

DESIGN BUILD AGREEMENT

BETWEEN

THE CITY OF HOUSTON

AND

[NAME OF CONTRACTOR]

FOR

PROGRAM MANAGEMENT OFFICE BUILDING AT IAH

PROJECT No. []

CIP No. []

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IN WITNESS WHEREOF, intending to be bound, the Parties have entered into this Agreement as of the Effective Date.

DESIGN BUILD CONTRACTOR:

[NAME OF CONTRACTOR]

CITY:

THE CITY OF HOUSTON, TEXAS

By _____
Name:
Title:
Tax ID NO. _____

By _____
Mayor

ATTEST:

By _____
Corporate Secretary

ATTEST:

By _____
City Secretary

APPROVED:

Mario C. Diaz
Director, Houston Airport System

APPROVED AS TO FORM:

Sr. Assistant City Attorney
L.D. File No. []

COUNTERSIGNED:

City Controller

DATE COUNTERSIGNED:

("Effective Date")

**DESIGN BUILD AGREEMENT
FOR THE PROGRAM MANAGEMENT OFFICE (PMO) BUILDING**

This Design Build Agreement ("Agreement") is entered into and effective as of the Effective Date, by and between the **CITY OF HOUSTON, TEXAS**, a home-rule city (the "City") and [REDACTED] ("DESIGN BUILD CONTRACTOR"), a limited liability company organized and existing under the laws of the State of Texas and authorized to do business in the State of Texas (each also referred to as "Party" individually or "Parties" collectively).

The City is: The City of Houston, Texas

Address for Written Notice: P.O. Box 60106, Houston TX 77205-0106

DESIGN BUILD CONTRACTOR is: [REDACTED]

Address for Written Notice: [REDACTED]

E-mail address: [REDACTED]

The Project is: [REDACTED]

Project Location: George Bush Intercontinental Airport

Project No: [REDACTED]

Design Build Contractor's Lead Design Firm is: [REDACTED]

RECITALS

WHEREAS, the City has determined to expand the Mickey Leland International Terminal as part of the ITRP;

WHEREAS, the City has determined that the best method for accomplishing the overall expansion is to split the ITRP into several smaller projects to be procured separately;

WHEREAS, this Agreement constitutes the procurement for one of the projects that will form part of the whole ITRP Program;

WHEREAS, the City has determined to implement the Project using the Design Build project delivery method in accordance with Chapter 2269 of the Texas Government Code (the "Enabling Law"), which determination was made in accordance with the Enabling Law;

WHEREAS, pursuant to the Enabling Law, the City issued a Request for Qualifications ("RFQ") on [REDACTED], in order to obtain statements of qualifications from design build firms interested in being included on a shortlist of qualified design build firms who would be invited to submit proposals for the performance of the design build work necessary for the Project;

WHEREAS, in accordance with the requirements and criteria for selection set forth in the RFQ, the City on [REDACTED], 2016, selected [REDACTED] design build firms (including the DESIGN BUILD CONTRACTOR) for inclusion on its shortlist of qualified design build firms;

WHEREAS, pursuant to the Enabling Law, the City issued a Notification to Short-listed Proponents on [REDACTED], 2016, requesting each design build firms to submit Technical and Price Proposals;

WHEREAS, each of the qualified design build firms, including the DESIGN BUILD CONTRACTOR, submitted a proposal (comprising a sealed technical proposal and a separate sealed cost proposal) on [REDACTED], 2016;

WHEREAS, following the review and selection process established in the RFP and based on the evaluation criteria and scoring formula set forth in the RFP, the City selected the DESIGN BUILD CONTRACTOR as the highest ranked design build firm among the qualified design build firms that submitted proposals in response to the RFP;

WHEREAS, on [REDACTED], 2016, the City initiated negotiations with the DESIGN BUILD CONTRACTOR, which negotiations have concluded with this Agreement;

WHEREAS, the City desires to receive, and the DESIGN BUILD CONTRACTOR desires to provide, design build services for the Project in accordance with the terms and conditions of this Agreement;

NOW THEREFORE, for and in consideration of the mutual covenants, agreements, and benefits to the Parties herein named, it is agreed as follows:

ARTICLE 1. THE PROJECT

1.1 **Project Description.** As of the Effective Date, City intends to construct the Project as set forth in **Exhibit “B”** – Scope of Services, a portion of the entire ITRP. The date of Substantial Completion for the Construction Phase will be established when and if the Director accepts DESIGN BUILD CONTRACTOR’s Guaranteed Maximum Price proposal.

ARTICLE 2. CONTRACT DOCUMENTS AND INTERPRETATION

2.1 **Contract Documents.** The “**Contract Documents**” comprise:

- 2.1.1 this Agreement and all Exhibits;
- 2.1.2 any GMP Amendment;
- 2.1.3 any Change Order or other Modification or Amendment;
- 2.1.4 any Notice to Proceed; and
- 2.1.5 any Construction Drawings and Specifications.

2.2 **Interpretation.** The Contract Documents are intended to be complimentary, and what is set forth in any one document is as binding as if set forth in each document. The Parties recognize that Amendments and Modifications may provide for specific modification to the terms and conditions of other Contract Documents, in which case, the modified terms and conditions shall govern, as expressly set forth in the Amendment or Modification. However, all terms and conditions of such other Contract Documents that are not expressly modified or deleted by an Amendment or Modification shall remain in effect. **Section 2.3** shall govern matters of interpretation related to the applicability, stringency, and consistency of the Contract Documents, which are included among the Contract Standards. If a conflict between the sections of this Agreement and the exhibits arises, the sections control over the exhibits.

2.3 **Applicability of Contract Standards.** The DESIGN BUILD CONTRACTOR shall be obligated to comply only with those Contract Standards which are applicable in any particular case. Where more than one Contract Standard applies to any particular performance obligation of the DESIGN BUILD CONTRACTOR hereunder, each such applicable Contract Standard shall be complied with. In the event there are different levels of stringency among such applicable Contract Standards, the most stringent of the applicable Contract Standards shall govern. In the event of any inconsistency among the Contract Standards, the DESIGN BUILD CONTRACTOR shall notify the Director. The Director's determination as to the applicable standard shall be binding.

2.4 **Defined Terms.** Capitalized terms used in the Contract Documents have the meanings set forth in **Exhibit "A"**. Further interpretation provisions are set forth in **Exhibit "A"**.

ARTICLE 3. GENERAL PERFORMANCE REQUIREMENTS

3.1 **Reliance.** The DESIGN BUILD CONTRACTOR acknowledges and agrees that the City is entering into this Agreement in reliance on the DESIGN BUILD CONTRACTOR's expertise with respect to the performance of the Work. The Project will serve an essential public service and will be critically important to enable the City to continue to meet its needs and obligations. The DESIGN BUILD CONTRACTOR shall perform the Work in accordance with the Contract Standards to further the interests of the City and the Project.

3.2 **Scope of the Work.** The Scope of Services is divided into Preconstruction and Construction Phase Services as more thoroughly described in **Exhibit "B"**, Scope of Services. The DESIGN BUILD CONTRACTOR recognizes that, notwithstanding this division, the components of the Work may overlap and agrees to perform all Work in accordance with the applicable Contract Standards. In no event will the DESIGN BUILD CONTRACTOR commence performance of any construction prior to the issuance of a Notice to Proceed following the GMP Amendment Date.

3.3 **Information Provided by or on Behalf of the City.** The City makes no representation or warranty with respect to any information provided to the DESIGN BUILD CONTRACTOR by or on behalf of the City in connection with this Agreement. The DESIGN BUILD CONTRACTOR shall assess all risks related to the Project and independently verify and confirm all information supplied to it by or on behalf of the City and upon which the DESIGN BUILD CONTRACTOR elects to rely in connection herewith. Except as may reasonably be requested by the DESIGN BUILD CONTRACTOR, (unless otherwise agreed by the Director in its sole discretion and

expressly established in the GMP), DESIGN BUILD CONTRACTOR shall have no right to relief hereunder, or to make any claim against the City, or to seek any adjustment to the Contract Compensation or the Contract Times as the result of any error, omission, or insufficiency relating to any information provided to the DESIGN BUILD CONTRACTOR by or on behalf of the City in connection with this Agreement.

3.4 Related Projects. The DESIGN BUILD CONTRACTOR acknowledges that the City may undertake other capital projects at or near the Project (“Related Projects”) and agrees to accept the obligations of the DESIGN BUILD CONTRACTOR concerning the Related Projects, as set forth in the General Conditions. Nothing in the Contract Documents shall be interpreted as granting the DESIGN BUILD CONTRACTOR exclusive occupancy of the Project Site. The DESIGN BUILD CONTRACTOR must ascertain to its own satisfaction the scope of the Project and the nature of any other contracts that have been or may be awarded for any Related Project.

3.5 Responsibility for Personnel and DESIGN BUILD CONTRACTOR-Related Entities. All obligations of the DESIGN BUILD CONTRACTOR hereunder shall be performed by DESIGN BUILD CONTRACTOR-Related Entities (subject to the limitations established herein) who are qualified to perform the specific services and meet all licensing and certification requirements of Applicable Law. The DESIGN BUILD CONTRACTOR shall be fully responsible, in accordance with the terms and conditions of the Contract Documents, for all Work performed by all DESIGN BUILD CONTRACTOR-Related Entities. The DESIGN BUILD CONTRACTOR shall, as between itself and the City, be responsible and liable to the City for, and not relieved of, its obligations under the Contract Documents by, the acts, omissions, breaches, defaults, non-compliance, negligence, wilful misconduct, or other legal fault of each DESIGN BUILD CONTRACTOR-Related Entity and all references in this Agreement to any act, omission, breach, default, non-compliance, negligence, wilful misconduct, or other legal fault of the DESIGN BUILD CONTRACTOR will be construed accordingly to include any such act, omission, breach, default, non-compliance, negligence, wilful misconduct or other legal fault committed by any other DESIGN BUILD CONTRACTOR-Related Entity.

3.6 Key Personnel. The DESIGN BUILD CONTRACTOR acknowledges that the identity and commitment of certain key management and supervisory personnel proposed by the DESIGN BUILD CONTRACTOR in its Proposal were material factors in the selection of the DESIGN BUILD CONTRACTOR to perform this Agreement. Such personnel, their affiliations, and their anticipated roles in the performance of the Work are set forth in **Exhibit “D”**. The DESIGN BUILD CONTRACTOR shall utilize such personnel to perform such services unless such personnel are unavailable for good cause shown. “Good cause shown” shall not include performing services on other projects for the DESIGN BUILD CONTRACTOR or any of its Affiliates, but shall include termination for cause, employee death, disability, retirement, or resignation. In the event of any such permissible unavailability, the DESIGN BUILD CONTRACTOR shall utilize replacement key management and supervisory personnel of equivalent skill, experience, and reputation. Any on-site personnel change shall be proposed to the Director with reasonable advance notice (no less than 30 days) for the Director’s review and approval, which shall not be unreasonably withheld or delayed. The Director may exclude from the Project any personnel performing Work if the Director, acting reasonably, determines that an unworkable relationship has developed between the City and the individual.

3.7 Designated Representative. The individual identified in **Exhibit “D”** as the “Designated Representative” shall, until further designation under this Section, act as the designated representative of the DESIGN BUILD CONTRACTOR with respect to this Agreement and shall coordinate with the Director as to administrative matters under this Agreement. The DESIGN BUILD CONTRACTOR may replace the individual designated as its representative under this Agreement from time to time by written notice to the Director, subject to the reasonable approval of the Director. The DESIGN BUILD CONTRACTOR shall replace the individual designated as its representative under this Agreement at any time upon written notice by the Director in the Director’s reasonable discretion. Any individual designated as the representative of the DESIGN BUILD CONTRACTOR under this Agreement shall have sufficient qualifications and experience to serve as the DESIGN BUILD CONTRACTOR’s representative hereunder and shall be vested with the authority to act on behalf of the DESIGN BUILD CONTRACTOR, to receive notices on behalf of the DESIGN BUILD CONTRACTOR, to make binding decisions with respect to the performance of the Work, and to bind the DESIGN BUILD CONTRACTOR with respect to any certification to be made by the DESIGN BUILD CONTRACTOR hereunder. The Designated Representative shall be the Director’s primary contact for the performance of the Work and shall be available, as required, for the benefit of the City and the Project.

ARTICLE 4. PRECONSTRUCTION SERVICES

4.1 Generally. The DESIGN BUILD CONTRACTOR shall render and perform the Preconstruction Services for the City in accordance with **Exhibit “B”** and all other applicable Contract Standards. The DESIGN BUILD CONTRACTOR’s responsibility for the Preconstruction Services includes the responsibility to employ or subcontract with (subject to the limitations established herein) all necessary professionals (including architects, if applicable), technicians and engineers, properly qualified, licensed and skilled in the various aspects of the Preconstruction Services, and to perform all services reasonably inferable from the description of the Preconstruction Services.

4.2 Notices to Proceed. The DESIGN BUILD CONTRACTOR shall commence performing Preconstruction Services upon the date specified in a Notice to Proceed with Preconstruction Services issued by the Director. The DESIGN BUILD CONTRACTOR acknowledges that the Preconstruction Services are segregated into discrete tasks associated with the advancement of the Preconstruction Services, as identified in **Exhibit “B”**, and that a Notice to Proceed with Preconstruction Services may be limited to certain specifically identified tasks. The City will therefore have the right to issue multiple Notices to Proceed with respect to Preconstruction Services, identifying the Preconstruction Services tasks to be performed by the DESIGN BUILD CONTRACTOR.

4.3 Ownership and Use of Work Products.

4.3.1 DESIGN BUILD CONTRACTOR conveys and assigns to the City its entire interest and full ownership worldwide in and to any work, invention, notes, plans, computations, data bases, tabulations, exhibits, reports, underlying data, photographs and other work products, and any modifications or improvements to them (collectively “Documents”), and the copyrights, patents, trademarks, trade secrets, and any other proprietary rights therein (collectively “Proprietary Rights”) that DESIGN BUILD CONTRACTOR, its agents, employees, contractors, and

Subconsultants (collectively "Authors") develop, write, or produce under this Agreement (collectively "Works").

- 4.3.2 The Authors shall not claim or exercise any Proprietary Rights related to the Works. If requested by the Director, DESIGN BUILD CONTRACTOR shall place a conspicuous notation on any Works which indicates that the City owns the Proprietary Rights.
- 4.3.3 DESIGN BUILD CONTRACTOR shall execute all documents required by the Director to further evidence this assignment and ownership. DESIGN BUILD CONTRACTOR shall cooperate with the City in registering, creating, and enforcing Proprietary Rights arising under this Agreement. If DESIGN BUILD CONTRACTOR's assistance is requested and rendered under this Section, the City shall reimburse DESIGN BUILD CONTRACTOR for all out-of-pocket expenses it incurs in rendering assistance, subject to the availability of funds. On termination of this Agreement, or if requested by the Director, DESIGN BUILD CONTRACTOR shall deliver all Works to the City. DESIGN BUILD CONTRACTOR shall obtain written agreements from the Authors which bind them to the terms in this Section.
- 4.3.4 All Works developed, written, or produced under this Agreement for use as a contribution to a collective work; a part of a motion picture or other audiovisual work; a translation; a supplementary work; a compilation; an instructional text; a test; answer material for a test; or an atlas, are "works made for hire."
- 4.3.5 DESIGN BUILD CONTRACTOR may retain copies of the Documents for its archives. DESIGN BUILD CONTRACTOR shall not otherwise use, sell, license, or market the Documents.

4.4 **GMP Submittal.** The DESIGN BUILD CONTRACTOR shall prepare and submit the GMP Proposal as set forth in **Exhibit "E"** in accordance with **Exhibit "B"** and all other applicable Contract Standards.

4.5 **GMP Amendment.** If the City determines to accept the GMP Proposal, following negotiations at the election of the City in its sole discretion and subject to approval by the City Council, the Parties will enter into the GMP Amendment and the GMP Amendment Date will be established hereunder.

4.6 **Failure to Reach a GMP.** In the event the City rejects the GMP Amendment, the City in its sole discretion may either direct the DESIGN BUILD CONTRACTOR at no additional cost to the City, to adjust the design and/or scope to attempt to bring the Guaranteed Maximum Price to an amount acceptable to the City or the City may elect to end its attempt to reach an agreement with the DESIGN BUILD CONTRACTOR. In the event the City elects to end its attempts to reach an agreement with the DESIGN BUILD CONTRACTOR, the DESIGN BUILD CONTRACTOR does hereby assign all rights to any agreement with Designer to the City effective upon written notice of acceptance by the City to the DESIGN BUILD CONTRACTOR and Designer. The City shall not be responsible for any past due amounts that the DESIGN BUILD CONTRACTOR owes to the Designer. The City shall be entitled to use any intellectual property developed by or on

behalf of DESIGN BUILD CONTRACTOR for this Project for the completion, maintenance, and further development of the ITRP project without additional compensation to DESIGN BUILD CONTRACTOR.

ARTICLE 5. CONSTRUCTION SERVICES

5.1 **Generally.** The DESIGN BUILD CONTRACTOR shall render and perform Construction Phase Services for the City in accordance with **Exhibit “B”**, **Exhibit “C”**, and all other applicable Contract Standards. The DESIGN BUILD CONTRACTOR’s responsibility for the Construction Phase Services includes the responsibility to employ or subcontract with (subject to the limitations established herein) all necessary professionals (including architects, if applicable) technicians and engineers, properly qualified, licensed and skilled in the various aspects of the Construction Phase Services, and to perform all services reasonably inferable from the description of the Construction Phase Services.

5.2 **Notices to Proceed.** The DESIGN BUILD CONTRACTOR shall commence performing Construction Phase Services upon the date specified in a Notice to Proceed with Construction Phase Services issued by the Director. The DESIGN BUILD CONTRACTOR acknowledges that the Construction Phase Services are segregated into discrete tasks associated with the advancement of the Preconstruction Services, as identified in **Exhibit “B”**, and that a Notice to Proceed with Construction Phase Services may be limited to certain specifically identified tasks. The City will therefore have the right to issue multiple Notices to Proceed with Construction Phase Services, identifying the Construction Phase Services tasks to be performed by the DESIGN BUILD CONTRACTOR.

5.3 The DESIGN BUILD CONTRACTOR warrants, represents, covenants, and agrees that all of the services to be performed by it under or pursuant to this Agreement shall be of at least the standard and quality which prevail among similar businesses and organizations with knowledge and skill engaged in providing similar services in major United States urban areas under the same or similar circumstances and involving a project such as the Project, including the performance of work in a high volume and international airport with ongoing operations.

5.4 The DESIGN BUILD CONTRACTOR’s duties as set forth herein shall at no time be in any way diminished by reason of any approval by the City or the Director nor shall the DESIGN BUILD CONTRACTOR be released from any liability by reason of such approval by the Director, it being understood that the City at all times is ultimately relying upon the DESIGN BUILD CONTRACTOR’s skill and knowledge in performing the services required hereunder.

5.5 The DESIGN BUILD CONTRACTOR warrants, represents, covenants, and agrees that the DESIGN BUILD CONTRACTOR and all persons connected with the DESIGN BUILD CONTRACTOR directly in charge of its services are duly registered and/or licensed under the laws, rules and regulations of any authority having jurisdiction, if so required by such laws, rules and regulations.

5.6 The DESIGN BUILD CONTRACTOR warrants, represents, covenants, and agrees to notify Project Manager in writing within five days of anything within its knowledge which it discovers of any nature in any drawings, specifications, plans, sketches, instructions, information, requirements, procedures, and other data supplied to the DESIGN BUILD CONTRACTOR (by the City or any other

party) which the DESIGN BUILD CONTRACTOR considers in its opinion to be unsuitable, improper, inaccurate, or defective in any way in connection with the purposes for which such document or data is furnished. Nothing shall excuse or detract from the DESIGN BUILD CONTRACTOR's responsibilities or obligations hereunder in any case where such document or data is furnished unless the DESIGN BUILD CONTRACTOR advises City in writing that in DESIGN BUILD CONTRACTOR's opinion such document or data and any requests made therein for action are unsuitable, improper, inaccurate or defective, and City confirms in writing that it wishes the DESIGN BUILD CONTRACTOR to proceed in accordance with the documents or data as originally given. DESIGN BUILD CONTRACTOR shall suspend that portion of the work affected by the reported discrepancy until clarification is received. If DESIGN BUILD CONTRACTOR does not suspend work, any increase in cost as a result, including the necessity to perform any re-work, shall be borne by DESIGN BUILD CONTRACTOR and not be reimbursable under this Agreement. Notwithstanding the foregoing DESIGN BUILD CONTRACTOR shall be responsible for all errors and omissions and lack of coordination in its own documents and the documents created by those working for DESIGN BUILD CONTRACTOR.

5.7 The DESIGN BUILD CONTRACTOR agrees to furnish efficient business administration and superintendence and perform its services hereunder properly and in an expeditious and economical manner consistent with the requirements of the Contract Documents.

5.8 In accordance with and not as an expansion of the time limitations set forth in the Conditions of the Contract, the DESIGN BUILD CONTRACTOR warrants, represents, covenants, and agrees that it shall, at its own cost, make good any errors or omissions in the Preconstruction Services and Construction Phases it performs as soon as the DESIGN BUILD CONTRACTOR becomes aware of such errors or omissions or is notified of such errors or omissions. Should the DESIGN BUILD CONTRACTOR refuse or neglect to make good such errors or omissions within a reasonable time after receiving written notice requesting such remedial work, then the City shall be entitled to make good such errors or omissions at the expense of the DESIGN BUILD CONTRACTOR. This commitment by DESIGN BUILD CONTRACTOR is in addition to, and not in substitution for, any other remedy for errors or omissions in the Preconstruction Phase Services and Construction Phases which the City may have at law or in equity.

5.9 DESIGN BUILD CONTRACTOR shall attend training on HAS Project Management System and utilize that system for the numbering and tracking for all Work records, including, Modifications, requests for information, submittals and supplementary instructions, and shall provide updated records, including meeting minutes, at each meeting with City as requested. The numbering system shall be consistent with the HAS project management system.

5.10 Subcontracts or other agreements shall conform to the applicable payment provisions of the Contract Documents, and shall not be awarded on the basis of cost plus a fee without the prior written consent of Director.

5.11 DESIGN BUILD CONTRACTOR shall require its Subcontractors who have not competitively bid to disclose to City their markups (both overhead and profit), estimates, and costs calculated in their bids or incurred or expected in sub-subcontracts and the Work performed, including any Change Order Work.

5.12 DESIGN BUILD CONTRACTOR shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to DESIGN BUILD CONTRACTOR by the terms of the Contract Documents, and to assume toward DESIGN BUILD CONTRACTOR all the obligations and responsibilities that DESIGN BUILD CONTRACTOR, by these Documents, assumes toward City. Each subcontract agreement shall preserve and protect the rights of City under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights. Where appropriate, DESIGN BUILD CONTRACTOR shall require each Subcontractor to enter into similar agreements with sub-subcontractors. DESIGN BUILD CONTRACTOR shall make available to the Director and 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 that may be at variance with the Contract Documents. Subcontractors shall similarly make copies of applicable portions of such documents available to their respective proposed sub-subcontractors. DESIGN BUILD CONTRACTOR shall provide City with a copy of each subcontract agreement upon request.

5.13 Each subcontract agreement is assignable by DESIGN BUILD CONTRACTOR to City on acceptance by the Director of the assignment. DESIGN BUILD CONTRACTOR agrees to execute such additional documents as City may request to confirm such assignments. DESIGN BUILD CONTRACTOR shall include a provision in each subcontract agreement recognizing the rights of City pursuant to the foregoing contingent assignment. Despite such acceptance by City of any such assignment, City shall not be liable for anything under such subcontract prior to the acceptance by City of the assignment or for any liability of DESIGN BUILD CONTRACTOR to the Subcontractor. Acceptance of any such assignment shall not relieve DESIGN BUILD CONTRACTOR or the Subcontractor of their responsibilities and liabilities for any Work performed prior to City's acceptance of such assignment.

5.14 Nothing contained in the Contract Documents shall create any obligations or liabilities owed by City to any Subcontractor or Supplier. Except as may be required by law, City shall have no liability or responsibility for the performance or nonperformance of any Subcontractor, Supplier, or consultant, even if City designated, required, identified or approved such Subcontractor, Supplier, consultant, or sub-consultant of any tier.

5.15 DESIGN BUILD CONTRACTOR is an independent contractor and not an agent of City. DESIGN BUILD CONTRACTOR shall be liable to City for acts and omissions that result in a breach of the obligations herein of DESIGN BUILD CONTRACTOR and DESIGN BUILD CONTRACTOR's Subcontractors and Suppliers of any tier, and their agents, employees and parties in privity of contract with any of them and anyone acting on behalf of any of them, and any other persons performing any of the Work directly or indirectly under contract with DESIGN BUILD CONTRACTOR, including any design professionals and their consultants and sub-consultants of any tier.

5.16 DESIGN BUILD CONTRACTOR and any of its design professionals, consultants, the Subcontractors and Suppliers and their agents and employees warrant that the information provided to City about the qualifications, including financial information and past performance, is accurate, has not materially changed, and does not omit information that would materially affect those qualifications and that DESIGN BUILD CONTRACTOR is financially sound, fully solvent,

and experienced in and fully qualified to perform the type of Work to be performed under this Agreement.

5.17 DESIGN BUILD CONTRACTOR represents that it has: (a) visited the Project site, (b) taken such other steps as may be necessary to ascertain the nature and location of the Work and the general and local conditions that affect the Work or the cost thereof, and (c) investigated the labor situation, including the availability of all necessary labor and material.

5.18 DESIGN BUILD CONTRACTOR shall coordinate its forces and cooperate with other Contractors and projects on or around the Project site, as well as the Project Team or other HAS staff, and to minimize disruptions to normal airport operations.

5.19 Without diminishing the other obligations of DESIGN BUILD CONTRACTOR, DESIGN BUILD CONTRACTOR represents and agrees that it will perform its services under no circumstances with less than the usual and customary standards of DESIGN BUILD CONTRACTOR's profession or business and in compliance with all Applicable Laws and in strict accordance with the Contract Documents. DESIGN BUILD CONTRACTOR agrees to correct in a timely manner and as may be directed by the Director and to bear the full cost of correcting DESIGN BUILD CONTRACTOR's Work and services that are not in strict conformance with the Contract Documents or Applicable Laws or that are otherwise defective or negligently performed, those of its Subcontractors, Suppliers, and consultants, and any related damages or other harm. The term defective work or similar terms when used in the Contract Documents include Work that is not in strict conformance with the Contract Documents. DESIGN BUILD CONTRACTOR agrees to perform Work required by the Contract Documents in a good and workman-like manner.

5.20 DESIGN BUILD CONTRACTOR represents and agrees to perform its services under the Contract Documents in an expeditious and economical manner consistent with good business practices and the interests of City in accordance with the Project Schedule reflected in **Exhibit "H"**.

5.21 DESIGN BUILD CONTRACTOR represents and agrees that there are no obligations, commitments, or impediments of any kind that will limit or prevent performance of its obligations under this Agreement.

5.22 Except for the obligations of City set forth in this Agreement, City has no liability to DESIGN BUILD CONTRACTOR or to anyone claiming through or under DESIGN BUILD CONTRACTOR by reason of the execution or performance of this Agreement.

5.23 DESIGN BUILD CONTRACTOR shall give all required notices and comply with all Applicable Laws. The Work, including documents that are the responsibility of DESIGN BUILD CONTRACTOR, shall be in accordance with all Applicable Laws. If DESIGN BUILD CONTRACTOR otherwise performs any Work that is contrary to Applicable Laws, DESIGN BUILD CONTRACTOR shall correct such Work at its expense and shall be liable for all costs, delays, and damages attributable thereto, including any damage to other Work or other property arising from or relating to the corrective Work.

5.24 DESIGN BUILD CONTRACTOR shall establish, implement, and follow a quality control program for the Work during all Construction Phases. DESIGN BUILD CONTRACTOR shall provide Project Manager with a copy of the written quality control program.

5.25 DESIGN BUILD CONTRACTOR shall provide Value Engineering suggestions to Project Manager. Whenever the term “Value Engineering” is used in conjunction with this Agreement or the Project, it has its commonly accepted meaning within the construction industry and does not imply the practice of professional engineering without a license. If any Value Engineering activities constitute the professional practice of engineering, then such activities shall be performed by an engineer licensed in Texas.

5.26 DESIGN BUILD CONTRACTOR shall give constant attention to the Work to facilitate the progress thereof, and shall cooperate with the Director, inspectors, and with other Contractors in every way possible. The Director may determine the areas in which the DESIGN BUILD CONTRACTOR and Contractors shall work in the event of a disagreement, and the DESIGN BUILD CONTRACTOR shall cooperate in such processes and decisions. The DESIGN BUILD CONTRACTOR shall have a competent superintendent on the Work at all times who is fully authorized as his/her agent on the Work. The superintendent shall be capable of reading and fully understanding the plans and specifications and schedules, shall receive and fulfill instructions from the Director, and shall be present at the Work site at all times while Work is in progress.

5.27 The City will be performing additional work with other Contractors as well as continuing with its normal airport operations on or near the Work covered by this Agreement. When separate contracts are let within the limits of any one project, DESIGN BUILD CONTRACTOR shall conduct its work so as not to interfere with or hinder the progress or completion of the work being performed by other Contractors. DESIGN BUILD CONTRACTOR shall cooperate with other Contractors, City consultants, design professionals, City employees, and others as directed by the Director. In the event an interference cannot be reasonably avoided, DESIGN BUILD CONTRACTOR shall notify the City before the Work is impacted to resolve the interference.

5.28 DESIGN BUILD CONTRACTOR shall arrange its Work and shall place and dispose of the materials being used so as to not interfere with the operations of other Contractors within the limits of the same project. DESIGN BUILD CONTRACTOR shall join its Work with that of the others in an acceptable manner and shall perform it in proper sequence to that of the others.

5.29 Subject to the obligations to cooperate with the City and Contractors with respect to contemporaneous operations and proximity at the Project site including, without limitation, relocating work areas, the DESIGN BUILD CONTRACTOR remains solely responsible for its means, methods, techniques, sequences and procedures and safety programs in connection with its Work.

5.30 DESIGN BUILD CONTRACTOR acknowledges that the Project site is, and at all times during the Work will be, within or around critically important areas of the operational airfield at IAH. DESIGN BUILD CONTRACTOR agrees that at all times when any forces are mobilized to strictly adhere to rules and instructions regarding permitted activities and physical locations on the airfield given by any authorized HAS personnel. Such instructions will include, without limitation, demobilizing from Work areas on minutes’ notice to allow aircraft movement; coordination of phased work areas to keep aircraft paths open and operational; vigilant cleaning

and removal of all foreign object debris caused by its Work from any areas on which aircraft may travel. DESIGN BUILD CONTRACTOR agrees and warrants that all delays and disruptions within the reasonable contemplation of those knowledgeable of airfield operations (including absolute deference to aircraft operations) caused by such adherence to rules and instructions or coordination for activities as specified herein have been taken into account in preparing the Guaranteed Maximum Price and that DESIGN BUILD CONTRACTOR will not seek any increase in the Guaranteed Maximum Price or the Contract Time on account of such adherence and coordination, as required for Project performance. DESIGN BUILD CONTRACTOR agrees that the City's needs arising from its ongoing airport operations as described herein has been expressly contemplated by DESIGN BUILD CONTRACTOR and shall not constitute active interference by the City.

5.31 All Subcontracts shall be awarded in accordance with the applicable provisions of *Texas Government Code* Chapter 2269, Subchapter H through a process overseen by the Project Team. DESIGN BUILD CONTRACTOR shall notify Director in advance in writing of the identities of all Subcontractors with which it intends to subcontract. DESIGN BUILD CONTRACTOR shall not subcontract with any Subcontractor to which Director has a reasonable objection in accordance with *Texas Government Code* Chapter 2269, Subchapter H. A notice of intent to employ a particular Subcontractor shall be given by the DESIGN BUILD CONTRACTOR to the City as to permit Director adequate time for review of the prospective Subcontractor without delay to the Project and to allow time for DESIGN BUILD CONTRACTOR to make substitute selections, but in no event shall such notice be given less than ten (10) days before the intended subcontract date. If Director has a reasonable objection to a proposed Subcontractor, DESIGN BUILD CONTRACTOR shall propose another against whom Director has no reasonable objection. DESIGN BUILD CONTRACTOR shall not be required to subcontract with any Subcontractor to which it has reasonable objection. When DESIGN BUILD CONTRACTOR's Subcontractors for constructing the Work have been identified, they shall not be changed without Director's prior written approval, which shall not be unreasonably withheld. DESIGN BUILD CONTRACTOR shall not incur any Subcontract costs prior to issuance by City of a Notice to Proceed for such Work. If the bidding process does not result in the selection of a subcontractor who is acceptable to the Director, the Director may ask the DESIGN BUILD CONTRACTOR to submit a proposal for the specific portion of work for approval.

5.32 The DESIGN BUILD CONTRACTOR shall (1) submit pricing for any proposed self-performed Work in the same manner as all other Subcontractors (2) perform self-performed Work in accordance with the same terms and conditions as its other Subcontractors, and (3) account for self-performed Work in the same manner as if the Work had been performed by other Subcontractors. In order to afford the City with maximum flexibility and the opportunity to achieve the best value, the DESIGN BUILD CONTRACTOR shall not self-perform any work to which the Director has a reasonable objection.

ARTICLE 6. LIQUIDATED DAMAGES

6.1 **Liquidated Damages Generally.** Additional liquidated damages provisions are set forth in Article 9 of the General Conditions.

6.2 **Failure to Achieve Milestones.** DESIGN BUILD CONTRACTOR and City agree that failure to achieve the Project milestones in this Section by the dates set forth in the agreed upon

Guaranteed Maximum Price proposals will cause damages to City and that actual damages from such harm are difficult to estimate accurately. Therefore, DESIGN BUILD CONTRACTOR and City agree that DESIGN BUILD CONTRACTOR and Surety are liable for and shall pay to City the amounts below per Day, on a cumulative basis, as liquidated damages and not as a penalty, for each and every Day or portion of a Day of delay beyond the milestone dates described below. DESIGN BUILD CONTRACTOR and City agree that the amounts of liquidated damages fixed in this Section are reasonable forecasts of just compensation for harm to City resulting from DESIGN BUILD CONTRACTOR's failure to achieve the milestones set forth herein. These liquidated damages shall be City's sole remedy for damages from delay by DESIGN BUILD CONTRACTOR except that City shall be entitled to recover all of its actual, direct and consequential damages in the event liquidated damages are determined to be unenforceable, and City shall also be entitled to City's remedies under Article 14 of the General Conditions. Liquidated damages for each of the Project milestones are as follows:

6.2.1 Completion of Phase 1- Pre-Construction Milestone: \$2,000 per Day. The milestone duration is 160 Calendar Days from Notice to Proceed.

6.2.2 Substantial Completion of Phase 2- Construction Milestone: \$5,000 per Day. The milestone duration is 268 Calendar Days from Notice to Proceed.

ARTICLE 7. TIME

7.1 **Time of the Essence.** Design Build Contractor acknowledges that Time is of the essence in this Agreement.

ARTICLE 8. CONTRACT COMPENSATION

8.1 General Payment Requirements.

8.1.1 In addition to the payment terms set forth in this Article, the general requirements for payment, including the procedures and timing for the Applications for Payment, for DESIGN BUILD CONTRACTOR's Services are set forth in Article 9 of the General Conditions.

8.1.2 As of the Effective Date, the maximum amount payable to the DESIGN BUILD CONTRACTOR under this Agreement is the total amount for compensation for the performance of Preconstruction Services as set forth in Section 8.2.1 below. Without limiting any term or condition hereunder with respect to payments to the DESIGN BUILD CONTRACTOR, the DESIGN BUILD CONTRACTOR's entitlement to, and the City's obligation to pay, any additional compensation to the DESIGN BUILD CONTRACTOR for the performance of the Work will be dependent upon the execution of the GMP Amendment. The DESIGN BUILD CONTRACTOR recognizes that the City has no obligation hereunder to enter into any such Amendment. In the event the City and DESIGN BUILD CONTRACTOR agree on a Guaranteed Maximum Price and the City authorizes DESIGN BUILD CONTRACTOR to proceed with the Construction Services, DESIGN BUILD CONTRACTOR's compensation shall be calculated under 8.3 below.

8.2 Preconstruction Services Price – Phase 1 Only.

- 8.2.1 Subject to the City's limit of appropriation, for properly performed and completed Preconstruction Phase Services, City shall pay DESIGN BUILD CONTRACTOR a total lump sum amount of \$[REDACTED], which includes \$[REDACTED] for Pre-Construction Services and \$[REDACTED] for DESIGN BUILD CONTRACTOR Design Services (Design Complete to GMP Agreement).
- 8.2.2 City will pay DESIGN BUILD CONTRACTOR on the basis of invoices showing the percentage of services performed and materials purchased during the preceding month for each phase of Preconstruction Phase Services based upon the allocation of the Preconstruction Services Price set forth above. The Preconstruction Services Price shall be deemed to be full compensation to DESIGN BUILD CONTRACTOR for all Preconstruction Phase Services, including all costs, overhead, and profit.
- 8.2.3 All payment requests for Preconstruction Phase Services shall be submitted on an Application for Payment and Schedule of Values approved by Director and includes all required attachments identifying payments to DESIGN BUILD CONTRACTOR , as well as to all Subcontractors.
- 8.2.4 DESIGN BUILD CONTRACTOR shall not be entitled to an increase in the Preconstruction Services amount set forth in this Section because of Project Schedule extensions or delays, or changes in the scope of the proposed Project, unless such extensions, delays, or changes are material and significant as reasonably determined by the Director.

8.3 Construction Phase Payments – Phase 2 Only.

- 8.3.1 Pursuant to the terms of this Agreement, City shall pay DESIGN BUILD CONTRACTOR for DESIGN BUILD CONTRACTOR's Construction Phase proper and complete performance of the Construction Phase Services, the Cost of the Work and the DESIGN BUILD CONTRACTOR's Fee, up to the limit of the Guaranteed Maximum Price in accordance with the payment provisions of the General Conditions. Payment by City shall be deemed full compensation to DESIGN BUILD CONTRACTOR for the performance of the Construction Phase. In the General Conditions, references to adjustments in "cost" or "costs" refer to Costs of the Work as defined below, and references to DESIGN BUILD CONTRACTOR's "home/branch office overhead" and "profit" refer to DESIGN BUILD CONTRACTOR's Fee.
- 8.3.2 DESIGN BUILD CONTRACTOR shall not receive any fee for Work deleted by Modifications. The DESIGN BUILD CONTRACTOR's Fee shall be compensation in full to DESIGN BUILD CONTRACTOR for all overhead and profit and all costs not otherwise recoverable.
- 8.3.3 The sum of the Cost of the Work and DESIGN BUILD CONTRACTOR's Fee is guaranteed by DESIGN BUILD CONTRACTOR not to exceed whatever

Guaranteed Maximum Price Director and DESIGN BUILD CONTRACTOR may agree upon in writing, subject to additions and deductions by Change Order as provided in the Contract Documents. This maximum sum is referred to in the Contract Documents as the Guaranteed Maximum Price. Costs that would cause the Guaranteed Maximum Price to be exceeded shall be paid by DESIGN BUILD CONTRACTOR without reimbursement by City. No Change Order shall affect the Guaranteed Maximum Price unless the Change Order specifies the exact total change to the Guaranteed Maximum Price.

- 8.3.4 In the event that the DESIGN BUILD CONTRACTOR is required to pay or bear the burden of any new federal, state, or local tax, or of any rate increase of an existing tax (except a tax on income) with respect to its forces and/or its performance of the Work as a result of any statute, court decision, written ruling, or regulation taking effect after the Effective Date of this Agreement, the Guaranteed Maximum Price shall be increased by the amount of the new tax or tax increase upon proof satisfactory to the Director that such increase has been applied to DESIGN BUILD CONTRACTOR.
- 8.3.5 If the sum of the Cost of the Work and the DESIGN BUILD CONTRACTOR's Fee for the Construction Phase is less than the Guaranteed Maximum Price for such Phase, then all such savings shall all be retained by City.
- 8.3.6 Subject to the City's appropriation of funds, in full consideration of DESIGN BUILD CONTRACTOR's services during Phase 2 – Construction the City shall pay the DESIGN BUILD CONTRACTOR during Phase 2 – Construction the City shall pay the DESIGN BUILD CONTRACTOR's Fee of [REDACTED] % of the Cost of the Work, in addition to a lump sum price of \$[REDACTED] for the DESIGN BUILD CONTRACTOR'S Design Services (For completion of Construction Documents and Designer's Services During Construction). DESIGN BUILD CONTRACTOR agrees that if the Guaranteed Maximum Price for a Phase increases or decreases from the amount originally agreed upon, the DESIGN BUILD CONTRACTOR's Fee may increase or decrease based upon the actual Cost of the Work. Notwithstanding anything in the Contract Documents to the contrary, DESIGN BUILD CONTRACTOR shall not earn a fee on the lump sum price of the Designer. DESIGN BUILD CONTRACTOR's Fee is inclusive of DESIGN BUILD CONTRACTOR's profit, general overhead and all expenses in connection with maintaining and operating DESIGN BUILD CONTRACTOR's main office and any branch office, including:
- 8.3.6.1. Salaries of persons employed in the main or branch offices of the DESIGN BUILD CONTRACTOR whose time is devoted to the general conduct of the DESIGN BUILD CONTRACTOR's business for the Project, such as project executives, operations managers, contract administrators, office managers, stenographers, plan clerks, file clerks, and draftsmen except to the extent that their time is actually spent on the Project and they are identified on **Exhibit "D"**.
- 8.3.6.2. Outside services and their expenses for estimating, personnel, accounting, budget control, audit and management information

- systems (other than Preconstruction Services) relating to accounting in DESIGN BUILD CONTRACTOR's office and even if at the site, except as specifically identified herein.
- 8.3.6.3. Interest on the DESIGN BUILD CONTRACTOR's capital or on money borrowed by the DESIGN BUILD CONTRACTOR, including the capital employed by the DESIGN BUILD CONTRACTOR in the performance of the Work.
 - 8.3.6.4. Amounts required to be paid by DESIGN BUILD CONTRACTOR for Federal and/or State income and franchise taxes.
- 8.3.7 In addition to the payment procedures described in the General Conditions, the following payment procedures shall apply:
- 8.3.7.1. The Schedule of Values may be revised from time to time to adjust allocations of costs to various line items as the costs become better known, but such adjustment shall be subject to the approval of the Director, which shall not be unreasonably withheld. Under no circumstances shall the Schedule of Values exceed the Guaranteed Maximum Price for the Construction Phase. The DESIGN BUILD CONTRACTOR's Fee, labor and expenses for General Conditions Work, labor and expenses for any self-performed Work, and the contingency shall be shown as separate line items on the Schedule of Values.
 - 8.3.7.2. The Schedule of Values submitted shall maintain the originally established value for each work classification line item, and shall contain any revisions to costs or cost estimates for each such classification. The format and tracking method of the original Schedule of Values and of all updates thereto shall be subject to the approval of Director.
 - 8.3.7.3. Payment for DESIGN BUILD CONTRACTOR's Fee shall be in the same proportion to the total fee as the amount requested for the Cost of the Work relative to the total Cost of the Work used in deriving the Guaranteed Maximum Price.
 - 8.3.7.4. DESIGN BUILD CONTRACTOR shall submit a monthly cost breakdown, including cost elements for staff labor and expenses over the duration of the construction period to Director for approval. Payment for DESIGN BUILD CONTRACTOR's General Conditions shall be made on a monthly basis per the approved breakdown.
 - 8.3.7.5. Payment for the Cost of the Work shall be made based on percentages of completion of each portion of the Work listed in Schedule of Values as of the end of the period covered by the Application for Payment, in accordance with the General Conditions.
 - 8.3.7.6. Retainage as specified in the General Conditions will be applied to the entire amount requested including the Cost of the Work, the DESIGN BUILD CONTRACTOR's Fee, and Preconstruction Phase Services, as

applicable. Retainage will not be held on the cost of the City's standard "pass-through" items, such as building permits, payment and performance bonds and insurance costs. Retainage will be reduced for the Project and the Project will be closed out consistent with the relevant provisions of the General Conditions.

- 8.3.7.7. At all times, the estimated cost of performing the uncompleted and unpaid portion of the Work shall not exceed the unpaid balance of the Guaranteed Maximum Price (less retainage on Work previously completed).
- 8.3.7.8. Payments to Subcontractors shall be made based on the same percentage of Work completed that is allocable to that Subcontractor for each respective Schedule of Values classification including applicable retainage.
- 8.3.7.9. With each application for payment, DESIGN BUILD CONTRACTOR shall submit a certified release of all claims, known or that should reasonably be known, and liens against the City, stating "In consideration for the payment requested herein and upon receipt of such payment, DESIGN BUILD CONTRACTOR waives and releases all claims and liens of every sort against City relating to or arising out of the Work performed, except for such claims as have been properly submitted in writing in accordance with the Contract Documents." The final request for payment shall not be made until DESIGN BUILD CONTRACTOR delivers to City a complete release by DESIGN BUILD CONTRACTOR of all claims and liens of any sort arising out of the performance of the Work, affidavits from Subcontractors indicating they have been paid in full, other than amounts remaining to be paid to the DESIGN BUILD CONTRACTOR for Work performed by that Subcontractor (which amounts shall be stated), a complete release of all claims and liens from all Subcontractors (except that, as to amounts remaining to be paid to that Subcontractor, such release may be made contingent upon City making payment to DESIGN BUILD CONTRACTOR) and an affidavit that so far as DESIGN BUILD CONTRACTOR has knowledge or information, the release includes and covers all materials and services over which DESIGN BUILD CONTRACTOR has control for which a lien could be filed, but DESIGN BUILD CONTRACTOR may, if any Subcontractor or consultant refuses to furnish a required affidavit or release, furnish a bond satisfactory to Director to indemnify City against any claim or lien of any sort and any related costs, including attorneys' fees. If any claim or lien of any sort remains unsatisfied after all payments are made, DESIGN BUILD CONTRACTOR shall refund to City all moneys City may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees, and City shall have all remedies at law and in equity.
- 8.3.7.10. The aggregate total of payments to DESIGN BUILD CONTRACTOR shall not exceed the total of the actual Cost of the Work as verified by Director from DESIGN BUILD CONTRACTOR's final accounting plus

the applicable DESIGN BUILD CONTRACTOR's Fee as certified for payment in accordance with the Contract, but in no event more than the Guaranteed Maximum Price and approved change orders to Guaranteed Maximum Price plus Preconstruction Phase services costs. If payments made to DESIGN BUILD CONTRACTOR exceed that which is due and owing pursuant to this **Article 8**, then DESIGN BUILD CONTRACTOR shall promptly refund such excess to City.

- 8.3.8 In addition to the City's other rights and any provision hereof to the contrary notwithstanding and to the extent reasonably necessary to protect itself, City shall not be obligated to make any payment (whether a progress payment or final payment) to DESIGN BUILD CONTRACTOR hereunder if any one or more of the following conditions exist:
- 8.3.8.1. The DESIGN BUILD CONTRACTOR is in breach or default under this Agreement;
 - 8.3.8.2. Any part of such payment is attributable to services, which are not performed in accordance with this Agreement; provided, however, such payment shall be made as to the part thereof attributable to services which were performed in accordance with this Agreement;
 - 8.3.8.3. The DESIGN BUILD CONTRACTOR has failed to make payments promptly to Subcontractors or other third parties used in connection with the services for which City has made payment to DESIGN BUILD CONTRACTOR; or
 - 8.3.8.4. If Director determines that the amount remaining under the Guaranteed Maximum Price will not be sufficient to complete the services in accordance with this Agreement, no additional payments will be due DESIGN BUILD CONTRACTOR hereunder unless and until DESIGN BUILD CONTRACTOR, at DESIGN BUILD CONTRACTOR's sole cost, performs a sufficient portion of the remaining services so that such portion of the amount remaining under the Guaranteed Maximum Price is determined by City to be sufficient to so complete the then remaining Work.
- 8.3.9 Nothing contained herein shall require the City to pay the DESIGN BUILD CONTRACTOR an aggregate amount exceeding the Guaranteed Maximum Price or to make payment if in the City's belief the cost to complete the Work would exceed the Guaranteed Maximum Price less previous payments to DESIGN BUILD CONTRACTOR.
- 8.3.10 No partial payment made hereunder shall be, or shall be construed to be, final acceptance or approval of that part of the Work to which such partial payment relates, or a release of DESIGN BUILD CONTRACTOR of any of DESIGN BUILD CONTRACTOR's obligations hereunder or liabilities with respect to such Work.
- 8.3.11 DESIGN BUILD CONTRACTOR shall promptly pay all bills validly due and owing for labor and material performed and furnished by others in connection with the

performance of the Preconstruction Services and the Construction Phase Services.

- 8.3.12 City shall have the right to verify and audit for a period of seven (7) years after final payment for the Construction Phase, the details set forth in DESIGN BUILD CONTRACTOR's billings, certificates, accountings, cost data, and statements, including all underlying costs and expenses in the Cost of the Work, either before or after payment therefor, by (1) inspecting the books and records of DESIGN BUILD CONTRACTOR with respect to the Project during normal business hours; (2) examining any reports with respect to this Project; (3) interviewing DESIGN BUILD CONTRACTOR's business employees; (4) visiting the Project site; and (5) other reasonable action. City shall have the right to audit all costs, the basis for those costs, and all underlying expenses relating to DESIGN BUILD CONTRACTOR's performance herein, including but not limited to, the Cost of the Work, particularly, without limitation, labor rates and hourly salary rates set forth in **Exhibit "D"**.
- 8.3.13 DESIGN BUILD CONTRACTOR shall establish and maintain a reasonable accounting system that enables the City to readily identify DESIGN BUILD CONTRACTOR's assets, expenses, costs of goods, and use of funds. The City and its authorized representatives shall have the right to audit, to examine, and to make copies of or extracts from all financial and related records (in whatever form they may be kept, whether written, electronic, or other) relating to or pertaining to this Agreement kept by or under the control of the DESIGN BUILD CONTRACTOR, including, but not limited to those kept by the DESIGN BUILD CONTRACTOR, its employees, agents, assigns, successors, and subcontractors. Such records shall include, but not be limited to, accounting records, written policies and procedures; subcontract files (including proposals of successful and unsuccessful bidders, bid recaps, etc.); all paid vouchers including those for out-of-pocket expenses; other reimbursement supported by invoices; ledgers; cancelled checks; deposit slips; bank statements; journals; original estimates; estimating work sheets; contract amendments and change order files; backcharge logs and supporting documentation; insurance documents; payroll documents; timesheets; memoranda; and correspondence.
- 8.3.14 DESIGN BUILD CONTRACTOR shall, at all times during the term of this Agreement and for a period of seven (7) years after the termination or completion of this Agreement, maintain such records, together with such supporting or underlying documents and materials. The DESIGN BUILD CONTRACTOR shall at any time requested by the City, whether during or after completion of this Agreement, and at DESIGN BUILD CONTRACTOR's own expense make such records available for inspection and audit (including copies and extracts of records as required) by the City. Such records shall be made available to the City during normal business hours at the DESIGN BUILD CONTRACTOR's office or place of business and subject to a three day written notice. In the event that no such location is available, then the financial records, together with the supporting or underlying documents and records, shall be made available for audit at a time and location that is convenient for the City.

8.3.15 DESIGN BUILD CONTRACTOR shall ensure the City has these rights with DESIGN BUILD CONTRACTOR's employees, agents, assigns, successors, and subcontractors, and the obligations of these rights shall be explicitly included in any subcontracts or agreements formed between the DESIGN BUILD CONTRACTOR and any subcontractors to the extent that those subcontracts or agreements relate to fulfillment of the DESIGN BUILD CONTRACTOR's obligations to the City. Costs of any audits conducted under the authority of this right to audit and not addressed elsewhere will be borne by the City unless the following criteria are met: (i) If the audit identifies overpricing or overcharges (of any nature) by the DESIGN BUILD CONTRACTOR to the City in excess of one-half of one percent (.5%) of the total contract billings, the DESIGN BUILD CONTRACTOR shall reimburse the City for the total costs of the audit and/or (ii) If the audit discovers substantive findings related to fraud, misrepresentation, or non-performance, the City may recoup the costs of the audit work from the DESIGN BUILD CONTRACTOR. Any adjustments and/or payments that must be made as a result of any such audit or inspection of the DESIGN BUILD CONTRACTOR's invoices and/or records shall be made within a reasonable amount of time (not to exceed 90 days) from presentation of the City's findings to DESIGN BUILD CONTRACTOR.

8.3.16 The acceptance by DESIGN BUILD CONTRACTOR or DESIGN BUILD CONTRACTOR's successors of final payment under this Agreement, shall constitute a full and complete release of City from any and all claims, demands, and causes of action whatsoever which DESIGN BUILD CONTRACTOR or DESIGN BUILD CONTRACTOR's successors have or may have against City under the provisions of this Agreement except those previously made in writing and identified by DESIGN BUILD CONTRACTOR as unsettled at the time of the final request for payment in a document captioned "Unsettled Claims" included with DESIGN BUILD CONTRACTOR's final request for payment.

8.4 **Cost of the Work.**

8.4.1 Definition. The term Cost of the Work means actual costs of Phase 2 – Construction excluding mark-up, which the DESIGN BUILD CONTRACTOR necessarily incurs to properly perform the Work in strict compliance with the Contract Documents. Such costs shall be at rates and amounts not higher than the standard paid at the place of the Project except with the prior written consent of Director to that specific rate or amount being higher than the standard. Cost of the Work shall not include costs not necessarily incurred or incurred at higher than permitted rates or amounts. Cost of the Work includes only the items set forth in this Section, which shall all be subject to verification by audit.

8.4.2 Labor Costs.

8.4.2.1. Actual hourly wages paid to construction workers directly employed by DESIGN BUILD CONTRACTOR who perform the construction of the Work. DESIGN BUILD CONTRACTOR shall provide certified payrolls and any other documentation requested by City to verify wages and

hours, and compliance with the City's wage rates identified in **Exhibit "G"**. Actual wages paid may include premium payments for overtime work or night work for time actually spent in the performance of the Work when such premium payments have been demonstrated to be in accordance with the DESIGN BUILD CONTRACTOR's normal business practice and is included in the Guaranteed Maximum Price. Premium time shall not accrue prior to the completion of 40 hours per week of work by any given individual.

- 8.4.2.2. Actual wages or salaries (inclusive of Labor Burden) of DESIGN BUILD CONTRACTOR's supervisory and administrative personnel who are identified on **Exhibit "D"** together with their Allowable Hourly Rate – but only for documented time when directly involved in performance of the Work. The salaries of DESIGN BUILD CONTRACTOR's supervisory personnel are subject to a not-to-exceed increase of 3% per year; the first year beginning on the date that Director approves DESIGN BUILD CONTRACTOR's Construction Phase Maximum Guaranteed Price proposal. The 3% increase shall be available to DESIGN BUILD CONTRACTOR each year thereafter not to exceed seven (7) years or at the completion or termination of this Agreement, whichever occurs first. The annual not-to-exceed increase of 3% is available hereunder only to the extent it reflects a concurrent and equal increase in the supervisory personnel's salaries or wages. Any increase or portion thereof not used in a given year shall expire and does not "bank" or "accumulate." Notwithstanding, Cost of the Work for purposes of calculating payment for DESIGN BUILD CONTRACTOR's supervisory and administrative personnel when directly involved in performance of the Work shall be based on the "actual hourly pay rate" set forth in **Exhibit "D"**. Projected wage increases should be reflected in the Guaranteed Maximum Price Proposal. Actual wages paid may include premium payments for overtime work or night work for time actually spent in the performance of the Work when such premium payments have been demonstrated to be in accordance with the DESIGN BUILD CONTRACTOR's normal business practice and is included in the Guaranteed Maximum Price. Premium time shall not accrue prior to the completion of 40 hours per week of work by any given individual. Labor burden for overtime payments shall be eliminated or reduced to equal the DESIGN BUILD CONTRACTOR's actual substantiated cost for such burden. Should DESIGN BUILD CONTRACTOR require employees, other than those listed on **Exhibit "D"**, DESIGN BUILD CONTRACTOR shall provide written notice to the Director setting forth all the information described above. If for any reason, Director reasonably objects to any such employee, DESIGN BUILD CONTRACTOR shall not use that employee to perform on the Project. Failing reasonable objection by the Director, the employee, together with the employee's daily billing rate, shall automatically become a part of **Exhibit "D"**. Initially, the Labor Burden shall be % of direct wages or salaries of DESIGN BUILD

CONTRACTOR's employees incurred in the interest of the Project, subject to verification by the City's auditors. It will be reset each year based on the audited rate for the prior year. Under no circumstances shall the City pay more for Labor Burden than the percentage established for billing purposes for any given year. Labor burden for overtime payments shall be eliminated or reduced to equal the DESIGN BUILD CONTRACTOR's actual substantiated cost for such burden.

8.4.2.3. Actual out of town travel expenses of DESIGN BUILD CONTRACTOR's personnel incurred directly and solely in support of the Project with prior written approval of the Project Manager or specifically identified in the negotiated cost proposal but only to the extent permitted by City's policies on reimbursement for travel.

8.4.2.4. Actual costs paid or incurred by DESIGN BUILD CONTRACTOR for labor costs arising out of taxes, insurance, and benefits which are (i) required by law, (ii) required by collective bargaining agreements, (iii) or as otherwise customary so long as such costs are based on the actual wages of construction workers properly included in the Cost of the Work as defined herein and are approved in advance by the Director.

8.4.3 Subcontractor Costs

8.4.3.1. Payments actually made by DESIGN BUILD CONTRACTOR to Subcontractors for prosecution of the Work, including Designer, but not Design Consultant, services, in accordance with the requirements of their agreements with DESIGN BUILD CONTRACTOR, but only for agreements to the extent they have been specifically consented to in writing by Director. Consent to such agreements shall not create any liability for City and shall not excuse DESIGN BUILD CONTRACTOR from complying with the terms of this Agreement.

8.4.4 Costs of Materials and Equipment Incorporated in the Completed Construction

8.4.4.1. Costs, including transportation, of materials and equipment incorporated or to be incorporated into the Work.

8.4.4.2. Costs of materials described in the preceding subparagraph in excess of those actually installed but required to provide reasonable allowance for waste and for spoilage. City shall be entitled to take possession of excess materials not incorporated into the Work, or at Director's option, DESIGN BUILD CONTRACTOR shall sell such materials and deduct the greater of fair market value or gross proceeds from the Cost of the Work.

8.4.5 Costs of Other Materials and Equipment, Temporary Facilities and Related Items

- 8.4.5.1. Costs, including transportation, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment, and hand tools not customarily owned by the construction workers, which are provided by DESIGN BUILD CONTRACTOR at the site and fully consumed in the performance of the Work; and if not fully consumed, then the cost shall be based on the cost of the item less its fair market value. Cost for items previously used by DESIGN BUILD CONTRACTOR shall mean fair market value prior to use on the Project. The cost for hand and small tools shall not exceed 3% of the direct payroll costs for employees of DESIGN BUILD CONTRACTOR.
 - 8.4.5.2. Rental charges for temporary facilities, machinery, equipment, excluding hand tools which are provided at the Project site, whether rented from DESIGN BUILD CONTRACTOR or others, and costs of transportation, installation, minor repairs and replacements, dismantling and removal thereof. The aggregate rental charges for an item used on this Project (including the rental charges for items used to replace it) shall not under any circumstances exceed 75% of the value of that item or 75% of any applicable option purchase price, whichever is lower. Machinery and equipment owned by DESIGN BUILD CONTRACTOR or any person affiliated with or owned or controlled by DESIGN BUILD CONTRACTOR or persons affiliated with DESIGN BUILD CONTRACTOR shall not be charged at more than the market rate for such equipment in the Houston area or 90% of current published rental rates of the Associated Equipment Dealers, for such equipment, whichever is less.
 - 8.4.5.3. Costs of removal of debris from the Project site.
 - 8.4.5.4. Costs of postage and parcel delivery charges, standard and reasonable telephone service at the Project site and reasonable petty cash expenses of the Project site office, incurred directly and solely in support of the Work, and all incurred at the Project site.
 - 8.4.5.5. Area specific site periodic and final clean up, not previously included, and in accordance with all Applicable Laws and regulations.
 - 8.4.5.6. Any hazardous materials handling, abatement and disposal cost(s).
- 8.4.6 Miscellaneous Costs
- 8.4.6.1. Sales, use or similar taxes imposed by a governmental authority that are related to the Work and for which DESIGN BUILD CONTRACTOR is liable. Notwithstanding, City is a home-rule municipal corporation and DESIGN BUILD CONTRACTOR shall avail itself of all exemptions which may exist for such taxes based on City's status.

- 8.4.6.2. Fees and assessments for building permits and for other permits and inspections that DESIGN BUILD CONTRACTOR is required by the Contract Documents to pay for or obtain.
- 8.4.6.3. Premiums for insurance and bonds to the extent directly attributable to this Agreement. Any premium allocation plan to this Project by DESIGN BUILD CONTRACTOR must be approved by the City's Legal Department.
- 8.4.6.4. Testing fees pursuant to the Contract Documents, except those related to defective or nonconforming Work for which reimbursement is excluded.
- 8.4.6.5. Intellectual property royalties and licenses for items specifically required by the Contract Documents which are, or will be, incorporated into the Work. If a particular design, process, or product of a particular manufacturer is required by City, then costs of payments made in accordance with legal judgments against DESIGN BUILD CONTRACTOR resulting from suits for such infringement, payments of settlements made with City's written consent, and reasonable legal fees related to the infringement are eligible as a Cost of the Work and shall not be included in the calculation of DESIGN BUILD CONTRACTOR's Fee or the Guaranteed Maximum Price (but shall still be subject to the limit covered by the Appropriated Funds). Notwithstanding the foregoing, if DESIGN BUILD CONTRACTOR had reason to believe the required design, process, or product is an infringement, such payments and fees shall not be a Cost of the Work and DESIGN BUILD CONTRACTOR shall be responsible for such payments, fees and losses unless DESIGN BUILD CONTRACTOR notifies Director of the potential infringement promptly before proceeding and in writing.
- 8.4.6.6. Utility company charges including meter fees, tap fees and utility consumption charges
- 8.4.6.7. Contingency allowed by the Contract Documents, and identified as a line item in the Schedule of Values.
- 8.4.6.8. Costs of cell phones and vehicles, not otherwise included in the Labor Burden, for those employees approved by the Director.
- 8.4.6.9. Other costs approved in advance in writing by Director at Director's sole option and discretion, including approved allocation and use of Contingency.

8.5 Costs Not Included in the Cost of the Work.

- 8.5.1 The Cost of the Work shall not include the items listed in this Section:

- 8.5.1.1. Salaries and other compensation of DESIGN BUILD CONTRACTOR's personnel stationed at DESIGN BUILD CONTRACTOR's principal office or offices other than the Project site office, except when such personnel are providing direct services to the Project pursuant to Article 8.4.2.2.
- 8.5.1.2. Expenses of DESIGN BUILD CONTRACTOR's principal office and offices other than the Project Site office.
- 8.5.1.3. Overhead and general expenses.
- 8.5.1.4. DESIGN BUILD CONTRACTOR's capital expenses, including interest on DESIGN BUILD CONTRACTOR's capital employed for the Work.
- 8.5.1.5. Rental costs of machinery and equipment, except as specifically provided in this Agreement.
- 8.5.1.6. Costs due in whole or in part to the fault or negligence of DESIGN BUILD CONTRACTOR, Subcontractors, anyone directly or indirectly employed by any of them, or for whose acts any of them may be liable, including but not limited to costs of the correction of damaged, defective or nonconforming Work, disposal and replacement of materials and equipment incorrectly ordered or supplied, and making good damage to property.
- 8.5.1.7. Costs of entertainment.
- 8.5.1.8. Costs incurred or that should have been incurred for Preconstruction Phase Services.
- 8.5.1.9. Any legal, accounting, professional, or other similar costs incurred by DESIGN BUILD CONTRACTOR, including costs incurred in connection with the prosecution or defense of any dispute, mediation, arbitration, litigation, or other proceeding related to or arising from the Project.
- 8.5.1.10. Any sales, use, income, franchise, and similar taxes paid by DESIGN BUILD CONTRACTOR. Any fines, penalties, sanctions, or other levies assessed by any governmental body against DESIGN BUILD CONTRACTOR.
- 8.5.1.11. The cost of any and all insurance deductibles and self-insured retentions payable by DESIGN BUILD CONTRACTOR, and all uninsured losses and costs, whether due to the failure of DESIGN BUILD CONTRACTOR or any Subcontractor to procure and maintain insurance as and to the extent required by the Contract Documents, or otherwise.

- 8.5.1.12. Costs that would cause the Guaranteed Maximum Price to be exceeded.
- 8.5.1.13. All profit, profit expectations and costs associated with profit sharing plans such as personnel bonuses, incentives, and rewards, company stock options, or any other like expenses of DESIGN BUILD CONTRACTOR.
- 8.5.1.14. Legal and administrative costs to review and negotiate this Agreement and all other Contract Documents.
- 8.5.1.15. Costs incurred by DESIGN BUILD CONTRACTOR resulting from the failure of DESIGN BUILD CONTRACTOR or its Subcontractors to coordinate their work with that of City and its other contractors, if any, after agreeing to schedules therefor.
- 8.5.1.16. Liquidated damages imposed by City.
- 8.5.1.17. Any costs arising out of the intentional acts or negligence of DESIGN BUILD CONTRACTOR, its Subcontractors, or any person or entity for whom any of them may be liable, including, without limitation, costs related to defective, rejected, or nonconforming Work within the Contract Time.
- 8.5.1.18. Costs including, but not limited to, the failure to perform of any Subcontractor or the bankruptcy or insolvency of any Subcontractor.
- 8.5.1.19. Costs for licenses, re-inspections and improperly timed permits and inspections.
- 8.5.1.20. Costs related to warranty work
- 8.5.1.21. Costs associated with deferred compensation and bonuses.
- 8.5.1.22. Costs of subcontractor default insurance.
- 8.5.1.23. Any other cost not specifically and expressly described in this Agreement as a Cost of the Work.
- 8.5.1.24. Notwithstanding anything in the Contract Documents to the contrary, the Lump Sum fee for DESIGN BUILD CONTRACTOR'S Design Services and/or other costs or expenses for DESIGN BUILD CONTRACTOR'S Design Services in both Phase 1 and Phase 2 shall not be included in the Cost of the Work.

- 8.6 **Discounts, Rebates and Refunds of the Cost of the Work.** The Cost of the Work to be paid by City shall be credited with the following items:

- 8.6.1 Proceeds of the sale of all tools, surplus materials, construction equipment, and temporary structures which have been charged to the Work other than by way of rental, and remaining after completion, whether such sale is made to the City, the DESIGN BUILD CONTRACTOR, or to some other party; and any such sale, if made to others than the City, shall be at fair market price. Upon completion of the Work or when no longer required, all tools, construction equipment and materials charged to the Cost of the Work shall be sold by DESIGN BUILD CONTRACTOR (unless turned-over to the City as set forth above) and the DESIGN BUILD CONTRACTOR shall use its best efforts to obtain the highest price in respect of such sales.
- 8.6.2 If City makes funds available to DESIGN BUILD CONTRACTOR, discounts earned by the DESIGN BUILD CONTRACTOR through advance or prompt payments. DESIGN BUILD CONTRACTOR shall provide sufficient advance notice of available discounts and the need for funds to be available to Director for City to obtain the benefit of the discounts. The DESIGN BUILD CONTRACTOR shall obtain all possible trade and time discounts on bills for material furnished, and shall pay said bills within the highest discount periods. The DESIGN BUILD CONTRACTOR shall purchase materials for this Project in such quantities as will provide the most advantageous prices to the City.
- 8.6.3 Reasonable market value as approved by the Director at the time of removal of all materials, tools, and equipment actually purchased for the Work and charged as a Cost of the Work and which is retained by the DESIGN BUILD CONTRACTOR upon completion of the Work.
- 8.6.4 Rebates, discounts, or commissions allowed to and collected by the DESIGN BUILD CONTRACTOR from suppliers of materials or from Subcontractors, together with all other refunds, returns, or credits received for return of materials, or on bond premiums, dividends or other compensation received from the surety or insurance and sales taxes.
- 8.6.5 DESIGN BUILD CONTRACTOR shall reimburse City for deposits made by City and not returned to City due to the negligent or intentional acts of the DESIGN BUILD CONTRACTOR. Should DESIGN BUILD CONTRACTOR not promptly so reimburse City upon demand, City shall be entitled to recover said amount from DESIGN BUILD CONTRACTOR, including, but not limited to, by deducting the amount from payments due the DESIGN BUILD CONTRACTOR.
- 8.7 Limit of Appropriation.**
- 8.7.1 The City's duty to pay money to the DESIGN BUILD CONTRACTOR for any purpose under this Agreement is limited in its entirety by the provisions of this Section.
- 8.7.2 In order to comply with Article II, Sections 19 and 19a of the City's Charter and Article XI, Section 5 of the Texas Constitution, the City has allocated the sum of \$[] as Appropriated Funds to pay money due under this Agreement for

Work, as may be required (the “Original Appropriation”). The executive and legislative officers of the City, in their sole discretion, may appropriate additional funds for this Agreement (the “Supplemental Appropriation”), but they are not obligated to do so.

- 8.7.3 The aggregate of all sums duly authorized by the City to be allocated to pay money due under this Agreement, including the Original Appropriation and all Supplemental Appropriations, constitute the Appropriated Funds. The City shall never be obligated to pay any money under this Agreement in excess of the Appropriated Funds. The DESIGN BUILD CONTRACTOR must assure itself that sufficient Appropriated Funds have been made to pay for services it provides. If Appropriated Funds are exhausted, the DESIGN BUILD CONTRACTOR’s only remedy is suspension or termination of its performance under this Agreement and the DESIGN BUILD CONTRACTOR has no other remedy in law or in equity against the City and no right to damages of any kind.
- 8.7.4 The DESIGN BUILD CONTRACTOR shall closely monitor expenditures under this Agreement and shall notify the Director when amounts payable by the City hereunder for authorized Work are equal to 80% of the Appropriated Funds, even if such amounts payable have not yet been billed to the City. At such point, if additional amounts payable by the City hereunder for the DESIGN BUILD CONTRACTOR’s continued performance of the authorized Work would exceed the amount of remaining Appropriated Funds, the DESIGN BUILD CONTRACTOR has the right to suspend performance of the authorized Work by seven days’ advance written notice to the Director describing the cause and the DESIGN BUILD CONTRACTOR’s planned suspension. Once Appropriated Funds have been increased, the DESIGN BUILD CONTRACTOR shall resume performance of the authorized Work and may be entitled to equitable adjustment in accordance with the applicable provisions of the Contract Documents. If after more than 180 days Appropriated Funds have not been increased, the DESIGN BUILD CONTRACTOR shall have the right to terminate its performance in accordance with the applicable provisions of the Contract Documents. However, termination shall not relieve DESIGN BUILD CONTRACTOR of its continuing obligations to the City already incurred. The City shall not under any circumstances be obligated to seek a Supplemental Appropriation.

ARTICLE 9. REPRESENTATIONS AND WARRANTIES

- 9.1 **Representations and Warranties of the City.** The City represents and warrants that:
- 9.1.1 The City is a home-rule city in the State of Texas, with full legal right, power and authority to enter into and to perform its obligations under this Agreement.
- 9.1.2 This Agreement has been duly authorized, executed and delivered by all necessary action of the City and constitutes a legal, valid, and binding obligation of the City, enforceable against the City in accordance with its terms, except to the extent that its enforceability may be limited by the Bankruptcy Code and by equitable principles of general application.

9.2 Representations and Warranties of the DESIGN BUILD CONTRACTOR. In addition to any other representations and warranties made by the DESIGN BUILD CONTRACTOR hereunder, the DESIGN BUILD CONTRACTOR represents and warrants that:

- 9.2.1 The DESIGN BUILD CONTRACTOR is a [type of legal entity], duly authorized, validly existing, and in good standing under the laws of Texas. The DESIGN BUILD CONTRACTOR has the authority to do business in the State of Texas and in any state in which it conducts its activities, with the full legal right, power and authority to enter into and perform its obligations under this Agreement.
- 9.2.2 This Agreement has been duly authorized, executed and delivered by all necessary corporate action of the DESIGN BUILD CONTRACTOR and constitutes a legal, valid and binding obligation of the DESIGN BUILD CONTRACTOR, enforceable against the DESIGN BUILD CONTRACTOR in accordance with its terms, except to the extent that its enforceability may be limited by the Bankruptcy Code or by equitable principles of general application.
- 9.2.3 To the best of its knowledge after due inquiry, neither the execution nor delivery by the DESIGN BUILD CONTRACTOR of this Agreement nor the performance by the DESIGN BUILD CONTRACTOR of its obligations in connection with the transactions contemplated hereby nor the fulfillment by the DESIGN BUILD CONTRACTOR of the terms or conditions hereof: (a) conflicts with, violates, or results in a breach of any constitution, law, governmental regulation, by-laws, or certificates of incorporation applicable to the DESIGN BUILD CONTRACTOR; or (b) conflicts with, violates or results in a breach of any order, judgment, or decree, or any contract, agreement, or instrument to which the DESIGN BUILD CONTRACTOR is a party or by which the DESIGN BUILD CONTRACTOR or any of its properties or assets are bound, or constitutes a default under any of the foregoing.
- 9.2.4 No approval, authorization, order or consent of, or declaration, registration, or filing with, any Governmental Authority is required for the valid execution and delivery of this Agreement by the DESIGN BUILD CONTRACTOR except as such have been duly obtained or made.
- 9.2.5 Except as disclosed in writing to the City, there is no legal proceeding, at law or in equity, before or by any court, arbitral tribunal, or other Governmental Authority pending or, to the best of the DESIGN BUILD CONTRACTOR's knowledge after due inquiry, overtly threatened or publicly announced against the DESIGN BUILD CONTRACTOR, in which an unfavorable decision, ruling, or finding could reasonably be expected to have a material and adverse effect on the execution and delivery of this Agreement by the DESIGN BUILD CONTRACTOR or the validity, legality, or enforceability of this Agreement against the DESIGN BUILD CONTRACTOR, or any other agreement or instrument entered into by the DESIGN BUILD CONTRACTOR in connection with the transactions contemplated hereby, or on the ability of the DESIGN BUILD CONTRACTOR to perform its obligations hereunder or under any such other agreement or instrument.

- 9.2.6 Except as disclosed in writing to the City, there are no material and adverse claims or demands based in environmental, contract, or tort law pending or threatened against the DESIGN BUILD CONTRACTOR or any of its Affiliates with respect to any facilities designed or constructed by the DESIGN BUILD CONTRACTOR or any of its Affiliates that would have a material and adverse effect upon the ability of the DESIGN BUILD CONTRACTOR to perform the Work.
- 9.2.7 Neither the DESIGN BUILD CONTRACTOR nor any of its Affiliates has any knowledge of any material violation of any law, order, rule, or regulation with respect to any facilities designed or constructed by the DESIGN BUILD CONTRACTOR or any of its Affiliates.
- 9.2.8 The information supplied and representations and warranties made by the DESIGN BUILD CONTRACTOR in all submittals made in response to the RFQ and RFP with respect to the DESIGN BUILD CONTRACTOR (and to its knowledge, all information supplied in such submittals with respect to any Affiliate or DESIGN BUILD CONTRACTOR-Related Entity) are true, correct, and complete in all material respects.
- 9.2.9 The DESIGN BUILD CONTRACTOR is under no obligation, commitment or impediment of any kind, whether contractual or otherwise, that will limit or prevent performance of its obligations under this Agreement.
- 9.2.10 The DESIGN BUILD CONTRACTOR is financially secure and no action relating to the Bankruptcy Code or suspension of payments by the DESIGN BUILD CONTRACTOR or any Affiliate has, to the best of its knowledge after due inquiry, been taken or is threatened.
- 9.2.11 The DESIGN BUILD CONTRACTOR:
- 9.2.11.1. has examined, carefully studied, and thoroughly understands the Contract Documents;
 - 9.2.11.2. has visited the Project Site and has become familiar with and is satisfied as to the general, local, and Project Site conditions that may affect cost, progress, and performance of the Work;
 - 9.2.11.3. is familiar with and is satisfied as to all Applicable Laws that may affect cost, progress, and performance of the Work;
 - 9.2.11.4. has carefully studied all information concerning the Project Site and the performance of the Work which have been identified or made available by the City prior to the Effective Date; and
 - 9.2.11.5. is prepared to perform the Work in accordance with Contract Standards and subject to the terms and conditions of the Contract Documents.

ARTICLE 10. MWBE COMPLIANCE

10.1 DESIGN BUILD CONTRACTOR shall comply with the City's Minority, Women and Small Business Enterprise ("MWSBE") programs as set out in Chapter 15 of the City of Houston Code of Ordinances. DESIGN BUILD CONTRACTOR shall make good faith efforts to award subcontracts or supply agreements to MWSBEs as follows: 30% M/WBE for design and professional services; 20% MBE for Phase 2 construction services; and 8% WBE for Phase 2 Construction Services. DESIGN BUILD CONTRACTOR acknowledges that it has reviewed the requirements for good faith efforts on file with the City's Office of Business Opportunity and will comply with them.

ARTICLE 11. BONDS AND INSURANCE

11.1 Within ten (10) days of the date the DESIGN BUILD CONTRACTOR executes this Agreement, DESIGN BUILD CONTRACTOR shall provide performance and payment bonds on forms prescribed by City in **Exhibit "F"**, in accordance with the requirements set forth in the General Conditions, unless the DESIGN BUILD CONTRACTOR furnishes other financial security acceptable to the Director to ensure that the DESIGN BUILD CONTRACTOR will furnish the required performance and payment bonds when a Guaranteed Maximum Price is established. The penal sum of the payment and performance bonds shall be equal to the construction budget, as specified in the request for qualifications or proposals, or as otherwise specified by the Director.

11.2 DESIGN BUILD CONTRACTOR shall cause its design professional(s) to purchase and maintain professional liability, errors and omissions insurance, covering the Preconstruction Phase Services and Construction Phase Services provided under this Agreement, as is acceptable to and approved by the Director. The insurance shall have minimum policy limits of \$5,000,000 in the aggregate and \$5,000,000 per claim or such higher limits as may be otherwise required in the Contract Documents. The premium for the insurance will be at no expense to the City. DESIGN BUILD CONTRACTOR shall cause its design professional(s) to maintain the insurance throughout the course of the Work and for a minimum of two years following Date of Substantial Completion. The design professional(s) professional liability insurance policy(ies) is(are) required to be furnished to the Director prior to performance. No policy providing the insurance shall be cancelled, materially altered, or allowed to expire without 30 days prior written notice to Director.

11.3 Prior to commencing the Work, DESIGN BUILD CONTRACTOR shall be required to purchase and maintain the insurance coverages set forth in Article 11 of the General Conditions; provided however, that DESIGN BUILD CONTRACTOR may delay purchase and maintenance of Owner's and Contractor's Protective Liability, Installation Floater, and Property and Casualty Coverage until no later than 10 days of the date the Director accepts the GMP Proposal. The DESIGN BUILD CONTRACTOR shall not commence Construction Phase Services unless all insurance coverages set forth in Article 11 of the General Conditions are in full force and effect.

11.4 DESIGN BUILD CONTRACTOR shall not request payment, and City shall not be required to pay for DESIGN BUILD CONTRACTOR's additional general liability insurance, builder's all risk insurance or any other form of insurance coverage that is in excess of the required coverage amounts specified in this Agreement and in Article 11 of the General Conditions, and City shall be entitled to repayment of any amounts paid in excess of what City is required to pay. The

additional costs for coverages in addition to those coverages specifically required by this Agreement shall be the sole responsibility of DESIGN BUILD CONTRACTOR.

11.5 City reserves the right to review the insurance requirements set forth in this Article and the Conditions of the Contract during the effective period of the Agreement and to make reasonable adjustments to the insurance coverages and their limits when deemed necessary and prudent by City based upon changes in statutory law, court decisions, or the claims history of the industry or DESIGN BUILD CONTRACTOR. DESIGN BUILD CONTRACTOR shall use its best efforts to comply with City's requests hereunder, and a Change Order shall be issued compensating DESIGN BUILD CONTRACTOR for the increased costs of insurance premiums incurred as a result thereof.

11.6 City shall be entitled, upon request, and without expense, to receive copies of the policies and all endorsements thereto 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 either of the Parties or the underwriter of any of such policies or to the extent that such deletion, revision, or modification results in increased costs for insurance premiums and City does not agree to compensate DESIGN BUILD CONTRACTOR for such increased costs after receiving notice from DESIGN BUILD CONTRACTOR of such increased costs. To the extent the losses should have been covered by insurance required by the Contract Documents that DESIGN BUILD CONTRACTOR failed to provide, then actual losses not covered by insurance as required by this Article shall be paid by the DESIGN BUILD CONTRACTOR

ARTICLE 12. TERMINATION AND SUSPENSION

12.1 Termination rights shall be as provided in the Conditions of the Contract and Applicable Laws.

12.2 The City's termination of this Agreement shall not relieve the DESIGN BUILD CONTRACTOR or any of its employees of liability for violations of this Agreement, any act or omission, or negligence of the DESIGN BUILD CONTRACTOR.

12.3 As of the date of termination of this Agreement, the DESIGN BUILD CONTRACTOR shall furnish to Director all statements, accounts, reports and other materials as are required hereunder or as have been prepared by the DESIGN BUILD CONTRACTOR in connection with the DESIGN BUILD CONTRACTOR's responsibilities hereunder. City shall have the right to use the ideas and designs therein contained for the completion of the services described by this Agreement, and for completion of the Project, or otherwise. All drawings, plans, specifications, renderings and models, etc., prepared by the Design Consultant are the property of City or Design Consultant, as set forth in the terms and conditions of the agreement between City and the Design Consultant. They are not to be used by any person or entity other than City on other projects unless expressly authorized by City in writing prior to such use.

ARTICLE 13. MISCELLANEOUS PROVISIONS

13.1 **Exhibits.** All exhibits hereto are hereby incorporated herein by reference.

13.2 **Assignments.** This Agreement is a personal service contract for the services of DESIGN BUILD CONTRACTOR, and DESIGN BUILD CONTRACTOR's interest in this Agreement, duties hereunder and/or fees due hereunder may not be assigned or delegated to a third party, except as provided by the Texas Business and Commerce Code.

13.3 **Entire Agreement; Modifications; Conflicts.** This Agreement supersedes all prior agreements, written or oral, between DESIGN BUILD CONTRACTOR and City and shall constitute the entire Agreement and understanding between the parties with respect to the subject matter hereof. This Agreement and each of its provisions shall be binding upon the Parties and may not be waived, modified, amended or altered except by a writing signed by City and DESIGN BUILD CONTRACTOR. If there is a conflict between this Agreement and the Conditions of the Contract, then the provision which provides the greatest benefit to City shall govern.

13.4 **Captions.** The captions of paragraphs in this Agreement are for convenience only and shall not be considered or referred to in resolving questions of interpretation or construction. DESIGN BUILD CONTRACTOR and City shall both be deemed equally to be the drafters of the Contract Documents, and the Contract Documents shall not be construed against City or DESIGN BUILD CONTRACTOR as the drafter.

13.5 **Governing Law.** This Agreement and all of the rights and obligations of the Parties hereto and all of the terms and conditions hereof shall be construed, interpreted and applied in accordance with and governed by and enforced under the laws of the State of Texas. Exclusive venue for litigation shall be located in Harris County, Texas.

13.6 **Non-Waiver.** If either Party fails to require the other to perform a term of this Agreement, that failure does not prevent the Party from later enforcing that term and all other terms. If either Party waives the others' breach of a term, that waiver does not waive a later breach of this Agreement. An approval or direction by the Director, or by any other employee or agent of the City, of any part of DESIGN BUILD CONTRACTOR's performance does not waive compliance with this Agreement or establish a standard of performance other than that required by this Agreement and by law.

13.7 **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective permitted assigns and successors.

13.8 **Appointment.** City hereby expressly reserves the right from time to time to designate by notice to DESIGN BUILD CONTRACTOR one or more representatives to act partially or wholly for City in connection with the performance of City's obligations hereunder. DESIGN BUILD CONTRACTOR shall act only upon instructions from such representatives unless otherwise specifically notified to the contrary.

13.9 **Notices.** All notices, consents, approvals, demands, requests or other communications provided for or permitted to be given under any of the provisions of this Agreement shall be in writing and shall be deemed to have been duly given or served when delivered by hand delivery or when deposited in the U.S. mail by registered or certified mail, return receipt requested, postage prepaid, and addressed as set forth in the preamble or to such other person or address as may be given in writing by either party to the other in accordance with the aforesaid.

13.10 **Dispute Resolution.** The dispute resolution procedures, which shall be applicable to all Phases of this Agreement, are set forth in the General Conditions.

13.11 **Severability.** In case any provision hereof shall, for any reason, be held invalid or unenforceable in any respect, such invalidity or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid or unenforceable provision had not been included herein.

13.12 **Independent Contractor.** DESIGN BUILD CONTRACTOR recognizes that it is engaged as an independent contractor and acknowledges that City will have no responsibility to provide transportation, insurance or other fringe benefits normally associated with employee status. DESIGN BUILD CONTRACTOR, in accordance with its status as an independent contractor, covenants and agrees that it shall conduct itself consistent with such status, that it will neither hold itself out as nor claim to be an officer, partner, employee or agent of City by reason hereof, and that it will not by reason hereof make any claim, demand or application to or for any right or privilege applicable to an officer, partner, employee or agent of City, including, but not limited to, unemployment insurance benefits, social security coverage or retirement benefits. DESIGN BUILD CONTRACTOR hereby agrees to make its own arrangements for any of such benefits as it may desire and agrees that it is responsible for all income taxes required by Applicable Law.

13.13 **DESIGN BUILD CONTRACTOR'S DEBT.** IF DESIGN BUILD CONTRACTOR, AT ANY TIME DURING THE TERM OF THIS AGREEMENT, INCURS A DEBT, AS THE WORD IS DEFINED IN SECTION 15-122 OF THE HOUSTON CITY CODE OF ORDINANCES, IT SHALL IMMEDIATELY NOTIFY THE CITY CONTROLLER IN WRITING. IF THE CITY CONTROLLER BECOMES AWARE THAT DESIGN BUILD CONTRACTOR HAS INCURRED A DEBT, IT SHALL IMMEDIATELY NOTIFY DESIGN BUILD CONTRACTOR IN WRITING. IF DESIGN BUILD CONTRACTOR DOES NOT PAY THE DEBT WITHIN THIRTY (30) DAYS OF EITHER SUCH NOTIFICATION, THE CITY CONTROLLER MAY DEDUCT FUNDS IN AN AMOUNT EQUAL TO THE DEBT FROM ANY PAYMENTS OWED TO DESIGN BUILD CONTRACTOR UNDER THIS AGREEMENT, AND DESIGN BUILD CONTRACTOR WAIVES ANY RECOURSE THEREFOR.

**EXHIBIT “A”
DEFINED TERMS**

ARTICLE 1. INTERPRETATION

1.1 This Agreement, including all Contract Documents, will be interpreted in accordance with the following:

- 1.1.1 **General.** The interpretation and miscellaneous provisions of the General Conditions apply to all Contract Documents and Work. References to sections, paragraphs, articles or other provisions shall be deemed to mean those contained in this main body of the Agreement unless specified otherwise.
- 1.1.2 **Entire Agreement.** This Agreement, including all Contract Documents, contains the entire agreement between the parties hereto with respect to the transactions contemplated by this Agreement. Without limiting the generality of the foregoing, this Agreement shall completely and fully supersede all other understandings and agreements among the parties with respect to such transactions, including those contained in the RFQ (if any), the submittal made by the DB in response thereto, the RFP, the proposal made by the DB in response thereto, and any amendments or supplements to any such documents.
- 1.1.3 **Gender and Plurality.** Words of the masculine gender mean and include correlative words of the feminine and neuter genders and words importing the singular number mean and include the plural number and vice versa.
- 1.1.4 **Headings.** The table of contents and any headings preceding the text of the articles, sections and subsections of this Agreement shall be solely for convenience of reference and shall not affect its meaning, construction or effect.
- 1.1.5 **References to Hereto.** The terms “hereto,” “hereby,” “hereof,” “herein,” “hereunder” and any similar terms refer to this Agreement.
- 1.1.6 **References to Including.** The words “include,” “includes” and “including” are to be construed as meaning “include without limitation,” “includes without limitation” and “including without limitation,” respectively.
- 1.1.7 **References to Statutes.** Each reference to a statute or statutory provision includes any statute or statutory provision which amends, extends, consolidates or replaces the statute or statutory provision or which has been amended, extended, consolidated or replaced by the statute or statutory provision and includes any orders, regulations, by-laws, ordinances, codes of practice or instruments made under the relevant statute.
- 1.1.8 **References to Governmental Authorities.** Each reference to the City or a Governmental Authority is deemed to include a reference to any successor to the City or such Governmental Authority or any organization or entity which has taken over the functions or responsibilities of the City or such Governmental

Authority. Each reference to a private Person that is not an individual is deemed to include a reference to its successors and permitted assigns.

- 1.1.9 **References to Documents and Standards.** Each reference to an agreement, document, standard, principle or other instrument includes a reference to that agreement, document, standard, principle or instrument as amended, supplemented, substituted, novated or assigned.
- 1.1.10 **Delivery of Documents in Digital Format.** In this Agreement, the DB is obligated to deliver reports, records, designs, plans, drawings, specifications, proposals and other documentary submittals in connection with the performance of its duties hereunder. The DB agrees that all such documents shall be submitted to the City both in printed form (in the number of copies indicated) and, at the City's request, in digital form. Digital copies shall consist of computer readable data submitted in any standard interchange format which the City may reasonably request to facilitate the administration and enforcement of this Agreement. In the event that a conflict exists between the signed or the signed and stamped hard copy of any document and the digital copy thereof, the signed or the signed and stamped hard copy shall govern.
- 1.1.11 **Severability.** If any provision of this Agreement is held to be invalid, unenforceable or illegal to any extent, such provision may be severed and such invalidity, unenforceability or illegality will not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Agreement. If any such provision of this Agreement is held to be invalid, unenforceable or illegal, the Parties will promptly endeavor in good faith to negotiate new provisions to eliminate such invalidity, unenforceability or illegality and to restore this Agreement as nearly as possible to its original intent and effect.
- 1.1.12 **Drafting Responsibility.** The Parties waive the application of any rule of law which otherwise would be applicable in connection with the construction of this Agreement to the effect that ambiguous or conflicting terms or provisions should be construed against the Party who (or whose counsel) prepared the executed agreement or any earlier draft of the same.
- 1.1.13 **Counterparts.** This Agreement may be executed in any number of original counterparts. All such counterparts shall constitute but one and the same Agreement.
- 1.1.14 **Governing Law.** This Agreement and all of the rights and obligations of the Parties hereto and all of the terms and conditions hereof shall be construed, interpreted and applied in accordance with and governed by and enforced under the laws of the State of Texas. Exclusive venue for litigation shall be located in Harris County, Texas.

ARTICLE 2. DEFINITIONS

- 2.1 As used in the in the Contract Documents, the following terms shall have the meanings set forth below:

- 2.1.1 **Actual Cost:** A verifiable amount paid for labor, material, equipment and supplies in the performance of the Work.
- 2.1.2 **Addenda:** Any addenda to the Drawings or Specifications or other Contract Documents identified as Addenda, if any, in the Contract Documents.
- 2.1.3 **Affiliate:** With respect to any particular company or entity, a company or entity that: (a) owns and controls, directly or indirectly, such company or entity; (b) is owned and controlled, directly or indirectly, by such company or entity; (c) is owned and controlled, directly or indirectly, by the same company or entity that owns and controls such company or entity; (d) is a member of a joint venture with such company; or (e) either entity is the joint venture and the other company is a member of the joint venture.
- 2.1.4 **Agreement:** Document signed by the Parties and binding the Parties, containing the name of Contractor, title and location of the Project, Original Contract Time, Original Contract Price, enumeration of documents included in the Contract, and other provisions.
- 2.1.5 **Air Operations Area (AOA):** Any area of the airport intended to be used for the landing, takeoff or surface maneuvering of aircraft and support equipment and all of the area within the airport security fence.
- 2.1.6 **Airport Improvement Program (AIP):** A funding source that provides grants to public agencies for planning and development of public use airports. Eligible projects include improvements related to enhancing safety, capacity, security and environmental concerns.
- 2.1.7 **Allowance:** “Allowance” means “Cash Allowance” as defined herein.
- 2.1.8 **Applicable Law:** All laws, treaties, ordinances, judgments, decrees, injunctions, writs, orders, codes, rules, regulations, permits, and interpretations of any Governmental Authority having jurisdiction over the Parties, the Project, the Work, the Contract Documents, and each other document delivered hereunder or in connection herewith.
- 2.1.9 **Basic Services:** All disciplines identified within the Contract Documents and all related usual and customary design, consultant, and other services necessary and reasonably inferable to complete the Project, or any phase of the Project, in accordance with the City’s requirements and the terms of the Contract.
- 2.1.10 **Beneficial Occupancy:** When the City takes possession of and operates the Work (or portions of the Work) for its intended purposes.
- 2.1.11 **BIM:** Building Information Modeling. The digital or electronic representation of the project model and includes the process to create the model.

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- 2.1.12 **Bonds:** Performance Bond, Payment Bond, Maintenance Bond, Bid Bond, Proposal Bond and other Surety instruments executed by Surety. When in singular form, refers to individual instrument.
- 2.1.13 **Bridging Documents:** The documents included in the Design Criteria Package as defined in Texas Government Code Section 2269.306, which are intended to provide a schematic level of design.
- 2.1.14 **Business Enterprise:** Any business entity registered in a program authorized by 49 C.F.R. § 26 (where applicable) or City Code of Ordinances, Chapter 15, Article II, relating to Equal Opportunity Employment and taking affirmative action to ensure that applicants are employed and employees are treated without regard to race, religion, color, sex, national origin, or age. The term “Business Enterprise” may include any Disadvantaged Business Enterprise (“DBE”), Minority Business Enterprise (“MBE”), Woman Business Enterprise (“WBE”), Small Business Enterprise (“SBE”), Person with Disability Enterprise (“PDBE”), and any Historically Underutilized Business (“HUB”).
- 2.1.15 **Business Enterprise Policy:** Contract documents and applicable policies relating to Business Enterprises and authorized under 49 C.F.R. § 26 or City Code of Ordinances, Chapter 15, Article II.
- 2.1.16 **Calendar Day:** Shall mean Day.
- 2.1.17 **Capital Improvement Program (CIP):** HAS’s Capital Improvement Program.
- 2.1.18 **Cash Allowance:** An estimated sum of money to be used only for a limited class of expenditures such as utility relocation costs, fees for special licenses or permits, or other “pass-through” costs that would be the same for any contractor. Cash Allowances may not be used to purchase goods or services that are not specified in the Contract. The unspecified items must be purchased according to the terms of the General Conditions. A Cash Allowance may be referred to in the Contract Documents as an “Allowance”.
- 2.1.19 **CBP:** U.S. Customs and Border Protection.
- 2.1.20 **Change Order:** Written instrument prepared by the City and signed by City Engineer and DB, specifying the following: (1) a change in the Work or Preconstruction Phase Services, if any; (2) a change in Contract Price, if any; and (3) a change in Contract Time, if any. The value of a Change Order is the net amount after offsetting all deductions against all additions effected by the Change Order.
- 2.1.21 **City:** The City of Houston, a home rule municipality located principally within Harris County, Texas, including its successors and its authorized representatives.
- 2.1.22 **City Engineer:** The City Engineer, or the City employee representing the City Engineer, designated in the Agreement and authorized to represent the City, or

successors. Where the term “City Engineer” appears in the Contract Documents, the meaning shall be “Director”.

- 2.1.23 **Claim:** Written demand or written assertion by one Party seeking adjustment of the Contract, payment of money, extension of time, or other relief under the Contract and includes, but is not limited to, claims for materials, labor, equipment, delay, changes, adjustments, substitutions, fees and third party claims. The Party making the Claim has the responsibility to substantiate the Claim.
- 2.1.24 **Co-Location:** A system under which the DB’s Key Personnel are located “under one roof” along with the Program Management Team in a location near the site.
- 2.1.25 **Commissioning:** A quality-focused process for enhancing delivery of a project. The process focuses upon verifying and documenting that the facility and all its systems and assemblies are planned, designed, installed, tested, operated, and maintained to meet HAS’s requirements.
- 2.1.26 **Commissioning Authority (CxA):** A third party firm contracted with the City to oversee the DB’s commissioning plan.
- 2.1.27 **Component Guaranteed Maximum Price (CGMP):** A guaranteed maximum price for construction of a defined incremental element of Work.
- 2.1.28 **Commissioning Plan (CxP):** Developed by the Commissioning Authority with the assistance of the HAS team per the requirements of the Contact Documents and Scope of Work. The CxP provides structure, checklists, testing forms, schedules for all systems and equipment being installed.
- 2.1.29 **Conditions of the Contract:** General Conditions.
- 2.1.30 **Contingency:** The dollar amount set out in the Guaranteed Maximum Price Proposal that is available for unanticipated impacts that are not otherwise the basis of a Change Order, and which may only be used upon prior written approval by the Director at his sole discretion for (i) any increased costs required for schedule recovery, if any; (ii) any increase in the costs of materials and equipment set forth in approved GMP; and (iii) any other costs that Director in his sole discretion deems appropriate to be covered by contingency. All unused contingency shall revert to the City at final completion of the Construction Phase. The Contingency shall not be used for costs incurred as a result of: (1) any failure to perform or insolvency; (2) fines or penalties imposed by any governmental body for negligent acts; (3) any failure to coordinate work with that of the City or its contractors after agreeing to a schedule; (4) any acts of negligence not attributable to the City or its separate contractors; and (5) any costs related to defective, rejected, or nonconforming Work, materials, or equipment.

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- 2.1.31 **Construction Documents (CD):** All of the graphic and written information prepared or assembled by Designer for communicating the design and for the bidding and construction of the Project.
- 2.1.32 **Construction Phase:** The phase of the Project during which the DB implements and executes the construction Work required by the Contract Documents. The Construction Phase may be referred to in this Agreement as “Phase 2 – Construction”.
- 2.1.33 **Construction Services:** The services more fully described as Construction Services in **Exhibit “B”**.
- 2.1.34 **Contract:** The Agreement; documents enumerated in and incorporated into the Agreement, Modifications, and amendments thereto.
- 2.1.35 **Contract Documents:** The executed Agreement, the Conditions of the Contract, Special Conditions, Administrative Requirements, Division 01, Scope of Work, and the Program Definition Manual.
- 2.1.36 **Contract Price:** The monetary amount stated in the Agreement adjusted by Change Order, if any.
- 2.1.37 **Contract Standards:** The standards, terms, conditions, methods, techniques and practices imposed or required by: (1) Applicable Law; (2) good engineering and construction practice; (3) the baseline design documents, if any; (4) the insurance requirements; (5) good operating practice, (6) applicable equipment manufacturers’ and suppliers’ requirements and recommendations; and (7) any other standard, term, condition or requirement specifically provided in the Contract Documents to be observed by the DB.
- 2.1.38 **Contract Time:** The number of days stated in the Agreement to substantially complete the Work, plus days authorized by Change Order.
- 2.1.39 **Contractor:** A construction contractor or construction manager other than the DB hired by the City that may work on the Project or in connection with the Project, except as set out in the Division 01 Specifications.
- 2.1.40 **Correction Period:** The period during which the DB shall be obligated to replace or correct deficiencies in Products and/or the Work, which period shall be one year following Substantial Completion and acceptance of the Project, or discrete phase thereof, unless the applicable manufacturer or subcontractor, if any, provides a longer correction period, in which event the longer correction period shall apply.
- 2.1.41 **Cost of the Work:** Cost of the Work has the meaning set forth in **Section 8.4** of the Agreement.
- 2.1.42 **Date of Commencement of the Work:** Date established in Notice to Proceed on which Contract Time will commence. This date will not be changed by failure of DB, or persons or entities for whom DB is responsible, to act.

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- 2.1.43 **Date of Substantial Completion:** Date that construction, or portion thereof designated by the Director, is certified by City Engineer to be substantially complete.
- 2.1.44 **Day:** Whether capitalized or not, unless otherwise specifically provided, means calendar day, including weekends and legal holidays. In the case of plural “days”, those days will be consecutive.
- 2.1.45 **DB:** Shall mean Design Build Contractor. The DB is the entity contracted by HAS to perform preconstruction and construction services for a project. Design-Build is the delivery method.
- 2.1.46 **DB-Related Entity:** The DB, its Subcontractors, Suppliers, subconsultants including professionals, technicians, engineers and anyone for whose acts any of the foregoing DB may be legally or contractually liable, including officers, directors, employees, representatives, agents, consultants and contractors.
- 2.1.47 **DB Fee:** The fee for the DB’s profit and general overhead calculated as a percentage of Cost of the Work (except pass-through Allowances, insurance and Bonds) determined by the City at the time of acceptance of the GMP.
- 2.1.48 **Design to Budget:** The process by which the Designer designs the Project to ensure the Cost of the Work is not exceeded.
- 2.1.49 **Design Consultant:** Person or firm, under contract with the City, to provide professional services during construction and its authorized representatives. If a Design Consultant is not employed for services during construction, Project Manager will perform duties of Design Consultant designated in the Contract in addition to usual duties of Project Manager.
- 2.1.50 **Designer:** Entity responsible for the preparation of the Construction Documents in a DB delivery team.
- 2.1.51 **Director:** The Director of the Houston Airport System, or any person designated by the Director to perform one or more of the Director's duties under this Agreement.
- 2.1.52 **Drawings:** Graphic and pictorial portions of the Contract that define the character and scope of the Work.
- 2.1.53 **Effective Date:** The date the City Controller countersigns the Signature Page of this Agreement.
- 2.1.54 **EPM:** The Executive Program Manager hired by the City to lead and manage, in consultation with the Director, the ITRP to successful completion. Roles include Executive Program Manager, Manager of Projects, Program Controls Manager, Manager of Design, and Manager of Construction.

- 2.1.55 **FAA:** The Federal Aviation Administration.
- 2.1.56 **Final Completion:** The full completion of the Work in accordance with the Contract Documents, without limitation, the satisfaction of all outstanding and Punch List items, and the issuance of a Certificate of Occupancy by all permitting and licensing entities.
- 2.1.57 **Furnish:** To supply, pay for, deliver to the site, and unload.
- 2.1.58 **General Conditions:** The requirements, terms and conditions set forth in **Exhibit “C”** of the DB Contract, which may include terms and conditions that are substantially the same as those found in this Agreement and therefore shall be read together and interpreted by City and DB to eliminate conflict between the two. However, should a conflict exist, after City Engineer and DB have used best efforts to reconcile the conflict, the provision most favorable to the City shall prevail.
- 2.1.59 **General Conditions Work:** DB's on-site management, administrative personnel, insurance, Bonds, equipment, utilities, and incidental work, including field labor and materials. General Conditions includes, but is not limited to: all supervision and project management, including superintendent, assistant superintendent; permits; mobilization; de-mobilization; field engineers and helpers, professional surveyor; field office; field office furnishings; office supplies; field office maintenance and repair; copiers and supplies; storage; communication devices (telephone, radio, etc.); project signs; construction fence – install/remove/maintain; access construction; general clean-up; finish areas clean-up; dumpsters; temporary water service; temporary electrical service; temporary lighting; temporary telephone; temporary weather protection; temporary fire protection; equipment start and testing; monthly ice and cups, monthly toilets; monthly water; and quality control.
- 2.1.60 **General Requirements:** The sections of Division 01 Specifications that specify administrative and procedural requirements and temporary facilities required for the Work.
- 2.1.61 **Governmental Authority:** Any federal, foreign, state, local or municipal governmental body; any governmental, regulatory or administrative agency, commission, body or other authority exercising or entitled to exercise any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power; or any court or governmental tribunal. Notwithstanding the foregoing, Governmental Authority shall not include the Director or his designees.
- 2.1.62 **GSE:** Ground Support Equipment.

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- 2.1.63 **Guaranteed Maximum Price (GMP):** The amount agreed upon by City and DB as the maximum cost to City for the Work for a Construction Phase, including the Cost of the Work and the DB's Fee for that Construction Phase.
- 2.1.64 **HAS:** The Houston Airport System, a department of the City of Houston.
- 2.1.65 **IAH:** George Bush Intercontinental Airport/Houston.
- 2.1.66 **Inspector:** City's employee or agent authorized to assist with inspection of the Work.
- 2.1.67 **Install:** Unpack, assemble, erect, place, anchor, apply, work to dimension, finish, cure, clean, protect, and similar operations.
- 2.1.68 **ITRP:** The IAH Terminal Redevelopment Program.
- 2.1.69 **ITRP Enabling Projects:** Projects included in the HAS CIP designed to serve the newly constructed facilities as well as a new roadway system and airfield improvements. These projects include, among others, the Program Management Office Building, the ITRP Enabling Utilities-Landside, and the East Aircraft Parking Hardstand.
- 2.1.70 **Key Personnel:** Those people having authority and responsibility for planning, directing and controlling the activities of the proposer, either directly or indirectly.
- 2.1.71 **Labor Burden:** Indirect costs associated with employees' compensation. Typical costs associated with the burden include payroll taxes, worker's compensation and health insurance, paid time off, training and travel expenses, vacation and sick leave, pension contributions and other benefits. Labor Burden includes actual costs paid or incurred by the DB for labor costs arising out of taxes, insurance, and benefits that are required either (1) by law or (2) by collective bargaining agreements. Labor Burden shall NOT include profit, general and administrative costs, short- or long-term disability, home and branch office overhead, profit sharing, bonuses, employee stock ownership plans, vehicle allowances, cell phones, computer charges and other costs not directly related to employee costs.
- 2.1.72 **Legal Holiday:** Day established by the City Council as a holiday.
- 2.1.73 **Major Unit Price Work:** An individual Unit Price item, (1) whose value is greater than five percent of Original Contract Price, (2) whose value becomes greater than five percent of Original Contract Price as the result of an increase in quantity, or (3) whose value is \$100,000, whichever is least.
- 2.1.74 **Mayor's Office of Business Opportunity:** Any reference to, or use of, the "Office of Affirmative Action" shall mean the City's Office of Business Opportunity, or any such future name to which it is changed.
- 2.1.75 **Milestone:** An event activity that has zero day duration and is typically used to represent the beginning or end of a certain stage of the Project.

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- 2.1.76 **Minor Change in the Work:** A written change in the Work ordered by City Engineer that does not change Contract Price or Contract Time, and that is consistent with the general scope of the Contract.
- 2.1.77 **MLIT:** The Mickey Leland International Terminal, or Terminal D at IAH.
- 2.1.78 **Modification:** Change Order, Work Change Directive, or Minor Change in the Work.
- 2.1.79 **Notice of Noncompliance:** A written notice by City Engineer to DB regarding defective or nonconforming work that does not meet the Contract requirements and that establishes a time by which DB shall correct the defective or nonconforming work.
- 2.1.80 **Notice to Proceed:** A written notice by City Engineer to DB establishing Date of Commencement of the Work.
- 2.1.81 **OCIP:** Owner Controlled Insurance Program.
- 2.1.82 **ORAT:** Operational Readiness, Activation and Transition.
- 2.1.83 **Original Contract Price:** The monetary amount originally stated in the Agreement.
- 2.1.84 **Overhead:** Indirect or fixed expenses of operating a business, including both home office locations and offsite and jobsite locations.
- 2.1.85 **Owner:** The City of Houston, Texas.
- 2.1.86 **Parties:** DB and the City. When in singular form, refers to either the City or DB (as appropriate).
- 2.1.87 **PDB:** Progressive Design-Build.
- 2.1.88 **PDM:** Program Definition Manual for the Mickey Leland International Terminal – Final Version December 2014.
- 2.1.89 **PFC:** Passenger Facility Charge. This is the fee placed on airline tickets that will be allocated to recoup capital costs.
- 2.1.90 **Phase:** Either the Project’s Preconstruction Phase or the Project’s Construction Phase, as those terms are defined in the Contract Documents.
- 2.1.91 **PMSS:** Program Management Support Services consisting of staff contracted by the City to provide systems, services and staff as an integrated team to manage and execute the ITRP in support of the EPM.
- 2.1.92 **Pollutant Facility:** Any facility regulated by the State of Texas to protect the health and environment from contamination by Pollutants, including without

limitation, landfills, oil and gas production and storage facilities, wastewater facilities, waste injection wells, and storage tanks (including drums).

- 2.1.93 **Pollutant:** Any materials subject to the Texas Solid Waste Disposal Act.
- 2.1.94 **Pre-construction Phase:** The phase of the Project during which the DB implements and executes the pre-construction Work required by the Contract Documents. The Pre-construction Phase may be referred to in this Agreement as “Phase 1 – Pre-construction”.
- 2.1.95 **Pre-construction Services:** The services more fully described as Pre-construction Services in **Exhibit “B”**.
- 2.1.96 **Price Proposal:** The completed RFP Price Proposal Form submitted by DB.
- 2.1.97 **Product:** Materials, equipment, or systems permanently incorporated into the Work (or to be incorporated into the Work) and temporarily used in performance of the Work. Products may include existing construction or components intended for reuse.
- 2.1.98 **Product Data:** Illustrations, standard schedules, performance charts, instructions, brochures, diagrams, and other information furnished by DB to illustrate a Product.
- 2.1.99 **Program:** IAH Terminal Redevelopment Program (ITRP). The Project is part of the Program.
- 2.1.100 **Project:** Total construction, of which the Work performed under the Contract Documents may be the whole or a part, and which may include construction by the City or by separate contractors as more fully described in the Agreement.
- 2.1.101 **Project or Program Manager:** Also referred to in this Agreement as “Program Management Team”. Professionals or firms employing professionals, engaged by City to be the Director’s authorized representative for administration of the Work. Titles used within City’s departments may be different from those used in this definition. Unless otherwise designated by Director, references in the Contract Documents to the Project or Program Manager shall refer to Director. More than one Project or Program Manager may be under contract with the City.
- 2.1.102 **Project Manual:** The specifications for the Work. Certain provisions of the Project Manual may be revised during Preconstruction Services. If any revisions to the Project Manual are inconsistent with the material terms of this Agreement, this Agreement shall control.
- 2.1.103 **Project Schedule:** The DB’s full scope of Works and Services, time phased and logic linked, in a schedule that represents how the DB intends to reach Final Completion within the Contract Time.
- 2.1.104 **Project Team:** The City (including the Project Manager, City Engineer and other City employees and representatives working in connection with the Project), EPM, PMSS, DB, any separate contractors employed by City, and other

consultants employed for the purpose of programming, design, and construction of the Project. The constitution of the Project Team may vary at different times during the Preconstruction Services and Construction Phase of the Project. The Project Team, excluding those designated by the DB, will be designated by the Director and may be modified from time to time by him, without additional time or compensation being awarded to DB.

- 2.1.105 **Proposal Documents:** Documents submitted by DB that may or may not have Price Proposal as part of the submittal.
- 2.1.106 **Provide:** Furnish and Install, complete, ready for intended use.
- 2.1.107 **Punch List:** Uncompleted work items that the DB, or Subcontractor must complete in order to achieve Final Completion.
- 2.1.108 **Quality Control (QC):** Those standards, systems, processes, procedures and activities exercised by the DB, subcontractors and suppliers to ensure that the Work is constructed in accordance with the Contract Documents.
- 2.1.109 **Safety Impact Position:** DB's employment position involving duties that if performed with inattentiveness, errors in judgment, or diminished coordination, dexterity, or composure may result in mistakes that could present a real and/or imminent threat to the personal health or safety of the employee, co-workers, and/or the public.
- 2.1.110 **Samples:** Physical examples that illustrate Products, or workmanship, and establish standards by which the Work is judged.
- 2.1.111 **Shop Drawings:** Drawings, diagrams, schedules, and other data specially prepared for the Work by DB, Subcontractor or Supplier, to illustrate a portion of the Work.
- 2.1.112 **SIDA:** Security Identification Display Area. The SIDA is the secure area in which an identification badge must be visible and displayed.
- 2.1.113 **Special Conditions:** Any additional provisions identified as Special Conditions, if any, in the Contract Documents.
- 2.1.114 **Specifications:** Divisions 01 through 48 of the documents (as defined in the CSI MasterFormat™ Edition 2014) that are incorporated into the Agreement, consisting of written General Requirements and requirements for Products, standards, and workmanship for the Work, and performance of related services.
- 2.1.115 **Statement of Qualifications:** Document submitted by the DB in response to a Request for Qualifications, to demonstrate its ability to perform the requested services.

- 2.1.116 **Subcontractor:** Person or firm that has direct or indirect contract with DB or with a Subcontractor to perform a portion of the Work and its authorized representatives.
- 2.1.117 **Substantial Completion:** The stage in the progress of the Work or designated portion thereof where the Work is sufficiently and suitably complete in accordance with the Contract Documents (i) so that the City, at its sole discretion, can take Beneficial Occupancy, and (ii) the balance of the Work, including all Punch List work can reasonably be expected to be completed within 30 Calendar Days.
- 2.1.118 **Superintendent:** Employee of DB having authority and responsibility to act for and represent DB.
- 2.1.119 **Supplier:** Manufacturer, distributor, materialman, or vendor having a direct agreement with DB or Subcontractor for Products, or services and its authorized representatives.
- 2.1.120 **Surety:** Corporate entity that is bound by one or more Bonds. Surety shall include co-surety or reinsurer, as applicable.
- 2.1.121 **TSA:** Transportation Security Administration.
- 2.1.122 **UMP:** The IAH Utilities Master Plan dated September 2014.
- 2.1.123 **Underground Facilities:** Pipes, conduits, ducts, cables, wires, manholes, vaults, tanks, tunnels, or other such facilities or attachments and encasements containing such facilities that exist below ground level.
- 2.1.124 **Unit Price:** An amount stated in the Contract for an individual, measurable item of work, which, when multiplied by actual quantity incorporated into the Work, amounts to full compensation for completion of the item, including work incidental to it.
- 2.1.125 **Work:** All services, supervision, labor, materials, supplies, equipment, Products and other items for a Construction Phase required to perform this Agreement (whether contemplated or partially contemplated) in strict accordance with the Contract Documents (as such may be modified or amended), including all things reasonably inferable from the Contract Documents and all of the foregoing provided or to be provided by DB to fulfill DB's obligations under the Contract Documents. The Work may constitute the whole or a portion of the Project.
- 2.1.126 **Work Change Directive:** A written change in the Work, ordered by City Engineer, that is within the general scope of the Contract and consisting of

additions, deletions, or other revisions. A Work Change Directive will state proposed basis for adjustment, if any, in Contract Price or Contract Time, or both.

Exhibit B – Scope of Services
PMO Building DESIGN-BUILD SERVICES

EXHIBIT “B”
PROGRAM MANAGEMENT OFFICE (PMO) BUILDING
DESIGN-BUILD
SCOPE OF SERVICES

EXHIBIT C

DOCUMENT 00700

GENERAL CONDITIONS (DESIGN BUILD)

ITRP EDITION

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ARTICLE 1 - GENERAL PROVISIONS

1.1 DEFINITIONS

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1.1.1 Capitalized terms have the meanings set forth in Exhibit A. Unless otherwise indicated, for purposes of interpreting this General Conditions document, "Contract" shall mean "Agreement"; "City Engineer" shall mean "Director"; and "Contract Price" shall mean "Guaranteed Maximum Price".

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1.2 EXECUTION, CORRELATION, AND INTENT

1.2.1 Execution of the Contract by Design Build Contractor is conclusive that it has visited the Work site, become familiar with local conditions under which the Work will be performed, and fully informed itself as to conditions and matters which can affect the Work or costs. Design Build Contractor further agrees that it has carefully correlated personal observations with requirements of the Contract.

1.2.2 The Contract Documents and Modifications have been read and carefully considered by Design Build Contractor who understands and agrees to their sufficiency for the Work. The Contract shall not be more strongly construed against City than against Design Build Contractor and Surety.

1.2.2 Design Build Contractor shall include all items necessary for proper execution and completion of the Work in strict accordance with Contract Documents and reasonably inferable therefrom.

1.2.3 Reference to standard specifications, manuals, or codes of a technical society, organization, or association, or to laws or regulations of a governmental authority, whether specific or implied, mean the latest edition in effect as of date of written agreement as to the Guaranteed Maximum Price for the portion of the Work covered by that Guaranteed Maximum Price, except as may be otherwise specifically stated in the Contract Documents.

1.2.4 No provision of any referenced standard, specification, or manual changes the

duties and responsibilities of City or City Engineer from those set forth in the Contract.

1.2.5 Organization of Specifications into divisions, sections, and articles and arrangement of Drawings does not control Design Build Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

1.2.6 Unless otherwise defined in the Contract, words which have well-known construction industry technical meanings are used in the Contract in accordance with these recognized meanings.

1.2.7 Where the words "directed," "required," "permitted," "ordered," "designated," "prescribed," or words of like import are used, it shall mean the direction, requirement, permission, order, designation, or prescription of City Engineer unless explicitly stated otherwise. The words "approved," "acceptable," "satisfactory," or words of like import, shall mean approved by, or acceptable to, or satisfactory to City Engineer, unless explicitly stated otherwise.

1.2.8 Reference to a specific requirement of a cited standard shall include all general requirements of the entire cited standard pertinent to the specific reference.

1.3 OWNERSHIP AND USE OF DOCUMENTS

1.3.1 Drawings, Specifications, and other documents prepared by City or by Design Build Contractor are instruments of service through which the Work to be executed by Design Build Contractor is described. Design Build Contractor may retain one Contract record set.

1.3.2 Neither Design Build Contractor, Subcontractor, nor Supplier will own or claim a copyright to documents contained in the Contract or any part of the Contract.

1.3.3 Documents contained in the Contract Documents, prepared by City or by Design Build Contractor, and copies furnished to Design Build Contractor, are for use solely with respect to the Work. They may not be used by Design Build Contractor, Subcontractors, or Suppliers on other

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projects or for additions to the Work, outside the scope of the Work, without the specific written consent of City Engineer.

1.3.4 Design Build Contractor, Subcontractors, and Suppliers are granted a limited license to use and reproduce applicable portions of the Contract appropriate to and for use in execution of their Work under the Contract.

1.3.5 Any documents created by Design Build Contractor or its subcontractors for the Work shall become the property of the City upon their creation. In the event this transfer of ownership is ineffective for any reason, the City is hereby granted an irrevocable, non-exclusive, perpetual, royalty-free license to use said documents in conjunction with the Project. This provision shall be in all contracts awarded by Design Build Contractor and Design Build Contractor shall require the provision in all contracts of lower tiers.

1.4 INTERPRETATION

1.4.1 Specifications are written in an imperative streamlined form and are directed to Design Build Contractor, unless noted otherwise. When written in this form, words "shall be" are included by inference where a colon (:) is used within sentences or phrases.

1.4.2 In the interest of brevity, the Contract frequently omits modifying words such as "all" and "any" and articles such as "the" and "an", but an absent modifier or article is not intended to affect interpretation of a statement.

ARTICLE 2 - THE CITY

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2.1 LIMITATIONS OF CITY'S OFFICERS AND EMPLOYEES

2.1.1 No officer or employee of City may authorize Design Build Contractor to perform an act or work contrary to the Contract Documents, except as otherwise provided in the Contract.

2.2 DUTIES OF CITY

2.2.1 If a building permit is required, the City will process an application for, and Design Build Contractor shall purchase and obtain the building permit before Date of Commencement of the Work or applicable Construction Phase of the Work.

2.2.2 City will make available to Design Build Contractor a reproducible set of Drawings. Additional copies will be furnished, on Design Build Contractor's request, at the cost of reproduction.

2.2.3 When necessary for performance of the Work, City will provide surveys describing physical characteristics, legal limitations, legal description of site, and horizontal and vertical control adequate to lay out the Work.

2.2.4 Information or services that City is required to provide under the Contract will be provided by City with reasonable promptness to avoid delay in orderly progress of the Work.

2.2.5 The Contract imposes no implied duty on the City. The City does not warrant any plans or specifications associated with the Contract.

2.2.6 Except as expressly stated in the Agreement and these Conditions of the Contract, the City owes no duty to the Design Build Contractor or any Subcontractor or Supplier.

2.3 AVAILABILITY OF LAND AND USE OF SITE

2.3.1 City will furnish, as indicated in the Contract Documents, rights-of-way, land on which the Work is to be performed, and other land designated in the Contract for use by Design Build Contractor unless otherwise provided in the Contract.

2.3.2 Design Build Contractor shall confine operations at site to those areas permitted by law, ordinances, permits, and the Contract Documents, and shall not unreasonably encumber the Project Site with materials or equipment.

2.3.3 In addition to land provided by City under Section 2.3, City shall provide all land and access to land that may be required for use by Design Build Contractor for temporary construction facilities or for storage of materials and Design Build Contractor equipment, and shall indemnify City during its use of the land as stated in Section 3.25.

2.4 CITY'S RIGHT TO STOP THE WORK

2.4.1 If Design Build Contractor fails to carry out the Work in accordance with the Contract, or fails to correct Work which is not in accordance with requirements of the Contract as required in Sections 12.1.1 and 12.2, City may, by Notice of Noncompliance, order Design Build Contractor to stop the Work or any portion of the Work until the cause for the order has been eliminated. However, the right of City to stop the Work will not give rise to a Claim for delay or an increase in compensation or to a duty on the part of City to exercise this right for the benefit of Design Build Contractor or any other person or entity, except to the extent required by Section 6.2. If Design Build Contractor corrects the defective or nonconforming work within the time established in Notice of Noncompliance, City Engineer will give written notice to Design Build Contractor to resume performance of the Work.

2.5 CITY'S RIGHT TO CARRY OUT WORK

2.5.1 If Design Build Contractor fails to carry out work in accordance with the Contract, and fails within the period established in a Notice of Noncompliance to correct the nonconforming work, City may, after expiration of the required period, correct the deficiencies without prejudice to other remedies City may have, including rights of City under Section 14.1.

2.5.1.1 When City corrects deficiencies, City Engineer will issue an appropriate Change Order and deduct from payments then or thereafter due Design Build Contractor the cost of correcting the deficiencies, including compensation for other design consultants and City Engineer's additional services and expenses made necessary by such default, neglect, or failure. This action by City and amounts charged to Design Build Contractor are both subject to prior approval of City Engineer. If payments, then or thereafter due Design Build Contractor are not sufficient to cover these amounts, Design Build Contractor shall pay the difference to City. Costs of correcting deficiencies which would have otherwise been reimbursable to Design Build Contractor, as determined by the City Engineer in his sole discretion, shall not be deducted from sums otherwise due Design Build Contractor, but shall be considered a Cost of the Work, as determined by the City Engineer in his sole discretion, in determining Guaranteed

Maximum Price and any savings shall revert to the City.

2.5.2 Notwithstanding City's right to carry out Work, maintenance and protection of the Work remains Design Build Contractor's responsibility, as provided in the Contract.

2.6 CITY'S RIGHT TO REJECT WORK

2.6.1 The City Engineer shall have the right to reject Work that does not conform to the Contract Documents. City shall also have the right to require special inspection or testing of the Work, whether or not such Work is then fabricated, installed, or completed. Neither City's right to act under this Section nor any decision by City either to exercise or not to exercise such right shall give rise to any duty or responsibility of City to Design Build Contractor or to any other person or entity, or result in a waiver of any of City's rights or relieve Design Build Contractor of its obligations.

ARTICLE 3 DESIGN BUILD CONTRACTOR

3.1 RESPONSIBILITIES

3.1.1 Design Build Contractor shall maintain an office with agent in the greater City of Houston area during Design Build Contractor's performance under the Contract. Design Build Contractor shall file its street address with City Engineer. Design Build Contractor may use the job site office of Design Build Contractor to meet this requirement.

3.1.2 Design Build Contractor and Design Build Contractor's employees shall not give or lend money or anything of value to an officer or employee of City. Should this Section 3.1.2 be violated, City Engineer may terminate the Contract under Section 14.1.

3.1.3 Design Build Contractor shall submit to City Engineer written monthly progress reports ("Progress Reports") as specified more thoroughly in the Scope of Services.

3.2 REVIEW OF CONTRACT AND FIELD CONDITIONS BY DESIGN BUILD CONTRACTOR

3.2.1 Design Build Contractor shall carefully prepare and study the Contract and any

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information furnished by City and shall immediately report, in writing any errors, inconsistencies, or omissions to City Engineer. If Work is affected, Design Build Contractor shall obtain a written interpretation or clarification from City Engineer before proceeding with the affected Work.

3.2.2 Design Build Contractor shall take field measurements and verify field conditions, and shall carefully compare the conditions and other information known to Design Build Contractor with the Contract, before commencing activities. Design Build Contractor shall immediately report, in writing, to City Engineer for interpretation or clarification of discrepancies, inconsistencies, or omissions discovered during this process. 20

3.3 SUPERVISION AND CONSTRUCTION PROCEDURES

3.3.1 Design Build Contractor shall supervise, direct, and inspect the Work competently and efficiently, devoting the attention and applying the skills and expertise as necessary to perform the Work in accordance with the Contract Documents. Design Build Contractor is solely responsible for and has control over construction means, methods, techniques, sequences, and procedures of construction; for safety precautions and programs in connection with the Work; and for coordinating all Work under the Contract.21

3.3.2 Regardless of observations or inspections by City or City's consultants, Design Build Contractor shall perform and complete the Work in accordance with the Contract and submittals approved pursuant to Section 3.18. City is not liable or responsible to Design Build Contractor or Surety for Work performed by Design Build Contractor that is not in accordance with the Contract regardless of whether such nonconformities are discovered during construction or after acceptance of the Work.

3.4 SUPERINTENDENT

3.4.1 Design Build Contractor shall employ a competent Superintendent and necessary assistants who shall be present at the Project Site during performance of the Work. Communications given to Superintendent are binding on the Design Build Contractor.

3.4.2 Design Build Contractor shall notify City Engineer in writing of its intent to replace the Superintendent. Design Build Contractor shall not replace the Superintendent if City Engineer makes a reasonable objection in writing.

3.5 LABOR

3.5.1 Design Build Contractor shall provide competent, qualified personnel to survey and lay out the Work and perform construction as required by the Contract Documents. City may, by written notice, require Design Build Contractor to remove from the Work any employee of Design Build Contractor or Subcontractors to whom City Engineer makes reasonable objection.

3.5.2 Design Build Contractor shall comply with the applicable Business Enterprise Policy set out in this Agreement and Chapter 15, Article II of the City of Houston Code of Ordinances.

3.5.3 When the Guaranteed Maximum Price is greater than \$1,000,000, Design Build Contractor shall make Good Faith Efforts to award subcontracts or supply agreements in at least the percentages set out in Article 10 of the Agreement. Design Build Contractor acknowledges that it has reviewed the requirements for Good Faith Efforts on file with the City's Office of Business Opportunity and shall comply with them.

3.5.3.1 Design Build Contractor shall require written subcontracts with Business Enterprises and shall submit all disputes with Business Enterprises to voluntary mediation. Business Enterprise subcontracts complying with City Code of Ordinances Chapter 15, Article V must contain the terms set out in Section 3.5.3.2. If Design Build Contractor is an individual person, as distinguished from a corporation, partnership, or other legal entity, and the amount of the subcontract is \$50,000 or less, the subcontract must also be signed by the attorneys of the respective parties.

3.5.3.2 Design Build Contractor shall ensure that subcontracts with Business Enterprise firms are clearly labeled "**THIS CONTRACT MAY BE SUBJECT TO MEDIATION ACCORDING TO THE TEXAS ALTERNATIVE DISPUTE RESOLUTION ACT**" and contain the following terms:

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1. (Business Enterprise) may not ~~de~~legate or subcontract more than 50 percent of work under this subcontract to any other subcontractor without the express written consent of the City's OBO Director ("the Director").

2. (Business Enterprise) shall permit representatives of the City of Houston, at all reasonable times, to perform (1) audits of the books and records of the Subcontractors and Suppliers, and (2) inspections of all places where work is to be undertaken in connection with this subcontract. (Business Enterprise) shall keep the books and records available for this purpose for at least four years after the end of its performance under this subcontract. Nothing in this provision shall affect the time for bringing a cause of action nor the applicable statute of limitations. 23

3. Within five (5) business days of execution of this subcontract, Design Build Contractor and (Business Enterprise) shall designate in writing to the Director an agent for receiving any notice required or permitted to be given pursuant to Chapter 15 of the Houston City Code of Ordinances, along with the street and mailing address and phone number of the agent.

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3.5.4 The requirements and terms of the City of Houston Pay or Play Program, as set out in Executive Order 1-7 and Ordinance 2007-0534, are incorporated into the Contract for all purposes. Design Build Contractor shall comply with the terms and conditions of the Pay or Play Program as they are as they are set out at the time of City Council approval of this Contract. IF DESIGN BUILD CONTRACTOR DOES NOT PAY IN ACCORDANCE WITH THE PAY OR PLAY PROGRAM WITHIN 30 DAYS OF THE DATE CITY ENGINEER SENDS DESIGN BUILD CONTRACTOR WRITTEN NOTIFICATION, CITY CONTROLLER MAY DEDUCT FUNDS UP TO THE AMOUNT OWED FROM ANY PAYMENTS OWED TO DESIGN BUILD CONTRACTOR UNDER THIS AGREEMENT, AND DESIGN BUILD CONTRACTOR WAIVES ANY RECOURSE.

3.6 PREVAILING WAGE RATES

3.6.1 Design Build Contractor shall comply with governing statutes providing for labor classification of wage scales for each craft or type of laborer, worker, or mechanic.

3.6.1.2 Prevailing wage rates applicable to the Work may be one or a combination of the following wage rates identified in Division 00:

1. Federal Wage Rate General Decisions
 1. Highway Rates
 2. Building Rates
 3. Heavy Construction Rates
 4. Residential Rates
2. City Prevailing Wage Rates
 1. Building Construction Rates
 2. Engineering Construction Rates
 3. Asbestos Worker Rates

3.6.2 Each week Design Build Contractor shall submit to City's Office of Business Opportunity certified copies of payrolls showing classifications and wages paid by Design Build Contractor, Subcontractors, and Suppliers for each employee under the Contract, for any day included in the Contract.

3.7 LABOR CONDITIONS

3.7.1 In the event of labor disputes affecting Design Build Contractor or Design Build Contractor's employees, Design Build Contractor shall utilize all reasonable means to resolve disputes in order that the Work not be delayed to any extent. These means will include seeking injunctive relief and filing unfair labor practice charges, and any other action available to Design Build Contractor.

3.7.2 When Design Build Contractor has knowledge that any actual or potential labor dispute is delaying or is threatening to delay timely performance of the Work, Design Build Contractor shall immediately notify City Engineer in writing. No Claims will be accepted by City Engineer for costs incurred as a result of jurisdictional or labor disputes.

3.8 DRUG DETECTION AND DETERRENCE

3.8.1 It is the policy of the City to achieve a drug-free work force and to provide a workplace that is free from the use of illegal drugs and alcohol. It is also the policy of City that manufacture, distribution, dispensation, possession, sale, or use of illegal drugs or alcohol

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by contractors while on City's premises is prohibited. By executing the Contract, Design Build Contractor represents and certifies that it meets and will comply with all requirements and procedures set forth in the Mayor's Policy on Drug Detection and Deterrence, City Council Motion No. 92-1971 ("Mayor's Policy") and the Mayor's Drug Detection and Deterrence Procedures for Contractors, Executive Order No. 1-31, (Revised) ("Executive Order"). Mayor's Policy is on file in the office of the City Secretary. Copies of Executive Order may be obtained at the location specified in the Advertisement for Proposals.

3.8.1.1 The Executive Order applies to the City's contracts for labor or services except the following: 27

1. contracts authorized by Emergency Purchase Orders,
2. contracts in which imposition of requirements of the Executive Order would exclude all potential bidders or proposers, or would eliminate meaningful competition for the Contract, 28
3. contracts with companies that have fewer than 15 employees during any 20-week period during a calendar year and no safety impact positions,
4. contracts with non-profit organizations providing services at no cost or reduced cost to the public, 29 and
5. contracts with federal, state, or local governmental entities.

3.8.1.2 Prior to execution of the Contract, Design Build Contractor shall have filed with the City:

1. a Drug Policy Compliance Agreement form (Attachment "A" to the Executive Order), and
2. a copy of Design Build Contractor's drug free workplace policy, and
3. a written designation of all safety impact positions, if applicable, or a Design Build Contractor's Certification of a No Safety Impact Positions form (Attachment "C" to the Executive Order).

3.8.1.3 Every six (6) months during performance of the Contract and upon completion of the Contract, Design Build Contractor shall file

a Drug Policy Compliance Declaration form (Attachment "B" to the Executive Order). The Design Build Contractor shall submit the Drug Policy Compliance Declaration within 30 days of expiration of each six-month period of performance and within 30 days of the Date of Final Completion of the Work. The first six-month period shall begin on Date of Commencement of the Work.

3.8.1.4 Design Build Contractor shall have a continuing obligation to file updated designation of safety impact positions when additional safety impact positions are added to Design Build Contractor's employee workforce during performance of the Work.

3.8.1.5 Design Build Contractor shall require its Subcontractors and Suppliers to comply with the Mayor's Policy and Executive Order. Design Build Contractor is responsible for securing and maintaining required documents from Subcontractors and Suppliers for City inspection throughout the Term of the Contract.

3.8.1.6 Failure of Design Build Contractor to comply with requirements will be a material breach of the Contract entitling the City to terminate in accordance with Section 14.1.

3.9 MATERIALS & EQUIPMENT

3.9.1 Unless otherwise provided in the Contract, Design Build Contractor shall provide and assume full responsibility for Products, labor, transportation, construction equipment and machinery, tools, appliances, fuel, power, light, heat, telephone, water, sanitary facilities, transportation, temporary facilities, supplies, and other facilities and incidentals necessary for Furnishing, performing, testing, starting-up, and completing the Work.

3.9.1.1 Design Build Contractor, Subcontractors, and Suppliers shall use Ultra Low Sulfur Diesel Fuel in all diesel operating vehicles and motorized equipment utilized in performing the Work. Ultra Low Sulfur Diesel Fuel is defined as diesel fuel having 15 ppm or the applicable standard set by state or federal law or rules and regulations of the Texas Commission on Environmental Quality, or the Environmental Protection Agency, whichever is less, in sulfur content. Off-road Ultra Low Sulfur Diesel Fuel may be used in lieu of on-road Ultra Low Sulfur

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Diesel Fuel. Design Build Contractor shall provide, upon request by City Engineer, proof that Design Build Contractor, Subcontractors, and Suppliers are using Ultra Low Sulfur Diesel Fuel.

3.9.2 Design Build Contractor shall provide Products that are:

1. new, unless otherwise required or permitted by the Contract, and
2. of specified quality. 30

If required by City Engineer, Design Build Contractor shall furnish satisfactory evidence, including reports of required tests, as to kind and quality of Products. 31

3.9.3 Design Build Contractor shall store Products in a safe, neat, compact, and protected manner. Design Build Contractor shall also store Products delivered during the Work, along the right-of-way: 32

1. so as to cause the least inconvenience to property owners, tenants, and general public; and
2. so as not to block access to, or be closer than, three feet to any fire hydrant.
3. so as to not put an unsafe load or distribution of weight on a particular area that causes damage. 34

Design Build Contractor shall protect trees, lawns, walks, drives, streets, and other improvements that are to remain, from damage. If private or public property is damaged by Design Build Contractor, Design Build Contractor shall, at its sole expense, restore the damaged property to at least its original condition.

3.9.3.1 Design Build Contractor shall obtain City Engineer's approval for storage areas used for Products for which payment has been requested under Section 9.1.7. Design Build Contractor shall provide the City access to the storage areas for inspection purposes. Products, once paid for by the City, become the property of City and may not be removed from place of storage, without City Engineer's written permission except for a movement to the site. Design Build Contractor's Installation Floater, required under Section 11.2, shall cover all perils, including loss or damage to Products during storage, loading, unloading, and transit to the Project Site. Payment for materials and transfer

of ownership shall not alleviate Design Build Contractor's responsibility for corrective action should the material become defective or be determined by the City Engineer to not be in compliance with the Contract Documents.

3.10 PRODUCT OPTIONS AND SUBSTITUTIONS

3.10.1 For Products specified by reference standards or by description only, Design Build Contractor may provide any Product meeting those standards or description.

3.10.2 For Products specified by naming one or more manufacturers with provision for substitutions or equal, Design Build Contractor may submit a request for substitution for any manufacturer not named.

3.10.3 City Engineer will consider requests for substitutions only within the first fifteen (15) percent of Contract Time or first ninety (90) days after date of Notice to Proceed of a Construction Phase, whichever is less.

3.10.4 Design Build Contractor shall document each request for substitution with complete data substantiating compliance of proposed substitution with the Contract.

3.10.5 A request for substitution constitutes a representation that Design Build Contractor:

1. has investigated the proposed Product and determined that it meets or exceeds the quality standard of the specified Product;
2. shall provide the same warranty for the substitution as for the specified Product;
3. shall coordinate installation of the proposed substitution and make changes to other work which may be required for the Work to be completed, with no additional cost or increase in time to the City;
4. confirms that cost data is complete and includes all related costs under the Contract Documents;
5. waives related Claim for additional costs or time extensions that may subsequently become apparent; and
6. shall provide review or redesign services by a design consultant with appropriate professional license and shall obtain re-approval and permits from authorities.

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3.10.6 City Engineer will not consider and will not approve substitutions when:

1. they are indicated or implied on Shop Drawing or Product Data submittals without separate written request; or
2. acceptance will require revision to the Contract Documents.

3.10.7 City Engineer may reject requests for substitution, and his decision will be final and binding on the Parties.

3.11 ALLOWANCES

3.11.1 The Guaranteed Maximum Price for each Construction Phase may include Allowances as identified in the Contract Documents.

3.11.2 Once the Allowance is fully defined the Design Build Contractor will price the work. Upon acceptance the City Engineer will issue a change order amending the Cost of the Work portion of the GMP.

3.12 WARRANTY

3.12.1 Design Build Contractor warrants to City that Products furnished under the Contract are:

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1. free of defects in title;
2. of good quality;
3. new, unless otherwise required or permitted by the Contract; and
4. free from defects and in strict conformance with the requirements of the Contract Documents.

If required by City Engineer, Design Build Contractor shall furnish satisfactory evidence as to kind, quality and title of Products, and that Products conform to requirements of the Contract Documents.

3.12.2 In the event of a defect in a Product, either during construction or Correction Period, Design Build Contractor shall take appropriate action with manufacturer of Product to assure correction or replacement of defective Product with minimum delay.

3.12.3 Design Build Contractor warrants that the Work is free of defects not inherent in the

quality required or permitted, and that the Work does conform with the requirements of the Contract Documents. Design Build Contractor further warrants that the Work has been performed in a good, thorough and workmanlike manner.

.1 If required in writing by the City Engineer, Design Build Contractor shall furnish satisfactory evidence, including reports or required tests, as to kind, quality and title of Products, and that Products conform to requirements of the Contract.

.2 In the event of a defect in a Product, either during construction or Correction Period, Design Build Contractor shall take appropriate action with the manufacturer of the Product to assure correction or replacement of the defective Product with minimum delay, to the satisfaction of the City Engineer.

3.12.4 Design Build Contractor warrants that the Work is free of concentrations on polychlorinated biphenyl (PCB) and other substances defined as hazardous by the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) or any other applicable law or regulation.

3.12.5 Work not conforming to requirements of Section 3.12, including substitutions not properly approved and authorized, may be considered nonconforming work.

3.12.6 Design Build Contractor's warranty excludes remedy for damage or defect caused by:

.1 improper or insufficient maintenance by City;

.2 normal wear and tear under normal usage; or

.3 claim that hazardous material was incorporated into the Work, if that material was specified in the Contract Documents.

3.12.7 Design Build Contractor warrants that title to all Work covered by Design Build Contractor's request for payment passes to City upon incorporation into the Work or upon Design Build Contractor's receipt of payment, whichever occurs first. Design Build Contractor further warrants that the title is free of all liens, claims,

security interests or other interests (“Encumbrances”). If not, upon written demand from City Engineer, Design Build Contractor shall immediately take legal action necessary to remove Encumbrances.

3.13 TAXES

3.13.1 Design Build Contractor shall pay all applicable sales, consumer, use, and similar taxes, which are related to work provided by Design Build Contractor and to which any sales or use tax exemption is not applicable.

3.13.2 Design Build Contractor shall obtain, and require Subcontractors and Suppliers to obtain, necessary permits from applicable state and local taxing authorities to perform contractual obligations under the Contract, including sales tax permits (to the extent any sales or use tax exemption is not applicable).

3.13.3 City is exempt from the Federal Transportation and Excise Tax. Design Build Contractor shall comply with federal regulations governing the exemptions.

3.13.4 Products incorporated into the Work are exempt from state sales tax according to provisions of the TEX. TAX CODE ANN. CH. 151, Subsection H.

3.14 PERMITS, FEES, AND NOTICES

3.14.1 Unless otherwise provided in the Contract, Design Build Contractor shall secure and pay for all construction permits, licenses, and inspections.

- .1 necessary for proper execution and completion of the Work; and
- .2 legally required at time the Guaranteed Maximum Price for a construction Phase is approved by the City Engineer.

3.14.2 The Design Build Contractor shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities bearing on performance of the Work, including Design Build Contractor’s or Subcontractor’s licenses; neither City nor its agents, shall be responsible for monitoring Design Build Contractor’s compliance with this requirement.

3.15 CONSTRUCTION SCHEDULES

3.15.1 Upon receipt of a Notice to Proceed for a particular Construction Phase, Design Build Contractor shall promptly prepare and submit a construction schedule for such Construction Phase for City Engineer’s review. The schedule must reflect the minimum time required to complete the Work of the Construction Phase, not to exceed Contract Time. The Director will define what project management/scheduling software systems will be employed for execution of the Work. Design Build Contractor shall make its own arrangements to produce his schedule using the same or approved compatible software. Design Build Contractor shall be responsible for assuring that all work, including all subcontractor work, is included in the schedule. Design Build Contractor shall be responsible for assuring that all work sequences are logical and that the schedule indicates a coordinated plan. At a minimum, the schedule shall provide information on the sequence of work activities, interdependence of activities, milestone dates and activity duration. Design Build Contractor shall maintain the work schedule and provide an update and analysis of the progress on a monthly basis, with the monthly billing. Submission of the work schedule shall not relieve Design Build Contractor of overall responsibility for scheduling sequencing and coordinating all work to comply with the requirements of the contract.

3.15.2 Design Build Contractor shall give 24-hour written notice to City Engineer before commencing work or resuming work where work has been stopped. Design Build Contractor shall also give the same notice to inspectors.

3.15.3 Design Build Contractor shall incorporate milestones specified in Summary of Work Specification into the construction Schedule. Design Build Contractor’s failure to meet a milestone, as determined by Director, may be considered a material breach of the Contract.

3.15.4 Each month, Design Build Contractor shall submit to City Engineer a copy of the updated construction schedule indicating actual progress, incorporating applicable changes, and indicating courses of action required to assure completion of each Construction Phase of the Work within Contract Time.

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3.15.5 Design Build Contractor shall keep a current schedule of all submittals that correlates with the schedules for each Construction Phase, and shall submit the initial schedule of submittals and any subsequent changes to City Engineer for approval.

3.16 DOCUMENTS AND SAMPLES AT THE SITE

3.16.1 Design Build Contractor shall maintain at the site, and make available to City Engineer, one record copy of Drawings, Specifications, and Modifications. Design Build Contractor shall maintain the documents in good order and marked currently to record changes and selections made during construction. In addition, Design Build Contractor shall maintain at the site, approved Shop Drawings, Product Data, Samples, and similar submittals, which will be delivered to City Engineer prior to final inspection as required in Section 9.8.4.

3.16.2 Design Build Contractor shall maintain all books, documents, papers, accounting records, and other relevant documentation pursuant to the Work and shall make the books, documents, papers, and accounting records available to representatives of City for review and audits during the Contract Term and for the greater of three years following Date of Substantial Completion of each Construction Phase or until all litigation or audits are fully resolved.

3.16.3 Design Build Contractor shall provide to City Attorney all documents and records that City Attorney deems necessary to assist in determining Design Build Contractor's compliance with the Contract, with the exception of those documents made confidential by federal or state law or regulation.

3.17 MANUFACTURER'S SPECIFICATIONS

3.17.1 Design Build Contractor shall handle, store, protect, and Install Products and perform all Work in the manner required by Product manufacturer. Should the Contract and manufacturer's instructions conflict, Design Build Contractor shall report conflict to City Engineer for resolution prior to proceeding with the affected portions of the Work.

3.17.2 References in the Contract to the manufacturer's specifications, directions, or recommendations, mean manufacturer's current published documents in effect as of date of receipt of a Guaranteed Maximum Price proposal, or in the case of a Modification, as of date of Modification.

3.18 SHOP DRAWINGS, PRODUCT DATA, AND SAMPLES

3.18.1 Shop Drawings, Product Data, and Samples are not part of the Contract. The purpose of Design Build Contractor submittals is to demonstrate, for those portions of the Work for which submittals are required, the way Design Build Contractor proposes to conform to information given and design concept expressed in the Contract. Design Build Contractor shall submit required submittals and requests for information (RFIs) into the HAS's web-based application, Microsoft SharePoint. Access to the SharePoint portal and required training will be coordinated through the Project Manager.

3.18.2 Design Build Contractor shall submit to City Engineer, if required by City Engineer for review the Shop Drawings, Product Data, and Samples, which are required by the Contract Documents. Review by City Engineer is subject to limitations of Section 4.1.4. Design Build Contractor shall transmit the submittals to the City Engineer with reasonable promptness and in a sequence, so as to cause no delay in the Work or in activities of City or of separate Contractors. Design Build Contractor shall transmit submittals in time to allow a minimum of fourteen (14) days for City Engineer's review prior to date Design Build Contractor needs reviewed submittals returned. This time may be shortened for a particular job requirement if approved by City Engineer in advance of submittal.

3.18.3 Design Build Contractor shall certify that the content of submittals conforms to the Contract without exception by affixing Design Build Contractor's approval stamp and signature. By certifying and submitting Shop Drawings, Product Data, and Samples, Design Build Contractor represents, and Design Build Contractor's stamp of approval shall state, that Design Build Contractor has determined and verified materials, quantities, field measurements, and field construction criteria related to the submittal, and has checked and

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coordinated information contained within the submittals with requirements of the Contract and for compatibility with other submittals.

3.18.4 Design Build Contractor shall not perform any work requiring submittal and review of Shop Drawings, Product Data, or Samples until the submittal has been returned with appropriate review decision by the City Engineer. Design Build Contractor shall perform Work in accordance with the review.

3.18.5 If Design Build Contractor performs any Work requiring submittals prior to review and acceptance of the submittals by City Engineer, such Work is at Design Build Contractor's risk and City is not obligated to accept work if the submittals are later found to be unacceptable.

3.18.6 If, in the opinion of City Engineer, the submittals are incomplete, or demonstrate an inadequate understanding of the Work or lack of review by the Design Build Contractor, then submittals may be returned to the Design Build Contractor for correction and resubmittal.

3.18.7 Design Build Contractor shall direct specific attention in writing and on the resubmitted Shop Drawings, Product Data, or Samples to any additional proposed revisions, other than those revisions requested by City Engineer on previous submittals.

3.18.8 Design Build Contractor is not relieved of responsibility for deviations from requirements of the Contract by City Engineer's review or approval of Shop Drawings, Product Data, or Samples unless Design Build Contractor has specifically informed City Engineer in writing of the deviation at the time of the submittal, and City Engineer has given written approval of the deviation.

3.18.9 When professional certification of performance criteria of Products is required by the Contract, the City may rely upon accuracy and completeness of the calculations and certifications.

3.18.10 For Product colors or textures to be selected by City, Design Build Contractor shall submit all samples together to allow preparation of a complete selection schedule.

3.18.11 Design Build Contractor shall submit informational submittals, on which City Engineer is not expected to take responsive action, as required by the Contract.

3.18.12 Submittals made by Design Build Contractor which are not required by the Contract may be returned to Design Build Contractor without action.

3.19 CULTURAL RESOURCES AND ENDANGERED SPECIES

3.19.1 Design Build Contractor shall not remove or disturb, or cause to be removed or disturbed, any historical, archaeological, architectural, or other cultural artifacts, relics, vestiges, remains, or objects of antiquity. If Design Build Contractor discovers one of these items, Design Build Contractor shall immediately notify City Engineer and further comply with the requirements of 13 Tex. Admin. Code Chs. 25 and 26 (2002), or successor regulation. Design Build Contractor shall protect site and cultural resources from further disturbance until professional examination can be made or until clearance to proceed is authorized in writing by City Engineer.

3.19.2 Should either threatened or endangered plant or animal species be encountered, Design Build Contractor shall cease work immediately in the area of encounter and notify City Engineer.

3.20 CUTTING AND PATCHING

3.20.1 Design Build Contractor is responsible for necessary cutting, fitting, and patching to accomplish the Work and shall suitably support, anchor, attach, match, and trim or seal materials to work of other Contractors. Design Build Contractor shall coordinate the Work with work of other contractors to minimize conflicts, as provided in Article 6.

3.20.2 Design Build Contractor shall not endanger work by cutting, digging, or other action, and may not cut or alter work of other Contractors except by written consent of Director.

3.20.3 If authorized by Director, cutting shall be accurately located and neatly done. Unnecessary cutting shall be avoided. Patching shall be done by skilled mechanics experienced

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in the particular type of work involved. Patching work shall conform to the standards of the Drawings and Specifications where applicable, and where not specified, such work shall conform to the highest standards of the trade. Finished patching in the work of a separate Contractor shall be acceptable to the Contractor whose work has been patched.

3.20.4 Design Build Contractor shall leave all holes, chases, and other openings in its construction required by other Contractors for the installation of their work, provided such openings are accurately located by the party requiring them before the execution of the construction. Design Build Contractor shall afford other Contractors a reasonable opportunity to locate such openings.

3.21 CLEANING

3.21.1 Design Build Contractor shall perform daily cleanup of all dirt, debris, scrap materials and other disposable items resulting from Design Build Contractor's operations, whether on-site or off-site. Unless otherwise authorized in writing by City Engineer, Design Build Contractor shall keep all streets, access streets, driveways, areas of public access, walkways, and other designated areas clean and open at all times.

3.21.2 Failure of Design Build Contractor to maintain a clean site, including access streets, is the basis for City Engineer to issue a Notice of Noncompliance. Should compliance not be attained within the time period in the Notice of Noncompliance, City Engineer may authorize necessary cleanup to be performed by others and the cost of the cleanup will be deducted from monies due Design Build Contractor.

3.21.3 Design Build Contractor shall legally dispose off site all waste products and debris resulting from Design Build Contractor's on site and off site operations.

3.22 SANITATION

3.22.1 Design Build Contractor shall provide and maintain sanitary facilities at site for use of all construction forces under the Contract. Newly-constructed or existing sanitary facilities may not be used by Design Build Contractor.

3.23 ACCESS TO WORK AND TO INFORMATION

3.23.1 Design Build Contractor shall provide City, Inspectors, testing laboratories, and governmental agencies which have jurisdictional interests, access to the Work in preparation and in progress wherever located. Design Build Contractor shall provide proper and safe conditions for the access.

3.23.2 If required by City Engineer, Design Build Contractor shall furnish information concerning character of Products and progress and manner of the Work, including information necessary to determine cost of the Work, such as number of employees, pay of employees, and time employees worked on various classes of the Work.

3.24 TRADE SECRETS

3.24.1 Design Build Contractor will not make any claim of ownership of trade secrets as to Products used in the Work, or preparation of any mixture for the Work. City Engineer will at all times have the right to demand and Design Build Contractor shall furnish information concerning materials or samples of ingredients of any materials used, or proposed to be used, in preparation of concrete placed or other work to be done. Mixtures, once agreed on, shall not be changed in any manner without knowledge and consent of City Engineer. City will make its best efforts to protect confidentiality of proprietary information.

3.25 RELEASE AND INDEMNIFICATION

3.25.1 DESIGN BUILD CONTRACTOR AGREES TO AND SHALL RELEASE THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") FROM ALL LIABILITY FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THIS AGREEMENT, EVEN IF THE INJURY, DEATH, DAMAGE, OR LOSS IS CAUSED BY THE CITY'S CONCURRENT (BUT NOT SOLE) NEGLIGENCE AND/OR THE CITY'S STRICT PRODUCT'S LIABILITY OR STRICT STATUTORY LIABILITY.

3.25.2 DESIGN BUILD CONTRACTOR AGREES TO AND SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") HARMLESS FOR ALL CLAIMS, CAUSES OF ACTION, LIABILITIES, FINES, AND EXPENSES (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES, COURT COSTS, AND ALL OTHER DEFENSE COSTS AND INTEREST) FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THE CONTRACT INCLUDING, WITHOUT LIMITATION, THOSE CAUSED BY:

- .1 DESIGN BUILD CONTRACTOR'S AND/OR ITS AGENTS', EMPLOYEES', OFFICERS', DIRECTORS', CONTRACTORS', OR SUBCONTRACTORS' (COLLECTIVELY IN NUMBERED PARAGRAPHS .1 THROUGH .3, "DESIGN BUILD CONTRACTOR") ACTUAL OR ALLEGED NEGLIGENCE OR INTENTIONAL ACTS OR OMISSIONS;
- .2 THE CITY'S AND DESIGN BUILD CONTRACTOR'S ACTUAL OR ALLEGED CONCURRENT NEGLIGENCE, WHETHER DESIGN BUILD CONTRACTOR IS IMMUNE FROM LIABILITY OR NOT; AND
- .3 THE CITY'S AND DESIGN BUILD CONTRACTOR'S ACTUAL OR ALLEGED STRICT PRODUCTS LIABILITY OR STRICT STATUTORY LIABILITY, WHETHER DESIGN BUILD CONTRACTOR IS IMMUNE FROM LIABILITY OR NOT.

DESIGN BUILD CONTRACTOR'S DUTY TO DEFEND, INDEMNIFY AND HOLD HARMLESS THE CITY SHALL SURVIVE ANY TERMINATION OF THIS AGREEMENT.

3.25.3 THE INDEMNIFICATION OBLIGATIONS UNDER SECTION 3.25.2 SHALL NOT BE LIMITED IN ANY WAY BY THE LIMITS OF ANY INSURANCE COVERAGE OR ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY, FOR, OR TO DESIGN BUILD CONTRACTOR OR ANY SUBCONTRACTOR, SUPPLIER, OR ANY OTHER INDIVIDUAL OR ENTITY UNDER ANY INSURANCE POLICY, WORKERS'

COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFITS ACTS.

3.26 RELEASE AND INDEMNIFICATION – PATENT, COPYRIGHT, TRADEMARK, AND TRADE SECRET INFRINGEMENT

3.26.1 UNLESS OTHERWISE SPECIFICALLY REQUIRED BY THE CONTRACT, DESIGN BUILD CONTRACTOR AGREES TO AND SHALL RELEASE AND DEFEND, INDEMNIFY, AND HOLD HARMLESS THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") FROM ALL CLAIMS OR CAUSES OF ACTION BROUGHT AGAINST THE CITY BY ANY PARTY, INCLUDING DESIGN BUILD CONTRACTOR, ALLEGING THAT THE CITY'S USE OF ANY EQUIPMENT, SOFTWARE, PROCESS, OR DOCUMENTS DESIGN BUILD CONTRACTOR FURNISHES DURING THE TERM OF THE CONTRACT INFRINGES ON A PATENT, COPYRIGHT, OR TRADEMARK, OR MISAPPROPRIATES A TRADE SECRET. DESIGN BUILD CONTRACTOR SHALL PAY, SUBJECT TO REIMBURSEMENT IF ALLOWED UNDER THE CONTRACT, ALL COSTS (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES, COURT COSTS, AND ALL OTHER DEFENSE COSTS, AND INTEREST) AND DAMAGES AWARDED.

3.26.2 DESIGN BUILD CONTRACTOR SHALL NOT SETTLE ANY CLAIM ON TERMS WHICH PREVENT THE CITY FROM USING THE EQUIPMENT, SOFTWARE, PROCESS, OR PRODUCT WITHOUT THE CITY ENGINEER'S PRIOR WRITTEN CONSENT.

3.26.3 UNLESS OTHERWISE SPECIFICALLY REQUIRED BY THE CONTRACT, WITHIN 60 DAYS AFTER BEING NOTIFIED OF THE CLAIM, DESIGN BUILD CONTRACTOR SHALL, AT ITS OWN EXPENSE, EITHER:

- .1 OBTAIN FOR THE CITY THE RIGHT TO CONTINUE USING THE EQUIPMENT, SOFTWARE, PROCESS, OR PRODUCT, OR
- .2 IF BOTH PARTIES AGREE, REPLACE OR MODIFY THEM WITH COMPATIBLE AND FUNCTIONALLY EQUIVALENT PRODUCTS.

IF NONE OF THESE ALTERNATIVES IS REASONABLY AVAILABLE, THE CITY MAY RETURN THE EQUIPMENT, SOFTWARE, OR PRODUCT, OR DISCONTINUE THE PROCESS, AND DESIGN BUILD CONTRACTOR SHALL REFUND THE PURCHASE PRICE.

3.27 INDEMNIFICATION PROCEDURES

3.27.1 *Notice of Indemnification Claims.* If City or Design Build Contractor receives notice of any claim or circumstances which could give rise to an indemnified loss, the receiving party shall give written notice to the other Party within 10 days. The notice must include the following:

- .1 a description of the indemnification event in reasonable detail,
- .2 the basis on which indemnification may be due, and
- .3 the anticipated amount of the indemnified loss.

This notice does not estop or prevent City from later asserting a different basis for indemnification or a different amount of indemnified loss than that indicated in the initial notice. If City does not provide this notice within the 10-day period, it does not waive any right to indemnification except to the extent that Design Build Contractor is prejudiced, suffers loss, or incurs expense because of the delay.

3.27.2 *Defense of Indemnification Claims.*

.1 *Assumption of Defense.* Design Build Contractor may assume the defense of the claim at its own expense with counsel chosen by it that is reasonably satisfactory to City. Design Build Contractor shall then control the defense and any negotiations to settle the claim. Within 10 days after receiving written notice of the indemnification request, Design Build Contractor must advise City as to whether or not it will defend the claim. If Design Build Contractor does not assume the defense, City shall assume and control the defense, and all defense expenses constitute an indemnified loss.

.2 *Continued Participation.* If Design Build Contractor elects to defend the claim, City may retain separate counsel to participate in, but not

control, the defense and to participate in, but not control, any settlement negotiations. Design Build Contractor may settle the claim without the consent or agreement of City, unless it:

- .1 would result in injunctive relief or other equitable remedies or otherwise require City to comply with restrictions or limitations that adversely affect City;
- .2 would require City to pay amounts that Design Build Contractor does not fund in full; or
- .3 would not result in City's full and complete release from all liability to the plaintiffs or claimants who are parties to or otherwise bound by the settlement.

ARTICLE 4 - ADMINISTRATION OF THE CONTRACT

4.1 CONTRACT ADMINISTRATION

4.1.1 City Engineer will provide administration of the Contract, and, subject to Section 7.1.2, City Engineer is authorized to issue Change Orders, Work Change Directives, and Minor Changes in the Work.

4.1.1.1 City Engineer may act through Project Manager or Inspector. When the term "City Engineer" is used in the Contract, action by City Engineer is required unless City Engineer delegates his authority in writing.

4.1.2 City does not have control over or charge of, and is not responsible for, supervision, construction, and safety procedures enumerated in Section 3.3. City does not have control over or charge of and is not responsible for acts or omissions of Design Build Contractor, Subcontractors, or Suppliers. The City Engineer may not delegate authority to render decisions under Section 4.4.

4.1.3 City Engineer may attend project meetings and visit the site to observe progress and quality of the Work. City Engineer is not required to make exhaustive or continuous on-site inspections or to check quality or quantity of the Work.

4.1.4 City Engineer will review and approve or take other appropriate action on Design Build Contractor's submittals, but only for limited purpose of checking for conformance with

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information given and design concept expressed in the Contract.

4.1.4.1 City Engineer's review of the submittals is not conducted for purpose of determining accuracy and completeness of other details, such as dimensions and quantities, or for substantiating instructions for installation or performance of Products, all of which remain the responsibility of Design Build Contractor.

4.1.4.2 City Engineer's review and/or approval of submittals shall not relieve Design Build Contractor of Design Build Contractor's obligations to perform the Work in strict conformance with the Contract Documents, including without limitation Design Build Contractor's obligations under Sections 3.3, 3.10, 3.12, 3.16 and 3.18 of these Document 00700-General Conditions and shall not constitute approval of safety precautions or, unless otherwise specifically stated by City Engineer, of any construction means, methods, techniques, sequences, or procedures. City Engineer's review and/or approval of a specific item shall not indicate approval of an assembly of which the item is a component.

4.1.4.3 City Engineer's decisions on matters relating to aesthetic effect shall be final if consistent with the intent expressed in the Contract Documents.

4.1.5 Based on field observations and evaluations, City Engineer will process Design Build Contractor's progress payments, certify amounts due Design Build Contractor, and issue Certificates for Payment in the amount certified.

4.1.6 Design Build Contractor shall deliver to City Engineer for his review and records, written warranties and related documents required by the Contract Documents and assembled by Design Build Contractor.

4.1.7 Upon written request by Design Build Contractor or City, City Engineer will resolve matters of interpretation of or performance of the Contract, which are not Claims. City Engineer's decisions are final and binding on the Parties.

4.1.8 City Engineer may reject Work which does not conform to the Contract.

4.1.9 When City Engineer considers it necessary to implement the intent of the Contract, City Engineer may require additional inspection or testing of work in accordance with Sections 13.6.3 and 13.6.4, whether such work is fabricated, Installed, or completed.

4.1.10 Except as expressly stated in this Article or other provisions of the Agreement or these Conditions of the Contract, the City owes no duty to the Design Build Contractor or any subcontractor.

4.2 COMMUNICATIONS IN ADMINISTRATION OF THE CONTRACT

4.2.1 Except as otherwise provided in the Contract or when authorized by City Engineer in writing, Design Build Contractor shall communicate with City Engineer. Design Build Contractor shall communicate with separate Contractors through City Engineer. City Engineer will communicate with Subcontractors and Suppliers through Design Build Contractor, but City Engineer is entitled to communicate directly with Subcontractors and Suppliers at any time to obtain information.

4.2.2 Inspectors employed by the City shall be authorized to inspect all work done and materials furnished. Such inspection may extend to all or any part of the work and to the preparation, fabrication or manufacture of the materials to be used. Inspectors are not authorized to revoke, alter or waive any provision of the contract. Inspectors are not authorized to issue instructions contrary to the plans and specifications or to act as foreman for the Design Build Contractor or its subcontractors.

4.3 CLAIMS AND DISPUTES

4.3.1 *Documentation by City Engineer:* Design Build Contractor shall submit Claims, to City Engineer.

4.3.2 *Decision of City Engineer:* Upon submission of Claim by Design Build Contractor, City Engineer will resolve Claims in accordance with Section 4.4.

4.3.3 *Time Limits on Claims:* Claims by Design Build Contractor shall be made within

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ninety-one (91) days after the occurrence of the event giving rise to such Claim. Claims by Design Build Contractor not made within the time required in the required manner shall be deemed waived by Design Build Contractor. Design Build Contractor must give initial notice to the City Engineer of an event that Design Build Contractor views are one that might give rise to a Claim within seven (7) days of the event.

4.3.4 *Continuing the Contract Performance:* Pending final resolution of a Claim including referral to non-binding mediation, unless otherwise agreed in writing, Design Build Contractor shall proceed diligently with the performance of the Contract and City will continue to make payments in accordance with the Contract.

4.3.4.1 Pending final resolution of a Claim including referral to non-binding mediation, Design Build Contractor is responsible for safety and protection of physical properties and conditions at the Project Site.

4.3.5 *Claims for Concealed or Unknown Conditions:* Concealed or unknown physical conditions may include utility lines, other man-made structures, storage facilities, Pollutants and Pollutant Facilities, and the like, but do not include conditions discovered or that should have been discovered through reasonable visual site inspection, geotechnical testing, geotechnical information available to Design Build Contractor, or otherwise, or that do not materially differ from those indicated in the Contract Documents, or information provided by City or those that should reasonably be anticipated, arising from Design Build Contractor's operations, or failure of Design Build Contractor to properly protect and safeguard subsurface facilities, or that do not materially differ from those indicated in the Contract Documents, or information provided by City or those that should reasonably be anticipated. Subject to the foregoing, concealed conditions also include naturally-occurring soil conditions outside the range of soil conditions identified through geotechnical investigations, but do not include conditions arising from groundwater, rain, or flood.

4.3.5.1 If conditions are encountered at the site which are Underground Facilities or otherwise concealed or unknown conditions as

defined in Section 4.3.5, then Design Build Contractor will give written notice to City Engineer no later than seven (7) days after Design Build Contractor's first observation of the condition and before condition is disturbed. Design Build Contractor's failure to provide notice constitutes a waiver of a Claim.

4.3.5.2 City Engineer will promptly investigate concealed or unknown conditions. If City Engineer determines that conditions at the site are not materially different and that no change in the Guaranteed Maximum Price or Contract Time is justified, City Engineer will notify Design Build Contractor in writing, stating reasons. If City Engineer determines the conditions differ materially and cause increase or decrease in Design Build Contractor's cost or time required for performance of part of the Work, City Engineer will recommend use of the Contingency an adjustment in the Guaranteed Maximum Price, or Contract Time, or all, as provided in Article 7. Opposition by a Party to City Engineer's determination must be made within twenty-one (21) days after City Engineer has given notice of the decision. If the Parties cannot agree on adjustment to the Guaranteed Maximum Price or Contract Time, adjustment is subject to further proceedings pursuant to Section 4.4.

4.3.6 *Claims for Additional Cost:* If Design Build Contractor wishes to make a Claim for increase in or Guaranteed Maximum Price, Design Build Contractor shall give written notice before proceeding with work for which Design Build Contractor intends to submit a Claim. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

4.3.6.1 Design Build Contractor may file a Claim in accordance with Section 4.4 if Design Build Contractor believes it has incurred additional costs, for the following reasons:

- .1 written interpretation of City Engineer contrary to the terms of the Contract Documents;
- .2 order by City Engineer to stop the Work when Design Build Contractor is not at fault, except when the direction is given to coordinate the Work;
- .3 suspension of the Work by City Engineer;
- .4 termination of the Contract by City Engineer; or

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.5 City's non-compliance with another provision of the Contract Documents.

4.3.6.2 No increase in the Guaranteed Maximum Price is allowed for delays or hindrances to the Work provided in Section 8.2.1.

4.3.6.3 City is not liable for Claims for delay when Date of Substantial Completion of a Construction Phase occurs prior to expiration of Contract Time.

4.3.7 *Claims for Additional Time:* If Design Build Contractor wishes to make a Claim for an increase in Contract Time, Design Build Contractor shall give written notice as provided in Section 8.2. In case of continuing delay, only one Claim is necessary.

4.4 RESOLUTION OF CLAIMS AND DISPUTES

4.4.1 City Engineer will review Claims and take one or more of the following preliminary actions within 30 days of receipt of Claim:

- .1 submit a suggested time to meet and discuss the Claim with City Engineer;
- .2 reject Claim, in whole or in part, stating reasons for rejection;
- .3 recommend approval of the Claim by the other Party;
- .4 suggest a compromise; or
- .5 take other actions as City Engineer deems appropriate to resolve the Claim.

4.4.2 City Engineer may request additional supporting data from claimant. Party making Claim shall, within ten (10) days after receipt of City Engineer's request, submit additional supporting data requested by City Engineer.

4.4.3 At any time prior to rendering a written decision regarding a Claim, City Engineer may refer Claim to non-binding mediation. If Claim is resolved, City Engineer will prepare and obtain all appropriate documentation. If Claim is not resolved, City Engineer will take receipt of Claim and begin a new review under Section 4.4.4.

4.4.4. If Claim is not referred to or settled in non-binding mediation, City Engineer may conduct a hearing and will render a written decision, including findings of fact, within seventy-five (75) days of receipt of the Claim, or

a time mutually agreed upon by the Parties in writing. City Engineer may notify Surety and request Surety's assistance in resolving a Claim. City Engineer's decision is final and binding on the Parties.

4.5 WAIVER OF ATTORNEY FEES AND INTEREST

4.5.1 Neither the City nor Design Build Contractor may recover attorney fees for any claim brought in connection with this Contract.

4.5.2 Neither the City nor the Design Build Contractor may recover interest for any damages claim brought in connection with this Contract except as allowed by TEXAS LOCAL GOVERNMENT CODE Chapter 2251.

4.6 WAIVER & RELEASE

37.6.1 In accordance with section 4.3, the Design Build Contractor shall use due diligence in the discovery and submission of any Claim against the City related to the Contractor's work.

37.6.2 The Design Build Contractor shall submit any Claim to the City not later than the ninety-first (91st) day after the occurrence of the event giving rise to the Claim.

37.6.3 Any failure to timely comply with the requirements of section 4.6.2 waives and releases any Claim when the Design Build Contractor submits an application for payment after the 91st day.

37.6.4 This waiver does not cover any retainage. In case of any conflict of law, this language shall be revised to the minimum extent necessary to avoid legal conflict. This waiver is made specifically for the benefit of the City.

ARTICLE 5 - SUBCONTRACTORS AND SUPPLIERS

5.1 AWARD OF SUBCONTRACTS OTHER CONTRACTS FOR PORTIONS OF THE WORK

5.1.1 Design Build Contractor may not contract with a Subcontractor, Supplier, person, or entity that City Engineer has made a reasonable and timely objection to.

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5.1.2 If City Engineer has a reasonable objection to person or entity proposed by Design Build Contractor, Design Build Contractor shall propose another with whom City Engineer has no reasonable objection.

5.1.3 Design Build Contractor shall execute contracts with approved Subcontractors, Suppliers, persons, or entities before the Subcontractors, Suppliers, persons, or entities begin work under the Contract. All such contracts must be sent to the OBO Director and HAS within thirty (30) days after the Notice to Proceed.

5.1.4 Design Build Contractor shall notify City Engineer in writing of any proposed change of Subcontractor or Supplier, person or entity previously approved by City Engineer.

5.1.5 Design Build Contractor shall make timely payments to Subcontractors, Suppliers, persons, and entities for performance of the Contract Documents. **DESIGN BUILD CONTRACTOR SHALL PROTECT, DEFEND, AND INDEMNIFY CITY FROM ANY CLAIMS OR LIABILITY ARISING OUT OF DESIGN BUILD CONTRACTOR'S FAILURE TO MAKE PAYMENTS.** Disputes relating to payment of Business Enterprise Subcontractors, Suppliers, persons, or entities will be submitted to arbitration in the same manner as other disputes under Business Enterprise subcontracts. Failure of Design Build Contractor to comply with decisions of arbitrator may be determined by City Engineer a material breach leading to termination of the Contract.

5.2 DESIGN BUILD CONTRACTOR RESPONSIBILITY FOR SUBCONTRACTORS

5.2.1 Design Build Contractor is responsible to City, as may be required by laws and regulations, for all acts and omissions of Subcontractors, Suppliers, and other persons and organizations performing or furnishing any of the Work under direct or indirect contract with Design Build Contractor.

5.2.2 Design Build Contractor shall make available to each proposed Subcontractor, prior to execution of subcontract, copies of the Contract to which Subcontractor is bound by this Section 5.2. Design Build Contractor shall notify Subcontractor of any terms of proposed

subcontract which may be at variance with the Contract.

5.2.3 City Engineer's approval of Subcontractor or Suppliers does not relieve Design Build Contractor of its obligation to perform, or to have performed to the full satisfaction of City, the Work required by the Contract.

5.2.4 Unless there is a contractual relationship between Design Build Contractor and a Subcontractor or Supplier to the contrary, Design Build Contractor shall withhold no more retainage from Subcontractors or Suppliers than City withholds from Design Build Contractor under this Contract. However, once a Subcontractor or Supplier completes performance, Design Build Contractor shall release all retainage to that Subcontractor or Supplier promptly upon the City's early payment of said retainage, in the discretion of the Director.

5.2.5 Prior to a Subcontractor or Supplier commencing performance for Design Build Contractor, Design Build Contractor shall meet with that Subcontractor or Supplier to provide instructions on invoicing procedures, dispute resolution procedures, and statutory rights, such as Section 2253 of the Texas Government Code. Subcontractors and Suppliers must certify to the City Engineer that Design Build Contractor has fulfilled the requirements of this Section.

ARTICLE 6 - CONSTRUCTION BY CITY OR BY SEPARATE CONTRACTORS

6.1 THE CITY'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS

6.1.1 City shall have the right to perform on-site construction operations related to the Work and as part of the Project with its own forces or with separate Contractors.

6.2 COORDINATION

6.2.1 Design Build Contractor will coordinate its activities with the City's workforce and each separate Contractor.

6.2.1.1 Design Build Contractor shall participate with other separate Contractors and City in reviewing their construction schedules

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when directed to do so by the City Engineer. Design Build Contractor shall make revisions to construction schedule and Guaranteed Maximum Price deemed necessary after joint review and mutual agreement. Construction schedules shall then constitute schedules to be used by Design Build Contractor, separate Contractors, and City, until subsequently revised.

6.2.2 Design Build Contractor shall afford to City and separate Contractors reasonable opportunity for introduction and storage of their materials and equipment, and for performance of their activities.

6.2.3 If part of Design Build Contractor's work depends on proper execution of construction or operations by City or a separate Contractor, Design Build Contractor shall, prior to proceeding with that portion of the Work, inspect the other work and promptly report to City Engineer apparent discrepancies or defects in the other construction that would render it unsuitable for the proper execution of the Work. Failure of Design Build Contractor to report apparent discrepancies or defects in the other construction shall constitute acknowledgment that City's or separate Contractor's completed or partially completed construction is fit and proper to receive Design Build Contractor's work, except as to discrepancies or defects not then reasonably discoverable.

6.3 MUTUAL RESPONSIBILITY

6.3.1 Design Build Contractor shall prosecute its Work in a prompt and diligent manner in accordance with the Project schedule, in cooperation with and without hindering the work of any other separate Contractor of the City. Design Build Contractor shall promptly remedy damage caused by Design Build Contractor to completed or partially completed construction or to property of City, its separate Contractor or others, and shall defend, hold harmless and indemnify the City for all claims or liability, if any, arising out of any hindrance, delay or damage by Design Build Contractor to the work or property of others.

6.4 CITY'S RIGHT TO CLEAN UP

6.4.1 If a dispute arises among Design Build Contractor, separate Contractors, and City as to responsibility under their respective

contracts for maintaining premises and surrounding area free from waste materials and rubbish as described in Section 3.21, City may clean up and allocate cost among those responsible, as determined by City Engineer.

ARTICLE 7 - CHANGES IN THE WORK

7.1 CHANGES

7.1.1 Changes in scope of the Work, subject to limitations in Article 7 and elsewhere in the Contract, may be accomplished without invalidating the Contract, or without notifying Surety by:

- .1 Change Order;
- .2 Work Change Directive; or
- .3 Minor Change in the Work.

7.1.2 The following types of Change Orders require City Council approval:

- .1 a single Change Order that exceeds ten (10) percent of the Guaranteed Maximum Price,
- .2 a Change Order which, when added to previous Change Orders, exceeds ten (10) percent of the Guaranteed Maximum Price,
- .3 a Change Order, in which the total value of increases outside of the general scope of work approved by City Council, when added to increases outside the general scope of work approved by City Council in previous Change Orders, exceeds 40 percent of the Guaranteed Maximum Price, even if the net increase to the Guaranteed Maximum Price is ten (10) percent or less. In this context, "increase" means an increase in quantity resulting from the addition of locations not within the scope of work approved by City Council, or the addition of types of goods or services not bid as unit price items.

Nothing in this Section is intended to permit an increase of the Guaranteed Maximum Price in excess of the limit set out in TEX. LOC. GOV'T CODE ANN. §252.048 or its successor statute.

7.1.3 Design Build Contractor shall proceed promptly to perform changes in the Work provided in Modifications, unless otherwise stated in the Modification.

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7.2 WORK CHANGE DIRECTIVES

7.2.1 A Work Change Directive cannot change the Guaranteed Maximum Price or Contract Time, but is evidence that the Parties agree that a change, ordered by directive, will be incorporated in a subsequently issued Change Order as to its effect, if any, on the Guaranteed Maximum Price or the Contract Time.

7.2.2 Failure by Design Build Contractor to commence work identified in a Work Change Directive within the time specified by City Engineer, or to complete the work in a reasonable period of time, may be determined by City Engineer to be a material breach of the Contract.

7.2.3 A Work Change Directive is used in the absence of total agreement of the terms of a Change Order. Interim payments are made in accordance with Article 9. Design Build Contractor may include a request for payment for undisputed Work under a Work Change Directive with Applications for Payment submitted in accordance with the Contract Documents.

7.2.4 If Design Build Contractor signs a Work Change Directive, then Design Build Contractor agrees to its terms including adjustment in the Guaranteed Maximum Price and Contract Time or method for determining them. Agreement by the Parties to adjustments in the Guaranteed Maximum Price or Contract Time shall immediately be recorded as a Change Order.

7.2.5 City Engineer, by Work Change Directive, may direct Design Build Contractor to take measures as necessary to expedite construction to achieve Date of Substantial Completion on or before expiration of Contract Time. When the Work is expedited solely for convenience of City and not due to Design Build Contractor's failure to prosecute timely completion of the Work, then Design Build Contractor is entitled to an adjustment in the Guaranteed Maximum Price equal to costs determined in accordance with Article 7.

7.3 ADJUSTMENTS IN CONTRACT PRICE

7.3.1 Adjustments in Contract Price shall be accomplished only by Change Order and are based on one of the following methods:

7.3.1.1 mutual acceptance of pricing, properly itemized and supported by sufficient data to permit evaluation in which to determine an adjustment to the GMP;

7.3.1.2 unit prices stated in the Contract or subsequently agreed upon;

7.3.1.3 cost to be determined in a manner agreed upon by the Parties and mutually acceptable fixed or percentage fee; or

7.3.1.4 as provided in Paragraph 7.3.2.

7.3.2 If Design Build Contractor does not agree with a change in Contract Price or Contract Time or the method for adjusting the same, as specified in connection the Work Change Directive, within twenty-one (21) days from date of the Work Change Directive's issuance, it may file a Claim in accordance with Section 4.4. Otherwise, the City Engineer's determination shall be deemed accepted by Design Build Contractor.

7.3.2.1 If City Engineer determines a method and adjustment in Contract Price under Section 7.3.2, Design Build Contractor shall provide, in a form as City Engineer may prescribe, appropriate supporting data for items submitted under Section 7.3.2. Failure to submit the data within 21 days of request for the data by City Engineer shall constitute waiver of a Claim.

7.3.2.2 Unless otherwise provided in the Contract, costs for the purposes of this Paragraph 7.3.2 are limited to the following:

7.3.2.2.1 costs of labor, including labor burden as stated below for social security, unemployment insurance, customary and usual fringe benefits required by agreement or custom, and Workers' Compensation insurance;

7.3.2.2.1.1 the maximum labor burden applied to costs of labor changes in the Work is specified in the Agreement.

7.3.2.2.1.2 Labor rates included in Contractor's and its subcontractors' proposals shall be substantiated with backup information showing the complete makeup of the rates.

7.3.2.2.2 costs of materials, supplies, and equipment, including cost of

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transportation, whether incorporated or consumed;

7.3.2.2.3 reasonable rental costs of machinery and equipment, exclusive of hand tools, whether rented from Design Build Contractor or others, with prior approval of City Engineer;

7.3.2.2.4 costs of premiums for Bonds and insurance and permit fees related to the change in the Work

directly added to the cost of change in the Work; incidental job burdens; cost of idle equipment; home office overhead and consequential damages; general home office expenses; profit; and loss of profit.

7.3.2.2.6.3 for changes in the Work performed by Design Build Contractor and its Subcontractors, allowance for overhead is applied to an amount equal to all increases in the Cost of the Work. Allowance for profit is applied to the net Cost of the Work whether the cost is an increase or decrease. Allowance for overhead to Design Build Contractor and first tier Subcontractors on changes performed by lower tier Subcontractors are applied to all increases in the Cost of the Work by applicable Subcontractors.

	Overhead	Profit
to Design Build Contractor for change in the Work performed by Subcontractors:	Design Build Contractor Stipulated Fee %.	
to first tier Subcontractors for change in the Work performed by its Subcontractors:	10 percent	0 percent
to Design Build Contractor and Subcontractor for change in the Work performed by their respective firms:	10 percent	5 percent

7.3.3 If the City deletes or makes a change, which results in a net decrease in Contract Price, the City is entitled to a credit calculated in accordance with Paragraphs 7.3.1 and 7.3.2 and Subparagraphs 7.3.2.1, and 7.3.2.2.1 through 7.3.2.2.5.

7.3.2.2.5 additional costs of field supervision of the Work, to the extent that the supervision is a direct addition to the Cost of the Work; and

7.3.2.2.6 allowances for overhead and profit as stated below.

7.3.2.2.6.1 the maximum allowances for overhead and profit on increases due to Change Orders set out in the table in this section.

7.3.4 When Design Build Contractor agrees with the determination made by City Engineer concerning adjustments in Contract Price and Contract Time, or the Parties otherwise reach agreement upon the adjustments, the agreement will be immediately recorded by Change Order.

7.3.5 Adjustments in the Guaranteed Maximum Price or Contract Time shall be accomplished only by Change Order after the Parties have agreed to amending the approved GMP Proposal.

7.3.2.2.6.2 **Overhead and Profit:** The Design Build Contractor's and Subcontractors' overhead and profit percentages shall be considered to include, among other costs; change order processing costs including without limitation project management, estimating, clerical and drafting costs performed by field operations or in the home office, relating to change in the Work; field supervision not

7.3.6 If the City Engineer deletes or makes a change which results in a net decrease in the GMP, City is entitled to a credit by Design Build Contractor in the GMP and the Cost of the Work.

7.4 MINOR CHANGES IN THE WORK

7.4.1 A Minor Change in Work is binding on the Parties. Design Build Contractor shall acknowledge, in a written form acceptable to City Engineer, that there is no change in Contract

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Time or Guaranteed Maximum Price ~~a45~~ shall carry out the written orders promptly.

7.5 CHANGES IN APPLICABLE LAW

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7.5.1 To the extent that a change in Applicable Law enacted after the Guaranteed Maximum Price for an affected Phase is agreed upon affects to a material extent Design Build Contractor's time or cost of performing the Work for the affected Construction Phase, Design Build Contractor shall give City Engineer written notice within ninety-one (91) Days of the effective date of such a change in Applicable Law, setting forth the details of the change in Applicable Law and Design Build Contractor's good faith determination of its impact on Design Build Contractor's performance obligations under the Contract Documents. The City Engineer will investigate such change in Applicable Law and, if the City Engineer determines that it causes an increase or decrease in Design Build Contractor's cost of, or time required for, performance of the Work for the affected Construction Phase and that the notice was given timely, City and Design Build Contractor shall enter into a Change Order in accordance with the provisions of Article 7 herein.

ARTICLE 8 – TIME

8.1 PROGRESS AND COMPLETION

43 8.1.1 Time is of the essence in the Contract. By executing a Guaranteed Maximum Price Proposal and any Guaranteed Maximum Price contract amendment or change order, as determined by the City, Design Build Contractor agrees that Contract Time is a reasonable period for performing the Work.

44 8.1.2 *Computation of Time:* In computing any period of time prescribed or allowed by the Document 00700-General Conditions, the day of the act, event, or default after which designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or Legal Holiday, in which event the period runs until end of the next day that is not a Sunday or Legal Holiday. Sundays and Legal Holidays are considered to be days and are to be included in all other time computations relative to Contract Time.

8.1.2.1 Design Build Contractor shall provide City Engineer an accounting of inclement weather delay days within thirty (30) days of their occurrences.

8.1.2.2 City Engineer may grant an extension of Contract Time due to inclement weather where the Design Build Contractor establishes an actual delay impacting the critical path of the Construction Schedule and otherwise complies with the requirements of Article 8 when inclement weather is the sole cause of delay.

8.1.3 Design Build Contractor may not commence the Construction Phase Work prior to the effective date of insurance and Bonds required by Article 11.

8.1.4 Design Build Contractor shall proceed expeditiously and without interruption, with adequate forces, and shall achieve Date of Substantial Completion within the Contract Time without additional cost to the City.

8.1.5 Should progress of the Work fall behind construction schedule, except for reasons stated in Section 8.2.1, Design Build Contractor shall promptly submit at the request of City Engineer, updated construction schedule to City Engineer for approval. Design Build Contractor's failure to submit updated schedule may, at City Engineer's discretion, constitute a material breach of the Contract. Design Build Contractor shall take action necessary to restore progress by working the hours, including night shifts and lawful overtime operations as necessary, to achieve Date of Substantial Completion within Contract Time.

8.1.6 Design Build Contractor must have an approved work-hours plan prior to commencing work on the project site. Changes to the approved work-hours plan shall require 48-hour written notice and subsequent written approval by the Director.

8.2 DELAYS AND EXTENSIONS OF TIME

8.2.1 Design Build Contractor may request extension of Contract Time for a delay in performance of work that arises from causes beyond Design Build Contractor's control and without fault or negligence of Design Build Contractor. Examples of these causes are:

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- .1 acts of God or of the public enemy,
- .2 acts of government in its sovereign capacity,
- .3 fires,
- .4 floods,
- .5 epidemics,
- .6 quarantine restrictions,
- .7 strikes,
- .8 freight embargoes,
- .9 unusually severe weather (subject to Section 8.1.2.2); and
- .10 discovery of Pollutants or Pollutant Facilities at the site.

8.2.2 For any reason other than those listed in Section 4.3.6.1, if the Design Build Contractor's work is delayed in any manner or respect, the Design Build Contractor shall have no claim for damages and shall have no right of additional compensation from the City by reason of any delay or increased expense to the Design Build Contractor's work, except for an extension of time as provided in this provision.

8.2.3 Design Build Contractor may request and may be entitled to an extension of Contract Time for delay only if:

- .1 delay is not caused by failure of Design Build Contractor or any of its Subcontractors or Suppliers to perform (or cause to be performed) or make progress for a cause within its control; and
- .2 cause of the delay was not reasonably anticipated and is beyond control of Design Build Contractor; and
- .3 the delay has been mitigated by all reasonably available efforts; and
- .4 Design Build Contractor can fully document and prove the impact of the event on Design Build Contractor's critical path of planned Work in the Project Schedule.

8.2.4 Claims relating to Contract Time must be made in accordance with Section 4.3.7.

8.2.5 Claims for extending or shortening Contract Time are based on written notice promptly delivered by Design Build Contractor to City Engineer. A Claim must accurately describe occurrence generating the Claim, and a

statement of probable effect on progress of the Work.

8.2.6 Claims for extension of Contract Time are considered only when a Claim is filed within the time limits stated in Section 4.3.3.

8.2.6.1. Notwithstanding Section 4.3.3, an extension of time for delays under this paragraph may be granted only upon prompt written application by the Design Build Contractor, not to exceed within five days from the claimed delay.

8.2.7 Written notice of a Claim must be accompanied by claimant's written statement that adjustment claimed is entire adjustment to which claimant is entitled as a result of the occurrence of the event. When the Parties cannot agree, Claims for adjustment in Contract Time are determined by City Engineer in accordance with Section 4.4.

8.2.8 Adjustments to Contract Time shall be accomplished only by Change Order.

ARTICLE 9 - PAYMENTS AND COMPLETION

9.1 APPLICATION FOR PAYMENT

9.1.1 Ten (10) days before submittal of the first Application for Payment for a Construction Phase of Work, Design Build Contractor shall submit to City Engineer a Schedule of Values accurately allocating the Guaranteed Maximum Price for such Construction Phase to the various portions of the Work for such Construction Phase, prepared in the form and supported by the data as City Engineer may require to substantiate its accuracy. The Schedule of Values shall contain, at a minimum, separate line items for the close out of the Work for such Construction Phase, the delivery of record "as-built" drawings, delivery of operation and maintenance manuals, delivery of warranty documents, and final cleanup. The Schedule of Values shall be balanced and not contain any "front end loading." The Schedule of Values, as approved by City Engineer, shall be used as a basis for approval of Design Build Contractor's Applications for Payment. In addition, Design Build Contractor shall submit the process and basis for calculating the earned value measurement for each schedule of value, including quantities and rules of credit, as applicable. At the direction of the Project Manager, the Schedule of Values shall be

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grouped along the lines of specific equipment, asset or deliverable produced as a result of the work performed. In addition to the required hard copies of the Application for Payment and supporting documentation, Design Build Contractor shall, as directed by the Project Manager, submit Applications for Payment electronically into the HAS's project management system including electronic uploading of supporting documentation. Access to the project management system and required training will be coordinated through the Project Manager.

9.1.2 Design Build Contractor shall submit Applications for Payment to City Engineer each month on a form acceptable to City Engineer in accordance with Schedule of Values. Each Application for Payment shall indicate percentages of completion of each portion of the Work listed in Schedule of Values as of the end of the period covered by the Application for Payment. Each Application for Payment shall include calculations to support the reported percentage complete. The period covered by each Application for Payment shall be one calendar month ending on the last Friday of the month. The value for any line item in the approved Schedule of Values shall not be modified without prior written approval of the Project Manager.

9.1.3 Each Schedule of Values submitted with an Application for Payment shall include the originally established value for each Work classification line item or subcontract and shall identify, by the addition of new data rows immediately below the previously accepted data rows, any revisions to the costs or cost estimates for each Work classification or subcontract. The format and tracking method of the original Schedule of Values and of all updates shall be subject to approval by City Engineer. At all times, the estimated cost of performing the uncompleted and unpaid portion of the Work, including Design Build Contractor's Fee, shall not exceed the unpaid balance of the Guaranteed Maximum Price, less retainage on Work previously completed.

9.1.4 If previously unpaid, the Pre-Construction Services costs shall be identified separately in each Application for Payment.

9.1.5 Design Build Contractor shall deliver to City Engineer three (3) copies

of each itemized Application for Payment in such detail as is required by City Engineer. Applications for Payment must be supported by such substantiating data as City Engineer may require and shall reflect retainages as provided in the Contract Documents. The Application for Payment must be sworn to and notarized. In addition to the required hard copies of the Application for Payment and supporting documentation, Design Build Contractor shall, as directed by the Project Manager, submit Applications for Payment electronically into the City's web-based collaboration tool, including electronic uploading of supporting documentation. Submit electronic version in Microsoft Excel native format of preliminary Schedule of Values within 21 days of Notice to Proceed for Preconstruction Services. Submit electronic copy with each Application for Payment. Obtain approval before making first application for payment.

9.1.6 Before submitting the next Application for Payment (and with the Application for Final Payment), Design Build Contractor shall submit any evidence required by City Engineer to verify the Cost of the Work and to demonstrate that the cash disbursements already made by Design Build Contractor on account of the Cost of the Work are equal to or exceed (1) progress payments already received by Design Build Contractor; less (2) that portion of those payments attributable to Design Build Contractor's Fee; plus (3) payrolls for the period covered by the most recent Application for Payment; less (4) retainage provided for in the Contract Documents applicable to prior progress payments. This documentation of the most recent Application for Payment, if required by City Engineer, shall have a summary sheet (in two (2) copies) that descriptively itemizes all expenses and individuals. No payment is required to be made for Work for which Design Build Contractor fails to provide required documentation.

9.1.7 Each Application for Payment shall be based upon the Cost of the Work and the most recent Schedule of Values submitted by Design Build Contractor in accordance with the Contract Documents and accepted by City Engineer.

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9.1.8 Applications for Payment shall show the Cost of the Work actually incurred by Design Build Contractor through the end of the period covered by the Application for Payment and for which Design Build Contractor has made or intends to make actual payment prior to the next Application for Payment and the percentage completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage completion shall be the lesser of (1) the percentage of that portion of the Work that has actually been completed or (2) the percentage obtained by dividing (a) the Cost of the Work that has actually been incurred by Design Build Contractor on account of that portion of the Work for which Design Build Contractor has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the Schedule of Values.

- .1 The City Engineer, at his sole discretion, may authorize payment of stored materials up to a value of eighty five percent (85%), subject to applicable retainage, of the actual invoice amount properly substantiated by certified copies of invoices and freight bills of non-perishable material and equipment delivered and properly stored. Design Build Contractor must obtain approval from City Engineer for authorization to bill for stored materials in advance of the request for payment. Properly stored materials shall be only materials suitably stored at the Project Site unless otherwise agreed to by the City Engineer in writing.

9.1.9 Each Application for Payment, including the Application for Final Payment shall constitute a certification by Design Build Contractor to City that the Work has progressed to the point indicated and the Work represented has actually been performed; the quality of the Work covered in the Application for Payment is in accordance with the Contract Documents; Design Build Contractor is entitled to payment in the amount requested; Design Build Contractor remains capable of performing the Contract to completion; and Design Build Contractor is current in payment with Subcontractors and Suppliers.

9.1.10 Design Build Contractor shall promptly and in all events before interest charges accrue to the Subcontractor pay each of its Subcontractors, upon receipt of payment from City, out of the amount paid to Design Build Contractor on account of such Subcontractor's work, the amount to which such Subcontractor is entitled in accordance with the terms of Design Build Contractor's Subcontract with such Subcontractor. Design Build Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to its sub-subcontractors in similar manner. City shall have no obligation to pay or to be responsible in any way for payment to any Subcontractor or Supplier.

9.1.11 With each Application for Payment, Design Build Contractor shall submit a certified "waiver and release." The waiver and release shall state: "In consideration for the payment received, Design Build Contractor waives all claims of every sort against City arising out of the Work performed through the effective date of the Application for Payment, except for retainage and such claims as have been properly submitted in accordance with the provisions of the Contract Documents or claims that can be made timely within the requirements of the Contract Documents."

9.1.12 Retainage shall be five percent (5%) of the Cost of the Work and the Design Build Contractor's Fee for each Phase of the Work. There shall be no retainage on the Design Build Contractor's building permit cost, bond and insurance cost, or the Pre-Construction Services. Otherwise, the City shall be entitled to withhold retainage from all Applications for Payment by Design Build Contractor. Retainage is not held by City for the benefit of any others and shall be deemed amounts not yet earned by or owed to Design Build Contractor.

9.1.13 In addition to other rights under the Contract Documents and Applicable Law, City Engineer, in its discretion, may retain amounts owing to Design Build Contractor as City deems appropriate to protect City's interest. Design Build Contractor shall not receive payments from City for any amounts Design Build Contractor retains from its Subcontractors, and Design Build Contractor shall immediately return to City any amounts paid to Design Build Contractor on behalf of any Subcontractor or Supplier or other

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which Design Build Contractor does not pass on as payment before the next Application for Payment. In the event City withholds all or any portion of the Design Build Contractor's payments under this paragraph or under 9.4 hereof, City shall provide specific written accounting for same and shall allocate specific amounts for each reason justifying withholding. Such explanation shall be provided at the time payments would otherwise be due and sums withheld shall be paid when each such reason for withholding same has been cured to the reasonable satisfaction of the City.

9.1.14 Materials and services utilized in the construction of the Project may be exempted from state and local taxes. Design Build Contractor is responsible for taking full advantage of all tax exemptions applicable to the Project. City will deduct from the Applications for Payment and from the Request for Final Payment any taxes paid for materials or services that were entitled to tax exemption.

9.1.15 The Design Build Contractor is subject to the assessment of liquidated damages as provided in the Contract Documents. Amounts assessed as liquidated damages, and other amounts to which City is entitled by way of setoff or recovery, may be deducted from any monies otherwise due Design Build Contractor.

9.1.16 Design Build Contractor's records shall be kept on the basis of generally accepted accounting principles in accordance with cost accounting standards issued by the Federal Office of Management and Budget Cost Accounting Standards Board consistently applied and organized by each Application for Payment period.

9.1.17 Applications for Payment must be supported by substantiating back-up data as required by the City Engineer and must reflect retainages as required herein. Evidence satisfactory to the City Engineer of payments made to Subcontractors and Suppliers for the month preceding the month for which the Application for Payment is submitted must accompany each Application for Payment on a form approved by the Director of the Office of Business Opportunity. The Application must be sworn and notarized.

9.2 CERTIFICATES FOR PAYMENT

9.2.1 Prior to issuing each Application for Payment under Section 9.1, Design Build Contractor shall submit a "Draft" Application for Payment that is valid and has all required documentation no later than the 25th of the same month with Work projected through the end of the month. Within five (5) days of receipt of the Draft, the City Engineer shall review the Draft and provide the Design Build Contractor with any adjustments to the progress of the Work or amount requested, within reason. The Design Build Contractor shall make agreed to corrections to the Draft and submit to the City a "Final" Application for Payment that is valid and has all required documentation within five (5) days from receipt of the City Engineer's adjustments. Upon receipt of the Final Application for Payment, the City shall make payment to the Design Build Contractor not later than thirty (30) days from receipt. If, and in the event, the City Engineer holds all or part of a Final Application for Payment for one or more reasons, the City Engineer will issue a written explanation apportioning the amount withheld to each such cause.

9.2.1.1 With its draft Application for Payment, Design Build Contractor shall submit to City Engineer on a form approved by the Director of Mayor's Office of Business Opportunity, evidence satisfactory to the City Engineer of payments made to Subcontractors and Suppliers for the month preceding the month for which the Application for Payment is prepared.

9.2.2 Unless otherwise provided in the Contract Documents, payment for completed Work and for properly stored Products is conditioned upon compliance with procedures satisfactory to and agreed to by City Engineer to protect City's interests. Procedures will include applicable insurance, storage, and transportation to the site (with suitable on site storage and protection) for Products stored off site and proper documentation for such delivered Products, including certified copies of invoices and freight bills. Design Build Contractor is responsible for maintaining materials and equipment until the Date of Substantial Completion.

9.2.3 Design Build Contractor shall document its use of Low Sulfur Diesel Fuel by providing invoices and receipts evidencing Design Build Contractor's use.

9.3 COMPUTATIONS OF CERTIFICATES FOR PAYMENT

9.3.1 Subject to the provisions of the Contract Documents, the amount of each Certificate for Payment is calculated as follows:

- .1 Take that portion of the Guaranteed Maximum Price for a Construction Phase properly allocated to completed Work for such Construction Phase based upon the percentage completion of each portion of the Work as set forth above. Pending final determination of cost to City of changes in the Work, amounts not in dispute may be included after increases and decreases have been netted out against each other, even though the Guaranteed Maximum Price has not yet been adjusted by Change Order.
- .2 Add the Design Build Contractor's Fee.
- .3 Subtract the amount of retainage and such other amounts as City is entitled to withhold.
- .4 Subtract the aggregate of the previous payments made by City.
- .5 Subtract the shortfall, if any, indicated by Design Build Contractor in the documentation required to substantiate prior Applications for Payment or Design Build Contractor's payment of Costs of the Work covered by previous payments, or resulting from errors subsequently discovered by City Engineer in such documentation.
- .6 Subtract amounts, if any, for which City has withheld or nullified an Application for Payment.

9.4 DECISIONS TO WITHHOLD CERTIFICATION

9.4.1 City Engineer may decline to issue a Certificate for Payment and may withhold payment in whole or in part to the extent reasonably necessary to protect City if, in City Engineer's opinion, there is reason to believe that:

- .1 nonconforming work has not been remedied;
- .2 the Work cannot be completed for unpaid balance of the Guaranteed Maximum Price;

- .3 there is damage to City or another Contractor;
- .4 Design Build Contractor has persistently failed to complete the Work in accordance with the Project Schedule or the Work will not be completed within Contract Time and that unpaid balance will not be adequate to cover actual and liquidated damages;
- .5 evidence that third party claims will probably be filed in court, in arbitration, or otherwise;
- .6 Design Build Contractor has failed to make payments to Subcontractors or Suppliers or other third parties related to the Work;
- .7 Design Build Contractor has failed to carry out the Work in accordance with the Contract Documents;
- .8 The payment request has insufficient documentation to support the amount of payment requested;
- .9 Design Build Contractor fails to obtain, maintain or renew insurance coverage as required by the Contract Documents;
- .10 Design Build Contractor is in breach or default under the Contract Documents or any loss or damage may result from negligence by Design Build Contractor or any Subcontractor or failure of Design Build Contractor or any Subcontractor to perform their obligations under the Contract Documents.
- .11 Design Build Contractor has not paid Subcontractors or Suppliers because of a payment dispute; or,
- .12 Design Build Contractor has failed to provide satisfactory evidence described in Sections 9.1.16, 9.2.1.1, and 9.5.2.
- .13 A determination that any amounts previously paid were the proper subject of withholding hereunder.

9.4.2 When the above reasons for withholding a Certificate for Payment are removed, certification will be made for amounts previously withheld.

9.4.3 City Engineer may decline to issue a Certificate for Payment and may withhold request for payment in whole or in part upon failure of

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Design Build Contractor to submit initial construction schedule or monthly schedule updates, as required in Section 3.15 or elsewhere in the Contract Documents.

9.4.4 City shall at any time during regular business hours have the right to inspect and copy the books and records (however kept) of Design Build Contractor for verification of Work done, costs, bids, estimates, markups, payments due, amounts claimed, obligations owed Subcontractors or Suppliers, or any other aspect of Design Build Contractor's obligations as they relate to the Project. At City Engineer's request, Design Build Contractor, shall promptly provide evidence satisfactory to City of Design Build Contractor's compliance with the Contract Documents. Design Build Contractor shall require its Subcontractors and Suppliers to comply with this Section, and similarly require their sub-subcontractors and Suppliers of any tier, to comply with this Section.

9.5. [OMITTED]

9.6. [OMITTED]

9.7. [OMITTED]

9.8 **PROGRESS PAYMENTS**

9.8.1 The City will make payment, in an amount certified by City Engineer, within thirty (30) days after City Engineer has issued a Certificate for Payment.

9.8.2 City has no obligation to pay or to facilitate the payment to any Subcontractor, Supplier, person or entity, except as may otherwise be required by law. Design Build Contractor shall comply with the prompt payment requirements of Chapter 2251 of the Government Code. However, Design Build Contractor shall pay Subcontractors and Suppliers within 7 calendar days of Design Build Contractor's receipt of payment from City unless there is a payment dispute between Design Build Contractor and a Subcontractor or Supplier evidenced on a form approved by the Director of the Office of Business Opportunity and submitted to the City Engineer each month with its Application for Payment. **DESIGN BUILD CONTRACTOR SHALL DEFEND AND INDEMNIFY THE CITY FROM ANY CLAIMS OR LIABILITY ARISING OUT OF DESIGN BUILD**

CONTRACTOR'S FAILURE TO MAKE THESE PAYMENTS.

9.8.2.1 City may, upon request and at the discretion of City Engineer, furnish to Subcontractor information regarding percentages of completion or the amounts applied for by Design Build Contractor, and action taken thereon by City because of Work done by the Subcontractor.

9.8.2.2 Design Build Contractor shall prepare and submit to City Engineer a Certification of Payment to Subcontractors, Suppliers, persons and entities form to be attached to each monthly Application for Payment.

9.8.3 A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Work by City, does not constitute acceptance of work that is not in accordance with the Contract.

9.9 **DATE OF SUBSTANTIAL COMPLETION**

9.9.1 When Design Build Contractor considers that a Construction Phase, or a portion thereof designated by City Engineer, to be substantially complete, Design Build Contractor shall prepare and submit to City Engineer a comprehensive punch list of items to be completed or corrected. Failure to include an item on the punch list does not alter the responsibility of Design Build Contractor to comply with the Contract Documents.

9.9.1.1 By submitting the punch list to City Engineer, Design Build Contractor represents that work on the punch list will be completed within the time provided for in Section 9.9.4.3.

9.9.2 Upon receipt of Design Build Contractor's punch list, City Engineer will inspect the Work, or designated portion thereof, to verify that the punch list contains all items needing completion or correction. If City Engineer's inspection discloses items not on Design Build Contractor's punch list, the items must be added to the punch list of items to be completed or corrected. If City Engineer's inspection reveals that Design Build Contractor is not yet substantially complete, Design Build Contractor shall complete or correct the deficiencies and

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request another inspection by City Engineer. City may recover the costs of re-inspection from Design Build Contractor. City Engineer will use reasonable efforts to inspect the Construction Phase within a reasonable time following receipt of Design Build Contractor's punch list, and if City Engineer disagrees that Substantial Completion has been achieved, City Engineer will provide written notice as to what remains before Substantial Completion is achieved (but City Engineer shall not be prohibited from identifying other deficiencies later).

9.9.3 Prior to City Engineer's issuing a Certificate of Substantial Completion for the Work or other portion of the Work designated by City Engineer, Design Build Contractor shall also provide:

.1 Certificate of Occupancy (a temporary Certificate of Occupancy is acceptable provided Design Build Contractor promptly and diligently proceeds to obtain a permanent Certificate of Occupancy without conditions) for new construction, or Certificate of Compliance for remodeled work, as applicable;

.2 deliver all operations and maintenance manuals for the Project to City and have them approved by City and provide all training required under the Contract Documents. It is mutually understood and agreed that the Design Build Contractor will make every effort to deliver the operation and maintenance manuals prior to the building or partial building substantial completion date but the requirement for the delivery of all operation manuals shall not be the sole reason for the delay in the issuance of the Certificate of Substantial Completion.

.3 compliance with Texas Accessibility Standards through state inspection of the Work, if required. If Design Build Contractor calls for inspection in a timely manner and the inspection is delayed through no fault of the Design Build Contractor, and City Engineer so confirms, City Engineer may, upon request by Design Build Contractor, add the inspection to the punch list in Section 9.6.2 and issue a Certificate of Substantial Completion.

9.9.4 When the Work, or designated portion thereof, is determined by City Engineer to be sufficiently complete in accordance with the Contract Documents so City can occupy or utilize

the Construction Phase, or designated portion thereof, for the purpose for which it is intended, and all other conditions and requirements are satisfied, City Engineer will prepare a Certificate of Substantial Completion that incorporates the punch list in Section 9.9.2 and establishes:

- .1 Date of Substantial Completion;
- .2 responsibilities of the Parties for security, maintenance, heating, ventilating and air conditioning, utilities, damage to the Work, and insurance; and
- 3 fixed time within which Design Build Contractor shall complete all items on punch list to be corrected or completed accompanying the certificate.

9.9.5 Warranties required by the Contract shall commence on the Date of Substantial Completion of each Construction Phase unless otherwise provided by City Engineer in Certificate of Substantial Completion. Warranties shall not commence on items not completed as of the date of Substantial Completion, until such items are actually completed and accepted.

9.9.6 Design Build Contractor shall complete or correct the items in the Punch List within the time period set out in the Certificate of Substantial Completion. If Design Build Contractor fails to do so, City may issue a Notice of Noncompliance and exercise all of its legal remedies under the Contract Documents, including those remedies set forth in Section 2.5.

9.9.7 Design Build Contractor shall keep the premises free from accumulation of waste materials or rubbish caused by Design Build Contractor's operations. At the completion of the Work, Design Build Contractor shall remove from and about the Project Design Build Contractor's tools, construction equipment, machinery, surplus materials, waste materials and rubbish.

9.9.8 Immediately prior to the review of a portion of the Work for Substantial Completion, Design Build Contractor shall remove all waste materials, rubbish, Design Build Contractor's tools, construction equipment, machinery and surplus materials from the area to be inspected. Design Build Contractor shall also remove all protective coatings, temporary work, barriers and other protective devices.

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- .1 Finished spaces that are to be inspected shall be cleaned as required to remove all stains, dirt and dust. Glass shall be cleaned on both faces, and carpet shall be vacuumed.
- .2 Unfinished spaces such as mechanical and electrical equipment rooms that are to be inspected shall be "broom clean."
- .3 Mechanical work such as duct work, unit heaters, finned tube radiation and its covers, air conditioning units, grilles and registers shall be cleaned as required to remove all stains, dirt and dust.
- .4 Electrical work shall be cleaned as necessary to remove all stains, dirt and dust.

9.9.9 Design Build Contractor shall maintain the Work in a clean condition until City determines the Date of Substantial Completion for the Construction Phase. After the Date of Substantial Completion of the Construction Phase, Design Build Contractor is responsible for removing waste materials, rubbish, dirt and dust caused by its continued operations.

9.9.10 Prior to final acceptance, or prior to City's partial or complete occupancy of a portion of the Work, Design Build Contractor shall do the following: (1) clean all spaces of the Work so that they are ready for City's occupancy without additional cleaning; (2) remove from the Project site all temporary buildings or facilities for that Work unless needed for other portions of the Work; (3) replace filters in air handling equipment according to the Specifications; and (4) replace burned out lamps. This obligation is in addition to and not by way of limitation of Design Build Contractor's obligation to prove the Project complete and ready to use in all respects by the time limits set forth in the Contract Documents.

9.9.11 After the Date of Substantial Completion of a Construction Phase and upon application by Design Build Contractor and approval by City Engineer, City may make payment, reflecting adjustment in retainage, if any, as follows: with the consent of Surety, the City, in the sole discretion of the Director, may increase payment to Design Build Contractor up to ninety-seven and one-half percent (97.5%) of the Guaranteed Maximum Price, less the value of items to be completed and accrued liquidated damages. In addition, before Substantial Completion, with the consent of Surety and in the

sole discretion of the Director, the City may release retainage attributable to early performing Subcontractors or small businesses, to the extent and provided the Design Build Contractor submits proof such sums have been actually paid to such Subcontractors and small businesses.

9.9.12 Design Build Contractor shall complete or correct the items in Section 9.9.2 within the time period set out in the Certificate of Substantial Completion. If Design Build Contractor fails to do so, the City may issue a Notice of Non-Compliance and proceed according to Section 2.5.

9.10 PARTIAL OCCUPANCY OR USE

9.10.1 City may occupy or use any completed or partially completed portion of the Work that is less than a completed Construction Phase of the Work, provided the occupancy or use is consented to by Design Build Contractor and Design Build Contractor's insurer and authorized by public authorities having jurisdiction over the Work. Consent of Design Build Contractor to partial occupancy or use may not be unreasonably withheld.

- .1 Occupancy by City of a completed Construction Phase of the Work shall not require any consent.

9.10.2 Immediately prior to the partial occupancy or use, City Engineer and Design Build Contractor shall jointly inspect the area to be occupied or portion of the Work to be used to determine and record condition of the Work.

9.10.3 Partial occupancy or use of a portion of the Work does not constitute acceptance of Work not in compliance with requirements of the Contract Documents.

9.11 FINAL COMPLETION AND FINAL PAYMENT

9.11.1 Design Build Contractor shall review the Contract and inspect the Work prior to Design Build Contractor notification to City Engineer that the Work is complete and ready for final inspection. Design Build Contractor shall submit an affidavit that Design Build Contractor has inspected the Work and that the Work is complete

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in accordance with the requirements of the Contract Documents.

9.11.2 City Engineer will make final inspection within fifteen (15) days after receipt of Design Build Contractor's written notice that the Work is ready for final inspection and acceptance. If City Engineer finds the Work has been completed in accordance with the Contract, Design Build Contractor shall submit items set out in Section 9.11.4 and a final Application for Payment. Within thirty (30) days of receipt of the items set out in Section 9.11.4, the City Engineer may perform an audit to determine the accuracy of Design Build Contractor's accounting of the Costs of the Work and the Final Application for Payment. City Engineer will, within ten (10) days thereafter, either notify the Design Build Contractor that the Design Build Contractor has not achieved Final Completion of the Construction Phase as provided in Section 9.11.3 or issue a Certificate of Final Completion stating that to the best of City Engineer's knowledge, information, and belief, the Work has been completed in accordance with the Contract. If there is only one Construction Phase, City Engineer will recommend acceptance of the Work and recommend release of the remaining retainage by City Council. If there is more than one Construction Phase, the Parties shall confer upon the issuance of each Certificate of Final Completion to determine whether it is appropriate to seek City Council acceptance of the Work and release of the remaining retainage held for the particular Construction Phase that is certified as complete. Failing mutual agreement of the Parties to seek City Council acceptance and release of the remaining retainage, City shall continue to hold the remaining retainage for the particular Construction Phase until such time as the Parties mutually agree to seek City Council acceptance and release of the remaining retainage for such Construction Phase.

9.11.3 Should Work be found not in compliance with requirements of the Contract Documents, City Engineer will notify Design Build Contractor in writing of items of noncompliance. Upon inspection and acceptance of the corrections by City Engineer, compliance with all procedures of Section 9.11.2, and Design Build Contractor's submission of the items set out in Section 9.11.4, City Engineer will issue Certificate of Final Completion to Design Build Contractor's as provided in Section 9.11.2.

9.11.4 Design Build Contractor shall submit the following items to City Engineer before City Engineer will issue a Certificate of Final Completion:

- .1 affidavit that payrolls, invoices for materials and equipment, and other indebtedness of Design Build Contractor connected with the Phase of the Work, less amounts withheld by City, have been paid or otherwise satisfied. If required by City Engineer, Design Build Contractor shall submit further proof including waiver or release of lien or claims from Subcontractors, Suppliers, laborers (which may be conditioned upon City making payment to Design Build Contractor);
- .2 certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect, will not be canceled or materially changed until at least 30 days written notice has been given to City ;
- .3 written statement that Design Build Contractor knows of no substantial reason that insurance will not be renewable to cover the Correction Period required by the Contract Documents;
- .4 consent of Surety to final payment;
- .5 copies of record documents, maintenance manuals, tests, inspections, and approvals and deliver the required record documents that describe changes or deviations from the Contract Documents, which occurred during construction and that reflect the actual "as-built" conditions of the completed Work; and
- .6 compliance with Texas Accessibility Standards through state inspection of the Work, if required.

9.11.5 If Design Build Contractor fails to submit required items in Section 9.11.4 within 10 days of City Engineer's inspection of the Work under Section 9.11.2 or Section 9.11.3, City Engineer may, but is not obligated to:

- .1 deduct liquidated damages accrued from monies held;
- .2 proceed to City Council for acceptance of the Work, minus some or

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all of the items Design Build Contractor fails to submit under Section 9.11.4; and, .3 upon acceptance by City Council of the portion of the Work completed, either make final payment as set out in Section 9.11.8 or request that City Attorney interplead the balance due to Design Build Contractor under the Contract into the registry of a court of appropriate jurisdiction.

9.11.6 If final completion is materially delayed through no fault of Design Build Contractor, or by issuance of Change Orders affecting Date of Final Completion, and City Engineer so confirms, City may, upon application by Design Build Contractor and certification by City Engineer, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted.

9.11.7 Upon City Engineer's issuance of a Certificate of Final Completion, Design Build Contractor may request an increase in payment to ninety-nine percent (99%) of all amounts earned and payable under this Agreement, less accrued liquidated damages.

9.11.8 If remaining balance due for work not corrected is less than retainage stipulated in the Contract, Design Build Contractor shall submit to City Engineer written consent of Surety to payment of balance due for that portion of the Work fully completed and accepted, prior to certification of the payment. The payment is made under terms governing final payment, except that it does not constitute waiver of Claims.

9.11.9 Final Payment. The City will make final payment to Design Build Contractor within thirty (30) days after the issuance of the Certificate of Final Completion by City Engineer and acceptance of the Work by City Council, subject to limitations, if any, as stated in the Contract. City is entitled to deduct from any payment any amounts owed by Design Build Contractor to City, including accrued liquidated damages.

9.11.10 Acceptance of final payment by Design Build Contractor shall constitute a waiver of all Claims, whether known or unknown, by Design Build Contractor, except those previously

made in writing and identified by Design Build Contractor as unsettled at time of final Application for Payment.

9.12 LIQUIDATED DAMAGES

9.12.1 Liquidated damages for late completion of the Work shall be assessed as set forth in the Master Agreement.

9.12.2 Design Build Contractor shall pay the City an amount equal to \$1,200.00 per diesel operating vehicle or piece of motorized equipment per incident of high sulfur diesel fuel usage.

9.13 DESIGN BUILD CONTRACTOR'S CLEAN AIR INCENTIVE

9.13.1 SPECIAL PROVISION: INCENTIVE FOR USING NONROAD DIESEL EQUIPMENT POWERED BY DIESEL ENGINES THAT MEET EPA TIER 1, 2, 3 STANDARDS, OR A TCEQ-APPROVED RETROFIT EQUIVALENT, IN HOUSTON NONATTAINMENT AREA.

9.13.1.2 PURPOSE, SCOPE AND DURATION. This special provision establishes the conditions for the incentive offered to persons performing construction under a City of Houston contract who use non-road equipment powered by diesel (compression-ignition) engines rated at 50 horsepower or above that meet certain exhaust emission standards. Incentive payments shall only be made for non-road equipment that is required and used on the Project Site, as more fully described below. This special provision is intended to assist the Houston-Galveston-Brazoria region to attain compliance with the State Implementation Plan mandated under the Clean Air Act, 42 U.S.C. § 7401 et seq.

9.13.1.3 ELIGIBLE EQUIPMENT.

9.13.1.3.1 For purposes of this special provision, "Non-road Diesel Equipment" means equipment: (a) whose primary design is for operation in non-highway environments and as such, is not titled or licensed by the state of Texas for use on state roadways. (e.g., construction equipment); and (b) that is powered by or that utilizes one or more non-road diesel-fueled compression-ignition engines that meet the emission standards for oxides of nitrogen (NOx) or non-methane hydrocarbon (NMHC) + NOx set

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forth at 40 CFR § 89.112(a) (“Tier 1, 2 or 3 standards”) non-road engines. Each non-road engine on each piece of Non-road Diesel Equipment must meet the Tier 1, 2 or 3 emission standards to qualify for an incentive payment.

9.13.1.3.2 Each engine must be verified by the EPA or California Air Resources Board (CARB) or otherwise accepted by the Texas Commission on Environmental Quality (TCEQ) as meeting the EPA Tier 1, 2 or 3 emission standards, and must be rated as 50 horsepower or above. The engine must be new, rebuilt or remanufactured. A rebuilt or remanufactured engine shall contain only original equipment manufacturer (OEM) components and must have been purchased from the OEM or its authorized dealers/distributors. A rebuilt or remanufactured engine provided by another entity may be accepted, if it has been certified by the TCEQ as meeting the Tier 1, 2 or 3 standards. In addition, retrofitting an existing diesel engine or adding devices to existing non-road diesel engines will make the equipment eligible for the incentive payment if the retrofit or add-on devices result in air emissions that otherwise meet EPA Tier 1, 2, or 3 standards.

9.13.1.4 **NONROAD DIESEL EQUIPMENT MUST BE USED ON THE PROJECT SITE.** In order to qualify for incentive payments, all Non-road Diesel Equipment must be used in the performance of work on the Project as defined under this Contract or on a Project-specific location that supports only the Project and is within one (1) mile of the Project (“Project Site”).

9.13.1.5 **DOCUMENTATION**

9.13.1.5.1 Design Build Contractor shall furnish, prior to award of the Contract, a list of Non-road Diesel Equipment that Design Build Contractor proposes to qualify under subsection (2) of this special provision for use in the performance of Project work. The list shall include the following information:

9.13.1.5.1.1 An assigned Design Build Contractor-unique identification number, which shall be prominently placed on the exterior of individual pieces of Equipment;

9.13.1.5.1.2 The dates each piece of Equipment is anticipated to arrive and depart the Project Site, and an indication of whether the

Equipment will be used in performance of Project work;

9.13.1.5.1.3 For each piece of Equipment: the make, description, model number, identification number, and model year;

9.13.1.5.1.4 For each engine: the make, model, identification number, model year, horsepower rating, test group (family code); and

9.13.1.5.1.5 Certification by EPA, CARB or TCEQ, and the Tier 1, 2 or 3 emission standards claimed.

9.13.1.5.2 Design Build Contractor shall also submit to the Project Manager a report with its monthly request or estimate for payment that identifies what Nonroad Diesel Equipment was used on the Project during that month. The monthly reports shall include, but not be limited to, the equipment and engine identification number, how often the equipment was used required on the Project Site; and such other documentation as the Project Manager may require. The Project Manager may also require that reports and other documentation be submitted in an electronic format acceptable to the Project Manager.

9.13.1.5.3 Design Build Contractor shall provide to the Project Manager, upon request, copies of any or all equipment or engine certifications that are the basis for a request for payment. Design Build Contractor shall provide the requested copies within 15 business days after receipt of the request.

9.13.1.5.4 Failure of Design Build Contractor to submit a report or other documentation as required in this Paragraph 9.13.1.5.4 shall waive the Design Build Contractor’s right to receive any incentive payment under this special provision for the period in question. The City of Houston may inspect each item of Nonroad Diesel Equipment used by the Contractor on the Project to insure compliance with the terms of this special provision, and to confirm Contractor’s reports. If the Project Manager reasonably believes that Design Build Contractor has provided inaccurate or false information, the City at Project Manager’s sole option, may revoke Contractor’s qualification for the incentive payment, may terminate incentive payments, may adjust incentive payments, and take such other action as s/he

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deems appropriate.

9.13.1.6 INCENTIVE PAYMENT

9.13.1.6.1 The City shall pay Design Build Contractor an incentive at the following rates for Design Build Contractor's compliance with the terms of this special provision. Except as otherwise provided, the payment rates shall be calculated by multiplying the units of horsepower that each engine is rated to produce, by the payment rate, which shall increase according to the emission standard as indicated below.

EPA Tier Or Equivalent	Incentive Payment Rate per Engine Horsepower Rating
1	\$0.50
2	\$0.75
3	\$1.00

9.13.1.6.2 The Project Manager shall review the requests for payment to confirm that the Nonroad Diesel Equipment is eligible and was required to support the Project work. The Project Manager shall adjust any request for payment for an incentive for use of Nonroad Diesel Equipment as provided in Paragraph 9.13.2.5.3. The Project Manager may reject any request for an incentive payment if the Project Manager deems the Equipment is ineligible. Design Build Contractor may protest in writing any adjustment within 30 calendar days of receipt of the adjusted incentive payment. Design Build Contractor shall be deemed to have accepted the adjusted incentive payment if no protest is received by the Project Manager within the 30-day period.

9.13.1.6.3 The Project Manager shall adjust the calculation of any incentive payment for any Nonroad Diesel Equipment that was on the Project Site for less than 30 calendar days. For example, adjustments shall be made for eligible equipment that arrives or was not used on the Project Site until after the 1st day of a month or leaves or is not used on the Project site before the last day of the month. The incentive payment shall be reduced as follows:

- a. When the total is 7 calendar days or less, the incentive payment rate shall be multiplied by 0.10.

- b. When the total is 8 calendar days or more but 15 calendar days or less, the incentive payment rate shall be multiplied by 0.25.
- c. When the total is 16 calendar days or more but 22 calendar days or less, the incentive payment rate shall be multiplied by 0.50.
- d. When the total is 23 calendar days or more but less than the entire month, the incentive payment rate shall be multiplied by 0.75.

(Example: A 125 h.p. front-end loader, rated at Tier 2, was used for 20 calendar days on a project. The Contractor incentive would be (\$0.75 X 125h.p. = \$93.75 X 0.50 adj. factor for days of use = \$46.88.)

9.13.1.6.4 The incentive payments under this special provision shall not exceed \$20,000.

ARTICLE 10 - SAFETY PRECAUTIONS

10.1 SAFETY PROGRAMS

10.1.1 Design Build Contractor is responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with performance of the Contract. Design Build Contractor shall submit a safety program to City Engineer prior to mobilizing for the Work, and is solely responsible for safety, efficiency, and adequacy of ways, means, and methods, and for damage which might result from failure or improper construction, maintenance, or operation performed by Design Build Contractor.

10.2 POLLUTANTS AND POLLUTANT FACILITIES

10.2.1 If Design Build Contractor encounters material on-site that it reasonably believes to be a Pollutant or facilities that it reasonably believes to be a Pollutant Facility, Design Build Contractor shall immediately stop work in affected area and immediately notify City Engineer, confirming the notice thereafter in writing.

10.2.2 If City Engineer determines that the material is a Pollutant or facility is a Pollutant Facility, work in affected area may not be resumed except by Modification, and only if the work would not violate applicable laws or regulations.

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10.2.3 If City Engineer determines that the material is not a Pollutant or a facility is not a Pollutant Facility, work in affected area will be resumed upon issuance of a Modification.

10.2.4 Design Build Contractor is not required to perform, unless authorized by Change Order, work relating to Pollutants or Pollutant Facilities except for that work relating to Pollutants or Pollutant Facilities specified in the Contract.

10.3 SAFETY OF THE ENVIRONMENT, PERSONS, AND PROPERTY

10.3.1 Design Build Contractor shall take reasonable precautions for safety and shall provide reasonable protection to prevent damage, injury, or loss from all causes, to:

- .1 employees performing work on-site, and other persons who may be affected thereby;
- .2 work, including Products to be incorporated into the Work, whether in proper storage, under control of Design Build Contractor or Subcontractor; and
- .3 other property at or adjacent to the site, such as trees, shrubs, lawns, walks, pavements, roadways, structures, utilities, and Underground Facilities not designated for removal or replacement in course of construction.

10.3.2 Design Build Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations, and lawful orders of public authorities bearing on safety of persons, property, or environment.

10.3.2.1 Design Build Contractor shall comply with requirements of Underground Facility Damage Prevention and Safety Act TEX. UTIL. CODE ANN. Ch. 251 (Vernon Supp. 2002).

10.3.2.2 Design Build Contractor shall comply with all safety rules and regulations of the Federal Occupational Health and Safety Act of 1970 and subsequent amendments (OSHA).

10.3.3 Design Build Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection of persons

and property, including posting danger signs and other warnings against hazards, promulgating safety regulations, and notifying owners and users of adjacent sites and utilities.

10.3.4 Design Build Contractor shall designate a responsible member of Design Build Contractor's organization at site whose duty is prevention of accidents. This person will be Design Build Contractor's Superintendent unless otherwise designated by Design Build Contractor in writing to City Engineer.

10.3.5 Design Build Contractor shall prevent windblown dust and shall not burn or bury trash debris or waste products on-site or use sewers for disposal of trash or debris. Design Build Contractor shall prevent unlawful and other environmental pollution, including but not limited to particulates, gases and noise, as a result of the Work.

10.3.6 When use or storage of hazardous materials or equipment, or unusual methods are necessary for execution of the Work, Design Build Contractor shall exercise utmost care and carry on the activities under supervision of properly qualified personnel.

10.3.7 Design Build Contractor shall promptly remedy damage and loss to property referred to in Sections 10.3.1.2 and 10.3.1.3, caused in whole or in part by Design Build Contractor, or Subcontractors, which is not covered by insurance required by the Contract. Design Build Contractor is not required to remedy damage or loss attributable to City, or other City contractors.

10.4 EMERGENCIES

10.4.1 In emergencies affecting safety of persons or property, Design Build Contractor shall act at Design Build Contractor's discretion to prevent imminent damage, injury, or loss. Additional compensation or extension of time claimed by Design Build Contractor because of emergencies are determined as provided in Article 7.

ARTICLE 11 - INSURANCE AND BONDS

11.1 GENERAL INSURANCE REQUIREMENTS

11.1.1 With no intent to limit Design Build Contractor's liability under indemnification and other provisions set forth in this Contract, Design Build Contractor shall provide and maintain in full force and effect during Term of the Contract and all extensions and amendments thereto, at least the following insurance and available limits of liability.

11.1.2 If any of the following insurance is written as "claims made" coverage and City is required to be carried as additional insured, then Design Build Contractor's insurance shall include a two-year extended discovery period after last date that Design Build Contractor provides any work under the Contract.

11.1.3 Aggregate amounts of coverage, for purposes of the Contract, are agreed to be amounts of coverage available during fixed 12-month policy period.

11.1.4 Design Build Contractor shall be liable to City for any required coverage that City does not have or costs, damage, losses, or liability incurred by City (including attorneys' fees) due to Design Build Contractor's failure to purchase and maintain required insurance.

11.2 INSURANCE TO BE PROVIDED BY DESIGN BUILD CONTRACTOR

11.2.1 *Risks and Limits of Liability:* Design Build Contractor shall provide at a minimum insurance coverage and limits of liability set out in Table 1, with no gaps in coverage between primary and excess coverage.

11.2.1.1 If Limit of Liability for Excess Coverage is \$2,000,000 or more, Limit of Liability for Employer's Liability may be reduced to \$500,000.

11.2.2 *Form of Policies:* Insurance may be in one or more policies of insurance, form of which is subject to approval by City Engineer. It is agreed, however, that nothing City Engineer does or fails to do with regard to insurance policies relieves Design Build Contractor from its duties to provide required coverage and City

Engineer's actions or inactions will never be construed as waiving City's rights.

11.2.3 *Issuers of Policies:* Issuer of any policy shall have:

- .1 a Certificate of Authority to transact business in Texas, or
- .2 have a Best's rating of at least B+ and a Best's Financial Size Category of Class VI or better, according to the most current edition of Best's Key Rating Guide, and the issuer must be an eligible nonadmitted insurer in the State of Texas.

Each insurer is subject to approval by City Engineer in City Engineer's sole discretion as to conformance with these requirements, pursuant to Section 11.2.2.

11.2.4 *Insured Parties:* The City shall be an Additional Insured under this Agreement. Each policy, except those for Workers' Compensation and professional liability, must name the City, its officers, agents, and employees as Additional Insured parties on original policy and all renewals or replacements during term of the Contract. City's status as additional insured under Design Build Contractor's insurance does not extend to instances of sole negligence of City unmixed with any fault of Design Build Contractor.

11.2.5 *Deductibles:* Design Build Contractor assumes and bears any claims or losses to extent of deductible amounts and waives any claim it may ever have for same against City, its officers, agents, or employees. All Design Build Contractor insurance claim deductibles are a Cost of the Work to the extent such deductibles are paid by Design Build Contractor.

11.2.6 *Cancellation:* Design Build Contractor shall notify the Director in writing 30 days prior to any cancellation or material change to Design Build Contractor's insurance coverage. Within the 30 day period, Design Build Contractor shall provide other suitable policies in lieu of those about to be canceled or nonrenewed so as to maintain in effect the required coverage. If Design Build Contractor does not comply with this requirement, the City Engineer, at his or her sole discretion, may immediately suspend Design Build Contractor from

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any further performance under this Contract and begin procedures to terminate for default.

11.2.7 *Subrogation:* Design Build Contractor waives any claim or right in nature of subrogation to recover against City, its officers, agents, or employees. Each policy must contain an endorsement waiving such claim.

11.2.8 *Endorsement of Primary Insurance:* Each policy, except Workers' Compensation and professional liability policies, must contain an endorsement that the policy is primary insurance to any other insurance available to additional insured with respect to claims arising under the Contract Documents.

11.2.9 *Liability for Premium:* Design Build Contractor is solely responsible for payment to insurers of all insurance premium requirements hereunder and the City is not obligated to pay any premiums to insurers.

11.2.10 *Additional Requirements for Workers' Compensation Insurance Coverage:* Design Build Contractor shall, in addition to meeting the obligations set forth in Table 1, maintain throughout the term of the Contract Workers' Compensation coverage as required by statute, and Design Build Contractor shall specifically comply with requirements set forth in Section 11.2.10. The definitions set out below shall apply only for purposes of this Section 11.2.10.

11.2.10.1 Definitions:

.1 *Certificate of Coverage:* A copy of certificate of insurance, or coverage agreement (TWCC-81, TWCC-82, TWCC-83, or TWCC-84), showing statutory Workers' Compensation insurance coverage for Design Build Contractor's, Subcontractor's, or Supplier's employees providing services for the duration of the Contract.

.2 *Duration of the Work:* Includes the time from Date of Commencement of the Work until Design Build Contractor's work under the Contract has been completed and accepted by City Council.

.3 *Persons providing services for the Work;* as required under Section 406.096 of the Texas Labor Code, as may be amended from time to time, for employees of Design Build Contractor and Subcontractor employees.

11.2.10.2 Design Build Contractor shall provide coverage, based on proper reporting of classification codes and payroll amounts and filing of coverage agreements, which meets the statutory requirements of Texas Labor Code, Section 401.011(44) for employees of Design Build Contractor providing services on the Work, for duration of the Work.

11.2.10.3 Design Build Contractor shall provide a Certificate of Coverage to City prior to beginning performance.

11.2.10.4 If coverage period shown on Design Build Contractor's original Certificate of Coverage ends during duration of the Work, Design Build Contractor shall file new Certificate of Coverage with City showing that coverage has been extended.

11.2.10.5 Design Build Contractor shall obtain from each person providing services on the Work, and provide to City Engineer:

.1 Certificate of Coverage, prior to that person beginning work on the Work, so City will have on file Certificates of Coverage showing coverage for all persons providing services on the Work; and

.2 no later than seven days after receipt by Design Build Contractor, new Certificate of Coverage showing extension of coverage, if coverage period shown on current Certificate of Coverage ends during the duration of the Work.

11.2.10.6 Design Build Contractor shall retain all required Certificates of Coverage for the duration of the Work and for one year thereafter.

11.2.10.7 Design Build Contractor shall notify City Engineer in writing by certified mail or personal delivery, within ten (10) days after Design Build Contractor knew or should have known, of any change that materially affects provision of coverage of any person providing services on the Work.

11.2.10.8 Design Build Contractor shall post on-site a notice, in text, form and manner prescribed by Texas Workers' Compensation Commission, informing all persons providing services on the Work that they are required to be

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covered, and stating how person may verify coverage and report lack of coverage.

Coverage to be provided to person for whom they are providing services.

11.2.10.9 Design Build Contractor shall contractually require each person with whom it contracts to provide services on the Work to:

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

.2 provide to Design Build Contractor, prior to that person's beginning work on the Work, a Certificate of Coverage showing that coverage is being provided for all employees of the person providing services on the Work, for the duration of the Work;

.3 provide Design Build 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 Work;

.4 obtain from each other person with whom it contracts, and provide to Design Build Contractor: (1) Certificate of Coverage, prior to other person's beginning work on the Work; and (2) new Certificate of Coverage showing extension of coverage, prior to end of coverage period, if coverage period shown on the current Certificate of Coverage ends during duration of the Work.

.5 retain all required Certificates of Coverage on file for the duration of the Work and for one year thereafter;

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

.7 contractually require each person with whom it contracts to perform as required by Sections 11.2.10.1 through 11.2.10.7, with Certificates of

11.2.10.10 By signing the Contract or providing or causing to be provided a Certificate of Coverage, Design Build Contractor is representing to City that all employees of Design Build Contractor who will provide services on the Work will be covered by Workers' Compensation coverage for the duration of the Work, that coverage will be based on proper reporting of classification codes and payroll amounts, and that all coverage agreements will be filed with appropriate insurance carrier. Design Build Contractor is not allowed to self-insure Workers' Compensation. Design Build Contractor may be subject to administrative penalties, criminal penalties, civil penalties, or other civil actions for providing false or misleading information.

11.2.10.11 Design Build Contractor's failure to comply with Section 11.2.10 is a breach of the Contract by Design Build Contractor, which entitles City to declare the Contract void if Design Build Contractor does not remedy breach within ten (10) days after receipt of notice of breach from City Engineer.

11.2.11 *Subcontractor Insurance Requirements:* Design Build Contractor shall require Subcontractors and Suppliers to obtain Commercial General Liability, Workers' Compensation, Employer's Liability and Automobile Liability coverage that meets all the coverage requirements of Section 11.2. The limits of liability may be reduced less in the discretion of the Director. Design Build Contractor shall require all Subcontractors with whom it contracts directly, whose subcontracts exceed \$100,000, to provide proof of all insurance coverage meeting the above requirements. Design Build Contractor shall deliver such certificates of insurance to City. Design Build Contractor shall comply with all requirements set out under Section 11.2.10 as to Workers' Compensation Insurance for all Subcontractors and Suppliers. Additionally, if any Subcontractor will be performing any Work that may involve environmental liabilities, Design Build Contractor shall ensure that Pollution Liability coverage in the amount of \$2,000,000 per occurrence and \$2,000,000 in the aggregate is obtained prior to commencement of the Work, and its shall include contractual liability, cleanup

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costs, abatement, transport, and non-owned disposal sites, including bodily injury and environmental damage arising from pollution conditions caused in performance of operations,

including asbestos and lead if part of operations (MCS-90 endorsement; \$1,000,000 CSL to Auto Policy and removal of Pollution exclusion).

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TABLE 1
REQUIRED COVERAGE

Coverage	Limit of Liability
Workers' Compensation	Statutory Limits for Workers' Compensation
Employer's Liability	Bodily Injury by Accident \$1,000,000 (each accident) Bodily Injury by Disease \$1,000,000 (policy limit) Bodily Injury by Disease \$1,000,000 (each employee)
Commercial General Liability: Including Design Build Contractor's Protective, Broad Form Property Damage, Contractual Liability, Explosion, Underground and Collapse, Bodily Injury, Personal Injury, Products, and Completed Operations (for a period of one year following completion of the Work).	Combined single limit of \$1,000,000 (each occurrence), subject to a per project general aggregate of \$2,000,000; and a per project Products and Completed Operations \$5,000,000 aggregate.
Installation Floater (Unless alternative coverage approved by the City Attorney)	Value of stored material or equipment, listed on Certificates of Payments, but not yet incorporated into the Work
Automobile Liability Insurance: (For automobiles furnished by Design Build Contractor in course of his performance under the Contract, including Owned, Non-owned, and Hired Auto coverage)	\$1,000,000 combined single limit each occurrence for (1) Any Auto or (2) All Owned, Hired, and Non-owned Autos. \$10,000,000 for autos on Airfield
Excess Coverage	\$10,000,000 each occurrence/combined aggregate in excess of limits specified for Employer's Liability, Commercial General Liability, and Automobile Liability
Property & Casualty Coverage: "All Causes of Loss" Builders Risk Form for direct physical damage to building or plant construction on Project site. [Including but not limited to earthquake, flood, boiler and Machinery -- including testing, damage to existing or adjoining property, time element coverage, collapse, soft costs (Management, architecture, financial costs, pre-opening costs, etc.), transit coverage, off-site storage]	100% Contract Price, including all change orders
Professional Liability Coverage: No policy exclusions of any kind	\$5,000,000 per claim/aggregate
Aggregate Limits are per 12-month policy period unless otherwise indicated.	

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11.3 PROOF OF INSURANCE

11.3.1 Prior to commencing the Construction Work and at the request of City Engineer at any time during the term of the Construction Contract, Design Build Contractor shall furnish City Engineer with Certificates of Insurance along with Affidavit from Design Build Contractor confirming the Certificate accurately reflects insurance coverage that is available during Term of the Contract. Additionally, Design Build Contractor shall furnish the City Engineer with endorsement forms CG24040509-Waiver of Transfer of Rights of Recovery against Others; CA04030604-Additional Insured Endorsement; CAT353-Business Auto Extension Endorsement; WC 42304A-Workers Compensation Waiver of Transfer of Rights of Recovery against Others, or others that may be approved by City Engineer. If requested in writing by City Engineer, Design Build Contractor shall furnish City Engineer with certified copies of Design Build Contractor's actual insurance policies. Failure of Design Build Contractor to provide certified copies, as requested, may be deemed, at City Engineer's or City Attorney's discretion, a material breach of the Contract. 6

11.3.2 Notwithstanding the proof of insurance requirements, Design Build Contractor shall continuously maintain in effect required insurance coverage set forth in Section 11.2. Failure of Design Build Contractor to comply with this requirement does constitute a material breach by Design Build Contractor allowing City, at its option, to immediately suspend or terminate Design Build Contractor from performing the Work, or exercise any other remedy allowed under the Contract Documents. Design Build Contractor agrees that City has not waived or is not estopped to assert a material breach of the Contract because of any acts or omissions by City regarding its review or non-review of insurance documents provided by Design Build Contractor, its agents, employees, or assigns. 9

11.4 PERFORMANCE AND PAYMENT BONDS

11.4.1 For Contracts over the value of \$25,000, Design Build Contractor shall provide Bonds on City's standard forms covering faithful performance of the Contract and payment of obligations arising thereunder as required in the Contract pursuant to Chapter 2253 of the Government Code, except for the

Preconstruction Services. The Bonds must be for 100 percent of Guaranteed Maximum Price, or if a Guaranteed Maximum Price has not been determined, in the amount of the Project Budget, and in accordance with conditions stated on standard City Performance and Payment Bond and Statutory Payment Bond forms. Bonds may be obtained from Design Build Contractor's usual source if it meets the requirements of the Contract Documents and is acceptable to City Engineer, and cost for the Bonds are included in the Guaranteed Maximum Price.

11.5 MAINTENANCE BONDS

11.5.1 *Maintenance Bond:* Design Build Contractor shall provide Bond on an approved City Maintenance Bond form, providing for Design Build Contractor's correction, replacement, or restoration of any portion of the Work which is found to be not in compliance with requirements of the Contract during Correction Period required in Section 12.2. The Maintenance Bond must be for 25% of the Guaranteed Maximum Price.

11.5.2 One-year Surface Correction Bond: Design Build Contractor shall provide, on the City standard form, an additional one year Bond in an amount equal to four percent of the Original Contract Price or cost of repair. Bond shall provide for Design Build Contractor's correction, replacement, or restoration of backfill or subsurface and surface work not in accordance with the Contract, within one year from the date the One-year Maintenance Bond has expired.

11.6 SURETY

11.6.1 A Bond that is given or tendered to City pursuant to the Contract must be executed by a surety company that is authorized and admitted to write surety Bonds in the State of Texas.

11.6.2 If a Bond is given or tendered to City pursuant to the Contract in an amount greater than 10 percent of Surety's capital and surplus, Surety shall provide certification that Surety has reinsured that portion of the risk that exceeds 10 percent of Surety's capital and surplus. The reinsurance must be with one or more reinsurers who are duly authorized, accredited, or trusted to do business in the State of Texas. The amount reinsured by reinsurer may not exceed 10 percent of reinsurer's capital and surplus. The amount of

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allowed capital and surplus must be based on information received from State Board of Insurance.

11.6.3 If the amount of a Bond is greater than \$100,000, Surety shall:

.1 also hold certificate of authority from the United States Secretary of Treasury to qualify as surety on obligations permitted or required under federal law; or, **10**

.2 Surety may obtain reinsurance for any liability in excess of \$100,000 from reinsurer that is authorized and admitted as a reinsurer in the State of Texas and is the holder of a certificate of authority from the United States Secretary of the Treasury to qualify as surety or reinsurer on obligations permitted or required under federal law.

11.6.4 Determination of whether Surety on the Bond or the reinsurer holds a certificate of authority from the United States Secretary of the Treasury is based on information published in Federal Register covering the date on which Bond was executed.

11.6.5 Each Bond given or tendered to City pursuant to the Contract must be on City forms with no changes made by Design Build Contractor or Surety, and must be dated, executed, and accompanied by power of attorney stating that the attorney in fact executing such the bond has requisite authority to execute such Bond. The Bonds must be dated and must be no more than 30 days old.

11.6.6 Surety shall designate in its Bond, power of attorney, or written notice to City, an agent resident in Harris County to whom any requisite notices may be delivered and on whom service of process may be had in matters arising out of the suretyship.

11.6.7 Design Build Contractor shall furnish information to a payment bond beneficiary as required by TEX. GOV'T CODE ANN. CH. 2253.

11.6.8 In the event the Surety becomes unacceptable to the City during the Course of the Project, Design Build Contractor shall furnish

replacement Bonds from an acceptable Surety upon written notice.

11.7 DELIVERY OF BONDS

11.7.1 Design Build Contractor shall deliver required Bonds to City within time limits stated in the Contract Documents or such earlier date as required by City Engineer and in any event prior to Date of Commencement of the Work.

ARTICLE 12 - UNCOVERING AND CORRECTION OF THE WORK

12.1 UNCOVERING OF THE WORK

12.1.1 If a portion of the Work has been covered that City Engineer has not specifically asked to observe prior to its being covered, City Engineer may request to see such work and it must be uncovered by Design Build Contractor. If such work is in accordance with the Contract Documents, the costs of uncovering and covering such Work that qualify as Costs of the Work are charged to City by Change Order in accordance with Article 7. If such Work is not in accordance with the Contract Documents, Design Build Contractor shall pay for uncovering and shall correct the nonconforming Work promptly after receipt of Notice of Noncompliance to do so.

12.2 CORRECTION OF THE WORK

12.2.1 Design Build Contractor shall promptly correct or remove work rejected by City Engineer as failing to conform to requirements of the Contract, whether observed before or after the Date of Substantial Completion of a Construction Phase and whether fabricated, Installed, or completed.

12.2.2 Design Build Contractor bears the costs of correcting the rejected or nonconforming work including additional testing and inspections, and expenses made necessary thereby.

12.2.3 If within one year after Date of Substantial Completion of a Construction Phase or after the date of commencement of warranties established under Section 9.6.5, or by other applicable special warranty required by the Contract, whichever is later in time, any of the Work is found not to be in accordance with the requirements of the Contract, Design Build

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Contractor shall correct such work promptly after receipt of Notice of Noncompliance to do so.

12.2.4 The Correction Period does not establish a duration for the Design Build Contractor's general warranty under Section 3.12 and other obligations under the Contract. City retains the right to recover damages from the Design Build Contractor as long as may be permitted by the applicable statutes of limitations and repose.

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12.2.5 If Design Build Contractor does not proceed with correction of the nonconforming work within the reasonable time fixed by Notice of Noncompliance, City may correct nonconforming work or remove nonconforming work and store salvageable Products at Design Build Contractor's expense. Design Build Contractor shall pay the costs of correction of nonconforming work and removal and storage of salvageable Products to City. If Design Build Contractor does not pay costs of the correction or removal and storage within 10 days after written notice, City may sell the Products at auction or at private sale. City will account for proceeds thereof after deducting costs and damages that would have been borne by Design Build Contractor, including compensation for services of city's design consultant and necessary expenses. If the proceeds of sale do not cover costs that Design Build Contractor should have borne, Design Build Contractor shall pay the value of the deficiency to City.

12.2.6 Design Build Contractor shall pay the cost of correcting work originally installed by Design Build Contractor, City, or by separate Contractors and damaged by Design Build Contractor's correction or removal of Design Build Contractor's Work.

12.3 ACCEPTANCE OF NONCONFORMING WORK

12.3.1 If City Engineer prefers to accept work which is not in accordance with requirements of the Contract Documents, City Engineer may do so only by issuance of Change Order, instead of requiring its removal and correction. City Engineer and the Design Build Contractor will mutually agree on the Guaranteed Maximum Price reduction. The reduction will become effective even if final payment has been made.

ARTICLE 13 - MISCELLANEOUS PROVISIONS

13.1 GOVERNING LAWS

13.1.1 The Contract is subject to the laws of the State of Texas, the City Charter and Ordinances, the laws of the federal government of the United States, and all rules and regulations of any regulatory body or officer having jurisdiction.

13.1.2 Venue for any litigation relating to the Contract is Harris County, Texas.

13.2 SUCCESSORS

13.2.1 The Contract binds and benefits the Parties and their legal successors and permitted assigns; however, this Section 13.2.1 does not alter the restrictions on assignment and disposal of assets set out in Section 13.3.1. The Contract does not create any personal liability on the part of any officer or agent of City.

13.3 BUSINESS STRUCTURE AND ASSIGNMENTS

13.3.1 Design Build Contractor may not assign the Contract at law or otherwise, or dispose of all or substantially all of its assets without City Engineer's prior written consent (nor shall any member of the joint venture, if Design Build Contractor is a joint venture). Nothing in this Section, however, prevents the assignment of accounts receivable or the creation of a security interest as described in §9.406 of the Texas Business & Commerce Code. In the case of such an assignment, Design Build Contractor shall immediately furnish City with proof of the assignment and the name, telephone number, and address of the assignee and a clear identification of the fees to be paid to the assignee.

13.3.2 Any series, as defined by the TEX. BUS. ORG. CODE ANN., affiliate, subsidiary, or successor to which Design Build Contractor assigns or transfers assets shall join in privity and be jointly and severally liable under this Contract.

13.4 WRITTEN NOTICE

13.4.1 All notices required or permitted by the Contract must be in writing and must be effected by hand delivery; registered or certified

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mail, return receipt requested; or facsimile with confirmation copy mailed to receiving Party. Notice is sufficient if made or addressed with proper postage to the address stated in the Agreement for each Party ("Notice Address") or faxed to the facsimile number stated in the Agreement for each Party. The notice is deemed delivered on the earlier of:

- .1 the date the Notice is actually received;
- .2 the third day following deposit in a United States Postal Service post office or receptacle; or
- .3 the date the facsimile is sent unless the facsimile is sent after 5:00 p.m. local time of the recipient and then it is deemed received on the following day.

Any Party may change its Notice Address or facsimile number at any time by giving written notice of the change to the other Party in the manner provided for in this Section at least 15 days prior to the date the change becomes effective..

13.5 RIGHTS AND REMEDIES

13.5.1 Duties and obligations imposed by the Contract and rights and remedies available thereunder are in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law.

13.5.2 No act or failure to act by City or Design Build Contractor is a waiver of rights or duties afforded them under the Contract, nor does the act or failure to act constitute approval of or acquiescence in a breach of the Contract. No waiver, approval or acquiescence is binding unless in writing and, in the case of City, signed by City Engineer.

13.6 TESTS AND INSPECTIONS

13.6.1 Design Build Contractor shall give City Engineer timely notice of the time and place where tests and inspections are to be made. Design Build Contractor shall cooperate with inspection and testing personnel to facilitate required inspections or tests.

13.6.2 City will employ and pay for services of an independent testing laboratory to perform

inspections or acceptance tests required by the Contract Documents except:

- .1 inspections or tests covered by Section 13.6.3;
- .2 those otherwise specifically provided in the Contract Documents; or
- .3 costs incurred in connection with tests or inspections conducted pursuant to Section 12.2.2.

13.6.3 Design Build Contractor is responsible for and shall initially pay all costs in connection with inspection or testing required in connection with City Engineer's acceptance of a Product to be incorporated into the Work, or of materials, mix designs, or equipment submitted for approval prior to Design Build Contractor's purchase thereof for incorporation into the Work.

13.6.4 Neither observations by City Engineer, nor inspections, tests, or approvals by others, relieves Design Build Contractor from Design Build Contractor's obligations to perform the Work in accordance with the Contract Documents.

13.6.5 If testing, inspection, or approval reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, Design Build Contractor shall bear all costs made necessary by such failure, including those of repeated procedures and compensation for City's services and expenses.

13.7 INTEREST

13.7.1 No interest will accrue on late payments by City except as provided under Chapter 2251 of the Government Code.

13.8 PARTIES IN INTEREST

13.8.1 The Contract does not bestow any rights upon any third party, but binds and benefits the Parties only.

13.9 ENTIRE CONTRACT

13.9.1 The Contract merges the prior negotiations and understandings of the Parties and embodies the entire agreement of the Parties. No other agreements, assurances,

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conditions, covenants, express or implied, or other terms of any kind, exist between the Parties regarding the Contract.

13.10 WRITTEN AMENDMENT

13.10.1 Changes to the Contract that cannot be made by Modifications, must be made by written amendment, which will not be effective until approved by City Council.

13.11 COMPLIANCE WITH LAWS

13.11.1 Design Build Contractor shall comply with the Americans with Disabilities Act of 1990 as amended (ADA) and Texas Architectural Barriers Act and all regulations relating to either statute. 23

13.11.2 Design Build Contractor shall comply with all applicable federal, state, and City laws, ordinances, rules and regulations. Nothing herein shall be construed to require that Design Build Contractor ensures that the contract documents are prepared in accordance with applicable laws.

13.12 ENFORCEMENT

13.12.1 City Attorney or designee has the right to enforce all legal rights and obligations under the Contract without further authorization.

13.13 SEVERABILITY

13.13.1 If any part of the Contract is for any reason found to be unenforceable, all other parts remain enforceable to the extent permitted by law.

ARTICLE 14 - TERMINATION OR SUSPENSION OF THE CONTRACT

14.1 TERMINATION BY THE CITY FOR CAUSE

14.1.1 Each of the following acts or omissions of Design Build Contractor or occurrences shall constitute an "Event of Default" under the Contract:

.1 Design Build Contractor refuses or fails to supply enough properly skilled workers or proper Products;

.2 Design Build Contractor disregards laws, ordinances, rules, regulations, or orders of a public authority having jurisdiction;

.3 Design Build Contractor is guilty of material breach of any duty or obligation of Design Build Contractor under the Contract, including, but not limited to, failure to submit certified payrolls electronically;

.4 Design Build Contractor has had any other contract with City terminated for cause at any time subsequent to the effective date of the Contract as set out in the Agreement; or,

.5 Design Build Contractor fails to utilize Ultra Low Sulfur Diesel Fuel, as required in Section 3.9.1.1.

14.1.2 If an Event of Default occurs, City Engineer may, at his option and without prejudice to any other rights or remedies which City may have, deliver a written notice to Design Build Contractor and Surety describing the Event of Default and giving the Design Build Contractor ten (10) days to commence and diligently pursue the cure of the Event of Default. If after the ten (10) day cure period, Design Build Contractor has failed or refused to commence and diligently pursue the cure of the Event of Default, then City Engineer may deliver a second written notice to Design Build Contractor and Surety giving notice of the termination of the Contract or of the termination of Design Build Contractor's performance under the Contract ("Notice of Termination"). If City Engineer issues a Notice of Termination, then City Engineer may, subject to any prior rights of Surety and any other rights of City under the Contract Documents or at law:

.1 request that Surety take over and restart the Work within thirty (30) days of termination and complete the Work within a reasonable period of time as established by the City Engineer; or

.2 take possession of the site and all materials, equipment, tools, and construction equipment and machinery on the site owned by Design Build Contractor; and

.3 finish the Work by whatever reasonable method City Engineer may deem expedient.

14.1.3 After Design Build Contractor's receipt of a Notice of Termination, and except as otherwise directed in writing by City Engineer, Design Build Contractor shall:

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- .1 stop the Work on the date and to the extent specified in the Notice of Termination;
- .2 place no further orders or subcontracts for Products or services;
- .3 suspend all orders and subcontracts to the extent that they relate to performance of work terminated;
- .4 assign to City, in the manner, at the times, and to the extent directed by City Engineer, all rights, title, and interest of Design Build Contractor, under the terminated supply orders and subcontracts. City may settle or pay claims arising out of termination of the orders and subcontracts;
- .5 settle all outstanding liabilities and all claims arising out of the termination of supply orders and subcontracts with approval of City Engineer;
- .6 take action as may be necessary, or as City Engineer may direct, for protection and preservation of property related to the Work that is in possession of Design Build Contractor, and in which City has or may acquire an interest; and
- .7 secure the Work in a safe state before leaving the site, return all rented equipment, providing any necessary safety measures, shoring, or other devices.

14.1.4 If City terminates the Contract or terminates Design Build Contractor's performance under the Contract for any one or more of the reasons stated in Section 14.1.1, Design Build Contractor may not receive any further payment until the Work is complete, subject to Section 14.1.5.

14.1.5 If the unpaid balance of the Guaranteed Maximum Price exceeds the costs of finishing the Work, including liquidated damages and other amounts due under the Contract, the balance will be paid to City. If the costs of finishing the Work exceed the unpaid balance, Design Build Contractor shall, within 10 days of receipt of written notice setting out the amount of the excess costs, pay the difference to City. The amount to be paid to Design Build Contractor or City will be certified by City Engineer in writing, and this obligation for payment shall survive termination of the Contract or termination of Design Build Contractor's performance under the Contract. Termination of the Design Build Contractor for cause shall not relieve the Surety from its obligation to complete the Project.

14.1.6. An adjudicated improper termination for cause by the City shall be converted to a termination for convenience and the Contractor's entitlement shall be as set forth in Section 14.2.

14.2 TERMINATION BY THE CITY FOR CONVENIENCE

14.2.1 City Engineer may, without cause and without prejudice to any other rights or remedies of City, give Design Build Contractor and Surety a Notice of Termination with seven (7) days written notice.

14.2.2 After receipt of City's Notice of Termination, and except as otherwise approved by City Engineer, Design Build Contractor shall conform to requirements of Section 14.1.3.

14.2.3 After receipt of the Notice of Termination, Design Build Contractor shall submit to City its termination Claim, in forms required by City Engineer. The Claim will be submitted to City promptly, but no later than six months from the effective date of termination, unless one or more extensions are granted by City Engineer in writing. If Design Build Contractor fails to submit its termination Claim within the time allowed, in accordance with Section 14.2.4, City Engineer will determine, on the basis of available information, the amount, if any, due to Design Build Contractor because of termination, and City Engineer's determination is final and binding on the Parties. City will then pay to Design Build Contractor the amount so determined.

14.2.4 City Engineer will determine, on the basis of information available to City Engineer, the amount due, if any, to Design Build Contractor for the termination as follows:

.1 Payment for all Work performed in accordance with the Contract Documents up to the date of termination determined in the manner prescribed for monthly payments in Article 9 and other applicable Contract Documents, except no retainage is withheld by City with respect to the terminated Work either for payment determined by percentage of completion or for materials and equipment delivered to the site, in storage or in transit.

.2 Reasonable termination expenses that would qualify as Cost of the Work, including, to

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the extent they qualify as Costs of the Work, costs for settling and paying Subcontractor and Supplier claims arising out of termination of the Work under their respective Subcontracts and purchase orders, reasonable cost of preservation and protection of City's property after termination if required, and the cost of Claim preparation Termination expenses do not include field or central office overhead, salaries of employees of Design Build Contractor or litigation costs (including, but not limited to, attorneys' fees).

No amount is allowed for anticipated profit or central office overhead on uncompleted work, or any cost or lost profit for other business of Design Build Contractor alleged to be damaged by the termination.

14.2.5 Design Build Contractor shall promptly remove from the site any construction equipment, tools, and temporary facilities not needed for Work not terminated, except the temporary facilities that City Engineer may wish to purchase and retain.

14.2.6 Design Build Contractor shall cooperate with City Engineer during the transition period.

14.2.7 City will take possession of the Work and materials delivered to the site, in storage, or in transit, as of date or dates specified in the Notice of Termination, and is responsible for maintenance, utilities, security, and insurance, as stated in Notice of Termination.

14.3 SUSPENSION BY THE CITY FOR CONVENIENCE

14.3.1 City Engineer may, without cause, after giving Design Build Contractor and Surety 24-hour prior written notice, order Design Build Contractor to suspend, delay, or interrupt the Work in whole or in part for a period of time as City Engineer may determine.

14.3.2 An adjustment will be made in Contract Time equivalent to the time of suspension.

14.3.3 Adjustment will be made to Guaranteed Maximum Price for increases in the Cost of the Work, caused by such suspension, delay, or interruption of the Work plus a proportionate increase in the Design Build Contractor's Fee in accordance with Section 7.3. No adjustment shall be made to the extent that:

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

14.4 TERMINATION BY DESIGN BUILD CONTRACTOR

14.4.1 Design Build Contractor may terminate the Contract if the Work is stopped for a period of 30 days through no act or fault of Design Build Contractor, directly related to one of these events:

- .1 issuance of an order of a court or other public authority having jurisdiction, other than the City acting in its role as a project owner;
- .2 act of government, such as a declaration of national emergency that makes material unavailable; or,
- .3 if repeated suspensions, delays, or interruptions by City as described in Section 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;

No termination will be effective for the above reasons if Design Build Contractor shall deliver written notice to City Engineer describing the reason for termination, giving the proposed termination date, and granting City a reasonable opportunity to respond and cure any City default before termination is effective.

14.4.2 If the Contract is terminated pursuant to this Section 14.4, Design Build Contractor shall comply with the requirements of Sections 14.2.2 through 14.2.7.

END OF DOCUMENT

EXHIBIT E

GUARANTEED MAXIMUM PRICE PROPOSAL

_____ (“DESIGN BUILD CONTRACTOR”) hereby submits to the City of Houston Texas (“the City”) pursuant to the provisions of the Design Build Contractor Agreement by and between the City and DESIGN BUILD CONTRACTOR dated _____, a Guaranteed Maximum Price (“GMP”) for the Project (as defined in the Agreement) based on the Contract Documents (as defined by the Agreement), as follows:

- 1. Cost of the Work \$ _____
 - a. Included in the Cost of the Work above are the Design Services during Phase 2-Construction \$ _____
 - b. Included in the Cost of the Work above are the General Conditions Work for the Project \$ _____
 - c. The following Cash Allowances are included in the Cost of the Work above:
 - 1. _____
 - 2. _____
 - d. The following Alternates are included in the Cost of the Work above:
 - 1. _____
 - 2. _____
 - e. The following Unit Priced Work is included in the Cost of the Work above:
 - 1. _____
 - 2. _____
 - f. The following Contingency is included in the Cost of the Work above:
 - 1. \$ _____

2. Construction Phase Fee (___%): \$ _____
Percentage of (Cost of the Work minus Pass-through items and Cash Allowances)

3. Guaranteed Maximum Price (GMP) \$ _____
(GMP = 1 + 2 + 3)

For GMP Proposal Cost Breakdown see Exhibit 1 attached hereto.

4. The GMP for the Project includes all Claims, Work, and Change Orders in existence before date of signing this GMP.

5. The Contract Documents upon which the GMP is based are set forth in Exhibit 7 attached hereto.

6. Design/Build Contractor shall provide complete performance of the Work for the GMP. In the event of a conflict among the Contract Documents, the Design/Build Contractor shall fulfill the greater of the requirements set forth in the Agreement, the Document 00700 – General Conditions, the Specifications, the Drawings, the Project criteria, and needs of the City.
7. The Clarifications & Assumptions made by the Design/Build Contractor are set forth in Exhibit 4.
8. Design/Build Contractor shall achieve Substantial Completion of the Pre-Construction Milestone within 197 Calendar Days from Notice to Proceed and Substantial Completion of Phase 2- Construction Milestone within 366 Calendar Days from Notice to Proceed.
9. Design/Build Contractor waives all rights to an extension of time or delay damages for any events or circumstances prior to the date of signing this GMP.

The following exhibits are incorporated into the GMP:

1. Exhibit 1 – GMP Proposal Cost Breakdown
2. Exhibit 2 – Project Team and Burden Rates
3. Exhibit 3 – Schedule of Values
4. Exhibit 4 – Clarifications & Assumptions
5. Exhibit 5 – Insurance
6. Exhibit 6 – Bonds
7. Exhibit 7 – Contract Documents
8. Exhibit 8 – Project Schedule
9. Exhibit 9 – Addendum(a) and Rider(s)

The insurance and bonds for this Guaranteed Maximum Price form have been reviewed as to form by the undersigned legal assistant and have been found to meet established Legal Department criteria. Legal Department has not reviewed the content of this document or its exhibits, except for Exhibit 5 and Exhibit 6.

Legal Assistant

Date

CITY ENGINEER

DB

Name: _____

[Design Build Contractor]

Date of Signing: _____

Signature: _____

Name: _____

Title: _____

Date of Signing: _____

EXHIBIT F

FORMS OF BONDS

The following documents are incorporated by reference:

- City of Houston Standard Document No. 00610 – Performance Bond
- City of Houston Standard Document No. 00611 – Payment Bond
- City of Houston Standard Document No. 00612 – One-Year Maintenance Bond

EXHIBIT G
CITY'S WAGE RATES

EXHIBIT H
PROJECT SCHEDULE