NCTRCA), State of Texas HUB, Small Business Administration (SBA) 8A or SDB, Dallas/Fort Worth Minority Supplier Development Council; Women's Business Council Southwest, and other certifications on an individual basis.
- All District bidders/proposers must be ready to demonstrate positive and reasonable good faith efforts to subcontract with and/or procure supplies/services from HUBs.
- Respondents who will subcontract portions of the work will be required to submit a letter of intent to subcontract (page 37) for each proposed subcontractor prior to an agreement being executed by the Board or District, or committing the District to an expenditure of funds.
- The contractor/proposer shall notify the Purchasing Director if the percentage of HUB participation declines or falls below the level of participation represented in the contract.
- Contractor must be prepared to submit a Pay Activity Report indicating the amounts paid to its subcontractors at any time requested by the District.
- Contractor agrees to establish a written contract with each subcontractor.

**Subcontractor/Supplier Utilization** - List all subcontractors/suppliers (minority and non-minority) that will be utilized in this bid/proposal. Non-certified firms will not be counted towards the prime's M/WBE subcontracting goals. Bidders/proposers may not apply one of its subsidiary companies or its own workforce towards meeting its M/WBE subcontracting goals. Use additional sheets if necessary.

Subcontractor / Supplier	Contact Person & Phone Number	Certification Type	Certification #	Ethnicity / Gender	Service/Supplies To be Provided	Estimated Amount	% of Total Bid
					<b>TOTALS</b>		

**Good Faith Efforts Documentation** – Complete this section if subcontractors/suppliers will be utilized if those subcontractors/suppliers are not M/WBE.

Yes No

<b>1. Was contact made with M/WBE's by telephone or written correspondence at least one week before the bid was due to determine whether any M/WBE's were interested in subcontracting and/or joint ventures?</b>		
<b>2. Were contracts broken down to provide opportunities for subcontracting?</b>		
<b>3. Was your company represented at a pre-bid/proposal conference to discuss, among other matters, M/WBE participation opportunities and obtain a list of certified M/WBE's?</b>		
<b>4. Was information provided to M/WBE's concerning bonding, lines of credit, technical assistance, insurance, scope of work, plans/specifications, etc.?</b>		
<b>5. Were negotiations conducted in good faith with interested M/WBE's?</b>		
<b>6. Were subcontracting opportunities advertised in general circulation, trade associations, minority/women focused media and/or minority chambers of commerce?</b>		
<b>7. Were the services utilized of available minority and women, community organizations, contractor groups, local, state, and federal business assistance offices, and other organizations that provide assistance in the identification of M/WBE's?</b>		

\*\* Special Note: The good faith efforts documentation is subject to an M/WBE audit. upon request, you will be required to provide supporting documentation for the purpose of verifying your good faith efforts.



**Letter of Intent to Perform/Contract as a Subcontractor**

---

Complete a form for each minority or woman-owned subcontractor, which will be utilized in this bid/proposal. If necessary, make copies to list additional subcontractors/suppliers.

Pursuant to district policy (CH Local), only “certified” HUBs may be counted towards meeting the district’s M/WBE goal at the subcontracting level. Refer to page 35 bullet 6 for a listing of DeSoto ISD-recognized certifications.

Bid/Proposal # \_\_\_\_\_ Bid/Proposal Title \_\_\_\_\_

Name of Offeror / Prime Contractor \_\_\_\_\_

Address, City, State & Zip \_\_\_\_\_

**SUBCONTRACTOR INFORMATION:**

1. The undersigned has been certified by a DeSoto ISD recognized certification agency

Name of Agency: \_\_\_\_\_ Certification # \_\_\_\_\_ Ethnicity/Gender \_\_\_\_\_

2. The undersigned is prepared to perform the following described work/service and/or supply the material listed in connection with the above project

\_\_\_\_\_  
\_\_\_\_\_

and at the following price \$ \_\_\_\_\_

\_\_\_\_\_ By: \_\_\_\_\_  
(Name of M/WBE firm) (Signature of Owner, President or Authorized Agent) (Date)

\_\_\_\_\_ \_\_\_\_\_  
(Phone) (Print or Type – Name of Owner, President or Authorized Agent)

**DECLARATION OF PRIME CONTRACTOR:**

I \_\_\_\_\_ HERBY DECLARE AND AFFIRM that I am the  
(Name of Declarant)

\_\_\_\_\_  
(Title of Declarant)

and a duly authorized representative of \_\_\_\_\_  
(Name of Prime Contractor)

to make this declaration that I have personally reviewed the material and facts set forth in this Letter of Intent to Perform/Contract as a Subcontractor. To the best of my knowledge, information and belief, the facts and representations contained in this form are true. The owner, president or authorized agent of the M/WBE firm signed this form and no material facts have been omitted.

The prime contractor has designated the following person as their M/WBE Liaison Officer:

\_\_\_\_\_  
(Name of M/WBE Liaison Officer) (Phone)

Caution: Any false statements or misrepresentations regarding information submitted on this form may be a criminal offence in violation of Section 37.10 of the Texas Penal Code.

\_\_\_\_\_  
(Name of Declarant) (Phone)

\_\_\_\_\_  
(Signature of Declarant) (Date)

**APPENDIX C**

**REQUEST FOR  
QUALIFICATIONS  
FOR A  
DISTRICT-WIDE ENERGY  
CONSERVATION  
SERVICES PROGRAM  
DRAFT OF CONTRACT FOLLOWS**



# AIA Document A14f'-2004

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

AGREEMENT made as of the \_\_\_\_\_ day of \_\_\_\_\_ in the year 2016  
(In words, indicate day, month and year.)

BETWEEN the Owner:  
(Name, legal status, address and other information)

DESOTO Independent School District  
200 E. Belt Line Rd.  
DeSoto, Texas 75115  
214-223-6666  
214-274-8041 (fax)

And the Design-Builder:  
(Name, legal status, address and other information)

For the following Project:  
(Name, location and detailed description)

DESOTO ISD Utility Conservation Services/Energy Savings Performance Contract

The Owner and Design- Builder agree as follows.

**ADDITIONS AND DELETIONS:**  
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revision to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

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

Consultation with an attorney is also encouraged with respect to professional licensing requirements in the jurisdiction where the Project is located.

## TABLE OF ARTICLES

- 1 THE DESIGN-BUILD DOCUMENTS
- 2 WORK OF THIS AGREEMENT
- 3 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION
- 4 CONTRACT SUM
- 5 PAYMENTS
- 6 DISPUTE RESOLUTION
- 7 MISCELLANEOUS PROVISIONS
- 8 ENUMERATION OF THE DESIGN-BUILD DOCUMENTS

## TABLE OF EXHIBITS

- A TERMS AND CONDITIONS
- B DETERMINATION OF THE COST OF THE WORK
- C INSURANCE AND BONDS

### ARTICLE 1 THE DESIGN-BUILD DOCUMENTS

§1.1 The Design-Build Documents form the Design-Build Contract. The Design-Build Documents consist of this Agreement between Owner and Design-Builder (hereinafter, the "Agreement") and its attached Schedules **A-I**; AIA Document A-141-2004 Exhibit A, Terms and Conditions and Supplementary Conditions attached hereto as Exhibit A.1; Addenda issued prior to execution of the Agreement; and Modifications issued after execution of this Agreement. The Design-Build Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Owner, (2) between the Owner and a Contractor or Subcontractor, or (3) between any persons or entities other than the Owner and Design-Builder, including but not limited to any consultant retained by the Owner to prepare or review the Project Criteria.

The Owner's project criteria and Design-Builder's proposals stemming from said criteria have heretofore been prepared and accepted; however, neither document is a contract document hereunder.

The nine attached schedules referenced above are as follows:

1. Schedule **A** – Scope of Work
2. Schedule **B** – Services Agreement
3. Schedule **C** – Performance Guarantee
4. Schedule **D** – Performance Tracking
5. Schedule **E** – Payment Schedule and Schedule of Values
6. Schedule **F** – Project Specific Customer Responsibilities
7. Schedule **G** – Prevailing Wage Schedule (See A.3.4.5 of Exhibit A.1.)
8. Schedule **H** – Performance and Payment Bond (See A.9.6.7 of Supplementary Terms and Conditions - Exhibit A.1.)
9. Schedule **I** – Agreed Schedule

§1.2 The Design-Build Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral.

Init.

§1.3 The Design-Build Contract may be amended or modified only by a Modification. A Modification is (1) a written amendment to the Design-Build Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Owner.

## ARTICLE 2 THE WORK OF THE DESIGN-BUILD CONTRACT

§2.1 The Design-Builder shall fully execute the Work described in the Design-Build Documents, except to the extent specifically indicated in the Design-Build Documents to be the responsibility of others.

## ARTICLE 3 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

§3.1 The date of commencement of the Work shall be the date of this Agreement unless a different date is stated below or provision is made for the date to be fixed in a notice issued by the Owner.

*(Insert the date of commencement if it differs from the date of this Agreement or, if applicable, state that the date will be fixed in a notice to proceed.)*

If, prior to the commencement of Work, the Owner requires time to file mortgages, documents related to mechanic's liens and other security interests, the Owner's time requirements shall be as follows:

*(Insert Owner's time requirements.)*

§3.2 The Contract Time shall be measured from the date of commencement, subject to adjustments of this Contract Time as provided in the Design-Build Documents.

*(Insert provisions, if any, for liquidated damages relating to failure to complete on time or for bonus payments for early completion of the Work.)*

§3.3 The Design-Builder shall achieve Substantial Completion of the Work not later than 180 days from the date of commencement, or as follows:

*(Insert number of calendar days. Alternatively, a calendar date may be used when coordinated with the date of commencement. Unless stated elsewhere in the Design-Build Documents, insert any requirements for earlier Substantial Completion of certain portions of the Work.)*

Portion of Work

Substantial Completion Date

§3.4 Design-Builder shall substantially complete the entire scope of work shown on Schedule A within 180 days following the date of commencement. Failure to substantially complete the Work within that timeframe, as that date may be extended as provided for herein, shall result in the liquidated damages set forth in A.8.3.4 of the Supplementary Terms and Conditions. The Owner shall have the right to withhold funds for late completion as specified in A.9.5.1 of the Exhibit A, Terms and Conditions.

Anything to the contrary notwithstanding, the approved schedule for the Work is attached as Schedule "I".

## ARTICLE 4 CONTRACT SUM

§4.1 The Owner shall pay the Design-Builder the Contract Sum in current funds for the Design-Builder's performance of the Design-Build Contract. The Contract Sum shall be one of the following:

*(Check the appropriate box.)*

Stipulated Sum in accordance with Section 4.2 below;

Cost of the Work Plus Design-Builder's Fee in accordance with Section 4.3 below;

Init.

[ ] Cost of the Work Plus Design-Builder's Fee with a Guaranteed Maximum Price in accordance with Section 4.4 below.

(Based on the selection above, complete either Section 4.2, 4.3 or 4.4 below.)

#### §4.2 STIPULATED SUM

§4.2.1 The Stipulated Sum shall be (\$ ), subject to additions and deductions as provided in the Design-Build Documents. Payments are to be made on percentage completion basis as per Schedule E. Schedule of Values may be adjusted during construction as long as guaranteed maximum price is not exceeded.

§4.2.2 The Stipulated Sum is based upon the following alternates, if any, which are described in the Design-Build Documents and are hereby accepted by the Owner:

§4.2.3

(Paragraphs deleted)

§4.2.4

(Paragraphs deleted)

(Table deleted)

§4.2.5

§4.3

(Paragraphs deleted)

§4.4

(Paragraphs deleted)

§4.4.3

(Paragraphs deleted)

(Table deleted)

(Paragraphs deleted)

(Table deleted)

(Paragraphs deleted)

#### §4.5 CHANGES IN THE WORK

§4.5.1 Adjustments of the Contract Sum on account of changes in the Work may be determined by any of the methods listed in Article A.7 of Exhibit A, Terms and Conditions; however, anything to the contrary notwithstanding, overhead and markup shall be equitably adjusted as agreed to by the Owner and Design-Builder on a Change Order basis.

§4.5.2

### ARTICLE 5 PAYMENTS

#### §5.1 PROGRESS PAYMENTS

§5.1.1 Based upon Applications for Payments submitted to the Owner by the Design-Builder, the Owner shall make progress payments on account of the Contract Sum to the Design-Builder as provided below and elsewhere in the Design-Build Documents.

§5.1.2 The period covered by each Application for Payments shall be one calendar month ending on the last day of the month, or as follows:

§5.1.3 Provided that an Application for Payment is received not later than the last day of a month, the Owners shall make payment to the Design-Builder not later than the 20th day of the next month. Within seven (7) days following the receipt of Design-Builder's Application for Payment, a written acknowledgement of the Application for Payment shall be furnished as provided in A.9.4.1 of the Exhibit A, Terms and Conditions.

#### §5.1.4

#### §5.1.5

§5.1.6 In taking action on the Design-Builder's Applications for Payment, the Owners shall be entitled to rely on the accuracy and completeness of the information furnished by the Design-Builder and shall not be deemed to have made a detailed examination, auditor arithmetic verification of the documentation submitted in accordance with Sections 5.1.4 or 5.1.5, or other supporting data; to have made exhaustive or continuous on-site inspections; or to have made examinationsto ascertain how or for what purpose the Design-Builder has used amounts previously paid on account of the Agreement. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner's accountants acting in the sole interest of the Owner.

§5.1.7 Except with the Owner's prior approval, the Design-Builder shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

### §5.2 PROGRESS PAYMENTS-STIPULATED SUM

§5.2.1 Applications for Payment where the Contract Sum is based upon a Stipulated Sum shall indicate the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment.

§5.2.2 Subject to other provisions of the Design-Build Documents, the amount of each progress payment shall be computed as follows:

- .1 Take that portion of the Contract Sum properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the Contract Sum allocated to that portion of the Work in the schedule of values, less retainage of five percent (5.0%) on the Work, other than services provided by design professionals and other consultants retained directly by the Design-Builder. Pending final determination of cost to the Owner of Changes in the Work, amounts not in dispute shall be included as provided in Section A.7.3.8 of Exhibit A, Terms and Conditions;
- .2 Add that portion of the Contract Sum properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the completed construction (or, if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing), less retainage of five percent (5.0%);
- .3 Subtract the aggregate of previous payments made by the Owner; and
- .4 Subtract amounts, if any, for which the Owner has withheld payment from or nullified an Application for Payment as provided in Section A.9.5 of Exhibit A, Terms and Conditions.

§5.2.3 The progress payment amount determined in accordance with Section 5.2.2 shall be further modified under the following circumstances:

- .1 add, upon Substantial Completion of the Work, a sum sufficient to increase the total payments to ninety-five percent (95%) of the Contract Sum, less such amounts as the Owners shall determine for incomplete Work, retainage applicable to such work and unsettled claims; and  
(Section A.9.8.6 of Exhibit A, Terms and Conditions requires release of applicable retainage upon Substantial Completion of Work with consent of surety, if any.)
- .2 add, if final completion of the Work is thereafter materially delayed through no fault of the Design-Builder, any additional amounts payable in accordance with Section A.9.10.3 of Exhibit A, Terms and Conditions.

§5.2.4 Reduction or limitation of retainage, if any, under Section 5.2.2 shall be as follows:

*(If it is intended, prior to Substantial Completion of the entire Work, to reduce or limit the retainage resulting from the percentages inserted in Sections 5.2.2.1 and 5.2.2.2 above, and this is not explained elsewhere in the Design-Build Documents, insert the provisions for such reduction or limitation.)*



(Paragraphs deleted)

§5.3

§5.4

(Paragraphs deleted)

§5.5 FINAL PAYMENT

§5.5.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Design-Builder not later than 30 days after the Design-Builder has fully performed the Design-Build Contract, including the requirements in Section A.9.10 of Exhibit A, Terms and Conditions, except for the Design-Builder's responsibility to correct non-conforming Work discovered after final payment or to satisfy other requirements, if any, which extend beyond final payment.

ARTICLE 6 DISPUTE RESOLUTION

§6.1

(Paragraphs deleted)

§6.2 If the parties do not resolve their dispute through mediation pursuant to Section A.4.3 of Exhibit A, Terms and Conditions, the method of binding dispute resolution shall be the following:

(If the parties do not select a method of binding dispute resolution, then the method of binding dispute resolution shall be by litigation in a court of competent jurisdiction.)

(Check one.)

Arbitration pursuant to Section A.4.4 of Exhibit A, Terms and Conditions

Litigation in a court of competent jurisdiction

Other (Specify)

§6.3

(Paragraph deleted)

ARTICLE 7 MISCELLANEOUS PROVISIONS

§7.1 The Architect, other design professionals and consultants engaged by the Design-Builder shall be persons or entities duly licensed to practice their professions in the jurisdiction where the Project is located and are listed as follows:

(Insert name, address, license number, relationship to Design-Builder and other information.)

Name and Address	License Number	Relationship to Design-Builder	Other Information
------------------	----------------	--------------------------------	-------------------

§7.2 Consultants, if any, engaged directly by the Owner, their professions and responsibilities are listed below:

(Insert name, address, license number, if applicable, and responsibilities to Owner and other information.)

Name and Address	License Number	Responsibilities to Owner	Other Information
------------------	----------------	---------------------------	-------------------

§7.3 Separate contractors, if any, engaged directly by the Owner, their trades and responsibilities are listed below:

(Insert name, address, license number, if applicable, responsibilities to Owner and other information.)

Name and Address	License Number	Responsibilities to Owner	Other Information
------------------	----------------	---------------------------	-------------------

§7.4 The Owner's Designated Representative is:  
*(Insert name, address and other information.)*

§7.4.1 The Owner's Designated Representative identified above shall be authorized to act on the Owner's behalf with respect to the Project.

§7.5 The Design-Builder's Designated Representative is:  
*(Insert name, address and other information.)*

§7.5.1 The Design-Builder's Designated Representative identified above shall be authorized to act on the Design-Builder's behalf with respect to the Project.

§7.6 Neither the Owner's nor the Design-Builder's Designated Representative shall be changed without ten (10) days written notice to the other party.

§7.7 Other provisions:

§7.7.1 Where reference is made in this Agreement to a provision of another Design-Build Document, the reference refers to that provision as amended or supplemented by other provisions of the Design-Build Documents.

Design-Builder and Owner have heretofore agreed upon preliminary design documents as a result of the energy audit process. Anything to the contrary notwithstanding, the construction documents required herein shall consist of the detailed energy audit, a detailed scope of work by building, outlines specifications or other documents sufficient to establish the character of the entire project including the materials and other elements of the project as may be appropriate. In order to maintain project schedule, Design-Builder may commence construction upon certain elements of the Work (with the prior written approval of the Owner which said approval shall not unreasonably be withheld) prior to approval of final construction documents. Anything to the contrary notwithstanding, Design-Builder shall not be required to submit submittals for approval following approval of the construction documents.

§7.7.2 Payments due and unpaid under the Design-Build Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located. Interest shall accrue pursuant to the Texas Prompt Payment Act, Texas Government Code.  
*(Insert rate of interest agreed upon, if any.)*

percent ( % )

*(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's and Design-Builder's principal places of business, the location of the Project and elsewhere may affect the validity of this provision. Legal advice should be obtained with respect to deletions or modifications, and also regarding requirements such as written disclosures or waivers.)*

## ARTICLE 8 ENUMERATION OF THE DESIGN-BUILD DOCUMENTS

§8.1 The Design-Build Documents, except for Modifications issued after execution of this Agreement are enumerated as follows:

1. AIA Document A141-2004-Standard Form of Agreement Between Owner and Design-Builder;
2. AIA Document A141-2004 Exhibit A - Terms and Conditions;
3. Exhibit A.I - Supplementary Terms and Conditions to AIA Document A141-2004 Exhibit A; and
4. Schedules A - II listed in Section 1.1 hereof

§8.1.1

§8.1.2

*(Paragraphs deleted)*

*(Table deleted)*

§8.1.3

*(Paragraphs deleted)*

*(Table deleted)*

§8.1.4

*(Paragraphs deleted)*

§8.1.5

*(Paragraphs deleted)*

§8.1.6

*(Paragraphs deleted)*

*(Table deleted)*

§8.1.7

*(Paragraphs deleted)*

§8.1.8

§8.1.9

*(Paragraphs deleted)*

§8.1.10

*(Paragraphs deleted)*

This Agreement entered into as of the day and year first written above and is executed in at least three (3) original copies, of which one is to be delivered to the Design-Builder and one to the Owner.

**Written Contract Approved by Board of  
Trustees During Meeting as per Section  
44.901(b) of the Texas Education Code on the**  
\_\_\_\_\_ day of \_\_\_\_\_,

DESOTO INDEPENDENT SCHOOL DISTRICT

OWNER (Signature)

DESIGN-BUILDER (Signature)

(Printed name and title)

(Printed name and title)



# AIA Document A14f. -2004 Exhibit A

## Terms and Conditions

for the following PROJECT:  
(Name and location or address)

DESOTO ISD Utility Conservation Services/Energy Savings Performance Contract

THE OWNER:  
(Name, legal status and address)

DESOTO Independent School District  
200 E. Belt Line Rd  
DESOTO, Texas 75115  
214-223-6666  
214-274-8041

THE DESIGN-BUILDER:  
(Name, legal status and address)

### ADDITIONS AND DELETIONS:

The author of this document has Added information needed for its completion. The author may also have revised the text of the original AIA standard form. Any *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information And where the author has added to or deleted from the original AIA text.

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## TABLE OF ARTICLES

- A.1 GENERAL PROVISIONS
- A.2 OWNER
- A.3 DESIGN-BUILDER
- A.4 DISPUTE RESOLUTION
- A.5 AWARD OF CONTRACTS
- A.6 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS
- A.7 CHANGES IN THE WORK
- A.8 TIME
- A.9 PAYMENTS AND COMPLETION
- A.10 PROTECTION OF PERSONS AND PROPERTY
- A.11 INSURANCE AND BONDS
- A.12 UNCOVERING AND CORRECTION OF WORK
- A.13 MISCELLANEOUS PROVISIONS
- A.14 TERMINATION OR SUSPENSION OF THE DESIGN-BUILD CONTRACT

## ARTICLE A.1 GENERAL PROVISIONS

### §A.1.1 BASIC DEFINITIONS

#### §A.1.1.1 THE DESIGN-BUILD DOCUMENTS

The Design-Build Documents are identified in Section 1.1 of the Agreement.

#### §A.1.1.2 PROJECT CRITERIA

The Project Criteria are identified in Section 8.1.3 of the Agreement and may describe the character, scope, relationships, forms, size and appearance of the Project, materials and systems and, in general, their quality levels, performance standards, requirements or criteria, and major equipment layouts.

#### §A.1.1.3 ARCHITECT

The Architect is the person lawfully licensed to practice architecture or an entity lawfully practicing architecture identified as such in the Agreement and having a direct contract with the Design-Builder to perform design services for all or a portion of the Work, and is referred to throughout the Design-Build Documents as if singular in number. The term "Architect" means the Architect or the Architect's authorized representative.

#### §A.1.1.4 CONTRACTOR

A Contractor is a person or entity, other than the Architect, that has a direct contract with the Design-Builder to perform all or a portion of the construction required in connection with the Work. The term "Contractor" is referred to throughout the Design-Build Documents as if singular in number and means a Contractor or an authorized representative of the Contractor. The term "Contractor" does not include a separate contractor, as defined in Section A.6.1.2, or subcontractors of a separate contractor.

#### §A.1.1.5 SUBCONTRACTOR

A Subcontractor is a person or entity who has a direct contract with a Contractor to perform a portion of the construction required in connection with the Work at the site. The term "Subcontractor" is referred to throughout the Design-Build Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor.

#### §A.1.1.6 THE WORK

The term "Work" means the design, construction and services required by the Design-Build Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Design-Builder to fulfill the Design-Builder's obligations. The Work may constitute the whole or a part of the Project.

#### §A.1.1.7 THE PROJECT

The Project is the total design and construction of which the Work performed under the Design-Build Documents may be the whole or a part, and which may include design and construction by the Owner or by separate contractors.

#### §A.1.1.8 NEUTRAL

The Neutral is the individual appointed by the parties to decide Claims and disputes pursuant to Section A.4.2.1.

### §A.1.2 COMPLIANCE WITH APPLICABLE LAWS

§A.1.2.1 If the Design-Builder believes that implementation of any instruction received from the Owner would cause a violation of any applicable law, statute, ordinance, building code, rule or regulation, the Design-Builder shall notify the Owner in writing. Neither the Design-Builder nor any Contractor or Architect shall be obligated to perform any act which they believe will violate any applicable law, ordinance, rule or regulation.

§A.1.2.2 The Design-Builder shall be entitled to rely on the completeness and accuracy of the information contained in the Project Criteria, but not that such information complies with applicable laws, regulations and codes, which shall be the obligation of the Design-Builder to determine. In the event that a specific requirement of the Project Criteria conflicts with applicable laws, regulations and codes, the Design-Builder shall furnish Work which complies with such laws, regulations and codes. In such case, the Owner shall issue a Change Order to the Design-Builder unless the Design-Builder recognized such non-compliance prior to execution of this Agreement and failed to notify the Owner.

### §A.1.3 CAPITALIZATION

§A.1.3.1 Terms capitalized in these Terms and Conditions include those which are (1) specifically defined, (2) the titles of numbered articles and identified references to sections in the document, or (3) the titles of other documents published by the American Institute of Architects.

### §A.1.4 INTERPRETATION

§A.1.4.1 In the interest of brevity, the Design-Build Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

§A.1.4.2 Unless otherwise stated in the Design-Build Documents, words which have well-known technical or construction industry meanings are used in the Design-Build Documents in accordance with such recognized meanings.

### §A.1.5 EXECUTION OF THE DESIGN-BUILD DOCUMENTS

§A.1.5.1 The Design-Build Documents shall be signed by the Owner and Design-Builder.

§A.1.5.2 Execution of the Design-Build Contract by the Design-Builder is a representation that the Design-Builder has visited the site, become generally familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Design-Build Documents.

### §A.1.6 OWNERSHIP AND USE OF DOCUMENTS AND ELECTRONIC DATA

§A.1.6.1 Drawings, specifications, and other documents including those in electronic form, prepared by the Architect and furnished by the Design-Builder are Instruments of Service. The Design-Builder, Design-Builder's Architect and other providers of professional services individually shall retain all common law, statutory and other reserved rights, including copyright in those Instruments of Services furnished by them. Drawings, specifications, and other documents and materials and electronic data are furnished for use solely with respect to this Project.

§A.1.6.2 Upon execution of the Design-Build Contract, the Design-Builder grants to the Owner an non-exclusive license to reproduce and use the Instruments of Service solely in connection with the Project, including the Project's further development by the Owner and others retained by the Owner for such purposes, provided that the Owners shall comply with all obligations, including prompt payment of sums when due, under the Design-Build Documents. Subject to the Owner's compliance with such obligations, such licenses shall extend to those parties retained by the Owner for such purposes, including other design professionals. The Design-Builder shall obtain similar non-exclusive licenses from its design professionals, including the Architect. The Owners shall not otherwise assign or transfer any license hereinto to another party without prior written agreement of the Design-Builder. Any unauthorized reproduction or use of the Instruments of Service by the Owner or others shall be at the Owner's sole risk and expense without liability to the Design-Builder and its design professionals. Except as provided in Section A.1.6.4, termination of this Agreement prior to completion of the Design-Builder's services to be performed under this Agreement shall terminate this license.

§A.1.6.3 Prior to any electronic exchange by the parties of the Instruments of Service or any other documents or material to be provided by one party to the other, the Owner and the Design-Builder shall agree in writing on the specific conditions governing the format thereof, including any special limitations or licenses not otherwise provided in the Design-Build Documents.

§A.1.6.4 If this Agreement is terminated for any reason other than the default of the Owner, each of the Design-Builder's design professionals, including the Architect, shall be contractually required to convey to the Owner an non-exclusive license to use that design professional's Instruments of Service for the completion, use and maintenance of the Project, conditioned upon the Owner's written notice to that design professional of the Owner's assumption of the Design-Builder's contractual duties and obligations to that design professional and payment to that design professional of all amounts due to that design professional and its consultants. If the Owner does not assume the remaining duties and obligations of the Design-Builder to that design professional under this Agreement, then the Owners shall indemnify and hold harmless that design professional from all claims and any expense, including legal fees, which that design professional shall thereafter incur by reason of the Owner's use of such Instruments of Service. The Design-Builder shall incorporate the requirements of this Section A.1.6.4 in all agreements with its design professionals.



§A.1.6.5 Submission or distribution of the Design-Builder's documents to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of the rights reserved in Section A.1.6.1.

## ARTICLE A.2 OWNER

### §A.2.1 GENERAL

§A.2.1.1 The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Design-Build Documents as if singular in number. The term "Owner" means the Owner or the Owner's authorized representative. The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all Project matters requiring the Owner's approval or authorization. The Owner shall render decisions in a timely manner and in accordance with the Design-Builder's schedules submitted to the Owner.

§A.2.1.2 The Owner shall furnish to the Design-Builder within 15 days after receipt of a written request information necessary and relevant for the Design-Builder to evaluate, given notice of enforcement mechanic's lien rights. Such information shall include an correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein.

### §A.2.2 INFORMATION AND SERVICES REQUIRED OF THE OWNER

§A.2.2.1 Information or services required of the Owner by the Design-Build Documents shall be furnished by the Owner with reasonable promptness. Any other information or services relevant to the Design-Builder's performance of the Work under the Owner's control shall be furnished by the Owner after receipt from the Design-Builder of a written request for such information or services.

§A.2.2.2 The Owner shall be responsible to provide surveys, if not required by the Design-Build Documents to be provided by the Design-Builder, describing physical characteristics, legal limitations, and utility locations for the site of this Project, and a written legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements, and adjoining property and structures; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restriction, boundaries, and contours of the site; locations, dimensions, and necessary data pertaining to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All the information on the survey shall be referenced to a Project benchmark.

§A.2.2.3 The Owner shall provide, to the extent available to the Owner and if not required by the Design-Build Documents to be provided by the Design-Builder, the results and reports of prior tests, inspections or investigations conducted for the Project involving structural or mechanical systems, chemical, air and water pollution, hazardous materials or environmental and subsurface conditions and information regarding the presence of pollutants at the Project site.

§A.2.2.4 The Owner may obtain independent review of the Design-Builder's design, construction and other documents by a separate architect, engineer, and contractor or cost estimator under contract to or employed by the Owner. Such independent review shall be undertaken at the Owner's expense in a timely manner and shall not delay the orderly progress of the Work.

§A.2.2.5 The Owner shall cooperate with the Design-Builder in securing building and other permits, licenses and inspections. The Owner shall not be required to pay the fees for such permits, licenses and inspections unless the cost of such fees is excluded from the responsibility of the Design-Builder under the Design-Build Documents.

§A.2.2.6 These services, information, surveys and reports required to be provided by the Owner under Section A.2.2, shall be furnished at the Owner's expense, and the Design-Builder shall be entitled to rely upon the accuracy and completeness thereof, except as otherwise specifically provided in the Design-Build Documents or to the extent the Owner advises the Design-Builder to the contrary in writing.

§A.2.2.7 If the Owner observes or otherwise becomes aware of a fault or defect in the Work or non-conformity with the Design-Build Documents, the Owner shall give prompt written notice thereof to the Design-Builder.

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§A.2.2.8 The Owners shall, at the request of the Design-Builder, prior to execution of the Design-Build Contract and promptly upon request thereafter, furnish to the Design-Builder reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Design-Build Documents.

§A.2.2.9 The Owners shall communicate through the Design-Builder with persons or entities employed or retained by the Design-Builder, unless otherwise directed by the Design-Builder.

§A.2.2.10 The Owners shall furnish the services of geotechnical engineers or other consultants, if not required by the Design-Build Documents to be provided by the Design-Builder, for subsurface, air and water conditions when such services are deemed reasonably necessary by the Design-Builder to properly carry out the design services provided by the Design-Builder and the Design-Builder's Architect. Such services may include, but are not limited to, test borings, test pits, determinations of soil bearing values, percolation tests, evaluation of hazardous materials, ground corrosion and resistivity tests, and necessary operations for anticipating subsurface conditions. The services of geotechnical engineer(s) or other consultants shall include preparation and submission of all appropriate reports and professional recommendations.

§A.2.2.11 The Owners shall promptly obtain easements, zoning variances, and legal authorizations regarding site utilization where essential to the execution of the Owner's program.

### §A.2.3 OWNER REVIEW AND INSPECTION

§A.2.3.1 The Owners shall review and approve or take other appropriate action upon the Design-Builder's submittals, including but not limited to design and construction documents, required by the Design-Build Documents, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Design-Build Documents. The Owner's actions shall be taken with such reasonable promptness as to cause no delay in the Work or in the activities of the Design-Builder or separate contractors. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details, such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Design-Builder as required by the Design-Build Documents.

§A.2.3.2 Upon review of the design documents, construction documents, or other submittals required by the Design-Build Documents, the Owners shall take one of the following actions:

1. Determine that the documents or submittals are in conformance with the Design-Build Documents and approve them.
2. Determine that the documents or submittals are in conformance with the Design-Build Documents but request changes in the documents or submittals which shall be implemented by a Change in the Work.
3. Determine that the documents or submittals are not in conformity with the Design-Build Documents and reject them.
4. Determine that the documents or submittals are not in conformity with the Design-Build Documents, but accept them by implementing a Change in the Work.
5. Determine that the documents or submittals are not in conformity with the Design-Build Documents, but accept them and request changes in the documents or submittals which shall be implemented by a Change in the Work.

§A.2.3.3 The Design-Builder shall submit to the Owner for the Owner's approval, pursuant to Section A.2.3.1, any proposed change or deviation to previously approved documents or submittals. The Owners shall review each proposed change or deviation to previously approved documents or submittals which the Design-Builder submits to the Owner for the Owner's approval with reasonable promptness in accordance with Section A.2.3.1 and shall make one of the determinations described in Section A.2.3.2.

§A.2.3.4 Notwithstanding the Owner's responsibility under Section A.2.3.2, the Owner's review and approval of the Design-Builder's documents or submittals shall not relieve the Design-Builder of responsibility for compliance with the Design-Build Documents unless a) the Design-Builder has notified the Owner in writing of the deviation prior to approval by the Owner or, b) the Owner has approved a Change in the Work reflecting any deviations from the requirements of the Design-Build Documents.

§A.2.3.5 The Owner may visit the site to keep informed about the progress and quality of the portion of the Work completed. However, the Owners shall not be required to make exhaustive or continuous on-site inspections to check

the quality or quantity of the Work. Visits by the Owners shall not be construed to create an obligation on the part of the Owner to make on-site inspections to check the quantity or quality of the Work. The Owners shall neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Design-Builder's rights and responsibilities under the Design-Build Documents, except as provided in Section A.3.3.7.

§A.2.3.6 The Owners shall not be responsible for the Design-Builder's failure to perform the Work in accordance with the requirements of the Design-Build Documents. The Owners shall not have control over or charge of and will not be responsible for acts or omissions of the Design-Builder, Architect, Contractors, or their agents or employees, or any other persons or entities performing portions of the Work for the Design-Builder.

§A.2.3.7 The Owner may reject Work that does not conform to the Design-Build Documents. Whenever the Owner considers it necessary or advisable, the Owners shall have authority to require inspection or testing of the Work in accordance with Section A.13.5.2, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Owner nor a decision made in good faith to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Owner to the Design-Builder, the Architect, Contractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.

§A.2.3.8 The Owner may appoint a non-site project representative to observe the Work and to have such other responsibilities as the Owner and the Design-Builder agree to in writing.

§A.2.3.9 The Owners shall conduct inspections to determine the date or dates of Substantial Completion and the date of final completion.

#### §A.2.4 OWNER'S RIGHT TO STOP WORK

§A.2.4.1 If the Design-Builder fails to correct Work which is not in accordance with the requirements of the Design-Build Documents as required by Section A.12.2 or persistently fails to carry out Work in accordance with the Design-Build Documents, the Owner may issue a written order to the Design-Builder to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Design-Builder or any other person or entity, except to the extent required by Section A.6.1.3.

#### §A.2.5 OWNER'S RIGHT TO CARRY OUT THE WORK

§A.2.5.1 If the Design-Builder defaults or neglects to carry out the Work in accordance with the Design-Build Documents and fails within a seven-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may after such seven-day period give the Design-Builder a second written notice to correct such deficiencies within a three-day period. If the Design-Builder within such three-day period after receipt of such second notice fails to commence and continue to correct any deficiencies, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. In such case, an appropriate Change Order shall be issued deducting from payments then or thereafter due the Design-Builder the reasonable cost of correcting such deficiencies. If payments due the Design-Builder are not sufficient to cover such amounts, the Design-Builder shall pay the difference to the Owner.

### ARTICLE A.3 DESIGN-BUILDER

#### §A.3.1 GENERAL

§A.3.1.1 The Design-Builder is the person or entity identified as such in the Agreement and is referred to throughout the Design-Build Documents as if singular in number. The Design-Builder may be an architect or other design professional, a construction contractor, a real estate developer or any other person or entity legally permitted to do business as a design-builder in the location where the Project is located. The term "Design-Builder" means the Design-Builder or the Design-Builder's authorized representative. The Design-Builder's representative is authorized to act on the Design-Builder's behalf with respect to the Project.

§A.3.1.2 The Design-Builder shall perform the Work in accordance with the Design-Build Documents.

#### §A.3.2 DESIGN SERVICES AND RESPONSIBILITIES

§A.3.2.1 When applicable law requires that services be performed by licensed professionals, the Design-Builder shall provide those services through the performance of qualified persons or entities duly licensed to practice their

professions. The Owner understands and agrees that the services performed by the Design-Builder's Architect and the Design-Builder's other design professionals and consultants are undertaken and performed in the sole interest of and for the exclusive benefit of the Design-Builder.

§A.3.2.2 The agreements between the Design-Builder and Architect or other design professionals identified in the Agreement, and in any subsequent Modifications, shall be in writing. These agreements, including services and financial arrangements with respect to this Project, shall be promptly and fully disclosed to the Owner upon the Owner's written request.

§A.3.2.3 The Design-Builder shall be responsible to the Owner for acts and omissions of the Design-Builder's employees, Architect, Contractors, Subcontractors and their agents and employees, and other persons or entities, including the Architect and other design professionals, performing any portion of the Design-Builder's obligations under the Design-Build Documents.

§A.3.2.4 The Design-Builder shall carefully study and compare the Design-Build Documents, materials and other information provided by the Owner pursuant to Section A.2.2, shall take field measurements of any existing conditions related to the Work, shall observe any conditions at the site affecting the Work, and report promptly to the Owner any errors, inconsistencies or omissions discovered.

§A.3.2.5 The Design-Builder shall provide to the Owner for Owner's written approval design documents sufficient to establish the size, quality and character of the Project; its architectural, structural, mechanical and electrical systems; and the materials and such other elements of the Project to the extent required by the Design-Build Documents. Deviations, if any, from the Design-Build Documents shall be disclosed in writing.

§A.3.2.6 Upon the Owner's written approval of the design documents submitted by the Design-Builder, the Design-Builder shall provide construction documents for review and written approval by the Owner. The construction documents shall set forth in detail the requirements for construction of the Project. The construction documents shall include drawings and specifications that establish the quality levels of materials and systems required. Deviations, if any, from the Design-Build Documents shall be disclosed in writing. Construction documents may include drawings, specifications, and other documents and electronic data setting forth in detail the requirements for construction of the Work, and shall:

- .1 be consistent with the approved design documents;
- .2 provide information for the use of those in the building trades; and
- .3 include documents customarily required for regulatory agency approvals.

§A.3.2.7 The Design-Builder shall meet with the Owner periodically to review progress of the design and construction documents.

§A.3.2.8 Upon the Owner's written approval of construction documents, the Design-Builder, with the assistance of the Owner, shall prepare and file documents required to obtain necessary approvals of governmental authorities having jurisdiction over the Project.

§A.3.2.9 The Design-Builder shall obtain from each of the Design-Builder's professionals and furnish to the Owner certifications with respect to the documents and services provided by such professionals (a) that, to the best of their knowledge, information and belief, the documents or services to which such certifications relate (i) are consistent with the Project Criteria set forth in the Design-Build Documents, except to the extent specifically identified in such certificate, (ii) comply with applicable professional practice standards, and (iii) comply with applicable laws, ordinances, codes, rules and regulations governing the design of the Project; and (b) that the Owner and its consultants shall be entitled to rely upon the accuracy of the representations and statements contained in such certifications.

§A.3.2.10 If the Owner requests the Design-Builder, the Architect or the Design-Builder's other design professionals to execute certificates other than those required by Section A.3.2.9, the proposed language of such certificates shall be submitted to the Design-Builder, or the Architect and such design professional through the Design-Builder, for review and negotiation at least 14 days prior to the requested dates of execution. Neither the Design-Builder, the Architect nor such other design professional shall be required to execute certificates that would require knowledge, services or responsibilities beyond the scope of their respective agreements with the Owner or Design-Builder.

### §A.3.3 CONSTRUCTION

§A.3.3.1 The Design-Builder shall perform no construction Work prior to the Owner's review and approval of the construction documents. The Design-Builder shall perform no portion of the Work for which the Design-Build Documents require the Owner's review of submittals, such as Shop Drawings, Product Data and Samples, until the Owner has approved each submittal.

§A.3.3.2 The construction Work shall be in accordance with approved submittals, except that the Design-Builder shall not be relieved of responsibility for deviations from requirements of the Design-Build Documents by the Owner's approval of design and construction documents or other submittals such as Shop Drawings, Product Data, Samples or other submittals unless the Design-Builder has specifically informed the Owner in writing of such deviation at the time of submittal and (1) the Owner has given written approval to the specific deviation as a minor change in the Work, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Design-Builder shall not be relieved of responsibility for errors or omissions in design and construction documents or other submittals such as Shop Drawings, Product Data, Samples or other submittals by the Owner's approval thereof.

§A.3.3.3 The Design-Builder shall direct specific attention, in writing or on resubmitted design and construction documents or other submittals such as Shop Drawings, Product Data, Samples or similar submittals, to revisions other than those requested by the Owner on previous submittals. In the absence of such written notice, the Owner's approval of a resubmission shall not apply to such revisions.

§A.3.3.4 When the Design-Build Documents require that a Contractor provide professional design services or certifications related to systems, materials or equipment, or when the Design-Builder in its discretion provides such design services or certifications through a Contractor, the Design-Builder shall cause professional design services or certification to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professionals, if prepared by others, shall bear such design professional's written approval. The Owner shall be entitled to rely upon the adequacy, accuracy and completeness of these services, certifications or approvals performed by such design professionals.

§A.3.3.5 The Design-Builder shall be solely responsible for and have control over all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Design-Build Documents.

§A.3.3.6 The Design-Builder shall keep the Owner informed of the progress and quality of the Work.

§A.3.3.7 The Design-Builder shall be responsible for the supervision and direction of the Work, using the Design-Builder's best skill and attention. If the Design-Build Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Design-Builder shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures. If the Design-Builder determines that such means, methods, techniques, sequences or procedures may not be safe, the Design-Builder shall give timely written notice to the Owner and shall not proceed with that portion of the Work without further written instructions from the Owner. If the Design-Builder is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Design-Builder, the Owner shall be solely responsible for any resulting loss or damage.

§A.3.3.8 The Design-Builder shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work.

### §A.3.4 LABOR AND MATERIALS

§A.3.4.1 Unless otherwise provided in the Design-Build Documents, the Design-Builder shall provide or cause to be provided and shall pay for design services, 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.

§A.3.4.2 When a material is specified in the Design-Build Documents, the Design-Builder may make substitutions only with the consent of the Owner and, if appropriate, in accordance with a Change Order.

§A.3.4.3 The Design-Builder shall enforce strict discipline and good order among the Design-Builder's employees and other persons carrying out the Design-Build Contract. The Design-Builder shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

#### §A.3.5 WARRANTY

§A.3.5.1 The Design-Builder warrants to the Owner that materials and equipment furnished under the Design-Build Documents will be of good quality and new unless otherwise required or permitted by the Design-Build Documents, that the Work will be free from defects not inherent in the quality required or permitted by law or otherwise, and that the Work will conform to the requirements of the Design-Build Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Design-Builder's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Design-Builder, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Owner, the Design-Builder shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

#### §A.3.6 TAXES

§A.3.6.1 The Design-Builder shall pay all sales, consumer, use and similar taxes for the Work provided by the Design-Builder which had been legally enacted on the date of the Agreement, whether or not yet effective or merely scheduled to go into effect.

#### §A.3.7 PERMITS, FEES AND NOTICES

§A.3.7.1 The Design-Builder shall secure and pay for building and other permits and governmental fees, licenses and inspections necessary for the proper execution and completion of the Work which are customarily secured after execution of the Design-Build Contract and which were legally required on the date the Owner accepted the Design-Builder's proposal.

§A.3.7.2 The Design-Builder shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities relating to the Project.

§A.3.7.3 It is the Design-Builder's responsibility to ascertain that the Work is in accordance with applicable laws, ordinances, codes, rules and regulations.

§A.3.7.4 If the Design-Builder performs Work contrary to applicable laws, ordinances, codes, rules and regulations, the Design-Builder shall assume responsibility for such Work and shall bear the costs attributable to correction.

#### §A.3.8 ALLOWANCES

§A.3.8.1 The Design-Builder shall include in the Contract Sum all allowances stated in the Design-Build Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Design-Builder shall not be required to employ persons or entities to which the Design-Builder has reasonable objection.

§A.3.8.2 Unless otherwise provided in the Design-Build Documents:

- .1 allowances shall cover the cost to the Design-Builder of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;
- .2 Design-Builder's costs for unloading and handling at the site, labor, installation costs, overhead, profit and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum but not in the allowances; and
- .3 Whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Section A.3.8.2.1 and (2) changes in Design-Builder's costs under Section A.3.8.2.2.

§A.3.8.3 Materials and equipment under an allowance shall be selected by the Owner in sufficient time to avoid delay in the Work.

### §A.3.9DESIGN-BUILDER'SSCHEDULE

§A.3.9.1The Design-Builder, promptly after execution of the Design-Build Contract, shall prepare and submit for the Owner's information the Design-Builder's schedule for the Work. The schedule shall not exceed time limits and shall be in such detail as required under the Design-Build Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Design-Build Documents, shall provide for expeditious and practicable execution of the Work and shall include allowances for periods of time required for the Owner's review and for approval of submissions by authorities having jurisdiction over the Project.

§A.3.9.2The Design-Builder shall prepare and keep current a schedule of submittals required by the Design-Build Documents.

§A.3.9.3The Design-Builder shall perform the Work in general accordance with the most recent schedule submitted to the Owner.

### §A.3.10DOCUMENTSANDSAMPLESATTHESITE

§A.3.10.1The Design-Builder shall maintain at the site for the Owner one record copy of the drawings, specifications, addenda, Change Orders and other Modifications, in good order and marked currently to record field changes and selections made during construction, and one record copy of approved Shop Drawings, Product Data, Samples and similar required submittals. These shall be delivered to the Owner upon completion of the Work.

### §A.3.11SHOPDRAWINGS,PRODUCTDATA ANDSAMPLES

§A.3.11.1Shop Drawings are drawings, diagrams, schedules and other data specially prepared for the Work by the Design-Builder or a Contractor, Subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.

§A.3.11.2Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Design-Builder to illustrate materials or equipment for some portion of the Work.

§A.3.11.3Samples are physical examples that illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

§A.3.11.4Shop Drawings, Product Data, Samples and similar submittals are not Design-Build Documents. The purpose of their submittal is to demonstrate for those portions of the Work for which submittals are required by the Design-Build Documents the way by which the Design-Builder proposes to conform to the Design-Build Documents.

§A.3.11.5The Design-Builder shall review for compliance with the Design-Build Documents and approve and submit to the Owner only those Shop Drawings, Product Data, Samples and similar submittals required by the Design-Build Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of separate contractors.

§A.3.11.6By approving and submitting Shop Drawings, Product Data, Samples and similar submittals, the Design-Builder represents that the Design-Builder has determined and verified materials, field measurements and field construction criteria 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 Design-Build Documents.

### §A.3.12USE OF SITE

§A.3.12.1The Design-Builder shall confine operations at the site to areas permitted by law, ordinances, permits and the Design-Build Documents, and shall not unreasonably encumber the site with materials or equipment.

### §A.3.13CUTTING AND PATCHING

§A.3.13.1The Design-Builder shall be responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly.

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§A.3.13.2 The Design-Builders shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or separate contractors by cutting, patching or otherwise altering such construction or by excavation. The Design-Builders shall not cut or otherwise alter such construction by the Owner or a separate contractor except with written consent of the Owner and of such separate contractor; such consents shall not be unreasonably withheld. The Design-Builders shall not unreasonably withhold from the Owner or a separate contractor the Design-Builder's consent to cutting or otherwise altering the Work.

#### §A.3.14 CLEANING UP

§A.3.14.1 The Design-Builders shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Design-Build Contract. At completion of the Work, the Design-Builder shall remove from and about the Project waste materials, rubbish, the Design-Builder's stools, construction equipment, machinery and surplus materials.

§A.3.14.2 If the Design-Builder fails to clean up as provided in the Design-Build Documents, the Owner may do so and the cost thereof shall be charged to the Design-Builder.

#### §A.3.15 ACCESS TO WORK

§A.3.15.1 The Design-Builders shall provide the Owner access to the Work in preparation and progress wherever located.

#### §A.3.16 ROYALTIES, PATENTS AND COPYRIGHTS

§A.3.16.1 The Design-Builders shall pay all royalties and license fees. The Design-Builders shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturer is required or where the copyright violations are contained in drawings, specifications or other documents prepared by or furnished to the Design-Builder by the Owner. However, if the Design-Builder has reason to believe that there is required design, process or product is an infringement of a copyright or patent, the Design-Builders shall be responsible for such loss unless such information is promptly furnished to the Owner.

#### §A.3.17 INDEMNIFICATION

§A.3.17.1 To the fullest extent permitted by law, the Design-Builders shall indemnify and hold harmless the Owner, Owner's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death or injury to or destruction of tangible property other than the Work itself, but only to the extent caused by the negligent acts or omissions of the Design-Builder, Architect, a Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section A.3.17.

§A.3.17.2 In claims against any person or entity indemnified under this Section A.3.17 by an employee of the Design-Builder, the Architect, a Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Section A.3.17.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Design-Builder, the Architect or a Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

### ARTICLE A.4 DISPUTE RESOLUTION

#### §A.4.1 CLAIMS AND DISPUTES

§A.4.1.1 Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Design-Build Contract terms, payment of money, extension of time or other relief with respect to the terms of the Design-Build Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Design-Builder arising out of or relating to the Design-Build Contract. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.



§A.4.1.2 Time Limit on Claims. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the other party.

§A.4.1.3 Continuing Performance. Pending final resolution of a Claim, except as otherwise agreed in writing or as provided in Section A.9.7.1 and Article A.14, the Design-Builder shall proceed diligently with performance of the Design-Build Contract and the Owner shall continue to make payments in accordance with the Design-Build Documents.

§A.4.1.4 Claims for Concealed or Unknown Conditions. If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Design-Build Documents or (2) unknown physical conditions of an unusual nature which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Design-Build Documents, then the observing party shall give notice to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Owner shall promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Design-Builder's cost of, or time required for, performance of any part of the Work, shall negotiate with the Design-Builder an equitable adjustment in the Contract Sum or Contract Time, or both. If the Owner determines that the conditions at the site are not materially different from those indicated in the Design-Build Documents and that no change in the terms of the Design-Build Contract is justified, the Owner shall so notify the Design-Builder in writing, stating the reasons. Claims by the Design-Builder in opposition to such determination must be made within 21 days after the Owner has given notice of the decision. If the conditions encountered are materially different, the Contract Sum and Contract Time shall be equitably adjusted, but if the Owner and Design-Builder cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall proceed pursuant to Section A.4.2.

§A.4.1.5 Claims for Additional Cost. If the Design-Builder wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section A.10.6.

§A.4.1.6 If the Design-Builder believes additional cost is involved for reasons including but not limited to (1) an order by the Owner to stop the Work where the Design-Builder was not at fault, (2) a written order for the Work issued by the Owner, (3) failure of payment by the Owner, (4) termination of the Design-Build Contract by the Owner, (5) Owner's suspension or (6) other reasonable grounds, Claims shall be filed in accordance with this Section A.4.1.

#### §A.4.1.7 Claims for Additional Time

§A.4.1.7.1 If the Design-Builder wishes to make Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Design-Builder's Claims shall include an estimate of the time and its effect on the progress of the Work. In the case of a continuing delay, only one Claim is necessary.

§A.4.1.7.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated and had an adverse effect on the scheduled construction.

§A.4.1.8 Injury or Damage to Person or Property. If either party to the Design-Build Contract suffers injury or damage to person or property because of an act or omission of the other party or of others for whose acts such party is legally responsible, written notice of such injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

§A.4.1.9 If unit prices are stated in the Design-Build Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order or Construction Change Directives so that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Design-Builder, the applicable unit prices shall be equitably adjusted.

§A.4.1.10 Claims for Consequential Damages. Design-Builder and Owner waive Claims against each other for consequential damages arising out of or relating to the Design-Build Contract. This mutual waiver includes:

- .1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
- .2 damages incurred by the Design-Builder for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article A.14. Nothing contained in this Section A.4.1.10 shall be deemed to preclude an award of liquidated direct damages, when applicable, in accordance with the requirements of the Design-Build Documents.

§A.4.1.11 If the enactment or revision of codes, laws or regulations or official interpretations which govern the Project cause an increase or decrease of the Design-Builder's cost of, or time required for, performance of the Work, the Design-Builder shall be entitled to an equitable adjustment in Contract Sum or Contract Time. If the Owner and Design-Builder cannot agree upon an adjustment in the Contract Sum or Contract Time, the Design-Builder shall submit a Claim pursuant to Section A.4.1.

#### §A.4.2 RESOLUTION OF CLAIMS AND DISPUTES

§A.4.2.1 **Decision by Neutral.** If the parties have identified a Neutral in Section 6.1 of the Agreement or elsewhere in the Design-Build Documents, then Claims, excluding those arising under Sections A.10.3 through A.10.5, shall be referred initially to the Neutral for decision. An initial decision by the Neutral shall be required as a condition precedent to mediation of all Claims between the Owner and Design-Builder arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Neutral with no decision having been rendered by the Neutral. Unless the Neutral and all affected parties agree, the Neutral will not decide disputes between the Design-Builder and persons or entities other than the Owner.

§A.4.2.2 **Decision by Owner.** If the parties have not identified a Neutral in Section 6.1 of the Agreement or elsewhere in the Design-Build Documents then, except for those claims arising under Sections A.10.3 and A.10.5, the Owner shall provide an initial decision. An initial decision by the Owner shall be required as a condition precedent to mediation of all Claims between the Owner and Design-Builder arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Owner with no decision having been rendered by the Owner.

§A.4.2.3 The initial decision pursuant to Sections A.4.2.1 and A.4.2.2 shall be in writing, shall state the reasons therefor and shall notify the parties of any change in the Contract Sum or Contract Time or both. The initial decision shall be final and binding on the parties but subject first to mediation under Section A.4.3 and thereafter to such other dispute resolution methods as provided in Section 6.2 of the Agreement or elsewhere in the Design-Build Documents.

§A.4.2.4 In the event of a Claim against the Design-Builder, the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Design-Builder's default, the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

§A.4.2.5 If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to initial resolution of the Claim.

#### §A.4.3 MEDIATION

§A.4.3.1 Any Claim arising out of or related to the Design-Build Contract, except those waived as provided for in Sections A.4.1.10, A.9.10.4 and A.9.10.5, shall, after initial decision of the Claim or 30 days after submission of the Claim for initial decision, be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable or other binding dispute resolution proceedings by either party.

§A.4.3.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect at the time of the mediation. Request for mediation shall be filed in writing with the other party to the Design-Build Contract and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration or other binding dispute resolution proceedings but, in such

event, mediation shall proceed in advance thereof of legal equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

**§A.4.3.3** The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

#### **§A.4.4 ARBITRATION**

**§A.4.4.1** Claims, except those waived as provided for in Sections A.4.1.10, A.9.10.4 and A.9.10.5, for which initial decisions have not become final and binding, and which have not been resolved by mediation but which are subject to arbitration pursuant to Sections 6.2 and 6.3 of the Agreement or elsewhere in the Design-Build Documents, shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect at the time of the arbitration. The demand for arbitration shall be filed in writing with the other party to the Design-Build Contract and with the American Arbitration Association.

**§A.4.4.2** A demand for arbitration may be made no earlier than concurrently with the filing of a request for mediation, but in no event shall it be made after the date when institution of legal equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Section A.13.6.

**§A.4.4.3** An arbitration pursuant to this Section A.4.4 may be joined with an arbitration involving common issues of law or fact between the Owner or Design-Builder and any person or entity with whom the Owner or Design-Builder has a contractual obligation to arbitrate disputes which does not prohibit consolidation or joinder. No other arbitration arising out of or relating to the Design-Build Contract shall include, by consolidation, joinder or in any other manner, an additional person or entity not a party to the Design-Build Contract or not a party to an agreement with the Owner or Design-Builder, except by written consent containing a specific reference to the Design-Build Contracts signed by the Owner and Design-Builder and any other person or entities sought to be joined. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by the parties to the Agreement shall be specifically enforceable in accordance with applicable law in any court having jurisdiction thereof.

**§A.4.4.4 Claims and Timely Assertion of Claims.** The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

**§A.4.4.5 Judgment on Final Award.** The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

#### **ARTICLE A.5 AWARD OF CONTRACTS**

**§A.5.1** Unless otherwise stated in the Design-Build Documents or the bidding or proposal requirements, the Design-Builder, as soon as practicable after award of the Design-Build Contract, shall furnish in writing to the Owner the names of additional persons or entities not originally included in the Design-Builder's proposal or in substitution of a person or entity (including those who are to furnish design services or materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Owner will promptly reply to the Design-Builder in writing stating whether or not the Owner has reasonable objection to any such proposed additional person or entity. Failure of the Owner to reply promptly shall constitute notice of no reasonable objection.

**§A.5.2** The Design-Builder shall not contract with a proposed person or entity to whom which the Owner has made reasonable and timely objection. The Design-Builder shall not be required to contract with anyone to whom the Design-Builder has made reasonable objection.

**§A.5.3** If the Owner has reasonable objection to a person or entity proposed by the Design-Builder, the Design-Builder shall propose another to whom the Owner has no reasonable objection. If the proposed but rejected additional person or entity was reasonably capable of performing the Work, the Contract Sum and Contract Times shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall

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be issued before commencement of the substitute person's or entity's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Design-Builder has acted promptly and responsively in submitting names as required.

§A.5.4 The Design-Builder shall not change a person or entity previously selected if the Owner makes reasonable objection to such substitute.

#### §A.5.5 CONTINGENT ASSIGNMENT OF CONTRACTS

§A.5.5.1 Each agreement for a portion of the Work is assigned by the Design-Builder to the Owner provided that:

- .1 assignment is effective only after termination of the Design-Build Contract by the Owner for cause pursuant to Section A.14.2 and only for those agreements which the Owner accepts by notifying the contractor in writing; and
- .2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Design-Build Contract.

§A.5.5.2 Upon such assignment, if the Work has been suspended for more than 30 days, the Contractor's compensation shall be equitably adjusted for increases in cost resulting from the suspension.

### ARTICLE A.6 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

#### §A.6.1 OWNER'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS

§A.6.1.1 The Owner reserves the right to perform construction operations related to the Project with the 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. The Design-Builder shall cooperate with the Owner and separate contractors whose work might interfere with the Design-Builder's Work. If the Design-Builder claims that delay or additional cost is involved because of such action by the Owner, the Design-Builder shall make such Claim as provided in Section A.4.1.

§A.6.1.2 The term "separate contractor" shall mean any contractor retained by the Owner pursuant to Section A.6.1.1.

§A.6.1.3 The Owner shall provide for coordination of the activities of the Owner's own forces and of each separate contractor with the work of the Design-Builder, who shall cooperate with them. The Design-Builder shall participate with the separate contractors and the Owner in reviewing their construction schedules when directed to do so. The Design-Builder shall make any revisions to the construction schedule deemed necessary after a joint review and mutual agreement. The construction schedule shall then constitute the schedule to be used by the Design-Builder, separate contractors and the Owner until subsequently revised.

#### §A.6.2 MUTUAL RESPONSIBILITY

§A.6.2.1 The Design-Builder shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities and shall connect and coordinate the Design-Builder's construction and operations with theirs as required by the Design-Build Documents.

§A.6.2.2 If part of the Design-Builder's Work depends for proper execution or results upon design, construction or operations by the Owner or a separate contractor, the Design-Builder shall, prior to proceeding with that portion of the Work, promptly report to the Owner apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of the Design-Builder to so report shall constitute an acknowledgment that the Owner's or separate contractor's completed or partially completed construction is fit and proper to receive the Design-Builder's Work, except as to defects not then reasonably discoverable.

§A.6.2.3 The Owner shall be reimbursed by the Design-Builder for costs incurred by the Owner which are payable to a separate contractor because of delays, improperly timed activities or defective construction of the Design-Builder. The Owner shall be responsible to the Design-Builder for costs incurred by the Design-Builder because of delays, improperly timed activities, damage to the Work or defective construction of a separate contractor.

§A.6.2.4 The Design-Builder shall promptly remedy damage wrongfully caused by the Design-Builder to completed or partially completed construction or to property of the Owner or separate contractors.

§A.6.2.5 The Owner and each separate contractor shall have the same responsibilities for cutting and patching as are described in Section A.3.13.

## §A.6.3OWNER'SRIGHTTOCLEANUP

§A.6.3.1 If a dispute arises among the Design-Builder, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and the Owner shall allocate the cost among those responsible.

## ARTICLE A.7 CHANGES IN THE WORK

### §A.7.1 GENERAL

§A.7.1.1 Changes in the Work may be accomplished after execution of the Design-Build Contract, and without invalidating the Design-Build Contract, by Change Order or Construction Change Directive, subject to the limitations stated in this Article A.7 and elsewhere in the Design-Build Documents.

§A.7.1.2 A Change Order shall be based upon agreement between the Owner and Design-Builder. A Construction Change Directive may be issued by the Owner with or without agreement by the Design-Builder.

§A.7.1.3 Changes in the Work shall be performed under applicable provisions of the Design-Build Documents, and the Design-Builder shall proceed promptly, unless otherwise provided in the Change Order or Construction Change Directive.

### §A.7.2 CHANGE ORDERS

§A.7.2.1 A Change Order is a written instrument signed by the Owner and Design-Builder stating their agreement upon all of the following:

- .1 a change in the Work;
- .2 the amount of the adjustment, if any, in the Contract Sum; and
- .3 the extent of the adjustment, if any, in the Contract Time.

§A.7.2.2 If the Owner requests a proposal for a change in the Work from the Design-Builder and subsequently elects not to proceed with the change, a Change Order shall be issued to reimburse the Design-Builder for any costs incurred for estimating services, design services or preparation of proposed revisions to the Design-Build Documents.

§A.7.2.3 Methods used in determining adjustments to the Contract Sum may include those listed in Section A.7.3.3.

### §A.7.3 CONSTRUCTION CHANGE DIRECTIVES

§A.7.3.1 A Construction Change Directive is a written order signed by the Owner directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Design-Build Contract, order changes in the Work within the general scope of the Design-Build Documents consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

§A.7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

§A.7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

- .1 mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
- .2 unit prices stated in the Design-Build Documents or subsequently agreed upon, or equitably adjusted as provided in Section A.4.1.9;
- .3 cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
- .4 as provided in Section A.7.3.6.

§A.7.3.4 Upon receipt of a Construction Change Directive, the Design-Builder shall promptly proceed with the change in the Work involved and advise the Owner of the Design-Builder's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

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§A.7.3.5 A Construction Change Directive signed by the Design-Builder indicates the agreement of the Design-Builder therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

§A.7.3.6 If the Design-Builder does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the method and the adjustments shall be determined by the Owner on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, a reasonable allowance for overhead and profit. In such case, and also under Section A.7.3.3.3, the Design-Builder shall keep and present, in such form as the Owner may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Design-Build Documents, costs for the purposes of this Section A.7.3.6 shall be limited to the following:

- .1 additional costs of professional services;
- .2 costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance;
- .3 costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;
- .4 rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Design-Builder or others;
- .5 costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and
- .6 additional costs of supervision and field office personnel directly attributable to the change.

§A.7.3.7 The amount of credit to be allowed by the Design-Builder to the Owner for a deletion or change that results in a net decrease in the Contract Sum shall be actual net cost. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

§A.7.3.8 Pending final determination of the total cost of a Construction Change Directive to the Owner, amounts not in dispute for such changes in the Work shall be included in Applications for Payment accompanied by a Change Order indicating the parties' agreement with part or all of such costs. For any portion of such cost that remains in dispute, the Owner shall make an interim determination for purposes of monthly payment for those costs. That determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of the Design-Builder to disagree and assert a Claim in accordance with Article A.4.

§A.7.3.9 When the Owner and Design-Builder reach agreement concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreements shall be effective immediately and shall be recorded by preparation and execution of an appropriate Change Order.

#### §A.7.4 MINOR CHANGES IN THE WORK

§A.7.4.1 The Owner shall have authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Design-Build Documents. Such changes shall be effected by written order and shall be binding on the Design-Builder. The Design-Builder shall carry out such written orders promptly.

### ARTICLE A.8 TIME

#### §A.8.1 DEFINITIONS

§A.8.1.1 Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Design-Build Documents for Substantial Completion of the Work.

§A.8.1.2 The date of commencement of the Work shall be the date stated in the Agreement unless provision is made for the date to be fixed in a notice to proceed issued by the Owner.

§A.8.1.3 The date of Substantial Completion is the date determined by the Owner in accordance with Section A.9.8.

§A.8.1.4 The term "day" as used in the Design-Build Documents shall mean a calendar day unless otherwise specifically defined.

## **§A.8.2 PROGRESS AND COMPLETION**

**§A.8.2.1** Time limits stated in the Design-Build Documents are of the essence of the Design-Build Contract. By executing the Design-Build Contract, the Design-Builder confirms that the Contract Time is a reasonable period for performing the Work.

**§A.8.2.2** The Design-Builder shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence construction operations on the site or elsewhere prior to the effective date of insurance required by Article A. II to be furnished by the Design-Builder and Owner. The date of commencement of the Work shall not be changed by the effective date of such insurance. Unless the date of commencement is established by the Design-Build Documents or a notice to proceed given by the Owner, the Design-Builder shall notify the Owner in writing not less than five days or other agreed period before commencing the Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

**§A.8.2.3** The Design-Builder shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

## **§A.8.3 DELAYS AND EXTENSIONS OF TIME**

**§A.8.3.1** If the Design-Builder is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Design-Builder's control, or by delay authorized by the Owner pending resolution of disputes pursuant to the Design-Build Documents, or by other causes which the Owner determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Owner may determine.

**§A.8.3.2** Claims relating to time shall be made in accordance with applicable provisions of Section A.4.1.7.

**§A.8.3.3** This Section A.8.3 does not preclude recovery of damages for delay by either party under other provisions of the Design-Build Documents.

## **ARTICLE A.9 PAYMENTS AND COMPLETION**

### **§A.9.1 CONTRACT SUM**

**§A.9.1.1** The Contract Sum is stated in the Design-Build Documents and, including authorized adjustments, is the total amount payable by the Owner to the Design-Builder for performance of the Work under the Design-Build Documents.

### **§A.9.2 SCHEDULE OF VALUES**

**§A.9.2.1** Before the first Application for Payment, where the Contract Sum is based upon a \_\_\_\_\_ Stipulated Sum or the Cost of the Work plus Contractor's Fee with a Guaranteed Maximum \_\_\_\_\_ Price, the Design-Builder shall submit to the Owner an initial schedule of values allocated to various portions of the Work prepared in such form and supported by such data to substantiate its accuracy as the Owner may require. This schedule, unless objected to by the Owner, shall be used as a basis for reviewing the Design-Builder's Applications for Payment. This schedule of values may be updated periodically to reflect changes in the allocation of the Contract Sum.

### **§A.9.3 APPLICATIONS FOR PAYMENT**

**§A.9.3.1** At least ten days before the date established for each progress payment, the Design-Builder shall submit to the Owner an itemized Application for Payment for operations completed in accordance with the current schedule of values. Such applications shall be notarized, if required, and supported by such data substantiating the Design-Builder's right to payment as the Owner may require, such as copies of requisitions from Contractors and material suppliers, and reflecting retainage if provided for in the Design-Build Documents:

**§A.9.3.1.1** As provided in Section A.7.3.8, such applications may include requests for payment on account of Changes in the Work which have been properly authorized by Construction Change Directives but are not yet included in Change Orders.

**§A.9.3.1.2** Such applications may not include requests for payment for portions of the Work for which the Design-Builder does not intend to pay to a Contractor or material supplier or other parties providing services for the Design-Builder, unless such Work has been performed by others whom the Design-Builder intend to pay.

§A.9.3.2 Unless otherwise provided in the Design-Build Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Design-Builder 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 the costs of applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.

§A.9.3.3 The Design-Builder warrants that title to all Work other than Instruments of Service covered by an Application for Payment will pass to the Owner no later than the time of payment. The Design-Builder further warrants that, upon submittal of an Application for Payment, all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Design-Builder's knowledge, information and belief, be free and clear of liens, Claims, security interests or encumbrances in favor of the Design-Builder, Contractors, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work.

#### §A.9.4 ACKNOWLEDGEMENT OF APPLICATION FOR PAYMENT

§A.9.4.1 The Owner shall, within seven days after receipt of the Design-Builder's Application for Payment, issue to the Design-Builder a written acknowledgement of receipt of the Design-Builder's Application for Payment indicating the amount the Owner has determined to be properly due and, if applicable, the reasons for withholding payment in whole or in part.

#### §A.9.5 DECISIONS TO WITHHOLD PAYMENT

§A.9.5.1 The Owner may withhold a payment in whole or in part to the extent reasonably necessary to protect the Owner due to the Owner's determination that the Work has not progressed to the point indicated in the Application for Payment or that the quality of Work is not in accordance with the Design-Build Documents. The Owner may also withhold a payment or, because of subsequently discovered evidence, may nullify the whole or a part of an Application for Payment previously issued to such extent as may be necessary to protect the Owner from loss for which the Design-Builder is responsible, including loss resulting from acts and omissions, because of the following:

- .1 defective Work not remedied;
- .2 third-party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the Design-Builder;
- .3 failure of the Design-Builder to make payments properly to Contractors or for design services labor, materials or equipment;
- .4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
- .5 damage to the Owner or a separate contractor;
- .6 reasonable evidence that the Work will not be completed within the Contract Time and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
- .7 persistent failure to carry out the Work in accordance with the Design-Build Documents.

§A.9.5.2 When the above reasons for withholding payment are removed, payment will be made for amounts previously withheld.

#### §A.9.6 PROGRESS PAYMENTS

§A.9.6.1 After the Owner has issued a written acknowledgement of receipt of the Design-Builder's Application for Payment, the Owner shall make payment of the amount, in the manner and within the time provided in the Design-Build Documents.

§A.9.6.2 The Design-Builder shall promptly pay the Architect, each design professional and other consultants retained directly by the Design-Builder, upon receipt of payment from the Owner, out of the amount paid to the Design-Builder on account of each such party's respective portion of the Work, the amount to which each such party is entitled.

§A.9.6.3 The Design-Builder shall promptly pay each Contractor, upon receipt of payment from the Owner, out of the amount paid to the Design-Builder on account of such Contractor's portion of the Work, the amount to which said Contractor is entitled, reflecting percentages actually retained from payments to the Design-Builder on account of the



Contractor's portion of the Work. The Design-Builder shall, by appropriate agreement with each Contractor, require each Contractor to make payments to Subcontractors in a similar manner.

**§A.9.6.4** The Owner shall have no obligation to pay or to see to the payment of money to a Contractor except as may otherwise be required by law.

**§A.9.6.5** Payment to material suppliers shall be treated in a manner similar to that provided in Sections A.9.6.3 and A.9.6.4.

**§A.9.6.6** A progress payment, or partial rent, use or occupancy of the Project by the Owner, shall not constitute acceptance of Work not in accordance with the Design-Build Documents.

**§A.9.6.7** Unless the Design-Builder provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Design-Builder for Work properly performed by Contractors and suppliers shall be held by the Design-Builder for those Contractors or suppliers who performed Work or furnished materials, or both, under contract with the Design-Builder for which payment was made by the Owner. Nothing contained herein shall require money to be placed in a separate account and not be commingled with money of the Design-Builder, shall create any fiduciary liability or tort liability on the part of the Design-Builder for breach of trust or shall entitle any person or entity to an award of punitive damages against the Design-Builder for breach of the requirements of this provision.

#### **§A.9.7 FAILURE OF PAYMENT**

**§A.9.7.1** If for reasons other than those enumerated in Section A.9.5.1, the Owner does not issue a payment within the time period required by Section 5.1.3 of the Agreement, then the Design-Builder may, upon seven additional days' written notice to the Owner, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Design-Builder's reasonable costs of shutdown, delay and start-up, plus interest as provided for in the Design-Build Documents.

#### **§A.9.8 SUBSTANTIAL COMPLETION**

**§A.9.8.1** Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Design-Build Documents so that the Owner can occupy or use the Work or a portion thereof for its intended use.

**§A.9.8.2** When the Design-Builder considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Design-Builder shall prepare and submit to the Owner a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Design-Builder to complete all Work in accordance with the Design-Build Documents.

**§A.9.8.3** Upon receipt of the Design-Builder's list, the Owner shall make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Owner's inspection discloses any item, whether or not included on the Design-Builder's list, which is not substantially complete, the Design-Builder shall complete or correct such item. In such case, the Design-Builder shall then submit a request for another inspection by the Owner to determine whether the Design-Builder's Work is substantially complete.

**§A.9.8.4** In the event of a dispute regarding whether the Design-Builder's Work is substantially complete, the dispute shall be resolved pursuant to Article A.4.

**§A.9.8.5** When the Work or designated portion thereof is substantially complete, the Design-Builder shall prepare for the Owner's signature an Acknowledgement of Substantial Completion which, when signed by the Owner, shall establish (1) the date of Substantial Completion of the Work, (2) responsibilities between the Owner and Design-Builder for security, maintenance, heat, utilities, damage to the Work and insurance, and (3) the time within which the Design-Builder shall finish all items on the list accompanying the Acknowledgement. When the Owner's inspection discloses that the Work or designated portion thereof is substantially complete, the Owner shall sign the Acknowledgement of Substantial Completion. Warranties required by the Design-Build Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Acknowledgement of Substantial Completion.

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§A.9.8.6 Upon execution of the Acknowledgement of Substantial Completion and consent of surety, if any, the Owner shall make payment of retainage applying to such Work or designated portion thereof. Such payments shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Design-Build Documents.

#### §A.9.9 PARTIAL OCCUPANCY OR USE

§A.9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Design-Builder, provided such occupancy or use is consented to by the insurer, if so required by the insurer, 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, provided the Owner and Design-Builder have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for completion or correction of the Work and commencement of warranties required by the Design-Build Documents. When the Design-Builder considers a portion substantially complete, the Design-Builder shall prepare and submit a list to the Owner as provided under Section A.9.8.2. Consent of the Design-Builder to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Design-Builder.

§A.9.9.2 Immediately prior to such partial occupancy or use, the Owner and Design-Builder shall jointly inspect the area to be occupied or portion of the Work to be used to determine and record the condition of the Work.

§A.9.9.3 Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Design-Build Documents.

#### §A.9.10 FINAL COMPLETION AND FINAL PAYMENT

§A.9.10.1 Upon receipt of written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Owner shall promptly make such inspection and, when the Owner finds the Work acceptable under the Design-Build Documents and fully performed, the Owner shall, subject to Section A.9.10.2, promptly make final payment to the Design-Builder.

§A.9.10.2 Neither final payment nor any remaining retained percentage will become due until the Design-Builder submits to the Owner (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the 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, (2) a certificate evidencing that insurance required by the Design-Build Documents to remain in force after final payment is currently in effect and will not be cancelled or allowed to expire until at least 30 days prior to written notice has been given to the Owner, (3) a written statement that the Design-Builder knows of no substantial reasons that the insurance will not be renewable to cover the period required by the Design-Build Documents, (4) consent of surety, if any, to final payment, and (5) 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 Design-Build Contract, to the extent and in such form as may be designated by the Owner. If a Contractor refuses to furnish a release or waiver required by the Owner, the Design-Builder may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Design-Builder shall refund to the Owner all money that the Owner may be liable to pay in connection with the discharge of such lien, including all costs and reasonable attorneys' fees.

§A.9.10.3 If, after the Owner determines that the Design-Builder's Work or designated portion thereof is substantially completed, final completion thereof is materially delayed through no fault of the Design-Builder or by issuance of a Change Order or a Construction Change Directive affecting final completion, the Owner shall, upon application by the Design-Builder, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Design-Build Documents, and if bond has been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Design-Builder. Such payments shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

§A.9.10.4 The making of final payments shall constitute a waiver of Claims by the Owner except those arising from:

- .1 liens, Claims, security interests or encumbrances arising out of the Design-Build Documents and unsettled;
- .2 failure of the Work to comply with the requirements of the Design-Build Documents; or

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.3 terms of special warranties required by the Design-Build Documents.

§A.9.10.5 Acceptance of final payment by the Design-Builder, a Contractor or material suppliers shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

## **ARTICLE A.10 PROTECTION OF PERSONS AND PROPERTY**

### **§A.10.1 SAFETY PRECAUTIONS AND PROGRAMS**

§A.10.1.1 The Design-Builder shall be responsible for initiating and maintaining all safety precautions and programs in connection with the performance of the Design-Build Contract.

### **§A.10.2 SAFETY OF PERSONS AND PROPERTY**

§A.10.2.1 The Design-Builder shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

- .1 employees on the Work and other persons whom may be affected thereby;
- .2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site or under the care, custody or control of the Design-Builder or the Design-Builder's Contractor or Subcontractors; and
- .3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

§A.10.2.2 The Design-Builder shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

§A.10.2.3 The Design-Builder shall erect and maintain, as required by existing conditions and performance of the Design-Build Documents, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

§A.10.2.4 When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Design-Builder shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

§A.10.2.5 The Design-Builder shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Design-Build Documents) to property referred to in Sections A.10.2.1.2 and A.10.2.1.3 caused in whole or in part by the Design-Builder, the Architect, a Contractor, a Subcontractor, or anyone directly or indirectly employed by any of them or by anyone for whose act they may be liable and for which the Design-Builder is responsible under Sections A.10.2.1.2 and A.10.2.1.3, except damage or loss attributable to acts or omissions of the Owner or anyone directly or indirectly employed by the Owner, or by anyone for whose act the Owner may be liable, and not attributable to the fault or negligence of the Design-Builder. The foregoing obligations of the Design-Builder are in addition to the Design-Builder's obligations under Section A.3.17.

§A.10.2.6 The Design-Builder shall designate in writing to the Owner a responsible individual whose duty shall be the prevention of accidents.

§A.10.2.7 The Design-Builder shall not load or permit any part of the construction or site to be loaded so as to endanger its safety.

### **§A.10.3 HAZARDOUS MATERIALS**

§A.10.3.1 If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Design-Builder, the Design-Builder shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner.

§A.10.3.2 The Owners shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Design-Builder and, in the event such material or substance is found to be present, to verify that it has been rendered harmless. Unless otherwise required by the Design-Build Documents, the Owners shall furnish in writing to the Design-Builder the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of such material or substance or who are to perform the task of removal or safe containment of such material or substance. The Design-Builder shall promptly reply to the Owner in writing stating whether or not the Design-Builder has reasonable objection to the persons or entities proposed by the Owner. If the Design-Builder has an objection to a person or entity proposed by the Owner, the Owners shall propose another to whom the Design-Builder has no reasonable objection. When the material or substance has been rendered harmless, work in the affected area shall resume upon written agreement of the Owner and Design-Builder. The Contract Time shall be extended appropriately, and the Contract Sum shall be increased in the amount of the Design-Builder's reasonable additional costs of shutdown, delay and start-up, which adjustments shall be accomplished as provided in Article A.7.

§A.10.3.3 To the fullest extent permitted by law, the Owners shall indemnify and hold harmless the Design-Builder, Contractors, Subcontractors, Architect, Architect's consultants and the agents and employees of any of them from and against Claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance exists on site as of the date of the Agreement, is not disclosed in the Design-Build Documents and presents the risk of bodily injury or death as described in Section A.10.3.1 and has not been rendered harmless, provided that such Claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death or to injury to or destruction of tangible property (other than the Work itself) to the extent that such damage, loss or expense is not due to the negligence of the Design-Builder, Contractors, Subcontractors, Architect, Architect's consultants and the agents and employees of any of them.

§A.10.4 The Owners shall not be responsible under Section A.II.3 for materials and substances brought to the site by the Design-Builder unless such materials or substances were required by the Design-Build Documents.

§A.10.5 If, without negligence on the part of the Design-Builder, the Design-Builder is held liable for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Design-Build Documents, the Owners shall indemnify the Design-Builder for all cost and expense thereby incurred.

#### §A.10.6 EMERGENCIES

§A.10.6.1 In an emergency affecting safety of persons or property, the Design-Builder shall act, at the Design-Builder's discretion, to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed by the Design-Builder on account of an emergency shall be determined as provided in Section A.4.1.7 and Article A.7.

### ARTICLE A.11 INSURANCE AND BONDS

§A.11.1 Except as may otherwise be set forth in the Agreement or elsewhere in the Design-Build Documents, the Owner and Design-Builder shall purchase and maintain the following types of insurance with limits of liability and deductible amounts and subject to such terms and conditions, as set forth in this Article A.II.

#### §A.11.2 DESIGN-BUILDER'S LIABILITY INSURANCE

§A.11.2.1 The Design-Builder shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Design-Builder from claims set forth below that may arise out of or result from the Design-Builder's operations under the Design-Build Contract and for which the Design-Builder may be legally liable, whether such operations be by the Design-Builder, by a Contractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

- .1 claims under workers' compensation, disability benefit and others similar employee benefit acts which are applicable to the Work to be performed;
- .2 claims for damages because of bodily injury, occupational sickness or disease, or death of the Design-Builder's employees;
- .3 claims for damages because of bodily injury, sickness or disease, or death of any person other than the Design-Builder's employees;
- .4 claims for damages insured by usual personal injury liability coverage;

- .5 claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of user resulting therefrom;
- .6 claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle;
- .7 claims for bodily injury or property damage arising out of completed operations; and
- .8 claims involving contractual liability insurance applicable to the Design-Builder's obligations under Section A.3.17.

**§A.11.2.2** The insurance required by Section A.11.2.1 shall be written for not less than limits of liability specified in the Design-Build Documents or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment.

**§A.11.2.3** Certificates of insurance acceptable to the Owners shall be filed with the Owner prior to commencement of the Work. These certificates and the insurance policies required by this Section A.11.2 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverages shall be submitted with the final Application for Payment as required by Section A.9.10.2. Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the Design-Builder with reasonable promptness in accordance with the Design-Builder's information and belief.

### **§A.11.3 OWNER'S LIABILITY INSURANCE**

**§A.11.3.1** The Owners shall be responsible for purchasing and maintaining the Owner's usual liability insurance.

### **§A.11.4 PROPERTY INSURANCE**

**§A.11.4.1** Unless otherwise provided, the Owners shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk, "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus the value of subsequent Design-Build Contract modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. Such property insurance shall be maintained, unless otherwise provided in the Design-Build Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Section A.9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Section A.11.4 to be covered, whichever is later. This insurance shall include interests of the Owner, Design-Builder, Contractors and Subcontractors in the Project.

**§A.11.4.1.1** Property insurance shall be on an "all-risk" or equivalent policy form and shall include, without limitation, insurance against the peril of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, false work, testing and startup, temporary buildings and debris removal, including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Design-Builder's services and expenses required as a result of such insured loss.

**§A.11.4.1.2** If the Owner does not intend to purchase such property insurance required by the Design-Build Contract and with all of the coverages in the amount described above, the Owners shall so inform the Design-Builder in writing prior to commencement of the Work. The Design-Builder may then effect insurance that will protect the interests of the Design-Builder, Contractors and Subcontractors in the Work, and, by appropriate Change Order, the cost thereof shall be charged to the Owner. If the Design-Builder is damaged by the failure or neglect of the Owner to purchase or maintain insurance as described above without so notifying the Design-Builder in writing, then the Owners shall bear all reasonable costs properly attributable thereto.

**§A.11.4.1.3** If the property insurance requires deductibles, the Owners shall pay costs not covered because of such deductibles.

**§A.11.4.1.4** This property insurance shall cover portions of the Work stored off the site and also portions of the Work in transit.

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§A.11.4.1.5 Partial occupancy or use in accordance with Section A.9.9 shall not commence until the insurance company or companies providing property insurance have consented to such partial occupancy or use, by endorsement or otherwise. The Owner and the Design-Builder shall take reasonable steps to obtain consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

§A.11.4.2 **Boiler and Machinery Insurance.** The Owner shall purchase and maintain boiler and machinery insurance required by the Design-Build Documents or by law, which shall specifically cover such insured objects during installation and until final acceptance by the Owner; this insurance shall include interests of the Owner, Design-Builder, Contractors and Subcontractors in the Work, and the Owner and Design-Builder shall be named insureds.

§A.11.4.3 **Loss of Use Insurance.** The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. The Owner waives all rights of action against the Design-Builder, Architect, the Design-Builder's other design professionals, if any, Contractors and Subcontractors for loss of use of the Owner's property, including consequential losses due to fire or other hazards, however caused.

§A.11.4.4 If the Design-Builder requests in writing that insurance for risks other than those described herein or other special causes of loss be included in the property insurance policy, the Owner shall, if possible, include such insurance, and the cost thereof shall be charged to the Design-Builder by appropriate Change Order.

§A.11.4.5 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Section A.11.4.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

§A.11.4.6 Before an exposure to loss may occur, the Owner shall file with the Design-Builder a copy of each policy that includes insurance coverages required by this Section A.11.4. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project. Each policy shall contain a provision that the policy will not be canceled or allowed to expire and that its limits will not be reduced until at least 30 days' prior written notice has been given to the Design-Builder.

§A.11.4.7 **Waivers of Subrogation.** The Owner and Design-Builder waive all rights against each other and any of their consultants, separate contractors described in Section A.6.1, if any, Contractors, Subcontractors, agents and employees, each of the other, and any of their contractors, subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section A.11.4 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Design-Builder, as appropriate, shall require of these separate contractors described in Section A.6.1, if any, and the Contractors, Subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waiver each in favor of the other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, even though the person or entity did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

§A.11.4.8 A loss insured under Owner's property insurance shall be adjusted by the Owner as fiduciary and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Section A.11.4.10. The Design-Builder shall pay Contractor their just shares of insurance proceeds received by the Design-Builder, and, by appropriate agreements, written where legally required for validity, shall require Contractors to make payments to their Subcontractors in similar manner.

§A.11.4.9 If required in writing by a party in interest, the Owner as fiduciary shall, upon occurrence of an insured loss, give bond for proper performance of the Owner's duties. The cost of required bonds shall be charged against proceeds

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received as fiduciary. The Owners shall deposit in a separate account proceeds so received, which the Owners shall distribute in accordance with such agreement as the parties in interest may reach. If after such loss no other special agreement is made and unless the Owner terminates the Design-Build Contract for convenience, replacement of damaged property shall be performed by the Design-Builder after notification of a Change in the Work in accordance with Article A.7.

§A.11.4.10 The Owner as fiduciary shall have power to adjust and settle a loss with insurers unless one of the parties in interest shall object in writing within five days after occurrence of loss to the Owner's exercise of this power.; The Owner as fiduciary shall, in the case of a decision or award, make settlement with insurers in accordance with directions of a decision or award. If distribution of insurance proceeds by arbitration is required, the arbitrators will direct such distribution.

#### §A.11.5 PERFORMANCE BOND AND PAYMENT BOND

§A.11.5.1 The Owners shall have the right to require the Design-Builder to furnish bonds covering faithful performance of the Design-Build Contract and payment of obligations arising thereunder, including payment to design professionals engaged by or on behalf of the Design-Builder, as stipulated in bidding requirements or specifically required in the Agreement or elsewhere in the Design-Build Documents on the date of execution of the Design-Build Contract.

### ARTICLE A.12 UNCOVERING AND CORRECTION OF WORK

#### §A.12.1 UNCOVERING OF WORK

§A.12.1.1 If a portion of the Work is covered contrary to requirements specifically expressed in the Design-Build Documents, it must be uncovered for the Owner's examination and be replaced at the Design-Builder's expense without change in the Contract Time.

§A.12.1.2 If a portion of the Work has been covered which the Owner has not specifically requested to examine prior to its being covered, the Owner may request to see such Work and it shall be uncovered by the Design-Builder. If such Work is in accordance with the Design-Build Documents, cost of uncovering and replacement shall, by appropriate Change Order, be at the Owner's expense. If such Work is not in accordance with the Design-Build Documents, corrections shall be at the Design-Builder's expense unless the condition was caused by the Owner or a separate contractor, in which event the Owners shall be responsible for payment of such costs.

#### §A.12.2 CORRECTION OF WORK

##### §A.12.2.1 BEFORE OR AFTER SUBSTANTIAL COMPLETION.

§A.12.2.1.1 The Design-Builder shall promptly correct Work rejected by the Owner or failing to conform to the requirements of the Design-Build 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, shall be at the Design-Builder's expense.

##### §A.12.2.2 AFTER SUBSTANTIAL COMPLETION

§A.12.2.2.1 In addition to the Design-Builder's obligations under Section A.3.5, if, within one year after the date of Substantial Completion or after the date for commencement of warranties established under Section A.9.8.5 or by terms of an applicable special warranty required by the Design-Build Documents, any of the Work is found to be not in accordance with the requirements of the Design-Build Documents, the Design-Builder shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Design-Builder a written acceptance of such condition. The Owners shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work, if the Owner fails to notify the Design-Builder and give the Design-Builder an opportunity to make the correction, the Owner waives the right to require correction by the Design-Builder and to make a claim for breach of warranty. If the Design-Builder fails to correct non-conforming Work within a reasonable time during that period after receipt of notice from the Owner, the Owner may correct it in accordance with Section A.2.5.

§A.12.2.2.2 The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual performance of the Work.

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§A.12.2.3 The one-year period for correction of Work shall not be extended by corrective Work performed by the Design-Builder pursuant to this Section A.12.2.

§A.12.2.3 The Design-Builder shall remove from the site portions of the Work which are not in accordance with the requirements of the Design-Build Documents and are either corrected by the Design-Builder or accepted by the Owner.

§A.12.2.4 The Design-Builder 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-Builder's correction or removal of Work which is not in accordance with the requirements of the Design-Build Documents.

§A.12.2.5 Nothing contained in this Section A.12.2 shall be construed to establish a period of limitation with respect to the obligation the Design-Builder might have under the Design-Build Documents. Establishment of the one-year period for correction of Work as described in Section A.12.2.2 relates only to the specific obligation of the Design-Builder to correct the Work, and has no relationship to the time within which the obligation to comply with the Design-Build Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Design-Builder's liability with respect to the Design-Builder's obligations other than specifically to correct the Work.

### §A.12.3 ACCEPTANCE OF NONCONFORMING WORK

§A.12.3.1 If the Owner prefers to accept Work not in accordance with the requirements of the Design-Build Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be equitably adjusted by Change Order. Such adjustments shall be effected whether or not final payment has been made.

## ARTICLE A.13 MISCELLANEOUS PROVISIONS

### §A.13.1 GOVERNING LAW

§A.13.1.1 The Design-Build Contract shall be governed by the law of the place where the Project is located.

### §A.13.2 SUCCESSORS AND ASSIGNS

§A.13.2.1 The Owner and Design-Builder respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Design-Build Documents. Except as provided in Section A.13.2.2, neither party to the Design-Build Contract shall assign the Design-Build Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Design-Build Contract.

§A.13.2.2 The Owner may, without consent of the Design-Builder, assign the Design-Build Contract to an institutional lender providing construction financing for the Project. In such event, the lender shall assume the Owner's rights and obligations under the Design-Build Documents. The Design-Builder shall execute all consents reasonably required to facilitate such assignment.

### §A.13.3 WRITTEN NOTICE

§A.13.3.1 Written notices shall be deemed to have been duly served if delivered in person to the individual or a member of the firm or entity or to an officer of the corporation for which it was intended, or if sent by registered or certified mail to the last business address known to the party giving notice.

### §A.13.4 RIGHTS AND REMEDIES

§A.13.4.1 Duties and obligations imposed by the Design-Build Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.

§A.13.4.2 No action or failure to act by the Owner or Design-Builder shall constitute a waiver of a right or duty afforded them under the Design-Build Documents, nor shall such action or failure to act constitute approval or acquiescence in a breach thereunder, except as may be specifically agreed in writing.



#### §A.13.5 TESTS AND INSPECTIONS

§A.13.5.1 Tests, inspections and approvals of portions of the Work required by the Design-Build Documents or by laws, ordinances, rules, regulations or orders of public authorities having jurisdiction shall be made at an appropriate time. Unless otherwise provided, the Design-Builders shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Owner or with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals. The Design-Builders shall give timely notice of when and where tests and inspections are to be made so that the Owner may be present for such procedures.

§A.13.5.2 If the Owner or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection or approval not included under Section A.13.5.1, the Owner shall in writing instruct the Design-Builder to make arrangements for such additional testing, inspection or approval by an entity acceptable to the Owner, and the Design-Builder shall give timely notice to the Owner of when and where tests and inspections are to be made so that the Owner may be present for such procedures. Such costs, except as provided in Section A.13.5.3, shall be at the Owner's expense.

§A.13.5.3 If such procedures for testing, inspection or approval under Sections A.13.5.1 and A.13.5.2 reveal a failure of the portions of the Work to comply with requirements established by the Design-Build Documents, all costs made necessary by such failure, including those of repeated procedures, shall be at the Design-Builder's expense.

§A.13.5.4 Required certificates of testing, inspection or approval shall, unless otherwise required by the Design-Build Documents, be secured by the Design-Builder and promptly delivered to the Owner.

§A.13.5.5 If the Owner is to observe tests, inspections or approvals required by the Design-Build Documents, the Owner will do so promptly and, where practicable, at the normal place of testing.

§A.13.5.6 Tests or inspections conducted pursuant to the Design-Build Documents shall be made promptly to avoid unreasonable delay in the Work.

#### §A.13.6 COMMENCEMENT OF STATUTORY LIMITATION PERIOD

§A.13.6.1 As between the Owner and Design-Builder:

- .1 Before Substantial Completion. As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion;
- .2 Between Substantial Completion and Final Application for Payment. As to acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Application for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of issuance of the final Application for Payment; and
- .3 After Final Application for Payment. As to acts or failures to act occurring after the relevant date of issuance of the final Application for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of any act or failure to act by the Design-Builder pursuant to any Warranty provided under Section A.3.5, the date of any correction of the Work or failure to correct the Work by the Design-Builder under Section A.12.2, or the date of actual commission of any other act or failure to perform any duty or obligation by the Design-Builder or Owner, whichever occurs last.

#### ARTICLE A.14 TERMINATION OR SUSPENSION OF THE DESIGN/BUILD CONTRACT

##### §A.14.1 TERMINATION BY THE DESIGN-BUILDER

§A.14.1.1 The Design-Builder may terminate the Design-Build Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Design-Builder or a Contractor, Subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Design-Builder, for any of the following reasons:

- .1 issuance of an order of a court or other public authority having jurisdiction which requires all Work to be stopped;
- .2 an act of government, such as a declaration of national emergency which requires all Work to be stopped;

- .3 the Owner has failed to make payment to the Design-Builder in accordance with the Design-Build Documents; or
- .4 the Owner has failed to furnish to the Design-Builder promptly, upon the Design-Builder's request, reasonable evidence as required by Section A.2.2.8.

§A.14.1.2 The Design-Builder may terminate the Design-Build Contract if, through no actor fault of the Design-Builder or a Contractor, Subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Design-Builder, repeated suspensions, delays or interruptions of the entire Work by the Owner, as described in Section A.14.3, constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

§A.14.1.3 If one of the reasons described in Sections A.14.1.1 or A.14.1.2 exists, the Design-Builder may, upon seven days' written notice to the Owner, terminate the Design-Build Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.

§A.14.1.4 If the Work is stopped for a period of 60 consecutive days through no actor fault of the Design-Builder or a Contractor or their agents or employees or any other persons performing portions of the Work under a director or indirect contract with the Design-Builder because the Owner has persistently failed to fulfill the Owner's obligations under the Design-Build Documents with respect to matters important to the progress of the Work, the Design-Builder may, upon seven additional days' written notice to the Owner, terminate the Design-Build Contract and recover from the Owner as provided in Section A.14.1.3.

#### §A.14.2 TERMINATION BY THE OWNER FOR CAUSE

§A.14.2.1 The Owner may terminate the Design-Build Contract if the Design-Builder:

- .1 persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
- .2 fail to make payment to Contractors for services, materials or labor in accordance with the respective agreements between the Design-Builder and the Architect and Contractors;
- .3 persistently disregards laws, ordinances or rules, regulations or orders of a public authority having jurisdiction; or
- .4 otherwise is guilty of substantial breach of a provision of the Design-Build Documents.

§A.14.2.2 When any of the above reasons exist, the Owner may without prejudice to any other rights or remedies of the Owner and after giving the Design-Builder and the Design-Builder's surety, if any, seven days' written notice, terminate employment of the Design-Builder and may, subject to any prior rights of the surety:

- .1 take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Design-Builder;
- .2 accept assignment of contracts pursuant to Section A.5.5.1; and
- .3 finish the Work by whatever reasonable method the Owner may deem expedient. Upon request of the Design-Builder, the Owner shall furnish to the Design-Builder a detailed accounting of the costs incurred by the Owner in finishing the Work.

§A.14.2.3 When the Owner terminates the Design-Build Contract for one of the reasons stated in Section A.14.2.1, the Design-Builder shall not be entitled to receive further payment until the Work is finished.

§A.14.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Design-Builder. If such costs and damages exceed the unpaid balance, the Design-Builder shall pay the difference to the Owner.

#### §A.14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE

§A.14.3.1 The Owner may, without cause, order the Design-Builder in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

§A.14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption as described in Section A.14.3.1. Adjustment of the Contract Sum shall include profit. No adjustments shall be made to the extent:

- .1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Design-Builder is responsible; or
- .2 that an equitable adjustment is made or denied under another provision of the Design-Build Contract.

**§A.14.4 TERMINATION BY THE OWNER FOR CONVENIENCE**

**§A.14.4.1** The Owner may, at any time, terminate the Design-Build Contract for the Owner's convenience and without cause.

**§A.14.4.2** Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Design-Builder shall:

- .1 cease operations as directed by the Owner in the notice;
- .2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing contracts and purchase orders and enter into no further contracts and purchase orders.

**§A.14.4.3** In the event of termination for the Owner's convenience prior to commencement of construction, the Design-Builder shall be entitled to receive payment for design services performed, costs incurred by reason of such termination and reasonable overhead and profit on design services not completed. In case of termination for the Owner's convenience after commencement of construction, the Design-Builder shall be entitled to receive payment for Work executed and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.

**DESOTO INDEPENDENT SCHOOL DISTRICT**

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

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

\_\_\_\_\_  
*(Printed name and title)*

\_\_\_\_\_  
*(Printed name and title)*

**Exhibit A.1**  
**SUPPLEMENTARY TERMS AND CONDITIONS TO EXHIBIT A.**  
**DESOTOISD/ \_\_\_\_\_**

**ARTICLE A.1. GENERAL PROVISIONS.**

- A.1.1.1. Add the following at the end of Subparagraph A.1.1.1:  
The Contract Documents executed or identified in accordance with Article 8 shall prevail in case of an inconsistency with subsequent versions made through manipulatable electronic operations involving computers. In the absence of individual signatures by Owner and Design-Builder, the Contract Documents identified in the signed contract prevail.
- A.1.1.3. Delete Subparagraph A.1.1.3 in its entirety and replace with the following:  
**Design Professionals**  
Design Professionals are persons lawfully licensed to practice architecture or engineering or an entity lawfully practicing architecture or engineering and identifies as such in the Agreement and are employees of the Design-Builder or have a direct contract with the Design-Builder to perform design services for all or a portion of the Work, and are referred to throughout the Design-Build Documents as if singular in number. The term "Architect" means the Design Professionals or the Design Professionals' authorized representative.
- A.1.1.8. Delete Subparagraph A.1.1.8 in its entirety.
- A.1.2.1. Delete Subparagraph A.1.2.1 and replace with the following:  
The Design-Builder and Architect shall notify the Owner in writing if the Design-Builder or Architect knows or should have known that implementation of any instruction received from the Owner would cause a violation of any applicable law. The Design-Builder and Architect shall be responsible to the Owner for costs and damages resulting from a violation of any applicable law which the Design-Builder or Architect knew or should have known about. Neither the Design-Builder nor the Architect shall be obligated to perform any act which either believes will violate any applicable law.
- A.1.2.2. Delete Subparagraph A.1.2.2 in its entirety.
- A.1.4.2. Add the following sentence at the beginning of A.1.4.2:  
Technical terms not specifically defined in the Contract Documents shall have the meanings given in AIAD Document "Glossary of Construction Industry Terms", July 1982 edition.
- A.1.4.3. Add new Subparagraph A.1.4.3 as follows:  
A.1.4.3. The intent of the Design-Build Documents is to include all items necessary for the proper design, execution and completion of the Work by the Design-Builder. The Design-Build Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Design-Builder shall be required only to the extent consistent with the Design-Build Documents and reasonable inferable from them as being necessary to produce the indicated results. In cases of discrepancy between any drawing and the dimension figures written thereon, the dimension figures shall govern over scaled dimensions; Detailed Plan Drawings and accompanying notations shall govern over General Plan Drawings; Specifications shall govern over Plan Drawings and Special Conditions shall govern over Specifications, Plan Drawings and General Conditions. The most recent revision of Plans shall control over older revisions.
- A.1.4.4. Add new Subparagraph A.1.4.4 as follows:

A.1.4.4. Referencetostandardspecifications,manualsorcodesofanytechnical society, organizationor association, or to the Laws or Regulations of any governmental authority,whethersuchreferencebespecificorbyimplication,shall mean thelateststandardspecification,manual,codeorLawsorRegulationsineffect asofthedateoftheContractDocuments,exceptasmaybeotherwisespecifically statedorwhereaparticularissueisindicated. Incaseofaconflictbetweenthe Specificationsandthereferencedstandard,themorestringentshallgovern.

A.1.4.5. AddnewSubparagraphA.1.4.5asfollows:

A.1.4.5 Precedence of the Contract Documents.The mostrecently issued Documenttakesprecedence overpreviousissuesofthesameDocument. Theorder ofprecedenceisasfollowswiththehighestauthoritylistedas"1".

- .1 ContractModificationssignedbyDesign-BuilderandOwner.
- .2 Addenda,withthoseoflaterdatehavingprecedenceoverthoseofearlierdate.
- .3 SupplementaryTermsandConditions-ExhibitA-1.
- .4 ExhibitsthroughhassetoutinArticle1oftheAgreement
- .5 TermsandConditions-ExhibitA
- .6 SpecificationsandDrawings.

A.1.4.6. AddnewSubparagraphA.1.4.6asfollows:

A.1.4.6. RelationofSpecificationsandDrawings.Tobeequivalentinauthority andpriority. Shouldtheydisagreeintheirselves, orwitheachother,pricesshallbe basedonthebetterqualityand greaterquantityofworkindicated.

A.1.4.7. AddnewSubparagraphA.1.4.7asfollows:

A.1.4.7. Where theDrawingsandSpecifications,certainproducts,manufacturer's tradenames,orcatalognumbersaregiven,itisdonefortheexpresspurposeof establishingastandardoffunction,dimension,appearance,andqualityofdesign,in harmonywiththeWork,andisnotintendedforthepurposeoflimitingcompetition. Materialsorequipmentsshallnotbesubstitutedunlesssuchsubstitutionhasbeen specificallyacceptedforuseonthisProjectbytheOwner.

A.1.4.8. AddnewSubparagraphA.1.4.8asfollows:

A.1.4.8. Whentheworkisgovernedbyreferencetostandards,buildingcodes, manufacturer's instructions,orotherdocuments,unlessotherwisespecified,the currenteditionasoftheAgreementdateshallapply.

A.1.4.9. AddnewSubparagraphA.1.4.9asfollows:

A.1.4.9. Requirementsofpublicauthoritiesapplyasminimumrequirementsonly anddonotsupersedemore stringentspecifiedrequirements.

A.1.6.1 DeleteSubparagraphA.1.6.1andreplacewiththefollowing:

A.1.6.1. UponexecutionofthisAgreementtheDesign-BuilderandArchitectgrant totheOwneranonexclusivelicensetoreproducetheArchitect'sInstruments of Servicesolelyforpurposesofconstructing,using,andmaintainingtheProject,and shallobtain similar,nonexclusivelicensesfromtheArchitect'sconsultants.

.1 ThepaymentoffeestotheDesign-Builderforprofessionalservicesperformed underthisAgreementshallconstitute fullpaymentforaone-time,perpetuallicensefee forthoseusesoftheArchitect'sInstruments ofServicesetforthinParagraph A.1.6.1.2,foralldocumentsproducedpursuanttothisAgreementandinexistenceas ofthedateofanysuchpayment.

.2 TheOwnershallhave therighttouse theArchitect'sInstrumentsofServiceand tomakederivativeWorksthereofforthepurposeofcompletingtheProjectintheevent

Architect is terminated for cause pursuant to this Agreement, without regard to whether such termination shall subsequently be adjudicated to have been wrongful. In the event the Owner shall make derivative works of the Architect's Instruments of Service pursuant to this Paragraph, the Architect shall bear no liability for errors or omissions appearing in such derivative works.

- A.1.6.2. Delete Subparagraph A.1.6.2. in its entirety.
- A.1.6.4. Delete the second sentence of Subparagraph A.1.6.4.
- A.1.6.5. Delete Subparagraph A.1.6.5 in its entirety.

**ARTICLE A.2. OWNER**

- A.2.1.1. Delete Subparagraph A.2.1.1. in its entirety and replace with the following:  
The Owner is the Board of Trustees of DESOTO Independent School District, and is referred to throughout the Contract Documents as if singular in number. The Owner may designate in writing one or more persons to represent the Owner; however, such representatives shall have the authority to bind the Owner only to the extent expressly authorized by the Owner and shall have no implied authority.
- A.2.1.2. Delete Subparagraph A.2.1.2. in its entirety
- A.2.2.2. Delete Subparagraph A.2.2.2. in its entirety.
- A.2.2.3. Delete Subparagraph A.2.2.3. in its entirety, and replace with the following:  
The Owner shall, at the Owner's expense, disclose to the extent such information is within the Owner's custody or control, and if not required by the Design-Build Documents to be provided by the Design-Builder, the results and reports of prior tests, inspections or investigations conducted for the Project involving structural or mechanical systems, chemical air and water pollution, hazardous materials or environmental and subsurface conditions. In addition, Owners shall disclose all information known to the owner regarding the presence of pollutants at the Project site.
- A.2.2.5. Delete the last sentence of Subparagraph A.2.2.5 beginning with the word "unless".
- A.2.2.6. Delete Subparagraph A.2.2.6. in its entirety.
- A.2.2.8. Delete Subparagraph A.2.2.8 in its entirety and replace with the following:  
Pursuant to Texas Business and Commerce Code section 35.521(n)(3), the Owner shall, at the request of the Design-Builder, furnish a statement that funds are available and have been authorized for the full contract amount for the construction of improvements.
- A.2.2.10. Delete Subparagraph A.2.2.10. in its entirety.
- A.2.2.11. Delete Subparagraph A.2.2.22 in its entirety and replace with the following:  
The Owners shall promptly obtain easements, zoning variances, and legal authorizations regarding site utilization where essential to the execution of the Work described in the Design-Build Documents.
- A.2.3.1. Delete Subparagraph A.2.3.1 in its entirety.
- A.2.3.2. Delete Subparagraph A.2.3.2 in its entirety.

- A.2.3.3 Delete Subparagraph A.2.3.3 in its entirety.
- A.2.3.4 Delete Subparagraph A.2.3.4 in its entirety and replace with the following:  
The Design-Builders shall be responsible for compliance with the Design-Build Documents unless the Owner has approved a Change in the Work reflecting any deviations from the requirements of the Design-Build Documents.
- A.2.5.1. Amend Subparagraph A.2.5.1 as follows:
  1. Replace phrase "seven-day period" with "three-day period" throughout.
  2. Delete fourth sentence in its entirety.

**ARTICLE A.3. DESIGN BUILDER**

- A.3.1.2. Delete Subparagraph A.3.1.2 in its entirety and replace with following:  
The Design-Builders shall perform the Work in a good and workmanlike manner except to the extent the Contract Documents expressly specify a higher degree of finish or workmanship.
- A.3.2.1. Add the following at the end of Paragraph A.3.2.1.:  
The design services shall include normal structural, mechanical, electrical and civil engineering services. Design-Builders shall be responsible for compliance with the requirements of the Texas Engineering Practice Act, Texas Occupations Code Chapter 1001.

Add the following additional clauses to Subparagraph A.3.2.1.:  
The exactness of grades, elevations, dimensions, or locations given on any Drawings issued by the Architect, or the work installed by other contractors, is not guaranteed by the Owner. The Design-Builders shall, therefore, satisfy itself as to the accuracy of all grades, elevations, dimensions, and locations. In all cases of interconnection of its Work with existing or other work, it shall verify at the site all dimensions relating to such existing or other work. Any errors due to the Design-Builder's failure to verify all such grades, elevations, dimensions, or locations shall be promptly rectified by the Design-Builder without any additional cost to the Owner.

- A.3.2.4 Delete the following language from line two of Subparagraph A.3.2.4:  
"pursuant to Section A.2.2"
- A.3.2.4. Add the following additional clauses to Subparagraph A.3.2.4.:  
Notwithstanding the delivery of a survey or other documents by the Owner, Design-Builders shall use reasonable effort to perform all work in such a manner so as to avoid damaging any utility lines, cables, pipes, or pipelines on the property. Design-Builders shall be responsible for, and shall repair at Design-Builder's own expense, any damaged or net lines, cables, pipes, and pipelines identified to Design-Builder.
- A.3.2.6. Delete Subparagraph A.3.2.6 in its entirety and replace with the following:  
Upon submission of the design and construction documents Design-Builders shall be deemed to have satisfied itself as to, and to adopt and accept responsibility for, the design contained in and reflected by the Specifications and the Drawings. In particular, but without prejudice to the generality of the foregoing, the Design-Builder hereby warrants:
  - .1 That the said design is in all respects adequate, accurate, sufficient and fit for its purpose; and
  - .2 That there are no ambiguities, inaccuracies or inconsistencies within or between the documents forming the Design-Build Contract; and

.3 The Design-Builder shall work with the aforementioned design so as to procure a completed detailed design of the Work and of each and every part thereof such that the Work and each and every part thereof will jointly and severally be in all respects fit for its or their purpose and in particular, but without limiting the generality of the foregoing, such that the Work as a whole and, as appropriate, each and every part thereof, shall comply with the requirements of any performance specifications.

A.3.2.8. Replace the term "assistance" with the word "cooperation" in Subparagraph A.3.2.8.

A.3.2.11. Add the following new Subparagraph A.3.2.11:

The Design-Builder and Architect shall notify the Owner in writing if the Design-Builder or Architect knows or should have known that implementation of any instruction received from the Owner would cause a violation of any applicable law. The Design-Builder and Architect shall be responsible to the Owner for costs and damages resulting from a violation of any applicable law which the Design-Builder or Architect knew or should have known about. Neither the Design-Builder nor the Architect shall be obligated to perform any act which either believes will violate any applicable law.

### ARTICLE A.3.3. CONSTRUCTION.

A.3.3.5. Delete Subparagraph A.3.3.5. in its entirety and replace with the following:

The Design-Builder shall be solely responsible for and have control over all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Design-Build Documents. It is understood and agreed that the relationship of Design-Builder to Owners shall be that of an independent Design-Builder. Nothing contained herein or inferable herefrom shall be deemed or construed to (1) make Design-Builder the agent, servant, or employee of the Owner, or (2) create any partnership, joint venture, or other association between Owner and Design-Builder. Any direction or instruction by Owner in respect of the Work shall relate to the result the Owner desires to obtain from the Work, and shall in no way affect Design-Builder's independent contractor status as described herein.

A.3.3.9. Add Additional Subparagraph A.3.3.9. as follows:

Prior to commencement of the warranty period, the Design-Builder shall be responsible for correcting Work which does not conform to the Contract Documents.

A.3.3.10. Add Additional Subparagraph A.3.3.10. as follows:

Unless otherwise provided in the Design-Build Documents, the Design-Builder shall provide or cause to be provided and shall pay for design services, labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation and other facilities and services necessary for the proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

A.3.4.4. Add Additional Subparagraph A.3.4.4. as follows:

Prevailing Wages. Attention is called to the Government Code, Chapter 2258, Prevailing Wage Rates. Among other things, this Article provides that it shall be mandatory upon the Design-Builder and upon any subcontractor under him to pay not less than the prevailing rates of per diem wages in the locality at the time of construction to all laborers, workmen, and mechanic employed by them in the execution of the contract.

A.3.4.5. Add Additional Subparagraph A.3.4.5. as follows:



In accordance herewith, the Owner has established a scale of prevailing wages which is attached as **Exhibit D**, and not less than this established scale must be paid on the project. Any workers not included in the schedule shall be properly classified and paid not less than the rate of wages prevailing in the locality of the work at the time of construction.

- A.3.4.6. Add Additional Subparagraph A.3.4.6. as follows:  
If the Design/Builder or any of its Contractors or Subcontractors violate the provisions of Supplementary Conditions 3.4.4. or 3.4.5, Design/Builders shall pay to Owner the sum of Sixty Dollars and No/100 (\$60.00) for each worker employed for each calendar day or part of the day that the worker is paid less than the wage rate stipulated in the scale of prevailing wages applicable to this Project, as required by Texas Government Code Section 2258.023(b).
- A.3.4.7. Add Additional Subparagraph A.3.4.7. as follows:  
The Design-Builder shall be responsible for the actions of Design-Builder's forces, Subcontractor's forces and all tiers of Sub-subcontractor's forces. The Design/Builder recognizes that the Project Site is a public school campus, and will prohibit the possession or use of alcohol, controlled substances, tobacco, and any prohibited weapons on the Project Site and shall require adequate dress of the Design/Builder's forces consistent with the nature of the work being performed, including wearing shirts at all times. Sexual harassment of employees of the Design/Builder or employees or students of the Owner by employees of the Design/Builder is strictly forbidden. Any employee of the Design/Builder who is found to have engaged in such conduct shall be subject to appropriate disciplinary action by the Design/Builder, including removal from the jobsite.
- A.3.4.9. Add Additional Subparagraph A.3.4.9. as follows:  
The Design-Builder shall furnish a list to the Owner of all engineers, consultants, job-site superintendents, subcontractors and suppliers involved in construction.
- A.3.4.10. Add Additional Subparagraph A.3.4.10. as follows:  
At all times during the progress of the Work Design-Builder shall assign a competent resident superintendent and any necessary assistants, all satisfactory to the Owner. Any Superintendent designee shall be identified in writing to the Owner promptly after Owner issues written Notice to Proceed. The Superintendents shall represent the Design-Builder and all directions given to him shall be binding on the Design-Builder. The designated Superintendents shall not be replaced without written notice to the Owner, except under extraordinary circumstances. The Superintendent may not be employed on any other project prior to final completion of the Work.
- A.3.4.11 Add Additional Subparagraph A.3.4.11 as follows:  
Design-Builder shall provide an adequate staff for the proper coordination and expedition of the work. Owner reserves the right to require Design-Builder to dismiss from the work any employee or employees that Owner reasonably deems incompetent, careless, insubordinate, or in violation of any provision in these Contract Documents. This provision is applicable to Subcontractors, Sub-subcontractors and their employees.
- A.3.4.12 Add Additional Subparagraph A.3.4.12 as follows:  
The Owner reserves the right to utilize one or more of its employees to function in the capacity of the Owner's Inspector, whose primary function will be daily inspections, checking pay requests, construction timelines, and storage of supplies and materials.
- A.3.5. Add new Subparagraphs A.3.5.2 through A.3.5.8 as follows:

A.3.5.2. Design-Builder's express warranty herein shall be in addition to, and not in lieu of, any other remedies Owner may have under this Agreement, at law, or in equity for defective Work.

A.3.5.3. The warranty provided in paragraph A.3.5.1 shall be in addition to and not in limitation of any other warranty or remedy required by law or by the Design-Build Documents, and such warranty shall be interpreted to require Design-Builder to replace defective materials and equipment and re-execute defective Work which is disclosed to the Design-Builder by the Owner within a period of one (1) year after Substantial Completion of the entire Work or if a latent defect, within one (1) year after discovery thereof by Owner.

A.3.5.4. The Design-Builder shall issue in writing to the Owner as a condition precedent to final payment a "General Warranty" reflecting the terms and conditions of paragraphs A.3.5.1 and A.3.5.2 for all Work under the Contract Documents. This General Warranty shall be assignable. Submittal of all warranties and guarantees are required as a prerequisite to the final payment.

A.3.5.5. Except when a longer warranty time is specifically called for in the Specification Sections or is otherwise provided by law, the General Warranty shall be for twelve (12) months and shall be in form and content to the satisfaction of the Owner.

Owner and Design-Builder acknowledge that the Project may involve construction work on more than one (1) building for the Owner. Each building, or approved phase of each building, shall have its own, separate, and independent date of Substantial Completion or Final Completion. Design-Builder shall maintain a complete and accurate schedule of the dates of Substantial Completion, dates upon which the one year warranty on each phase or building which is substantially complete will expire, and dates of Final Completion. Design-Builder agrees to provide notice of the warranty expiration date to Owner and Architect at least one month prior to the expiration of the one year warranty period on each building or each phase of the building which has been substantially completed. Prior to termination of the one year warranty period, Design-Builder shall accompany the Owner on reinspection of the building and be responsible for correcting any reasonable additional deficiencies not caused by the Owner or by the use of the building which are observed or reported during the reinspection. For extended warranties required by various sections, i.e. roofing, compressors, mechanical equipment, Owner will notify the Design-Builder of deficiencies and Design-Builder shall start remedying these defects within three (3) days of initial notification from Owner. Design-Builder shall prosecute the work without interruption until accepted by the Owner and the Architect, even though such prosecution should extend beyond the limit of the warranty period. If Design-Builder fails to provide notice of the expiration of the one-year warranty period at least one month prior to the expiration date, Design-Builder's warranty obligations described in this paragraph shall continue until such inspection is conducted and any deficiencies found in the inspection corrected.

A.3.5.6. Warranties shall become effective on a date established by the Owner in accordance with the Contract Documents. This date shall be the Date of Substantial Completion of the entire Work, unless otherwise provided in any Certificate of Partial Substantial Completion approved by the parties, except for work to be completed or corrected after the date of Substantial Completion and prior to final payment. Warranties for work to be completed or corrected after the date of Substantial Completion and prior to final payment shall become effective on the later of the date the work is completed or corrected and accepted by the Owner and Architect or the date of final payment.

A.3.5.7. Neither the final payment nor any provision in the Contract Documents shall constitute an acceptance of Work not done in accordance with the Contract Documents or relieve the Design-Builder of its warranties of liability with respect to any warranties or responsibility for faulty materials and workmanship. The Design-Builder guarantees that the Work will conform to the Contract Documents.

A.3.5.8. The building(s) constructed, if any, shall be watertight and leakproof at every point and in every area, except where leaks can be attributed to damage to the building(s) by external forces beyond Design-Builder's control. The Design-Builder, immediately upon notification by the Owner of water penetration, shall determine the source of water penetration and do any work necessary to make the building(s) watertight. The Design-Builder also shall repair or replace any damaged material, finishes, and fixtures, damaged as a result of this water penetration, to return the building(s) to original condition. The cost of such determination and repair shall be borne by the Design-Builder only to the extent that the leak(s) are attributable to faulty workmanship or unauthorized or defective materials.

A.3.6.1. Delete Subparagraph A.3.6.1. in its entirety and replace with the following:  
The Design-Builder will not include in the Contract Price or any Modification any amount for sales, use, or similar taxes for which (1) the Owner is exempt, and (2) the Owner has or will provide the Design-Builder with a tax exemption certificate or other documentation necessary to establish the Owner's exemption from such taxes.

A.3.7.5. Add Additional Subparagraph A.3.7.5. as follows:

A.3.7.5. The Design-Builder shall also obtain all permits and approvals, and pay all fees and expenses, if any, associated with National Pollutant Discharge Elimination System (NPDES) regulations administered by the Environmental Protection Agency (EPA) and local authorities, if applicable, that require completion of documentation and/or acquisition of a "Land Disturbing Activities Permit" for the project. Design-Builder's obligations under this paragraph do not require it to perform engineering services during the pre-construction phase to prepare proper drainage for the construction sites. However, any drainage alterations made by Design-Builder during the construction process which require the issuance of a permit shall be at Design-Builder's sole cost.

A.3.9.5. Add new Subparagraph A.3.9.5. as follows:

In the event the Owner reasonably determines that the performance of the Work, as of a Milestone Date, has not progressed or reached the level of completion required by the Design-Build Documents due to delays not warranting an extension of time under article 8, the Owner shall have the right to order the Design-Builder to take corrective measures necessary to expedite the progress of construction, including, without limitations, (i) working additional shifts of overtime, (ii) supplying additional manpower, equipment and facilities, and (iii) other similar measures (hereinafter referred to collectively as "Extraordinary Measures"). Such Extraordinary Measures shall continue until the progress of the Work complies with the stage of completion required by the Design-Build Documents. The Owner's right to require Extraordinary Measures is solely for the purpose of ensuring the Design-Builder's compliance with the construction schedule.

.1 The Design-Builder shall not be entitled to an adjustment in the Contract Sum in connection with Extraordinary Measures required by the Owner under or pursuant to this Subparagraph A.3.9.5.

.2 The Owner may exercise the rights furnished the Owner under or pursuant to this Subparagraph A.3.9.5. as frequently as the Owner deems necessary to ensure that the Design-Builder's performance of the Work will comply with any Milestone Date or completion dates set forth in the Contract Documents.

- A.3.9.6. AddnewSubparagraphA.3.9.6.asfollows:  
IfreasonablyrequiredbyOwner,Design-Buildershallalso prepareandfurnishproject cashflowprojections,manningdataforcritical activities,andschedulesforthe purchaseanddeliveryofallcriticalequipmentandmaterial,togetherwithperiodic updatingthereof.
- A.3.9.7. AddnewSubparagraphA.3.9.7.asfollows:  
TheDesign-BuildershallrecommendtotheOwnerascheduleforprocurementof long-leadtimeitemswhichwillconstitutepartoftheWorkasrequiredtomeetthe project schedule. Ifsuchlong-leadtime itemsareprocuredbytheOwner,theyshall beprocuredon termsandconditionsrecommendedbytheDesign-Builder.
- A.3.10.2. AddnewSubparagraphA.3.10.2.asfollows:  
Design-Buildershallatalltimesmaintainjobrecords,including,butnotlimitedto, invoices,paymentrecords,payrollrecords,dailyreports,logs,diaries,andjobmeeting minutes,applicable to the project. Design-Buildershallmake suchreportsand recordsavailabletoinspectionbytheOwneroritsagents,withinfive(5)workingdays ofrequestbyOwnerorits agents.
- A.3.12.1. AddthefollowingattheendofSubparagraphA.3.12.1.:  
TheDesign-Buildershallsoconductitsoperationsasnottounreasonablyinterfere withtrafficonpublicthoroughfaresadjacenttoorneartotheProjectsite.
- A.3.12.2. AddnewSubparagraphA.3.12.2.asfollows:  
The Design-BuilderwillabidebyallapplicablerulesandregulationsoftheOwnerwith respecttoconduct,including smoking,parking ofvehicles andentry intoadjacent facilitiesownedbytheOwner;whichrulesandregulationsareattachedas**ExhibitE**.
- A.3.13.3. AddnewSubparagraphA.3.13.3.asfollows:  
AnypartofthefinishedWorkdamaged duringinstallationorpriortosubstantial completionoftheWorkshallberepairedsoastobeequalinquality,appearance, serviceabilityandotherrespectstoanundamageditemorpartoftheWork.Where thiscannotbefullyaccomplishedthedamageditemorpartshallbereplaced.
- A.3.14.1. DeleteSubparagraphA.3.14.1.in itsentiretyandreplacewiththefollowing:  
TheDesign-Builder shallkeepthepremisesandsurroundingareasfreefrom accumulationofwastematerialsorrubbishcausedbyoperationsundertheContract andshall,notlessthan twotimeseachweek, clean upbyremovingrubbish,including oldandsurplus materials.AtcompletionoftheWork,theDesign-Buildershallremove fromandabouttheProjectwastematerials, rubbish,theDesign-Builder'stools, constructionequipment,machineryandsurplusmaterials,andshallclean,sweep, mop,brushandpolish,asappropriate,theinterioroftheimprovementsorrenovated areas,includingbutnotlimitedto,anyfloors,carpeting,ducts,fixtures,andventilation unitsoperatedduringconstruction. Design-Builder shallcleanexteriorgutters, drainage,walkways,drivewaysandroofs of debris.
- A.3.14.3. AddnewSubparagraphA3.14.3.asfollows:  
TheDesign-Builder shallberesponsiblefordamagedorbrokenglass,andat completionoftheWork,shallreplacesuchdamagedorbrokenglass.
- A.3.15.2. AddnewSubparagraphA.3.15.2.asfollows:  
UponrequestoftheOwner,theDesign-BuildershallaccompanytheOwneronan inspectionoftheWork.
- A.3.16.1. DeletefirstsentenceofSubparagraphA.3.16.1.replacewiththefollowingsentence:

Design-Builders shall pay all license fees and royalties and assume all costs incident to the use of the performance of the Work or the incorporation in the Work of any invention, design, process, product, or device, which is the subject of patent rights or copyrights, held by others.

A.3.17.1. Delete Subparagraph A.3.17.1. in its entirety and replace with the following:

TO THE FULLEST EXTENT PERMITTED BY LAW, DESIGN-BUILDERS SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS THE OWNER, OWNER'S CONSULTANTS, AND AGENTS AND EMPLOYEES OF ANY OF THEM FROM AND AGAINST ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES ARISING OUT OF, OR RESULTING FROM THE PERFORMANCE OF THE WORK, PROVIDED THAT ANY SUCH CLAIM, DAMAGE, LOSS OR EXPENSE (1) IS ATTRIBUTABLE TO BODILY OR PERSONAL INJURY, SICKNESS, DISEASE OR DEATH, OR TO INJURY TO OR DESTRUCTION OF TANGIBLE PROPERTY (OTHER THAN THE WORK ITSELF) INCLUDING THE LOSS OF USER RESULTING THEREFROM, AND (2) IS CAUSED IN WHOLE OR IN PART BY ANY WILLFUL OR NEGLIGENT ACT OR OMISSION OF THE DESIGN-BUILDER, THE ARCHITECT, ANY DESIGN-BUILDER OR SUBCONTRACTOR, ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY ANY OF THEM OR ANYONE FOR WHOSE ACTS ANY OF THEM MAY BE LIABLE, REGARDLESS OF WHETHER OR NOT CAUSED IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF OWNER OR OWNER'S CONSULTANTS, WHERE THAT NEGLIGENCE IS A CONCURRING CAUSE OF THE INJURY, DEATH, OR DAMAGE. HOWEVER, THE INDEMNITY PROVIDED FOR IN THIS PARAGRAPH SHALL HAVE NO APPLICATION TO ANY CLAIM, LOSS, DAMAGE, CAUSE OF ACTION, SUIT, OR LIABILITY WHERE THE INJURY, DEATH, OR DAMAGE RESULTS FROM THE SOLE NEGLIGENCE OF OWNER OR OWNER'S CONSULTANTS, UNMIXED WITH THE FAULT OF ANY OTHER PERSON OR ENTITY; PROVIDED THAT WHERE THE NEGLIGENCE OF OWNER IS A CONCURRING CAUSE, DESIGN-BUILDER'S OBLIGATION TO INDEMNIFY IS LIMITED TO THE AMOUNT NECESSARY TO CAUSE THE RELATIVE LIABILITY OF OWNER, AND DESIGN-BUILDER TO REFLECT THE COMPARATIVE NEGLIGENCE FINDINGS OF THE TRIER OF FACT (JUDGE OR JURY) OR AS AGREED IN A SETTLEMENT AGREEMENT BETWEEN OWNER AND DESIGN-BUILDER.

A.3.17.3. Add new Subparagraph A.3.17.3. as follows:

DESIGN-BUILDER SHALL BE RESPONSIBLE FOR AND SHALL HOLD OWNER FREE AND HARMLESS FROM LIABILITY RESULTING FROM LOSS OF OR DAMAGE TO DESIGN-BUILDER'S OR ITS SUBCONTRACTOR'S CONSTRUCTION TOOLS AND EQUIPMENT AND RENTED ITEMS WHICH ARE USED OR INTENDED FOR USE IN PERFORMING THE WORK REGARDLESS OF WHETHER SUCH LOSS OR DAMAGE IS CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE OF OWNER OR OWNER'S CONSULTANTS. THIS PROVISION SHALL APPLY, WITHOUT LIMITATION, TO LOSS OR DAMAGE OCCURRING AT THE WORKSITE OR WHILE SUCH ITEMS ARE IN TRANSIT TO OR FROM THE WORKSITE AND IN ADDITION TO DESIGN-BUILDER'S OBLIGATIONS UNDER PARAGRAPH A.3.17.1., IT IS THE EXPRESS INTENTION OF THE PARTIES HERETO, BOTH DESIGN-BUILDER AND OWNER, THAT THE INDEMNITY PROVIDED FOR IN THIS PARAGRAPH AS TO DESIGN-BUILDER'S OR ITS SUBCONTRACTOR'S TOOLS AND EQUIPMENT AND RENTAL ITEMS, IS AN INDEMNITY BY DESIGN-BUILDER TO INDEMNIFY AND PROTECT OWNER FROM THE CONSEQUENCES OF OWNER'S OWN NEGLIGENCE, AND THAT OF OWNER'S CONSULTANTS, WHETHER THAT NEGLIGENCE IS THE SOLE OR CONCURRING CAUSE OF THE LOSS OR DAMAGE. PROVIDED, THAT WHERE THE NEGLIGENCE OF OWNER IS A SOLE OR CONCURRING CAUSE, DESIGN-

**BUILDER'S OBLIGATION TO INDEMNIFY IS LIMITED TO THE AMOUNT NECESSARY TO CAUSE THE RELATIVE LIABILITY OF OWNER AND DESIGN-BUILDER TO REFLECT THE COMPARATIVE NEGLIGENCE FINDINGS OF TRIER OF FACT (JUDGE OR JURY) OR AS AGREED IN A SETTLEMENT AGREEMENT TO WHICH OWNER AND DESIGN-BUILDER ARE BOTH PARTIES.**

A.3.17.4. Add new Subparagraph A.3.17.4. as follows:

Indemnification hereunder shall include, without limiting the generality of the foregoing, liability which could arise to the Owner, its agents, consultants, and representatives pursuant to State statutes for the safety of workmen and in addition, all Federal statutes and rules existing thereunder for protection, occupational safety and health to workmen. It being agreed that the primary obligation of the Design-Builder is to comply with said statutes in performance of the Work by Design-Builder and that the obligations of the Owner, its agents, consultants, and representatives under said statutes are secondary to that of the Design-Builder.

A.3.18. Add new Section A.3.18. as follows:

**Section A.3.18. REPRESENTATIONS AND WARRANTIES.**

A.3.18.1. The Design-Builder represents and warrants the following to the Owner (in addition to the other representations and warranties contained in the Design-Build Documents), as an inducement to the Owner to execute this Contract, which representations and warranties shall survive the execution and delivery of the Contract and the final completion of the Work:

- .1 that it is financially solvent, able to pay its debts as they mature and possessed of sufficient working capital to complete the Work and perform its obligations under the Design-Build Documents;
- .2 that it is able to furnish the plant, tools, materials, supplies, equipment and labor required to complete the Work and perform its obligations hereunder and has sufficient experience and competence to do so;
- .3 that it is authorized to do business in the State where the Project is located and properly licensed by all necessary governmental and public quasi-public authorities having jurisdiction over it and over the Work and the site of the Project;
- .4 that the execution of the Contract and its performance thereof is within its duly authorized powers; and
- .5 that its duly authorized representative has visited the site of the Work, familiarized itself with the local conditions under which the Work is to be performed and correlated its observations with the requirements of the Design-Build Documents.

A.3.19. Add new Section A.3.19. as follows:

**Section A.3.19. BUSINESS STANDARDS.**

A.3.19.1. Design-Builder, in performing its obligations under Contract, shall establish and maintain appropriate business standards, procedures, and controls, including those necessary to avoid any real or apparent impropriety or adverse impact on the interest of Owner or affiliates. Design-Builder shall review, with Owner, at a reasonable frequency during the performance of the Work hereunder, such business

standards and procedures including, without limitation, those related to the activities of Design-Builder's employees and agents in their relations with Owner's employees, agents, and representatives, vendors, subcontractors, and other third parties, and those relating to the placement and administration of purchase orders and subcontracts.

A.3.20. Add new Paragraph 3.20 as follows:

Pursuant to 19 Texas Administrative Code §61.1036, the Design/Builder shall sign and seal the Construction Documents and certify on the Certification of Project Completion form developed by the Texas Education Agency as follows:

.1 I have reviewed the standards contained in 19 TAG Chapter 61 and have used the best professional judgment and reasonable care consistent with the practice of engineering in the State of Texas in executing the construction documents and that these documents conform with the provisions of 19 TAG §61.1036.

.2 I have performed a building code search under applicable regulations that may influence the project and the design has been researched prior to becoming final.

.3 I have designed the facility according to the provisions of 19 TAG §61.1036 based on the long-range school facility plan and/or education specifications attached as **Exhibit \_\_\_**, building code specifications, and all documented changes to the Construction Documents provided by the District.

.4 As a condition to the Project being considered Substantially Complete, the Design/Builder shall certify on the Certification of Project Compliance form that the facility has been constructed in general accordance with the Construction Documents set out in 3.20.3 above.

**ARTICLE A.4. DISPUTE RESOLUTION.**

A.4.1.2. Delete Subparagraph A.4.1.2. in its entirety and replace with the following: Claims by the Design-Builder must be initiated within 21 days after occurrence of the event giving rise to such Claim. Claims must be initiated by written notice to the Owner.

A.4.1.4. Delete Subparagraph A.4.1.4. in its entirety and replace with the following: If conditions are encountered at the site which are subsurface or otherwise concealed physical conditions which were not known to the Design-Builder and which differ substantially from those indicated in the Design-Build Documents, then the Design-Builder shall notify the Owner of such conditions promptly before conditions are disturbed, and in no event less than 3 days after first observation of the conditions. The Owner will promptly investigate such conditions. If the Owner and the Design-Builder cannot agree on an adjustment to the Contract Sum or Contract Time, the adjustment shall be subject to mediation pursuant to Section A.4.3.

A.4.1.5. Delete second sentence of Paragraph A.4.1.5. in its entirety.

A.4.1.7. Delete Subparagraph A.4.1.7. in its entirety and replace with the following: The Design-Builder shall be entitled to an extension of the Contract Time for delays or disruptions due to unusually severe weather in excess of that normally experienced at the jobsite, as determined from climatological data set forth in Division 1 of the Project specifications. The Design-Builder shall bear the entire economic risk of all weather delays and disruptions, and shall not be entitled to any increase in the Contract Price by reason of such delays or disruptions. Requests for an extension of time pursuant to

this Subparagraph shall be submitted to the Owner not later than the fifteenth day of the month following the month during which the delays or disruptions occurred, and shall include documentation demonstrating the nature and duration of the delays or disruptions.

A.4.1.8. Delete reference to "21 days" in Subparagraph A.4.1.8. and replace with "3 days."

A.4.1.12 Add new Section A.4.1.12. as follows:

**A.4.1.12. SUBCONTRACTOR PASS-THROUGH CLAIMS.** In the event that any Subcontractor of the Design-Builder asserts a claim to the Design-Builder that the Design-Builder seeks to pass through to the Owner under the Contract Documents, any entitlement to submit and assert the claim as to the Owners shall be subject to the following:

- .1 the requirements of Section A.4.1. of these Supplementary Terms and Conditions; and
- .2 the following additional three requirements listed below, all three of which additional requirements shall be conditions precedent to the entitlement of the Design-Builder to seek and assert such claim against the Owner:

(i) the Design-Builder shall either (A) have direct legal liability as a matter of contract, common law, or statutory law to the Subcontractor for the claim that the Subcontractor is asserting or (B) the Design-Builder shall have entered into a written liquidating agreement with the Subcontractor, under which agreement the Design-Builder has agreed to be legally responsible to the Subcontractor for pursuing the assertion of such claim against the Owner under the Contract and for paying to the Subcontractor any amount that may be recovered, less Design-Builder's included markup (subject to the limits in the Contract Documents for any markup). The liability or responsibilities shall be identified in writing by the Design-Builder to the Owner at the time such claim is submitted to Owner, and a copy of any liquidating agreements shall be included by the Design-Builder in the claims submittal materials.

(ii) The Design-Builder shall have reviewed the claim of the Subcontractor prior to its submittal to Owner and shall have independently evaluated such claim in good faith to determine the extent to which the claim is believed in good faith to be valid. The Design-Builder shall also certify, in writing and under oath to the Owner, at the time of the submittal of such claim, that the Design-Builder has made a review, evaluation, and determination that the claim is made in good faith and is believed to be valid.

(iii) The subcontractor making the claim to the Design-Builder shall certify in writing and under oath that it has compiled, reviewed and evaluated the merit of such claim and that the claim is believed in good faith by the Subcontractor to be valid. A copy of the certification by the Subcontractor shall be included by Design-Builder in the claims submittal materials.

A.4.1.13 Add new Section A.4.1.13. as follows:

Any failure of the Design-Builder to comply with any of the foregoing requirements and conditions precedent with regard to any such claim shall constitute a waiver of any entitlement to submit or pursue such claim.

A.4.1.14 Add new Section A.4.1.14. as follows:



Receipt and review of a claim by the Owner under this Subparagraph shall not be construed as a waiver of any defenses to the claim available to the Owner under the Contract Documents or law.

- A.4.2.3. Delete Subparagraph A.4.2.3. in its entirety and replace with the following:  
Upon receipt by the Design-Builder of Owner's initial decision, if Design-Builder elects not to accept such initial decision as rendered and makes a formal objection as described in A.4.2.1, the Design-Builder and Owner shall attempt to reach agreement as to any adjustment to the Contract Price and/or Contract Time. If no agreement can be reached either party may request mediation of the dispute pursuant to Section A.4.3.
- A.4.2.5. Delete Subparagraph A.4.2.5. in its entirety and replace with the following.  
Waiver of Lien. It is understood that by virtue of this Contract, no mechanic, contractor, materialman, artisan, or laborer, whether skilled or unskilled, shall ever in any manner have, claim, or acquire any lien upon the building, or any of the improvements of whatever nature or kind so erected or to be erected by virtue of this Contract nor upon any of the land upon which said building or any of the improvements are so erected, built, or situated.
- A.4.3.1. Delete Subparagraph A.4.3.1. in its entirety and replace with the following:  
In the event that the Owner or the Design-Builder shall contend that the other has committed a material breach of this Agreement, or in the event the parties cannot reach an agreement regarding a Claim by the procedures set out in Section A.4.2., the party alleging such breach shall, as a condition precedent to filing any lawsuit, request mediation of the dispute.
- A.4.3.2. Delete Subparagraph A.4.3.2. in its entirety and replace with the following:  
Request for mediation shall be in writing, and shall request that the mediation commence not less than 30 or more than 90 days following the date of the request, except upon agreement of both parties.
- A.4.3.4. Add new Section A.4.3.4. as follows:  
In the event the Owner and the Design-Builder are unable to agree to a date for the mediation or to the identity of the mediator or mediators within 30 days following the date of the request for mediation, all conditions precedent in this article shall be deemed to have occurred and the parties may proceed to litigate the dispute.
- A.4.3.5. Add new Section A.4.3.5. as follows:  
Unless otherwise agreed in writing by the Owner in the Owner's sole discretion, Design-Builder may not bring a legal action against the Owner unless the Design-Builder has given written notice to the Owner of the Claim, dispute, or other matter giving rise to the legal action within 91 days after the date of the start of the event giving rise to the Design-Builder's Claim, dispute or other matter.
- A.4.4. Delete Section A.4.4., including all of its Subparagraphs, in its entirety. Delete all references to arbitration in this Contract, including these Supplementary Terms and Conditions.

#### **ARTICLE A.5. AWARD OF CONTRACTS.**

- A.5.6. Add new Section A.5.6. as follows:  
By appropriate agreement, written where legally required for validity, the Design-Builder shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Design-Builder by terms of the Contract Documents, and to assume toward the Design-Builder all the obligations and

responsibilities, including the responsibility for safety of the Subcontractor's Work, which the Design-Builder, by these Documents, assumes toward the Owner. Each subcontract agreement shall preserve and protect the rights of the Owner under the Contract Documents with respect to the work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Design-Builder that the Design-Builder, by the Contract Documents, has against the Owner. Where appropriate, the Design-Builder shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The Design-Builder shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement which may be at variance with the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

**ARTICLE A.6. CONSTRUCTION BY OWNER OR BY SEPARATE DESIGN-BUILDERS.**

**ARTICLE A.7 CHANGES IN THE WORK.**

- A.7.2.1. Delete Subparagraph A.7.2.1. in its entirety and replace with the following:  
 A.7.2.1. A Change Order is a written modification of the Design-Build Contract prepared by the Design-Builder and signed by the Owner and Design-Builder which authorizes an addition, deletion, or revision in the Work or an adjustment in the Contract Price or the Contract Times and is issued on or after the Effective Date of the Design-Build Contract.
- A.7.2.2. Delete Subparagraph A.7.2.2. in its entirety and replace with the following:  
 A.7.2.2. Acceptance of a Change Order by the Design-Builder shall constitute full accord and satisfaction for any and all claims, whether direct or indirect, including but not limited to impact, delay or acceleration damages, arising from the subject matter of the Change Order.
- A.7.3.7. Add the following clause to the end of the first sentence in Subparagraph A.7.3.7:  
 ... plus the Design-Builder's allocated percent for profit and overhead as confirmed by the Architect, subject to equitable adjustment approved by the Owner.  
  
 Add the following clause at the end of the second sentence in Subparagraph A.7.3.7:  
 ... only when the deductive change is \$50,000.00 or more.

**ARTICLE A.8. TIME**

- A.8.1.1. Add the following at the end of Subparagraph A.8.1.1.:  
 When the plural ("Contract Times") is used it refers to milestones designated in the Work Progress Schedule.
- A.8.1.3. Add the following clause at the end of Paragraph A.8.1.3.:  
 ... when the Work or a designated portion thereof is sufficiently complete in accordance with the Design-Build Documents to be operational and fit for the use intended by the Owner.
- A.8.3.1. Delete Paragraph A.8.3.1. in its entirety and replace with the following:  
 If the Design-Builder is delayed in the performance of services under this Agreement through no fault of the Design-Builder, its employees, agents, contractors, subcontractors, consultants, or any other person or entity providing services to the

Design-Builder, then Design-Builder shall receive an extension of time for completion equal to the delay if a written claim is made for forty-eight (48) hours, and under no circumstances shall the Owner be liable to pay the Design-Builder any compensation for such delays.

- A.8.3.3. Delete Paragraph A.8.3.3. in its entirety and replace with the following:  
This Agreement does not permit the recovery of damages by the Design-Builder for delay, disruption, or acceleration. Design-Builder agrees that Design-Builder shall be fully compensated for all delays solely by an extension of time.
- A.8.3.4. Add new Subparagraph A.8.3.4. as follows:  
The Design/Builder and the Design/Builder's surety shall be liable for and shall pay the Owner, as liquidated damages and not as a penalty, the sum herein after stipulated for each calendar day of delay after the date established for Substantial Completion in the Contract Documents until the Work is substantially complete, whether the Work is completed by Design/Builder, or by a substitute contractor after Design/Builder's abandonment of the Work or termination by the Owner for cause: One Hundred Dollars (\$100.00) a day.

#### ARTICLE A.9. PAYMENTS AND COMPLETION

- A.9.1.1. Add the following at the end of Subparagraph A.9.1.1.:  
All costs of overtime work required by the Contract Time and the nature of the Work, as set forth in or inferable from the Design-Build Documents, except costs of emergencies covered in Paragraph A.10.6 and costs resulting from excusable delay, shall be and are included in the Contract Sum.
- A.9.3.3. Add the following sentence at the end of Paragraph A.9.3.3.:  
**DESIGN-BUILDERS SHALL INDEMNIFY AND HOLD OWNER HARMLESS FROM ANY LIENS, CLAIMS, SECURITY INTEREST OR ENCUMBRANCES FILED BY THE DESIGN BUILDER OR SUBCONTRACTOR FOR ITEMS COVERED BY PAYMENTS MADE BY THE OWNER TO THE DESIGN-BUILDER.**
- A.9.3.4. Add new Subparagraph A.9.3.4. as follows:  
In each Request for Payment, Design-Builder shall certify that there are no known mechanics' or materialmen's liens outstanding at the date of this requisition, that all due and payable bills with respect to the Work have been paid to date or are included in the amount requested in the current application and that except for such bills not paid but so included, there is no known basis for the filing of any mechanics' or materialmen's liens on the Work, and that releases from all subcontractors and materialmen have been obtained in such form as to constitute an effective release of lien under the laws of the State of Texas covering all Work theretofore performed and for which payment has been made by Owner to Design-Builder.
- A.9.5.1. Add the new Clauses A.9.5.1.8., A.9.5.1.9., and A.9.5.1.10. to Subparagraph A.9.5.1. as follows:
- .8 evidence of financial inability to perform the Contract fully;
  - .9 failure to submit record documents required by the Contract; or
  - .10 failure of the Design-Builder to perform any other obligations of the Contract.
- A.9.5.2. Add to the end of Subparagraph A.9.5.2. the following:  
The Owner shall not be deemed in default by reason of withholding payment as provided for in subparagraph A.9.5.1.

- A.9.6.2. Delete Subparagraph A.9.6.2. in its entirety and replace with the following:  
 The Design/Builder shall, within ten (10) days following receipt of payment from the Owner, pay the Design Professionals and all bills for labor and materials performed and furnished by others in connection with the construction, furnished and equipping of the improvements and the performance of the work, and shall, if requested, provide the Owner with evidence of such payment. Design/Builder's failure to make payments within such times shall constitute a material breach of this contract. Design/Builder shall include a provision in each of its subcontracts imposing the same payment obligation on its subcontractors as are applicable to the Design/Builder hereunder, and if the Owners requests, shall provide copies of such subcontractor payment to the Owner. If the Design/Builder has failed to make payment promptly to the Design/Builder's subcontractors or for materials or labor used in the Work for which the Owner has made payment to the Design/Builder, the Owner shall be entitled to withhold payment to the Design/Builder in part or in whole to the extent necessary to protect the Owner.
- A.9.6.3. Delete Subparagraph A.9.6.3. in its entirety.
- A.9.6.7. Delete Subparagraph A.9.6.7. in its entirety and replace with the following:  
 The Design-Builder shall, as a condition precedent to any obligation of the Owner under this agreement, provide to the Owner payment and performance bonds in the full penal amount of the Contract in accordance with Texas Government Code Chapter 2253.
- A.9.8.1. Add the following to Subparagraph A.9.8.1.:  
 In the event substantial completion is not achieved by the designated date, or as it may be extended, including extension to which Design-Builder is entitled due to excusable delay, Owners shall be entitled to deduct out of any sums due to Design-Builder any or all liquidated damages due Owner in accordance with Agreement Between the Owner and Design-Builder, where the basis of payment is a Stipulated Sum.
- A.9.8.3. Modify Subparagraph A.9.8.3 as follows:  
 After "the Owners shall" add "within 7 days".
- A.9.8.5. Make the following changes to Subparagraph A.9.8.5.:
  - After the word "complete" add the following: "as reasonably determined by the Owner"
  - Substitute the term "Certificate" for the term "Acknowledgement" throughout
- A.9.8.6. Delete Subparagraph A.9.8.6. and replace with the following:  
 Retainage is not due to the Design-Builder until 30 days after final completion of the Work as set out in Paragraph A.9.10. After the Certificate of Substantial Completion is accepted by the Owner, the Owner may, in its sole discretion and upon acceptance and consent of surety, make payment of retainage on all or a part of the Work accepted.

A.9.10.1. Delete Subparagraph A.9.10.1. in its entirety and replace with the following:  
When all of the Work is finally completed and the Design-Builder is ready for a final inspection it shall notify the Owner thereof in writing. Thereupon, the Owner shall within 7 days make a final inspection of the Work and, if the Work is complete in full accordance with the Design-Build Contract and the Design-Build Contract has been fully performed, the Owner will promptly issue a final Certificate for Payment certifying that the Project is complete and the Design-Builder is entitled to the remainder of the unpaid Contract Price, less any amount withheld pursuant to this Contract. Except as otherwise agreed in writing, Owner will perform no more than one (1) inspection to determine whether the Work has attained Final Completion in accordance with the Design-Build Documents. If the Owner is unable to issue its final Certificate for Payment and is required to repeat its final inspection of the Work, the Design-Builder shall bear the cost of such repeat final inspection(s) which cost may be deducted by the Owner from the Design-Builder's final payment.

A.9.10.4. Delete Subparagraph A.9.10.4. in its entirety and replace with the following:  
The Owner shall make final payment of all sums due the Design-Builder not more than thirty (30) days after the Architect's execution of a final Certificate for Payment.

A.9.11. Add new Section A.9.11., as follows:  
Section A.9.11 AUDIT.

A.9.11.1. Design-Builder agrees to maintain adequate books, payrolls and records satisfactory to the Owner in connection with any and all Work performed hereunder. Design-Builder agrees to retain all such books, payrolls and records (including data stored in computer) for a period of not less than three (3) years after completion of the Work. At all reasonable times, Owner and its duly authorized representatives shall have access to all personnel of Design-Builder and all such books, payrolls and records, and shall have the right to audit same.

A.9.12. Add new Section A.9.12. as follows:

Section A.9.12. ALLOCATION OF OWNER'S ADDITIONAL COSTS.

In addition to any liquidated damages payable to the Owner by the Design-Builder, if: (1) the Owner is required to make more than 1 inspection for Substantial Completion; (2) the Owner is required to make more than 1 inspection for Final Completion; or (3) the Work is not substantially complete within sixty days after the date established for Substantial Completion in the Contract Documents; the Owner shall be entitled to deduct from the Contract Sum amount paid to any Consulting Architect or other Consultant hired by the Owner for any additional inspections or services.

ARTICLE 10. PROTECTION OF PERSONS AND PROPERTY.

A.10.1.1. Add the following to Subparagraph A.10.1.1.:

Design-Builder shall develop a safety program applicable to the Work to be done, review such program with Owner in advance of beginning the Work, and enforce such program at all times. Further, Design-Builder shall comply with all applicable laws and regulations including but not limited to, the standards and regulations promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970 (OSHA) and any other legislation enacted for the safety and health of Design-Builder employees. Owner shall have the right, but not the obligation, to inspect Design-Builder's complete responsibility for protecting the safety and health of its employees and subcontractor.

A.10.1.2. Add new Subparagraph 10.1.2. as follows:

Design-Builder's employees, agents, and subcontractors shall not perform any service for Owner while under the influence of alcohol or any controlled substance. Design-Builder, its employees, agents, and subcontractors shall not use, possess, distribute, or sell illicit or unprescribed controlled drugs or drug paraphernalia, or misuse legitimate prescription drugs while performing the Work. Design-Builder, its employees, agents, and subcontractors shall not use, possess, distribute, or sell alcoholic beverages while performing the Work.

Design-Builder has adopted or will adopt its own policy to assure drug and alcohol free workplace while performing the Work.

Design-Builder will remove any of its employees from performing the Work anytime there is suspicion of alcohol and/or drug use, possession, or impairment involving such employee, and at any time an incident occurs where drug or alcohol use could have been a contributing factor. Owner has the right to require Design-Builder to remove employees from performing the Work anytime cause exists to suspect alcohol or drug use. In such cases, Design-Builder's employees may only be considered for return to work after the Design-Builder certifies as a result of a for-cause test, conducted immediately following removal that said employee was in compliance with this contract. Design-Builder will not use an employee to perform the Work who either refuses to take, or tests positive in, any alcohol or drug test.

Design-Builder will comply with all applicable federal, state, and local drug and alcohol related laws and regulations (e.g., Department of Education and Department of Transportation regulations, Department of Defense Drug-Free Work-force Policy, Drug-Free Workplace Act of 1988). Owner has also banned the presence of all weapons on the Project site, whether the owner thereof has a permit for a concealed weapon or not.

A.10.2.6. Add the following sentence to Subparagraph A.10.2.6.:

This person shall be the Design-Builder's superintendent unless otherwise designated by the Design-Builder in writing to the Owner and Architect.

A.10.2.7. Add the following clause to the end of Subparagraph A.10.2.7.:

... or the structure, nor shall Design-Builder subject any part of the Work or adjacent property to stresses or pressures that will endanger it.

A.10.2.8. Add new Subparagraph 10.2.8. as follows:

The Design/Builder shall review subcontractors safety programs, procedures, and precautions in connection with performance of the Work. However, the Design/Builder's duties shall not relieve any subcontractor(s) or any other person or entity (e.g. a supplier) including any person or entity with whom the Design/Builder does not have a contractual relationship, of their responsibility or liability relative to compliance with all applicable federal, state and local laws, rules, regulations, and ordinances which shall include the obligation to provide for the safety of their employees, persons, and property and their requirements to maintain a work environment free of recognized hazards. The foregoing notwithstanding, the requirements of this paragraph are not intended to impose upon the Design/Builder any additional obligations that the Design/Builder would not have under any applicable state or federal laws including, but not limited to, any rules, regulations, or statutes pertaining to the Occupational Safety and Health Administration.

A.10.2.9. Add new Subparagraph 10.2.9. as follows:

Design/Builder shall bear responsibility for design and execution of acceptable trenching and shoring procedures, in accordance with Texas Government Code,

Section 2166.303 and Texas Health and Safety Code, Subchapter C, Sections 756.021, et seq.

A.10.3.3. Add the following to the end of Subparagraph A.10.3.3.:

Notwithstanding anything to the contrary contained in this Subparagraph A.10.3.3., the agreement of the Owner to indemnify, defend and hold harmless the parties described in this Subparagraph shall not extend or apply to claims, damages, losses, expenses or liabilities related to, created or caused in whole or in part by a party indemnified hereunder; it being agreed and understood that the Owner and any party so indemnified shall each bear liability for its own negligent acts or omissions, and that such indemnity shall extend only to liability for the negligent acts and omissions of the Owner.

A.10.5. Delete Subparagraph A.10.5. in its entirety and replace with the following:

If without negligence on the part of the Design-Builder, the Design Builder is held liable for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Design-Build Documents, to the extent permitted by Texas law, the Owners shall indemnify the Design-Builder for all cost and expense thereby incurred.

#### **ARTICLE A.11. INSURANCE AND BONDS.**

A.11 Delete the entirety of ARTICLE A.11. INSURANCE AND BONDS and replace with the following:

#### **ARTICLE A.11. INSURANCE AND BONDS.**

A.11.1 DESIGN-BUILDER'S INSURANCE REQUIREMENTS. The Design Builders shall purchase and maintain insurance as set forth in this Article A.11. Such insurance shall be written for not less than the following limits or greater if required by law or the Design-Build Documents:

A.11.1.1 WORKER'S COMPENSATION AND EMPLOYER'S LIABILITY INSURANCE: In accordance with all applicable State and Federal laws and endorsed specifically to include Employer's liability, including occupational disease, subject to a limit of liability of not less than \$500,000.00 and Waiver of subrogation in favor of the Owner.

,1 Definitions.

a) Certificate of Coverage ("Certificate"). A copy of a certificate of insurance, a certificate of authority to self-insure issued by the commission, or a coverage agreement (DWC-81, OWE-82, OWE-83, or DWC-84), showing statutory Workers' Compensation Insurance coverage for the person's or entity's employees providing services on the Project, for the duration of the Project. Other evidence of such insurance as may be required by Owner.

b) Duration of the Project. Includes the time from the beginning of a person's work on the Project until the contractor's/person's work on the Project has been completed and accepted by the Owner.

c) Persons Providing Services on the Project ("Subcontractor" in §406.096). Includes all persons or entities performing all or part of the services the contractor has undertaken to perform on the Project, regardless of whether that person contracted directly with the contractor and regardless of whether that person has employees. This includes,

without limitation, independent contractors, subcontractors, leasing companies, motor carriers, owner-operators, employees of any such entity, or employees of any entity which furnishes person to provide seNices on the Project. "SeNices" include, without limitation, providing, hauling, or delivering equipment or materials, or providing labor, transportation, or other seNicer related to a Project. "SeNices" does not include activities unrelated to the Project, such as food/beverage vendors, office supply deliveries, and delivery of portable toilets.

## .2 Coverage and Evidence of Coverage.

.2.1 By Design-Builder. The Design-Builder shall provide coverage, based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements, which meets the statutory requirements of Texas Labor Code, Title 5 for all employees of the Design-Builder providing seNices on the Project, for the duration of the Project. The Design-Builder must provide a Certificate of Coverage and a copy of its insurance Policy to the Owner prior to commencement of any Work on under this Contract. If the coverage period shown on the Design-Builder's current Certificate of Coverage ends during the duration of the Project, the Design-Builder must, prior to the end of the coverage period, file a new Certificate of Coverage and a copy of its new Policy or Binder evidencing extension of the current Policy, with the Owners showing that coverage has been extended.

.2.2 Contractors Providing SeNices. The Design-Builder shall contractually require each person with whom it contracts to provide seNices on a Project, to:

a) provide coverage, based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements, which meets the statutory requirements of Texas Labor Code, Section 401.011(44) for all of its employees providing seNices on the Project, for the duration of the Project;

b) provide to the Design-Builder, prior to that person beginning work on the Project, a Certificate of Coverage and copy of its current insurance Policy showing that coverage is being provided for all employees of the person providing seNices on the Project, for the duration of the Project;

c) provide the Design-Builder, prior to the end of the coverage period, a new Certificate of Coverage and a copy of its new Policy or Binder evidencing extension of, if the coverage period shown on the current Certificate of Coverage ends during the duration of the Project;

.3 The Design-Builder shall provide to the Owner all evidence of insurance required above, to the Owner prior to commencement of any Work on the Project.

.4 The Design-Builder shall retain all required certificates and other evidence of insurance coverage for the duration of the Project and for four (4) years thereafter.



.5 The Design-Builder shall notify the Owner in writing by certified mail or personal delivery, within ten (10) days after the Design-Builder knew or should have known, of any change that materially affects the provision of coverage of any person or entity providing services on the Project.

.6 The Design-Builder shall post on each Project site an notice, in the text, form and manner prescribed by the Texas Department of Insurance, Workers' Compensation Division, informing all persons providing services on the Project that they are required to be covered, and stating how a person may verify coverage and report lack of coverage.

.7 The Design-Builder shall contractually require each person with whom it contracts to provide services on a Project, to:

7.1 Provide coverage, based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements, which meets the statutory requirements of Texas Labor Code 401.011(44) for all of its employees providing services on the Project for the duration of the Project;

.7.2 Provide to the Contractor, prior to that person beginning work on the Project, a certificate of coverage showing that coverage is being provided for all employees of the person providing services on the Project for the duration of the Project;

.7.3 Provide to the Contractor, prior to the end of the coverage period, a new certificate of coverage showing extension of coverage, if the coverage period shown on the current certificate of coverage ends during the duration of the Project;

.7.4 Obtain from each other person with whom it contracts, and provide to the Contractor, a certificate of coverage, prior to the other person beginning work on the Project; and a new certificate of coverage showing extension of coverage, prior to the end of the coverage period, if the coverage period shown on the current certificate of coverage ends during the duration of the Project;

.7.5 Retain all required certificates of coverage on file for the duration of the Project and for one (1) year thereafter;

.7.6 Notify the Owner in writing by certified mail or personal delivery, within ten (10) days after the person knew, or should have known, of any change that materially affects the provision of coverage of any person providing services on the Project; and

.7.7 Contractually require each person with whom it contracts to perform as required by these Subparagraphs 7.1 through 7.7, with the certificates of coverage to be provided to the person for whom they are providing services.

.8 By signing this contract or providing or causing to be provided a Certificate Of Coverage, the Design-Builder is representing to the Owner that all employees of the Design-Builder who will provide services on the Project will be covered by Workers' Compensation coverage for the duration of the Project, that the coverage will be based on proper reporting of classification codes and payroll amounts, and that all coverage agreements will be filed with the appropriate insurance carrier or, in the case of a self-insured, with the commission's Division

of Self-Insurance Regulation. Providing false or misleading information may subject the Design-Builder to administrative penalties, criminal penalties, civil penalties, or other civil actions.

.9 The Design-Builder's failure to comply with any of these provisions is a breach of contract by the Design-Builder which entitles the Owner to declare the contract void if the Design-Builder does not remedy the breach within ten (10) days after receipt of notice of breach from the Owner.

.10 The coverage requirement recited above does not apply to sole proprietors, partners, and corporate officers who are excluded from coverage in an insurance policy or certificate of authority to self-insure that is delivered, issued for delivery, or renewed on or after January 1, 1996. 28 TAC 110.110(i)

A.11.1.2 COMMERCIAL GENERAL LIABILITY INSURANCE, INCLUDING PERSONAL INJURY LIABILITY, INDEPENDENT DESIGN-BUILDER'S LIABILITY, PRODUCTS AND COMPLETED OPERATIONS AND CONTRACTUAL LIABILITY covering, but not limited to, the liability assumed under the indemnification provisions of this Contract, fully insuring Design-Builder's (or Subcontractor's) liability for injury to or death of the Owner's employees and third parties, and for damage to property of third parties, with a combined bodily injury (including death) and property damage minimum limit of \$500,000 per occurrence, \$1,000,000 annual aggregate. If coverage is written on a claims-made basis, coverage shall be continuous (by renewal or extended reporting period) for no less than 60 months following completion of the contract and acceptance of work by the Owner. Coverage, including any renewals, shall have the same retroactive date as the original policy applicable to the Project. The Owners shall be named, by way of endorsement, as additional insureds.

The general liability policy shall include coverage extended to apply to completed operations, asbestos hazards (if the project involves work with asbestos), and XCU hazards. The Completed Operations coverage must be maintained for a minimum of one (1) year after final completion and acceptance of the Work, with evidence of same filed with Owner. The policy shall include an endorsement to extend the policy's limits specifically to the project in question.

A.11.1.3 COMPREHENSIVE AUTOMOBILE LIABILITY INSURANCE (owned, non-owned and hired vehicles): With limits of liability for bodily injury of not less than \$250,000.00 any one person, and \$500,000.00 any one occurrence, and for property damage of not less than \$250,000.00 any one occurrence. Such coverage shall include owned, hired and non-owned vehicles. Policy shall be endorsed to include a waiver of subrogation against Owner and shall include the Owner as an additional insured.

A.11.1.4 BUILDER'S RISK COVERAGE: In addition to the insurance described above, the Design-Builder shall obtain at its expense, and maintain throughout the duration of the Project, All-Risk Builder's Risk Insurance, if the Project involves complete construction of a new building, or an All-Risk Installation Floater policy, if the Project involves materials and supplies needed for addition to, or renovations or remodeling of an existing building. Coverage on either policy shall be All-Risk, including, but not limited to, Fire, Extended Coverage, Vandalism and Malicious Mischief, Flood (if located in a flood zone) and Theft, in an amount equal to one hundred percent (100%) of the insurable value of the Project for the Installation Floater policy, and one hundred percent (100%) of the replacement cost of the Project for the Builder's Risk policy. If an Installation Floater policy is provided, the Owners shall be shown as a Joint Named Insured with respect to the Project. If a Builder's Risk policy is provided, the policy shall be written on a Completed Value Form, including materials delivered and labor performed for the Project. This policy shall be written jointly in the names of the Owner, the Design-Builder, Subcontractors, and Sub-

Subcontractors as their interests may appear. The policy shall have endorsements as follows:

- .1 This insurance shall be specific as to coverage and not contributing insurance with any permanent insurance maintained on the property.
- .2 Loss, if any, shall be adjusted with and made payable to the Owner as trustee for the insureds as their interests may appear.
- .3 The right of subrogation under the policy shall be waived as to the Owner. A.11.1.5.

UMBRELLA COVERAGE. The Design-Builder shall obtain, pay for and maintain umbrella liability insurance during the Contract term, insuring Design-Builder for an amount of not less than \$5,000,000 per occurrence combined limit Bodily Injury (including death) and Property Damage, that follows form and applies in excess of the primary coverage required hereinabove. The Owner, by way of endorsement, shall be named as an additional insured. No aggregate shall be permitted for this type of coverage. The policy shall provide "dropdown" coverage where underlying primary insurance coverage limits are insufficient or exhausted.

#### A.11.2. GENERAL INSURANCE POLICY REQUIREMENTS.

A.11.2.1 Notice of Cancellation to Owner. Prior to commencing any work, Design-Builder shall furnish to Owner at the address shown below Certificates of Insurance and if requested by Owner a copy of the actual policies (or other evidence deemed sufficient by the Owner) for all insurance coverage required by this Article and additional insurance called for elsewhere in the Contract Documents, certifying compliance with the minimum required coverage. Design-Builder shall notify the Owner in the event of any notice of cancellation, non-renewal or material change in coverage and shall give such notices not less than thirty (30) days prior to the change, or ten (10) days notice for cancellation due to non-payment of premiums, which notice must be accompanied by a replacement Certificate of Insurance. In addition, all policies shall be endorsed to provide that in the event of cancellation or reduction of coverage during the policy period, the insurers shall provide the Owner thirty (30) days advance written notice of such cancellation or reduction.

A.11.2.2 Company Rating. Insurance shall be carried with financially responsible insurance companies, licensed in the State of Texas, with an A.M. Best Rating of A(-) VI or better, if Owner has any objection to the coverage afforded by or other provisions of the insurance required to be purchased and maintained by Design-Builder in accordance with this Contract on the basis of its not complying with the Contract Documents, Owner will notify Design-Builder in writing thereof. Design-Builder will provide to Owners such additional information in respect of insurance provided by him as Owner may reasonably request.

A.11.2.3 If Design-Builder fails to maintain the aforementioned insurance, or fails to secure and maintain the aforementioned endorsements, the Owner may obtain such insurance, and deduct and retain the amount of the premiums for such insurance from any sums due under the agreement; however, procuring of said insurance by the Owner is an alternative to other remedies the Owner may have, and is not the exclusive remedy for failure of Design-Builder to maintain said insurance or secure such endorsement. In addition to any other remedies the Owner may have upon Design-Builder's failure to provide and maintain any insurance or policy endorsement to the extent and within the time herein required, the Owners shall have the right to order Design-Builder to stop work hereunder, and/or withhold any payment(s) which become due, to Design-Builder hereunder until Design-Builder demonstrates compliance with the requirements hereof.

Nothing herein contained shall be construed as limiting in any way the extent to which Design-Builder may be held responsible for payments of damages to persons or property resulting from Design-Builder's performance of the Work covered under this Agreement.

A.11.2.4 The Owner reserves the right to review the insurance requirements set forth in this Article during the effective period of the Agreement and to make reasonable adjustments to the insurance coverage and their limits when deemed necessary and prudent by the Owner based upon changes in statutory law, court decisions, or the claim history of the industry as well as the Design-Builder.

A.11.2.5. The Owners shall be entitled, upon request, and without expense, to receive complete copies of the policies with all endorsements and may make any reasonable requests for deletion, or revision or modification of particular policy terms, conditions, limitations, or exclusions, except where policy provisions are established by law or regulation binding upon the Parties or the underwriter of any of such policies. Damages caused by the Design-Builder and not covered by insurance shall be paid by the Design-Builder.

A.11.2.6 If any insurance company for the Design-Builder, which company provides insurance required under the Contract Documents, becomes insolvent or becomes the subject of any rehabilitation, conservatorship, or liquidation or similar proceeding, the Design-Builder shall procure, immediately upon first notice of such occurrence and without cost to the Owner, replacement insurance coverage before continuing the performance of the Work at the Project. Any failure to provide such replacement insurance coverages shall constitute a material breach of the Contract.

A.11.2.7. Each insurance policy to be furnished by the Design-Builder shall include the following required provisions within the certificate of insurance, and within the body of the insurance contract or by endorsement to the policy:

.1 That the Owners shall be named as an additional insured on all liability coverages.

.2 Each insurance policy shall require that thirty (30) days prior to the expiration, cancellation, nonrenewal or any material change in coverage, a notice thereof shall be given to Owner by certified mail. Design-Builder shall also notify Owner, within 24 hours after receipt, of any notice of expiration, cancellation, nonrenewal or material change in coverage it receives from its insurer.

.3 The policy phrase or clause "Other Insurance" shall not apply to Owner where Owner is an additional insured on the policy. The insurance coverage furnished by Design-Builder as required is considered to be primary insurance for purposes of the Project and the additional insureds named in the required policies.

.4 All provisions of the Contract Documents concerning liability, duty and standard of care, together with the indemnification provision, shall, to the maximum extent allowable in the insurance market, be underwritten by contractually liability coverages sufficient to include such obligations with the applicable liability policies.

A.11.2.8. Concerning the insurance to be furnished by the Design-Builder, it is a condition precedent to acceptability that:

.1 All policies must comply with the applicable requirements and special provisions of this Article.

.2 Any policy evidenced by a certificate of insurance or submitted for review shall not be subject to limitations, conditions or restrictions deemed inconsistent with the intent of the insurance requirements set forth herein, and the Owner's decision regarding whether any policy contains such provisions, contrary to this requirement, shall be final.

.3 All policies required are to be written through companies duly authorized and approved to transact that class of insurance in the State of Texas and that are otherwise acceptable to the Owner.

A.11.2.9. The Design Builder agrees to the following special provisions:

.1 The Design Builder hereby waives subrogation rights for loss or damage to the extent same are covered by insurance. Insurers shall have no right of recovery or subrogation against the Owner, it being the intention that the insurance policies shall protect all parties to the Contract and be primary coverage for all losses covered by the policies. This waiver of subrogation shall be included, by endorsement or otherwise, as a provision of all policies required under this Article A.11.

.2 Insurance companies issuing the insurance policies and the Design-Builder shall have no recourse against the Owner for payment of any premiums or assessments for any deductibles, as all such premiums and deductibles are the sole responsibility and risk of Design-Builder.

.3 Approval, disapproval or failure to act by the Owner regarding any insurance supplied by the Design-Builder (or any Subcontractors) shall not relieve the Design-Builder of any responsibility or liability for damage or accidents as set forth in the Contract Documents. The bankruptcy, insolvency or denial of liability of or by the Design-Builder's insurance company shall likewise not exonerate or relieve the Design-Builder from liability.

.4 The Owner reserves the right to review the insurance requirements of this Article A.11 during the effective period of this Contract and to adjust insurance coverages and their limits when deemed necessary and prudent by the Owner, based upon changes in statutory law, court decisions or the claim history of the field as well as that of the Design-Builder. The Design-Builder agrees to make any reasonable request for deletion, revision or modification of particular policy terms, conditions, limitations or exclusions (except where policy provisions are established by law or regulation binding upon either party to this Contract or upon the underwriter of any such policy provisions). Upon request by the Owner, the Design-Builder shall exercise reasonable effort to accomplish such changes in policy coverages and shall pay the cost thereof.

.5 No special payments shall be made for any insurance policies that the Design-Builder and Subcontractors are required to carry; all are included in the Contract Sum.

A.11.2.10. Any insurance policies required under this Article may be written in combination with any of the others, where legally permitted, but none of the specified

limits may be lowered or otherwise negatively impacted by doing so, nor may any of the requirements or special provisions of this Article be limited or circumvented by doing so.

#### A.11.3 BOND REQUIREMENTS.

A.11.3.1 The Design-Builder is required, as a condition precedent to the execution of the Contract, to execute a PERFORMANCE BOND in the form required by TEXAS STATUTES, in an amount equal to ONE HUNDRED PERCENT (100%) of the Contract Sum (less the amount for design services only).

A.11.3.2 The Design-Builder is required, as a condition precedent to the execution of the Contract, to execute a PAYMENT BOND in the form required by TEXAS STATUTES, in an amount equal to ONE HUNDRED PERCENT (100%) of the total Contract Sum (less the amount for design services only) as security for payment of all persons performing labor and furnishing materials in connection with this Contract. (Bonding Company is to furnish such forms). All bonds shall name the Owner as additional obligee.

A.11.3.3 The Payment and Performance Bond shall meet requirements of Chapter 2253 of the Texas Governmental Code. All bonds shall be issued by a surety company licensed, listed and authorized to issue bonds in the State of Texas by the Texas Department of Insurance. The surety company may be required by the Owner to have a rating of not less than "B" in the latest edition of Best's Insurance Reports, Property-Casualty. The surety company shall provide, if requested, information on bonding capacity, other projects under coverage and shall provide proof to establish adequate financial capacity for this project.

A.11.3.4 Should the bond amount be in excess of ten percent (10%) of the surety company's capital and surplus, the surety company issuing the bond shall certify that the surety company has acquired reinsurance, in a form and amount acceptable to the Owner, to reinsure the portion of the risk that exceeds ten percent (10%) of the surety company's capital and surplus with one or more reinsurers who are duly authorized and admitted to do business in Texas and that amount reinsured by an reinsurer does not exceed ten percent (10%) of the reinsurer's capital and surplus.

A.11.3.5 All bonds will be reviewed by the Owner for compliance with the Contract Documents prior to execution of the contract.

A.11.3.5 All bonds shall be originals. The Design-Builder shall require the attorney-in-fact who executes the required bonds on behalf of the surety to affix thereto a certified and current copy of the Power-of-Attorney. The name, address, and telephone number of a contact person for the bonding company shall be provided.

A.11.3.6. Upon the request in writing of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the contract, the Design-Builder shall promptly furnish a copy of the bonds or shall permit a copy to be made.

A.11.3.7 Bonds shall be signed by an agent resident in the State of Texas and the date of the bond shall be the date of execution of the contract. If at any time during the continuance of the contract, the surety of the Design-Builder's bonds fails to satisfy the requirements of Subparagraph A. 11.3.4, Owners shall have the right to require additional and sufficient sureties which the Design-Builder shall furnish to the satisfaction of the Owner within ten (10) business days after notice to do so. In default thereof, the Design-Builder may be suspended, and all payment or money due to the Design-Builder withheld.

A.11.3.8 By inclusion of this Subparagraph A.11.3.7 in the Contract Documents, the surety which issues the bonds is hereby notified that the Owner, and its agents and employees do not represent and will not be responsible for the surety's interests during the course of the Work. To protect its interests, the surety shall have the right to attend pay estimate meetings, review Applications for Payment when requested in writing by them, comment upon and make recommendations regarding payments, and inspect the Work in the presence of the Design-Builder and the Owner. By providing the bonds for the Work, the surety shall and hereby waives any cause of action against the Owner its agents and employees, for any loss suffered by the surety by reason of overpayment of any amount to the Design-Builder, unless such is a direct result of a fraudulent or grossly negligent act committed by such party.

## **ARTICLE A.12 UNCOVERING AND CORRECTION OF WORK.**

A.12.1.2. Add new A.12.1.2.1 to Subparagraph A.12.1.2. as follows:

.1 If a portion of the Work has been covered and the Owner has specifically requested to see such Work, or if any known deficiencies exist, or the Contract Documents specifically request inspection prior to its being covered, the Owner may require to see that Work in writing and it shall be uncovered by the Design-Builder. If the work is not in accordance with the Contract Documents, it must be corrected and covered at the expense of the Design-Builder. If the Work is according to the Contract Documents, the cost to restore or recover on the Work is at the sole expense of the Design-Builder.

A.12.1.2. Add new Clause A.12.1.2.2 to Subparagraph A.12.1.2. as follows:

.2 Where deficiencies are observed and noted, in addition to listing in the Site Visit Reports, the Owner may, at his/her own discretion, institute a "Notice to Comply" form (NTC) citing the deficiency. Only one item per notice will be listed in order to enable each individual deficiency to be tracked until corrected.

A.12.2.2. Add new Clause A.12.2.2.4 to Subparagraph A.12.2.2. as follows:

.4 Upon request by the Owner and prior to the expiration of one year from the date of Substantial Completion, the Design-Builder shall attend a meeting with the Owner to review the facility operations and performance.

A.12.2.6. Add new Subparagraph A.12.2.6. as follows:

Design-Builder shall (i) re-execute any part of the Work that fail to conform with the requirements of this Agreement that appear in the progress of the Work; (ii) remedy any defects in the Work due to faulty materials or workmanship which appear within a period of one (1) year from Substantial Completion of the Work hereunder, or within such longer period of time as may be set forth in the Drawings and Specifications or other Contract Documents; and (iii) replace, repair, or restore any part of the Project or furniture, fixtures, equipment, or other items placed therein (whether by Owner or any other party) that are injured or damaged by any such parts of the Work that do not conform to the requirements of this Agreement or defects in the Work.

A.12.2.7. Add new Subparagraph A.12.2.7. as follows:

The provisions of this Paragraph A.12.2 apply to Work done by subcontractors of the Design-Builder as well as work done directly by employees of the Design-Builder. The cost to Design-Builder of performing any of its obligations under this Clause A.12.2.7. to the extent not covered by insurance shall be borne by Design-Builder.

A.12.2.8. Add new Subparagraph A.12.2.8. as follows:

If, however, Owner and Design-Builder deem it inexpedient to require the correction of work damaged as provided in Subparagraph 12.2.6 or not done in accordance with the

Contract Documents, an equitable deduction from the Contract Sum and the Stipulated Sum shall be made by agreement between Design-Builder and Owner. Until such settlement, Owner may withhold such sums as Owner deems just and reasonable from moneys, if any, due Design-Builder. The settlements shall not be unreasonably delayed by the Owner and the amount of money withheld shall be based on an estimated actual cost of the correction to Owner.

A.13.2.9. Add new Subparagraph A.13.2.9. as follows:

Design-Builder's express warranty herein shall be in addition to, and not in lieu of, any other remedies Owner may have under this Agreement, at law, or in equity for defective Work.

#### **ARTICLE 13 MISCELLANEOUS PROVISIONS.**

A.13.1.1. Delete Subparagraph A.13.1.1. in its entirety and replace with the following:

The Contract shall be governed by the laws of the State of Texas, without regard to choice-of-law rules of any jurisdiction. The Contract is deemed performable entirely in Jim Wells County, Texas. Any litigation to enforce or interpret any terms of the Contract, or any other litigation arising out of or as a result of the Contract shall be brought in the State courts of said county.

A.13.1.2 Add new Subparagraph A.13.1.2 as follows:

This Agreement is made under the authority of Subchapter \_\_\_\_\_ of Chapter 271 of the Texas Local Government Code. Any party hereto that prevails in the adjudication of any claim arising under this Agreement shall be entitled to recover its reasonable and necessary attorney's fees under Section 271,159 of the Texas Local Government Code. Except as provided in this Subparagraph A.13.2.2, no provision of this Agreement shall waive any immunity or defense.

A.13.3.1. Delete Subsection A.13.3.1. in its entirety and replace with the following:

Written notices shall be deemed to have been duly served if delivered in person to the individual or a member of the firm or entity or to an officer of the corporation for which it was intended, or if delivered or sent by registered or certified mail return receipt requested or by electronic facsimile transmission to the last business address known to the party giving notice.

A.13.5.1. Delete second sentence of Subparagraph A.13.5.1. in its entirety and replace with following:

The Owner will contract for, independently of the Design-Builder, the inspection services, the testing of construction materials engineering, and the verification testing services necessary for the acceptance of the Work by the Owner. The Design-Builder shall give timely notice to the persons or entities selected by the Owner of the need for such services.

A.13.6.1. Delete Subparagraph A.13.6.1. in its entirety and replace with following:

Payments due and unpaid under the Contract Documents shall bear interest in accordance with the Texas Prompt Payment Act, Texas Gov't Code Chapter 2251.

A.13.7. Delete Paragraph A.13.7, including all subparts, in its entirety.

A.13.8. Add new Paragraph A.13.8., as follows:

13.8.1 Design-Builder agrees to furnish Owners such information as may be available in Design-Builder's files and records for the Project for the purpose of aiding Owner in establishing a depreciation schedule for the Project or such portion thereof as Owner may determine.



**ARTICLE A.14 TERMINATION ORSUSPENSION OF THE DESIGN-BUILD CONTRACT.**

- A.14.1.3. Delete Subparagraph A.14.1.3.in its entirety and replace with following:  
If one of the reasons described in Subparagraph A.14.1.1 or A.14.1.2 exists, the Design-Builder may, upon 7 days written notice to the Owner, terminate the Contract and recover from the Owner payment in an amount which would have been recoverable had the termination been for the Owner's convenience.
  
- A.14.2.1. Add new Clause A.14.2.1.5. to Subparagraph A.14.2.1. as follows:  
.5 or any Subcontractor becomes insolvent, enters bankruptcy, receivership or other like proceeding (voluntary or involuntarily, or makes an assignment for the benefit of creditors, and the Design-Builder, within fifteen (15) days after receipt of notice from the Owner, fails to provide satisfactory evidence that the Design-Builder will either (i) perform the Work of such Subcontractor with the Design-Builder's own forces, in a timely manner, or (ii) replace the Subcontractor with another similarly qualified subcontractor who is ready, willing and able to do such Subcontractor's Work in a timely manner.
  
- A.14.4.3. Delete Subparagraph A.14.4.3.in its entirety and replace with following:  
In the case of such termination for the Owner's convenience, the Design-Builder shall be entitled to receive payment for Work executed, for profits only on that portion of the Work executed, and for reasonable costs of demobilization.
  
- A.15.1. Add new Paragraph A.15.1.as follows:  
The Design-Builder shall certify in writing that no materials used in the work contain lead or asbestos materials in them in excess of amounts allowed by Local/State standards, laws, codes, rules and regulations the Federal Environmental Protection Agency (EPA) standards and/or the Federal Occupational Safety and Health Administration (OSHA) standards, whichever is most restrictive.

DESOTO INDEPENDENT SCHOOL DISTRICT

By:

\_\_\_\_\_  
President, Board of Trustees

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By: