

## Attachment 1

### *University System of New Hampshire USNH General Conditions of the Contract for Design-Build Version 1.3*

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## Attachment 1

### USNH General Conditions of the Contract for Design-Build

#### ARTICLE 1 GENERAL PROVISIONS

##### 1.1 BASIC DEFINITIONS

###### 1.1.1 THE DESIGN-BUILD DOCUMENTS

The Design-Build Documents form the Design-Build Contract. The Design-Build Documents consist of the Agreement between Owner and Design-Builder and its attached Exhibits; Supplementary and other Conditions; Addenda issued prior to execution of the Agreement; the Project Program, including changes to the Project Program proposed by the Design-Builder and accepted by the Owner, if any; the Design-Builder's Proposal and written modifications to the Proposal accepted by the Owner, if any; other documents listed in this Agreement; and Modifications issued after execution of this Agreement. The Design-Build Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Owner, (2) between the Owner and a Contractor or Subcontractor, or (3) between any persons or entities other than the Owner and Design-Builder, including but not limited to any consultant retained by the Owner to prepare or review the Project Criteria.

###### 1.1.2 PROJECT PROGRAM

The Project Program describes the character, scope, and appearance of the Project, materials and systems; quality levels, performance standards, requirements or criteria and major equipment layouts.

###### 1.1.3 ARCHITECT

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

###### 1.1.4 CONTRACTOR

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

###### 1.1.5 SUBCONTRACTOR

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

###### 1.1.6 THE WORK

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

###### 1.1.7 THE PROJECT

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

## **1.2 COMPLIANCE WITH APPLICABLE LAWS**

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

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

## **1.3 CAPITALIZATION**

**1.3.1** Terms capitalized in these General Conditions of the Contract for Design-Build include those which are (1) specifically defined, or (2) the titles of numbered articles and identified references to sections in the document.

## **1.4 INTERPRETATION**

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

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

## **1.5 EXECUTION OF THE DESIGN-BUILD DOCUMENTS**

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

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

## **1.6 OWNERSHIP AND USE OF DOCUMENTS AND ELECTRONIC DATA**

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

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

- 1.6.3** Prior to any electronic exchange by the parties of the Instruments of Service or any other documents or materials to be provided by one party to the other, the Owner and the Design-Builder shall agree in writing on the specific conditions governing the format thereof, including any special limitations or licenses not otherwise provided in the Design-Build Documents.
- 1.6.4** If this Agreement is terminated for any reason other than the default of the Owner, each of the Design-Builder's design professionals, including the Architect, shall be contractually required to convey to the Owner a non-exclusive license to use that design professional's Instruments of Service for the completion, use and maintenance of the Project, conditioned upon the Owner's written notice to that design professional of the Owner's assumption of the Design-Builder's contractual duties and obligations to that design professional and payment to that design professional of all amounts due to that design professional and its consultants. The Design-Builder shall incorporate the requirements of this Section 1.6.4 in all agreements with its design professionals.
- 1.6.5** Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the Design-Builder's or Design-Builder's Architect's copyrights or other reserved rights.

## **ARTICLE 2 OWNER**

### **2.1 GENERAL**

- 2.1.1** The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Design-Build Documents as if singular in number. The term "Owner" means the Owner or the Owner's authorized representative. The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all Project matters requiring the Owner's approval or authorization. The Owner shall render decisions in a timely manner and in accordance with the Design-Builder's schedule submitted to the Owner.
- 2.1.2** The Owner shall furnish to the Design-Builder within 15 days after receipt of a written request information necessary and relevant for the Design-Builder to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein.
- 2.2 INFORMATION AND SERVICES REQUIRED OF THE OWNER**
- 2.2.1** The Owner shall, at the written request of the Design-Builder, prior to commencement of the Work and thereafter, furnish to the Design-Builder reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract. After such evidence has been furnished, the Owner shall not materially vary such financial arrangements without prior notice to the Design-Builder.
- 2.2.2** Except for permits and fees, including those required under Section 3.7.1, which are the responsibility of the Design-Builder under the Design-Build Documents, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities
- 2.2.3** The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and if applicable a legal description of the site. The Design-Builder shall be entitled to rely reasonably on the accuracy of information furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.
- 2.2.4** Information or services required of the Owner by the Design-Build Documents shall be furnished by the Owner with reasonable promptness. Any other information or services relevant to the Design-Builder's performance of the Work under the Owner's control shall be furnished by the Owner after receipt from the Design-Builder of a written request for such information or services.

## **2.3 OWNER REVIEW AND INSPECTION**

- 2.3.1** The Owner shall review and approve or take other appropriate action upon the Design-Builder's submittals, including but not limited to design and construction documents, required by the Design-Build Documents, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Design-Build Documents. The Owner's action shall be taken with such reasonable promptness as to cause no delay in the Work or in the activities of the Design-Builder or separate contractors. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details, such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Design-Builder as required by the Design-Build Documents.
- 2.3.2** Upon review of the design documents, construction documents, or other submittals required by the Design-Build Documents, the Owner shall take one of the following actions:
- .1** Determine that the documents or submittals are in conformance with the Design-Build Documents and approve them.
  - .2** Determine that the documents or submittals are in conformance with the Design-Build Documents but request changes in the documents or submittals which shall be implemented by a Change in the Work.
  - .3** Determine that the documents or submittals are not in conformity with the Design-Build Documents and reject them.
  - .4** Determine that the documents or submittals are not in conformity with the Design-Build Documents, but accept them by implementing a Change in the Work.
  - .5** Determine that the documents or submittals are not in conformity with the Design-Build Documents, but accept them and request changes in the documents or submittals which shall be implemented by a Change in the Work.
- 2.3.3** The Design-Builder shall submit to the Owner for the Owner's approval, pursuant to Section 2.3.1, any proposed change or deviation to previously approved documents or submittals. The Owner shall review each proposed change or deviation to previously approved documents or submittals which the Design-Builder submits to the Owner for the Owner's approval with reasonable promptness in accordance with Section 2.3.1 and shall make one of the determinations described in Section 2.3.2.
- 2.3.4** Notwithstanding the Owner's responsibility under Section 2.3.2, the Owner's review and approval of the Design-Builder's documents or submittals shall not relieve the Design-Builder of responsibility for compliance with the Design-Build Documents unless a) the Design-Builder has notified the Owner in writing of the deviation prior to approval by the Owner or, b) the Owner has approved a Change in the Work reflecting any deviations from the requirements of the Design-Build Documents.
- 2.3.5** The Owner may visit the site to keep informed about the progress and quality of the portion of the Work completed. However, the Owner shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. Visits by the Owner shall not be construed to create an obligation on the part of the Owner to make on-site inspections to check the quantity or quality of the Work. The Owner shall neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Design-Builder's rights and responsibilities under the Design-Build Documents, except as provided in Section A.3.3.7.
- 2.3.6** The Owner shall not be responsible for the Design-Builder's failure to perform the Work in accordance with the requirements of the Design-Build Documents. The Owner shall not have control over or charge of and will not be responsible for acts or omissions of the Design-Builder, Architect, Contractors, or their agents or employees, or any other persons or entities performing portions of the Work for the Design-Builder.
- 2.3.7** The Owner may reject Work that does not conform to the Design-Build Documents. Whenever the Owner considers it necessary or advisable, the Owner shall have authority to require inspection or testing of the Work in accordance with Section 13.5.2, whether or not such Work is fabricated, installed or completed.

However, neither this authority of the Owner nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Owner to the Design-Builder, the Architect, Contractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.

- 2.3.8 The Owner may appoint an on-site project representative to observe the Work and to have such other responsibilities as the Owner and the Design-Builder agree to in writing.
- 2.3.9 The Owner shall conduct inspections to determine the date or dates of Substantial Completion and the date of final completion.

## **2.4 OWNER'S RIGHT TO STOP WORK**

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

## **2.5 OWNER'S RIGHT TO CARRY OUT THE WORK**

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

## **ARTICLE 3 DESIGN-BUILDER**

### **3.1 GENERAL**

- 3.1.1 The Design-Builder is the person or entity identified as such in the Agreement and is referred to throughout the Design-Build Documents as if singular in number. The term "Design-Builder" means the Design-Builder or the Design-Builder's authorized representative. The Design-Builder's representative is authorized to act on the Design-Builder's behalf with respect to the Project.
- 3.1.2 The Design-Builder shall perform the Work in accordance with the Design-Build Documents.

### **3.2 DESIGN SERVICES AND RESPONSIBILITIES**

- 3.2.1 When applicable law requires that services be performed by licensed professionals, the Design-Builder shall provide those services through the performance of qualified persons or entities duly licensed to practice their professions. The Owner understands and agrees that the services performed by the Design-Builder's Architect and the Design-Builder's other design professionals and consultants are undertaken and performed in the sole interest of and for the exclusive benefit of the Design-Builder.
- 3.2.2 The agreements between the Design-Builder and Architect or other design professionals identified in the Agreement, and in any subsequent Modifications, shall be in writing. These agreements, including services and financial arrangements with respect to this Project, shall be promptly and fully disclosed to the Owner upon the Owner's written request.
- 3.2.3 The Design-Builder shall be responsible to the Owner for acts and omissions of the Design-Builder's employees, Architect, Contractors, Subcontractors and their agents and employees, and other persons or

entities, including the Architect and other design professionals, performing any portion of the Design-Builder's obligations under the Design-Build Documents.

- 3.2.4** The Design-Builder shall carefully study and compare the Design-Build Documents, materials and other information provided by the Owner pursuant to Section 2.2, shall take field measurements of any existing conditions related to the Work, shall observe any conditions at the site affecting the Work, and report promptly to the Owner any errors, inconsistencies or omissions discovered.
- 3.2.5** The Design-Builder shall provide to the Owner for Owner's written approval design documents sufficient to establish the size, quality and character of the Project; its architectural, structural, mechanical and electrical systems; and the materials and such other elements of the Project to the extent required by the Design-Build Documents. Deviations, if any, from the Design-Build Documents shall be disclosed in writing.
- 3.2.6** Upon the Owner's written approval of the design documents submitted by the Design-Builder, the Design-Builder shall provide construction documents for review and written approval by the Owner. The construction documents shall set forth in detail the requirements for construction of the Project. The construction documents shall include drawings and specifications that establish the quality levels of materials and systems required. Deviations, if any, from the Design-Build Documents shall be disclosed in writing. Construction documents may include drawings, specifications, and other documents and electronic data setting forth in detail the requirements for construction of the Work, and shall:
- .1** be consistent with the approved design documents;
  - .2** provide information for the use of those in the building trades; and
  - .3** include documents customarily required for regulatory agency approvals.
- 3.2.7** The Design-Builder shall meet with the Owner periodically to review progress of the design and construction documents.
- 3.2.8** Upon the Owner's written approval of construction documents, the Design-Builder, with the assistance of the Owner, shall prepare and file documents required to obtain necessary approvals of governmental authorities having jurisdiction over the Project.
- 3.2.9** The Design-Builder shall obtain from each of the Design-Builder's professionals and furnish to the Owner certifications with respect to the documents and services provided by such professionals (a) that, to the best of their knowledge, information and belief, the documents or services to which such certifications relate (i) are consistent with the Project Criteria set forth in the Design-Build Documents, except to the extent specifically identified in such certificate, (ii) comply with applicable professional practice standards, and (iii) comply with applicable laws, ordinances, codes, rules and regulations governing the design of the Project; and (b) that the Owner and its consultants shall be entitled to rely upon the accuracy of the representations and statements contained in such certifications.
- 3.2.10** If the Owner requests the Design-Builder, the Architect or the Design-Builder's other design professionals to execute certificates other than those required by Section 3.2.9, the proposed language of such certificates shall be submitted to the Design-Builder, or the Architect and such design professionals through the Design-Builder, for review and negotiation at least 14 days prior to the requested dates of execution. Neither the Design-Builder, the Architect nor such other design professionals shall be required to execute certificates that would require knowledge, services or responsibilities beyond the scope of their respective agreements with the Owner or Design-Builder.

### **3.3 CONSTRUCTION**

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

- 3.3.2** The construction Work shall be in accordance with approved submittals, except that the Design-Builder shall not be relieved of responsibility for deviations from requirements of the Design-Build Documents by the Owner's approval of design and construction documents or other submittals such as Shop Drawings, Product Data, Samples or other submittals unless the Design-Builder has specifically informed the Owner in writing of such deviation at the time of submittal and (1) the Owner has given written approval to the specific deviation as a minor change in the Work, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Design-Builder shall not be relieved of responsibility for errors or omissions in design and construction documents or other submittals such as Shop Drawings, Product Data, Samples or other submittals by the Owner's approval thereof.
- 3.3.3** The Design-Builder shall direct specific attention, in writing or on resubmitted design and construction documents or other submittals such as Shop Drawings, Product Data, Samples or similar submittals, to revisions other than those requested by the Owner on previous submittals. In the absence of such written notice, the Owner's approval of a resubmission shall not apply to such revisions.
- 3.3.4** When the Design-Build Documents require that a Contractor provide professional design services or certifications related to systems, materials or equipment, or when the Design-Builder in its discretion provides such design services or certifications through a Contractor, the Design-Builder shall cause professional design services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professionals, if prepared by others, shall bear such design professional's written approval. The Owner shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professionals.
- 3.3.5** The Design-Builder shall be solely responsible for and have control over all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Design-Build Documents.
- 3.3.6** The Design-Builder shall keep the Owner informed of the progress and quality of the Work.
- 3.3.7** The Design-Builder shall be responsible for the supervision and direction of the Work, using the Design-Builder's best skill and attention. If the Design-Build Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Design-Builder shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures. If the Design-Builder determines that such means, methods, techniques, sequences or procedures may not be safe, the Design-Builder shall give timely written notice to the Owner and shall not proceed with that portion of the Work without further written instructions from the Owner. If the Design-Builder is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Design-Builder, the Owner shall be solely responsible for any resulting loss or damage.
- 3.3.8** The Design-Builder shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work.
- 3.4 LABOR AND MATERIALS**
- 3.4.1** Unless otherwise provided in the Design-Build Documents, the Design-Builder shall provide or cause to be provided and shall pay for design services, labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.
- 3.4.2** When a material is specified in the Design-Build Documents, the Design-Builder may make substitutions only with the consent of the Owner and, if appropriate, in accordance with a Change Order.



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

### **3.5 WARRANTY**

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

**3.5.2** The warranty required by this Section 3.5 shall be in addition to and not in limitation of any other warranty required by the Design-Build Documents or otherwise prescribed by law.

**3.5.3** The Design-Builder shall procure and deliver to the Owner, no later than the Date of Substantial Completion, all warranties required by the Design-Build Documents.

### **3.6 TAXES**

**3.6.1** The Design-Builder shall pay all sales, consumer, use and similar taxes for the Work provided by the Design-Builder which had been legally enacted on the date of the Agreement, whether or not yet effective or merely scheduled to go into effect. The Owner is an institution exempt from sales tax; Owner will provide Design-Builder with its tax exemption number.

### **3.7 PERMITS, FEES AND NOTICES**

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

**3.7.2** The Design-Builder shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities relating to the Project. The Design-Builder shall be responsible for scheduling all tests and inspections required by authorities having jurisdiction.

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

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

### **3.8 ALLOWANCES**

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

**3.8.2** Unless otherwise provided in the Design-Build Documents:

- .1** allowances shall cover the cost to the Design-Builder of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;
- .2** Design-Builder's costs for unloading and handling at the site, labor, installation costs, overhead, profit and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum but not in the allowances; and

- .3 whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Section 3.8.2.1 and (2) changes in Design-Builder's costs under Section 3.8.2.2.
- 3.8.3** Materials and equipment under an allowance shall be selected by the Owner in sufficient time to avoid delay in the Work.
- 3.9 SUPERINTENDENT**
- 3.9.1** The Design-Builder shall employ a competent superintendent and necessary assistants, who shall be at the Project site during performance of the Work. The superintendent shall represent the Design-Builder, and communications given to the superintendent shall be as binding as if given to the Design-Builder. Important communications shall be confirmed in writing. Other communications shall be similarly confirmed on written request in each case.
- 3.9.2** The Design-Builder shall coordinate and supervise the work performed by Contractors and/or Subcontractors to ensure that the Work is carried out without conflict between trades and so that no trade, at any time, causes delay to the general progress of the Work. The Design-Builder and all Contractors and all Subcontractors at all times shall afford each trade, any separate contractor, or the Owner, every reasonable opportunity for the installation of their work and the storage of materials.
- 3.9.3** The Design-Builder shall arrange for and attend job meetings with the Owner and such other persons as the Owner may from time to time wish to have present. The Design-Builder shall be represented by a principal, project manager, general superintendent, or other authorized main office representative, as well as by the Design-Builder's own superintendent. An authorized representative of any Contractor or Subcontractor shall attend such meetings if the representative's presence is requested by the Owner. Such representatives shall be empowered to make binding commitments on all matters to be discussed at such meetings, including costs, payments, Change Orders, time schedules, and manpower. Any notices required under the Contract may be served on such representatives.
- 3.10 DESIGN-BUILDER'S SCHEDULE**
- 3.10.1** The Design-Builder, promptly after execution of the Design-Build Contract, shall prepare and submit for the Owner's information the Design-Builder's schedule for the Work. The schedule shall not exceed time limits and shall be in such detail as required under the Design-Build Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Design-Build Documents, shall provide for expeditious and practicable execution of the Work and shall include allowances for periods of time required for the Owner's review and for approval of submissions by authorities having jurisdiction over the Project.
- 3.10.2** The Design-Builder shall prepare and keep current a schedule of submittals required by the Design-Build Documents.
- 3.10.3** The Design-Builder shall perform the Work in general accordance with the most recent schedules submitted to the Owner.
- 3.10.4** The Design-Builder's schedule shall be prepared and maintained using Primavera, Microsoft Project, or equivalent computer software, shall clearly show the critical path of the entire Project, and shall show long lead time items and critical material and equipment delivery dates.
- 3.10.5** The Design-Builder shall revise the construction schedule at appropriate intervals as required by the conditions of the Work and Project. At a minimum, an up-to-date schedule shall be submitted with each Requisition for Payment, and within seven days following receipt of information by the Design-Builder, which the Design-Builder believes may result in a change of completion date.

### **3.11 DOCUMENTS AND SAMPLES AT THE SITE**

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

### **3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES**

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

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

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

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

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

**3.12.6** By approving and submitting Shop Drawings, Product Data, Samples and similar submittals, the Design-Builder represents that the Design-Builder has determined and verified materials, field measurements and field construction criteria related thereto, or will do so, and has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Design-Build Documents.

### **3.13 USE OF SITE**

**3.13.1** The right of possession of the premises and the improvements made thereon by the Design-Builder shall remain at all times with the Owner. The Design-Builder's right to entry and use thereof arises solely from the permission granted by the Owner under the Design-Build Documents. The Design-Builder shall confine operations at the site to areas permitted by law, ordinances, permits and the Design-Build Documents, and shall not unreasonably encumber the site with materials or equipment.

### **3.14 CUTTING AND PATCHING**

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

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

### **3.15 CLEANING UP**

**3.15.1** The Design-Builder shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Design-Build Contract. At completion of the Work, the Design-Builder shall remove from and about the Project waste materials, rubbish, the Design-Builder's tools, construction equipment, machinery and surplus materials. Immediately prior to the Owner's

inspection for Substantial Completion, the Design-Builder shall completely clean the premises. Concrete and ceramic surfaces shall be cleaned and washed. Resilient coverings shall be cleaned, waxed, and buffed. Woodwork shall be dusted and cleaned. Sash, fixtures and equipment shall be thoroughly cleaned. Stains, spots, dust marks, and smears shall be removed from all surfaces. Hardware and all metal surfaces shall be cleaned and polished. Glass and plastic surfaces shall be thoroughly cleaned by professional window cleaners. All damaged, broken, or scratched glass or plastic shall be replaced by the Design-Builder at the Design-Builder's expense.

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

### **3.16 ACCESS TO WORK**

**3.16.1** The Design-Builder shall provide the Owner access to the Work in preparation and progress wherever located.

### **3.17 ROYALTIES, PATENTS AND COPYRIGHTS**

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

### **3.18 INDEMNIFICATION**

**3.18.1** To the fullest extent permitted by law, and to the extent claims, damages, losses or expenses are not covered by insurance purchased by the Design-Builder in accordance with Paragraph 11.1, the Design-Builder shall indemnify and hold harmless the Owner, Owner's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death or to injury to or destruction of tangible property other than the Work itself, but only to the extent caused by the negligent acts or omissions of the Design-Builder, Architect, a Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.

**3.18.2** In claims against any person or entity indemnified under this Section 3.18 by an employee of the Design-Builder, the Architect, a Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Section 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Design-Builder, the Architect or a Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

## **ARTICLE 4 DISPUTE RESOLUTION**

### **4.1 CLAIMS AND DISPUTES**

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

- 4.1.2 Time Limits on Claims.** Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the other party. After a Change Order has been implemented, no additional Claim based on the same scope of Work will be considered.
- 4.1.3 Continuing Performance.** Pending final resolution of a Claim, except as otherwise agreed in writing or as provided in Section 9.7.1 and Article 14, the Design-Builder shall proceed diligently with performance of the Design-Build Contract and the Owner shall continue to make payments in accordance with the Design-Build Documents.
- 4.1.4 Claims for Concealed or Unknown Conditions.** If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Design-Build Documents or (2) unknown physical conditions of an unusual nature which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Design-Build Documents, then the observing party shall give notice to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Owner shall promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Design-Builder's cost of, or time required for, performance of any part of the Work, shall negotiate with the Design-Builder an equitable adjustment in the Contract Sum or Contract Time, or both. If the Owner determines that the conditions at the site are not materially different from those indicated in the Design-Build Documents and that no change in the terms of the Design-Build Contract is justified, the Owner shall so notify the Design-Builder in writing, stating the reasons. Claims by the Design-Builder in opposition to such determination must be made within 21 days after the Owner has given notice of the decision. If the conditions encountered are materially different, the Contract Sum and Contract Time shall be equitably adjusted, but if the Owner and Design-Builder cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall proceed pursuant to Section 4.2.
- 4.1.5 Claims for Additional Cost.** If the Design-Builder wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.6.
- 4.1.6** If the Design-Builder believes additional cost is involved for reasons including but not limited to (1) an order by the Owner to stop the Work where the Design-Builder was not at fault, (2) a written order for the Work issued by the Owner, (3) failure of payment by the Owner, (4) termination of the Design-Build Contract by the Owner, (5) Owner's suspension or (6) other reasonable grounds, Claim shall be filed in accordance with this Section 4.1.
- 4.1.7 Claims for Additional Time**
- 4.1.7.1** If the Design-Builder wishes to make Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Design-Builder's Claim shall not be valid unless it is submitted in accordance with time limits established by Section 4.1.2, includes an estimate of cost and of probable effect of delay in the progress of the Work, and demonstrates the specific impact of the Claim on the critical path shown on the Design-Builder's current construction schedule. The Design-Builder shall have the burden of demonstrating such impact, and shall furnish to the Owner such documentation relating thereto as the Owner may reasonable require. In the case of a continuing delay, only one Claim is necessary.
- 4.1.7.2** If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated and had an adverse effect on the scheduled construction.
- 4.1.7.3** Claims for additional time shall be valid only to the extent that in aggregate they extend the Date of Substantial Completion past the date on which the Owner requires such Substantial Completion, as stated in Paragraph 13.10, unless such date is specifically changed by Change Order or Construction Change Directive.

- 4.1.8 Injury or Damage to Person or Property.** If either party to the Design-Build Contract suffers injury or damage to person or property because of an act or omission of the other party or of others for whose acts such party is legally responsible, written notice of such injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.
- 4.1.9** If unit prices are stated in the Design-Build Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order or Construction Change Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Design-Builder, the applicable unit prices shall be equitably adjusted.
- 4.1.10 Claims for Consequential Damages.** Design-Builder and Owner waive Claims against each other for consequential damages arising out of or relating to the Design-Build Contract. This mutual waiver includes:
- .1** damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
  - .2** damages incurred by the Design-Builder for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

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

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

## **4.2 RESOLUTION OF CLAIMS AND DISPUTES**

- 4.2.1 Decision by Owner.** Except for those claims arising under Sections 10.3 and 10.5, the Owner shall provide an initial decision. An initial decision by the Owner shall be required as a condition precedent to mediation of all Claims between the Owner and Design-Builder arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Owner with no decision having been rendered by the Owner.
- 4.2.2** The initial decision pursuant to Section 4.2.1 shall be in writing, shall state the reasons therefore and shall notify the parties of any change in the Contract Sum or Contract Time or both. The initial decision shall be final and binding on the parties but subject first to mediation under Section 4.3 and thereafter to such other dispute resolution methods as provided in Section 11.3 of the Agreement or elsewhere in the Design-Build Documents.
- 4.2.3** In the event of a Claim against the Design-Builder, the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Design-Builder's default, the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.
- 4.2.4** If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to initial resolution of the Claim.

### **4.3 MEDIATION**

- 4.3.1** Any Claim arising out of or related to the Design-Build Contract, except those waived as provided for in Sections 4.1.10, 9.10.4 and 9.10.5, shall, after initial decision of the Claim or 30 days after submission of the Claim for initial decision, be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable or other binding dispute resolution proceedings by either party.
- 4.3.2** The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect at the time of the mediation. Request for mediation shall be filed in writing with the other party to the Design-Build Contract and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration or other binding dispute resolution proceedings but, in such event, mediation shall proceed in advance thereof or of legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.
- 4.3.3** The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.
- 4.3.4** Any unresolved claims between Owner and Design-Builder, Design-Builder and its Surety, or Contractor and its Subcontractors or suppliers shall be submitted for mediation as provided in this Section 4.3, and any or all of the parties named above shall at the Owner's request be joined or consolidated therein.

## **ARTICLE 5 AWARD OF CONTRACTS**

- 5.1** Unless otherwise stated in the Design-Build Documents or the bidding or proposal requirements, the Design-Builder, as soon as practicable after award of the Design-Build Contract, shall furnish in writing to the Owner the names of additional persons or entities not originally included in the Design-Builder's proposal or in substitution of a person or entity (including those who are to furnish design services or materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Owner will promptly reply to the Design-Builder in writing stating whether or not the Owner has reasonable objection to any such proposed additional person or entity. Failure of the Owner to reply promptly shall constitute notice of no reasonable objection.
- 5.2** The Design-Builder shall not contract with a proposed person or entity to whom which the Owner has made reasonable and timely objection. The Design-Builder shall not be required to contract with anyone to whom the Design-Builder has made reasonable objection.
- 5.3** If the Owner has reasonable objection to a person or entity proposed by the Design-Builder, the Design-Builder shall propose another to whom the Owner has no reasonable objection. If the proposed but rejected additional person or entity was reasonably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute person's or entity's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Design-Builder has acted promptly and responsively in submitting names as required.
- 5.4** The Design-Builder shall not change a person or entity previously selected if the Owner makes reasonable objection to such substitute.

### **5.5 CONTINGENT ASSIGNMENT OF CONTRACTS**

- 5.5.1** Each agreement for a portion of the Work is assigned by the Design-Builder to the Owner provided that:
- .1** assignment is effective only after termination of the Design-Build Contract by the Owner for cause pursuant to Section 14.2 and only for those agreements which the Owner accepts by notifying the contractor in writing; and
  - .2** assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Design-Build Contract.

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

## **ARTICLE 6 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS**

### **6.1 OWNER'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS**

- 6.1.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces and to award separate contracts in connection with other portions of the Project or other construction or operations on the site. The Design-Builder shall cooperate with the Owner and separate contractors whose work might interfere with the Design-Builder's Work. If the Design-Builder claims that delay or additional cost is involved because of such action by the Owner, the Design-Builder shall make such Claim as provided in Section 4.1.
- 6.1.2 The term "separate contractor" shall mean any contractor retained by the Owner pursuant to Section 6.1.1.
- 6.1.3 The Owner shall provide for coordination of the activities of the Owner's own forces and of each separate contractor with the work of the Design-Builder, who shall cooperate with them. The Design-Builder shall participate with other separate contractors and the Owner in reviewing their construction schedules when directed to do so. The Design-Builder shall make any revisions to the construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Design-Builder, separate contractors and the Owner until subsequently revised.

### **6.2 MUTUAL RESPONSIBILITY**

- 6.2.1 The Design-Builder shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities and shall connect and coordinate the Design-Builder's construction and operations with theirs as required by the Design-Build Documents.
- 6.2.2 If part of the Design-Builder's Work depends for proper execution or results upon design, construction or operations by the Owner or a separate contractor, the Design-Builder shall, prior to proceeding with that portion of the Work, promptly report to the Owner apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of the Design-Builder so to report shall constitute an acknowledgment that the Owner's or separate contractor's completed or partially completed construction is fit and proper to receive the Design-Builder's Work, except as to defects not then reasonably discoverable.
- 6.2.3 The Owner shall be reimbursed by the Design-Builder for costs incurred by the Owner which are payable to a separate contractor because of delays, improperly timed activities or defective construction of the Design-Builder. The Owner shall be responsible to the Design-Builder for costs incurred by the Design-Builder because of delays, improperly timed activities, damage to the Work or defective construction of a separate contractor.
- 6.2.4 The Design-Builder shall promptly remedy damage wrongfully caused by the Design-Builder to completed or partially completed construction or to property of the Owner or separate contractors as provided in Section 10.2.5. If such separate contractor sues or initiates an arbitration proceeding against the Owner because of any damage alleged to have been caused by the Design-Builder, the Owner shall notify the Design-Builder, who shall defend such proceedings at the Design-Builder's expense, and if any judgment, award, or settlement against the Owner arises therefrom the Design-Builder shall pay or satisfy it.
- 6.2.5 The Owner and each separate contractor shall have the same responsibilities for cutting and patching as are described in Section 3.14.

### **6.3 OWNER'S RIGHT TO CLEAN UP**

- 6.3.1 If a dispute arises among the Design-Builder, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste



materials and rubbish, the Owner may clean up and the Owner shall allocate the cost among those responsible.

## **ARTICLE 7 CHANGES IN THE WORK**

### **7.1 GENERAL**

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

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

**7.1.3** Changes in the Work shall be performed under applicable provisions of the Design-Build Documents, and the Design-Builder shall proceed promptly, unless otherwise provided in the Change Order or Construction Change Directive or order for a minor change in the Work.

**7.1.4** For all changes in the Work involving an increase in the Contract Sum, the allowance for combined overhead and profit included in the total cost to the Owner shall not exceed the following percentages of the aggregate cost of the net added Work defined in Sections 7.3.6.1, 7.3.6.2, 7.3.6.3, 7.3.6.4 and 7.3.6.5:

- .1** for Work performed by the Design-Builder; ten (10) percent of the Design-Builder's net cost.
- .2** for Work performed by Contractors; ten (10) percent of the Contractor's or Contractors' combined net cost, plus five (5) percent of the total amount paid the Contractor or Contractors as Design-Builder's overhead and profit.
- .3** for Work performed by Subcontractors: seven and one half (7½) percent of the Subcontractor's or Subcontractors' combined net cost, plus five (5) percent of the total amount paid the Subcontractor or Subcontractors as the Subcontractor's or Subcontractors' combined overhead and profit, plus five (5) percent of the total amount paid the Subcontractor or Subcontractors as the Design-Builder's overhead and profit.

### **7.2 CHANGE ORDERS**

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

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

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

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

### **7.3 CONSTRUCTION CHANGE DIRECTIVES**

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

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

- 7.3.3** If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:
- .1** mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
  - .2** unit prices stated in the Design-Build Documents or subsequently agreed upon, or equitably adjusted as provided in Section 4.1.9;
  - .3** cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
  - .4** as provided in Section 7.3.6.
- 7.3.4** Upon receipt of a Construction Change Directive, the Design-Builder shall promptly proceed with the change in the Work involved and advise the Owner of the Design-Builder's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.
- 7.3.5** A Construction Change Directive signed by the Design-Builder indicates the agreement of the Design-Builder therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.
- 7.3.6** If the Design-Builder does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the method and the adjustment shall be determined by the Owner on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, a reasonable allowance for overhead and profit. In such case, and also under Section 7.3.3.3, the Design-Builder shall keep and present, in such form as the Owner may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Design-Build Documents, costs for the purposes of this Section 7.3.6 shall be limited to the following:
- .1** additional costs of professional services;
  - .2** costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance;
  - .3** costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;
  - .4** rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Design-Builder or others;
  - .5** costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and
  - .6** additional costs of supervision and field office personnel directly attributable to the change.
- 7.3.7** The amount of credit to be allowed by the Design-Builder to the Owner for a deletion or change that results in a net decrease in the Contract Sum shall be actual net cost. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.
- 7.3.8** Pending final determination of the total cost of a Construction Change Directive to the Owner, amounts not in dispute for such changes in the Work shall be included in Applications for Payment accompanied by a Change Order indicating the parties' agreement with part or all of such costs. For any portion of such cost that remains in dispute, the Owner shall make an interim determination for purposes of monthly payment for those costs. That determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of the Design-Builder to disagree and assert a Claim in accordance with Article 4.
- 7.3.9** When the Owner and Design-Builder reach agreement concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and shall be recorded by preparation and execution of an appropriate Change Order.

#### **7.4 MINOR CHANGES IN THE WORK**

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

### **ARTICLE 8 TIME**

#### **8.1 DEFINITIONS**

- 8.1.1** Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Design-Build Documents for Substantial Completion of the Work.
- 8.1.2** The date of commencement of the Work shall be the date stated in the Agreement unless provision is made for the date to be fixed in a notice to proceed issued by the Owner.
- 8.1.3** The date of Substantial Completion is the date determined by the Owner in accordance with Section 9.8.
- 8.1.4** The term “day” as used in the Design-Build Documents shall mean calendar day unless otherwise specifically defined.

#### **8.2 PROGRESS AND COMPLETION**

- 8.2.1** Time limits stated in the Design-Build Documents are of the essence of the Design-Build Contract. By executing the Design-Build Contract, the Design-Builder confirms that the Contract Time is a reasonable period for performing the Work.
- 8.2.2** The Design-Builder shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence construction operations on the site or elsewhere prior to the effective date of insurance required by Article 11 to be furnished by the Design-Builder and Owner. The date of commencement of the Work shall not be changed by the effective date of such insurance. Unless the date of commencement is established by the Design-Build Documents or a notice to proceed given by the Owner, the Design-Builder shall notify the Owner in writing not less than five days or other agreed period before commencing the Work to permit the timely filing of mortgages, mechanic’s liens and other security interests.
- 8.2.3** The Design-Builder shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

#### **8.3 DELAYS AND EXTENSIONS OF TIME**

- 8.3.1** If the Design-Builder is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Design-Builder’s control, or by delay authorized by the Owner pending resolution of disputes pursuant to the Design-Build Documents, or by other causes which the Owner determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Owner may determine.
- 8.3.2** Claims relating to time shall be made in accordance with applicable provisions of Section 4.1.7.
- 8.3.3** This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Design-Build Documents.

### **ARTICLE 9 PAYMENTS AND COMPLETION**

#### **9.1 CONTRACT SUM**

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

## **9.2 SCHEDULE OF VALUES**

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

## **9.3 APPLICATIONS FOR PAYMENT**

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

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

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

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

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

**9.3.4** If requested by the Owner, each Application for Payment or periodic estimate requesting payment shall be accompanied by (1) a waiver of liens on account of prior payments from each Contractor or (2) a certificate from each Contractor stating that the Contractor has been paid all amounts due the Contractor on the basis of the previous periodic payment to the Design-Builder, or else stating the amount not so paid and the reason for the discrepancy. In the event of any such discrepancy, the Design-Builder shall furnish the Design-Builder's own written explanation to the Owner. Such waiver or certificate shall be in a form acceptable to the Owner.

## **9.4 ACKNOWLEDGEMENT OF APPLICATION FOR PAYMENT**

**9.4.1** The Owner shall, within seven days after receipt of the Design-Builder's Application for Payment, issue to the Design-Builder a written acknowledgement of receipt of the Design-Builder's Application for Payment

indicating the amount the Owner has determined to be properly due and, if applicable, the reasons for withholding payment in whole or in part.

## **9.5 DECISIONS TO WITHHOLD PAYMENT**

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

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

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

## **9.6 PROGRESS PAYMENTS**

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

**9.6.1.1** On or about the twenty first (21st) day of each calendar month, the Owner will make a partial payment to the Design-Builder on the basis of a duly certified and approved estimate of the Work performed during the preceding calendar month, provided such estimate is submitted not later than the first day of each month. Until the Work is fifth (50) percent complete, the Owner will pay ninety (90) percent of the amount due the Design-Builder on account of each such progress payment. At the time the Work is fifty (50) percent complete and thereafter, if its manner of completion and progress are satisfactory, the Owner may, at its sole discretion, make any of the remaining progress payments in full, subject to presentation by the Contractor of written consent of surety for such reduction in retainage. The initial ten (10) percent retainage will continue to be withheld, and the Owner will release such retainage within thirty (30) days after the date of issuance of a Certificate of Final Completion.

**9.6.1.2** The full Contract retainage may be reinstated at any time if the manner of completion of the Work and its progress do not remain satisfactory to the Owner, or if the Surety withholds or revokes its consent, or for other good and sufficient reasons.

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

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

agreement with each Contractor, require each Contractor to make payments to Subcontractors in a similar manner.

- 9.6.4** The Owner shall have no obligation to pay or to see to the payment of money to a Contractor except as may otherwise be required by law.
- 9.6.5** Payment to material suppliers shall be treated in a manner similar to that provided in Sections 9.6.3 and 9.6.4.
- 9.6.6** A progress payment, or partial or entire use or occupancy of the Project by the Owner, shall not constitute acceptance of Work not in accordance with the Design-Build Documents.
- 9.6.7** Unless the Design-Builder provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Design-Builder for Work properly performed by Contractors and suppliers shall be held by the Design-Builder for those Contractors or suppliers who performed Work or furnished materials, or both, under contract with the Design-Builder for which payment was made by the Owner. Nothing contained herein shall require money to be placed in a separate account and not be commingled with money of the Design-Builder, shall create any fiduciary liability or tort liability on the part of the Design-Builder for breach of trust or shall entitle any person or entity to an award of punitive damages against the Design-Builder for breach of the requirements of this provision.

**9.7 FAILURE OF PAYMENT**

- 9.7.1** If for reasons other than those enumerated in Section 9.5.1, the Owner does not issue a payment within the time period required by Article 6 of the Agreement, then the Design-Builder may, upon seven additional days' written notice to the Owner, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Design-Builder's reasonable costs of shutdown, delay and start-up, plus interest as provided for in the Design-Build Documents.

**9.8 SUBSTANTIAL COMPLETION**

- 9.8.1** Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Design-Build Documents so that the Owner can occupy or use the Work or a portion thereof for its intended use, and only minor items which can be corrected or completed without any material interference with the Owner's use of the Work remain to be corrected or completed.
- 9.8.2** When the Design-Builder considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Design-Builder shall prepare and submit to the Owner a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Design-Builder to complete all Work in accordance with the Design-Build Documents.
- 9.8.3** Upon receipt of the Design-Builder's list, the Owner shall make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Owner's inspection discloses any item, whether or not included on the Design-Builder's list, which is not substantially complete, the Design-Builder shall complete or correct such item. In such case, the Design-Builder shall then submit a request for another inspection by the Owner to determine whether the Design-Builder's Work is substantially complete.
- 9.8.4** In the event of a dispute regarding whether the Design-Builder's Work is substantially complete, the dispute shall be resolved pursuant to Article 4.
- 9.8.5** When the Work or designated portion thereof is substantially complete, the Design-Builder shall prepare for the Owner's signature an Acknowledgement of Substantial Completion which, when signed by the Owner, shall establish (1) the date of Substantial Completion of the Work, (2) responsibilities between the Owner and Design-Builder for security, maintenance, heat, utilities, damage to the Work and insurance, and (3) the

time within which the Design-Builder shall finish all items on the list accompanying the Acknowledgement. When the Owner's inspection discloses that the Work or a designated portion thereof is substantially complete, the Owner shall sign the Acknowledgement of Substantial Completion. Warranties required by the Design-Build Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Acknowledgement of Substantial Completion.

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

## **9.9 PARTIAL OCCUPANCY OR USE**

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

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

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

## **9.10 FINAL COMPLETION AND FINAL PAYMENT**

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

**9.10.2** Neither final payment nor any remaining retained percentage will become due until the Design-Builder submits to the Owner the following:

- .1** an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied,
- .2** a certificate evidencing that insurance required by the Design-Build Documents to remain in force after final payment is currently in effect and will not be cancelled or allowed to expire until prior written notice has been given to the Owner as required in Article 11,
- .3** a written statement that the Design-Builder knows of no substantial reason that the insurance will not be renewable to cover the period required by the Design-Build Documents,
- .4** consent of surety, if any, to final payment, and
- .5** if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Design-Build Contract, to the extent and in such form as may be designated by the Owner. If a

Contractor refuses to furnish a release or waiver required by the Owner, the Design-Builder may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Design-Builder shall refund to the Owner all money that the Owner may be liable to pay in connection with the discharge of such lien, including all costs and reasonable attorneys' fees.

- 9.10.3** If, after the Owner determines that the Design-Builder's Work or designated portion thereof is substantially completed, final completion thereof is materially delayed through no fault of the Design-Builder or by issuance of a Change Order or a Construction Change Directive affecting final completion, the Owner shall, upon application by the Design-Builder, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Design-Build Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Design-Builder. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of claims.
- 9.10.4** The making of final payment shall constitute a waiver of Claims by the Owner except those arising from:
- .1** liens, Claims, security interests or encumbrances arising out of the Design-Build Documents and unsettled;
  - .2** failure of the Work to comply with the requirements of the Design-Build Documents; or
  - .3** terms of special warranties required by the Design-Build Documents.
- 9.10.5** Acceptance of final payment by the Design-Builder, a Contractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

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

### **10.1 SAFETY PRECAUTIONS AND PROGRAMS**

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

### **10.2 SAFETY OF PERSONS AND PROPERTY**

- 10.2.1** The Design-Builder shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:
- .1** employees on the Work and other persons who may be affected thereby;
  - .2** the Work and materials and equipment to be incorporated therein, whether in storage on or off the site or under the care, custody or control of the Design-Builder or the Design-Builder's Contractors or Subcontractors; and
  - .3** other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.
- 10.2.2** The Design-Builder shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.
- 10.2.3** The Design-Builder shall erect and maintain, as required by existing conditions and performance of the Design-Build Documents, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.
- 10.2.4** When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Design-Builder shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.



- 10.2.5** The Design-Builder shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Design-Build Documents) to property referred to in Sections 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Design-Builder, the Architect, a Contractor, a Subcontractor, or anyone directly or indirectly employed by any of them or by anyone for whose acts they may be liable and for which the Design-Builder is responsible under Sections 10.2.1.2 and 10.2.1.3, except damage or loss attributable to acts or omissions of the Owner or anyone directly or indirectly employed by the Owner, or by anyone for whose acts the Owner may be liable, and not attributable to the fault or negligence of the Design-Builder. The foregoing obligations of the Design-Builder are in addition to the Design-Builder's obligations under Section 3.18.
- 10.2.6** The Design-Builder shall designate a responsible member of the Design-Builder's organization at the site whose duty shall be the prevention of accidents. This person shall be the Design-Builder's superintendent unless otherwise designated by the Design-Builder in writing to the Owner.
- 10.2.7** The Design-Builder shall not load or permit any part of the construction or site to be loaded so as to endanger its safety.
- 10.2.8** The Design-Builder shall at all times be responsible for maintaining fire safety on the site, including prompt removal of all combustible rubbish, provision of fire extinguishing apparatus, and other measures and/or services specified herein or required by the State Fire Marshal or other authority having jurisdiction. If such authority determines that the Design-Builder has failed to provide or maintain adequate fire safety, the Design-Builder shall provide at its own expense any compensatory services, equipment, or devices required by the authority having jurisdiction including, but not limited to, maintaining a continuous fire watch.
- 10.2.9** The Design-Builder shall at all times protect excavations, trenches, buildings, and materials from rain water, ground water, ice, snow, back-up or leakage of sewers, drains, or other piping, and from water of any other origin and shall remove promptly any accumulation of water. The Design-Builder shall provide and operate all pumps, piping, and other equipment necessary to this end.
- 10.2.10** The Design-Builder shall remove snow or ice within the limits of the Work indicated in the Design-Builder Documents that might result in damage or delay.
- 10.2.11** During the progress of the Work and at all times prior to the Date of Substantial Completion or occupancy of the Work by the Owner, whichever is earlier, the Design-Builder shall provide temporary heat, ventilation, and enclosure adequate to permit the Work to proceed in a timely fashion, and to prevent damage to completed Work or Work in progress, or to materials stored on the premises. The permanent heating and ventilation systems may be used for these purposes when available unless otherwise provided in the Design-Builder Documents. The use of the permanent heating system for temporary heat shall be subject to the prior written approval of the Owner and reimbursement to the Owner for the cost of utilities used during construction.
- 10.2.12** Owner reserves the right to request, from time to time, information relating to Design-Builder's employees, agents, or other employed by or associated with the Design-Builder, including employees and agents of sub-contractors and sub-sub-contractors, who have access to the campus on which the Work is located as required by to comply with the provisions of the Jeanne Clery Act, as amended, 20 U.S.C. Section 1092(f) and to ensure that no such personnel represent a safety or security risk to Owner, its employees, agents, students or guests. Owner reserves the right to deny entry to the campus on which the Work is located, at its sole discretion, to any consultant, sub-consultant, sub-sub-consultant, contractor, sub-contractor and sub-sub-contractor personnel who Owner believes represents a safety or security risk to Owner, its employees, agents, students or guests.
- 10.3 HAZARDOUS MATERIALS**
- 10.3.1** If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Design-Builder, the Design-Builder shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner.

- 10.3.2** The Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Design-Builder and, in the event such material or substance is found to be present, to verify that it has been rendered harmless. Unless otherwise required by the Design-Build Documents, the Owner shall furnish in writing to the Design-Builder the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of such material or substance or who are to perform the task of removal or safe containment of such material or substance. The Design-Builder shall promptly reply to the Owner in writing stating whether or not the Design-Builder has reasonable objection to the persons or entities proposed by the Owner. If the Design-Builder has an objection to a person or entity proposed by the Owner, the Owner shall propose another to whom the Design-Builder has no reasonable objection. When the material or substance has been rendered harmless, work in the affected area shall resume upon written agreement of the Owner and Design-Builder. The Contract Time shall be extended appropriately, and the Contract Sum shall be increased in the amount of the Design-Builder's reasonable additional costs of shutdown, delay and start-up, which adjustments shall be accomplished as provided in Article 7 and Section 8.3.
- 10.3.3** To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Design-Builder, Contractors, Subcontractors, Architect, Architect's consultants and the agents and employees of any of them from and against Claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance exists on site as of the date of the Agreement, is not disclosed in the Design-Build Documents and presents the risk of bodily injury or death as described in Section 10.3.1 and has not been rendered harmless, provided that such Claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death or to injury to or destruction of tangible property (other than the Work itself) to the extent that such damage, loss or expense is not due to the negligence of the Design-Builder, Contractors, Subcontractors, Architect, Architect's consultants and the agents and employees of any of them.
- 10.4** The Owner shall not be responsible under Section 10.3 for materials and substances brought to the site by the Design-Builder unless such materials or substances were required by the Design-Build Documents.
- 10.5** If, without negligence on the part of the Design-Builder, the Design-Builder is held liable for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Design-Build Documents, the Owner shall indemnify the Design-Builder for all cost and expense thereby incurred.
- 10.6 EMERGENCIES**
- 10.6.1** In an emergency affecting safety of persons or property, the Design-Builder shall act, at the Design-Builder's discretion, to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed by the Design-Builder on account of an emergency shall be determined as provided in Section 4.1.7 and Article 7.

## **ARTICLE 11 INSURANCE AND BONDS**

### **11.1 GENERAL INSURANCE REQUIREMENTS**

- 11.1.1** The Design-Builder shall not commence the Work, nor shall the Design-Builder permit any Contractor or Subcontractor to commence any part of the Work, until the insurance required by this Article 11 has been obtained and such insurance has been approved by the Owner. Insurance required under this article shall be carried during the life of the Contract and for not less than one year thereafter
- 11.1.2** The Design-Builder shall require the Architect and all Contractors and Subcontractors to carry the insurance required by this Article 11 for all of their activities in connection with the Project, or the Design-Builder shall provide all such coverage under the Design-Builder's own insurance policies. The Design-Builder shall provide to the Owner a list (noting whether or not the Architect is providing his/her own insurance) of all Contractors and Subcontractors who are providing their own insurance as required by these

documents and Design-Builder shall certify that Contractors or Subcontractors not on this list are insured by the Design-Builder.

- 11.1.3** Certificates of Insurance on Acord 25 forms or other comparable forms shall be filed with the Owner for all policies. Any such Certificate found incomplete or not according to form will be rejected as unsatisfactory. Rejected Certificates and copies of policies shall be corrected as necessary and resubmitted until approved.
- 11.1.4** All required insurance shall be provided by a company licensed to do business in the State of New Hampshire or on the New Hampshire Insurance Department's approved List of Non-Admitted Carriers.
- 11.1.5** The University System of New Hampshire, its trustees, officers, agents, and employees shall be listed as additional insureds on all certificates and policies, except workers' compensation and professional liability.
- 11.1.6** Every policy shall contain an endorsement stating that the insurance company will not cancel the policy, or allow it to expire, or change any coverage therein without first mailing by registered mail written notice of such action to the Treasurer of the University System, Myers Financial Center, 27 Concord Road, Lee, NH 03861-6624, at least seven (7) days prior to termination for nonpayment of premium, and at least thirty (30) days prior to termination or change for any other cause.
- 11.1.7** The Design-Builder agrees to assist in every manner possible in reporting and investigation of any accident, and to cooperate with all interested insurance carriers in handling any claim, by securing and giving evidence, and obtaining attendance of witnesses, as required for the settlement of any claim, arbitration or suit.
- 11.1.8** Title to all buildings and equipment not comprising part of the Work shall remain with the University System of New Hampshire, and property insurance therefore will be the responsibility of the University System. The Design-Builder shall be responsible for loss or damage to all personal property brought on University System premises.
- 11.1.9** The Design-Builder shall assume full responsibility and liability for losses, expenses, damages, demands and claims in connection with any injury or alleged injury, including death, or damage or alleged damage to property, sustained or alleged to have been sustained in connection with or arisen out of the performance of the Work by the Design-Builder, its agents, employees, Contractors and Subcontractors, including losses, expenses, damages, demands and claims sustained by the University System, its trustees, officers, agents and employees. In addition, the Design-Builder shall indemnify and hold harmless the University System, its trustees, officers, agents and employees from any and all such losses, expenses, damages, demands and claims.

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## 11.2 REQUIRED COVERAGE

| <i>Insurance (X indicates required coverage)</i>                               |  | <i>Limits of Liability</i>                                 |             |
|--|--|--|-------------|
| <b>a. Commercial General Liability (must be location and project specific)</b> |  |  |             |
| X  | Premises-Operations  | General Aggregate  | \$2,000,000 |
| X  | Products/Completed Operations  | Products-Comp. Ops Aggregate                               | \$2,000,000 |
| X  | Explosion, Collapse and Underground Hazard                                       | Personal & Advertising Injury                              | \$1,000,000 |
| X  | Contractual Insurance  | Each Occurrence  | \$1,000,000 |
| X  | Broad Form Property Damage   | Fire Damage (any one fire)                                 | \$50,000    |
| X  | Independent Contractors  | Medical Expense (any one person)                           | \$5,000     |
| X  | Personal Injury with Advertising Injury  |  |             |
| <b>b. Other - Liability</b>  |  |  |             |
|  | Contractors Pollution Legal Liability<br>(must be location and project specific) | per Occurrence   | \$1,000,000 |
|  |  | Aggregate  | \$1,000,000 |
|  | Owner's Protective Liability   | per Occurrence   | \$1,000,000 |
|  |  | Aggregate  | \$2,000,000 |
| <b>c. Excess Liability</b>   |  |  |             |
| X  | Umbrella Form or Other Form  | Each Occurrence  | \$2,000,000 |
|  |  | General Aggregate  | \$2,000,000 |
| X  | Umbrella Form or Other Form<br>(required for projects over \$10,000,000)         | Each Occurrence  | \$5,000,000 |
|  |  | General Aggregate  | \$5,000,000 |
| <b>d. Automobile Liability</b>   |  |  |             |
| X  | Owned  | Bodily Injury and Property Damage<br>Combined Single Limit | \$1,000,000 |
| X  | Hired  |  |             |
| X  | Non-owned  |  |             |
| <b>e. Workers' Compensation</b>  |  |  |             |
| X  | Workers' Compensation  |  | Statutory   |
| X  | Employer's Liability   | Each Accident  | \$500,000   |
|  |  | Disease, Policy Limit                                      | \$500,000   |
|  |  | Disease, Each Employee                                     | \$500,000   |
| <b>f. Property</b>   |  |  |             |
| X  | Builder's Risk/Or Comparable Coverage in an<br>Installation Floater              | Replacement Cost   | by Owner    |
|  | Renovation Risk  |  |             |
| <b>g. Architect &amp; Engineer Professional Liability</b>                      |  |  |             |
| X  | Professional Liability   | Each Claim   | \$1,000,000 |
|  |  | Aggregate  | \$2,000,000 |
| X  | Professional Liability<br>(required for projects over \$10,000,000)              | Each Claim   | \$3,000,000 |
|  |  | Aggregate  | \$3,000,000 |

### **11.3.1 CONTRACTOR'S POLLUTION LEGAL LIABILITY**

**11.3.1** Contractor's Pollution Legal Liability, if required as defined in the solicitation documents, shall be at the minimum limits set by Subparagraph 11.2 above, and may be higher based on project risk.

### **11.4 OWNER'S PROTECTIVE LIABILITY INSURANCE**

**11.4.1** Owner's Protective Liability coverage, if required, shall be at limits set by Subparagraph 11.2 above, and shall include as additional insureds all architects, engineers and other agents of the Owner engaged in the Project.

**11.4.2** Owner's Protective Liability will be required in the following circumstances:

- .1** The Owner has reason to question the financial stability/reputation of a contractor
- .2** The contractor is unable to obtain general liability insurance on a per project basis

### **11.5 PROPERTY INSURANCE (provided by Owner)**

**11.5.1** Builders Risk coverage or comparable coverage if required by Subparagraph 11.2 shall insure all parts of the Work comprising new buildings, structures, paths, roadways, utility and landscape structures, utility distribution systems and the like, and all additions to or extensions of existing buildings, structures and systems. If the Contract Work also includes renovation within an existing structure, then this portion of the Work shall also be insured and so described and endorsed to the policy. Coverage shall be written on an "All Risk: basis for the full value of the Work. The policy or policies shall be in the names of the Owner and Design-Builder, as their interests may appear, shall provide for inclusion as insureds of all other Contractors, Subcontractors and others employed on the premises, and shall stipulate that the insurance company or companies shall have no right of subrogation against any of the insureds for any portion of the Work. Coverage shall be on all Work in place, stored on the Site, stored off the Site as provided in Subparagraph 9.3.2, or in transit.

**11.5.2** Renovation Risk coverage, if required by Subparagraph 11.2 above, shall insure all parts of existing buildings, structures, paths, roadways, utility and landscape structures, utility distribution systems and the like within or in connection with which the Work is performed, on a flat or no coinsurance basis. In addition the "other insurance" clause shall be deleted. Coverage shall be written on an "All Risk" basis. The policy or policies shall be in the names of the Owner and Contractor, as their interests may appear, shall provide for the inclusion as insureds all other contractors, Subcontractors, Sub-subcontractors and others employed on the premises, and shall stipulate that the insurance company or companies shall have no right of subrogation against any of the insureds for portion of the Work. Coverage shall be on all Work in place, stored on the Site, stored off the Site as provided in Section 9.3.2, or in transit.

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

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

**11.5.5** If during the period between the date of commencement of construction and one year after the Date of Substantial Completion of the Work the Owner insures properties, real or personal or both, at or adjacent to

the site by property insurance under policies separate from those insuring the Project, or if after the end of such period property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during such period, the Owner shall waive all rights in accordance with the terms of Subparagraph 11.4.6 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

**11.5.6 Mutual Waivers of Subrogation.** The Owner and Design-Builder mutually waive all rights against (1) each other and any of their Contractors, Subcontractors, agents and employees, each of the other, and (2) separate contractors described in Article 6, if any, and any of their Subcontractors, Sub-subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Paragraph 11.4 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Design-Builder as fiduciary. The Owner or Design-Builder, as appropriate, shall require of the separate contractors described in Article 6, if any, and the Architect, Contractors, Subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise, separate policies shall provide this waiver of subrogation by endorsement or otherwise.

This waiver of subrogation shall not apply to any of the following claims by the Owner: (1) a claim for any uninsured loss or damage in connection with any part of the Work regardless of when the claim accrues, (2) a claim for reimbursement of any deductible amount applied to any first party property claim by the Owner under any policy of insurance for any loss or damage to the Work regardless of when the claim accrues, and (3) any claim seeking recovery of the amount of any self insured retention maintained by the Owner with respect to any loss or damage to the Work regardless of when the claim accrues.

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

**11.5.8** If required in writing by a party in interest, the Owner as fiduciary shall, upon occurrence of an insured loss, give bond for proper performance of the Design-Builder's duties. The cost of required bonds shall be charged against proceeds received as fiduciary. The Owner shall deposit in a separate account proceeds so received, which the Owner shall distribute in accordance with such agreement as the parties in interest may reach, or in accordance with an mediation award in which case the procedure shall be as provided in Section 4.5. If after such loss no other special agreement is made and unless the Owner terminated the Contract for convenience, replacement of damaged property shall be performed by the Design-Builder, after notification of a Change in the Work in accordance with Article 7.

**11.5.9** The Owner as fiduciary shall have power to adjust and settle a loss with insurers unless one of the parties in interest shall object in writing within five days after occurrence of loss to the Owner's exercise of this power; if such objection is made, the dispute shall be resolved as provided in Section 4.5. The Owner as fiduciary shall, in the case of arbitration, make settlement with insurers in accordance with directions of the arbitrators. If distribution of insurance proceeds by arbitration is required, the arbitrators will direct such distribution.

## **11.6 PERFORMANCE BOND AND PAYMENT BOND**

**11.6.1** The Design-Builder shall furnish bonds covering faithful performance of the Contract and payment of obligations arising there under as stipulated in bidding requirements or specifically required in the Contract Documents on the date of execution of the Contract. The surety company providing these bonds shall be licensed to do business in the State of New Hampshire and listed on the Federal Register for the Department of the Treasury as an approved surety company.

- 11.6.2** Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Design-Builder shall promptly furnish a copy of the bonds or shall permit a copy to be made.

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

### **12.1 UNCOVERING OF WORK**

- 12.1.1** If a portion of the Work is covered contrary to requirements specifically expressed in the Design-Build Documents, it must be uncovered for the Owner's examination and be replaced at the Design-Builder's expense without change in the Contract Time.
- 12.1.2** If a portion of the Work has been covered which the Owner has not specifically requested to examine prior to its being covered, the Owner may request to see such Work and it shall be uncovered by the Design-Builder. If such Work is in accordance with the Design-Build Documents, costs of uncovering and replacement shall, by appropriate Change Order, be at the Owner's expense. If such Work is not in accordance with the Design-Build Documents, correction shall be at the Design-Builder's expense unless the condition was caused by the Owner or a separate contractor, in which event the Owner shall be responsible for payment of such costs.

### **12.2 CORRECTION OF WORK**

#### **12.2.1 BEFORE OR AFTER SUBSTANTIAL COMPLETION.**

- 12.2.1.1** The Design-Builder shall promptly correct Work rejected by the Owner or failing to conform to the requirements of the Design-Build Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing, shall be at the Design-Builder's expense.

#### **12.2.2 AFTER SUBSTANTIAL COMPLETION**

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

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

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

- 12.2.3** The Design-Builder shall remove from the site portions of the Work which are not in accordance with the requirements of the Design-Build Documents and are neither corrected by the Design-Builder nor accepted by the Owner.

- 12.2.4** The Design-Builder shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of the Owner or separate contractors caused by the Design-Builder's correction or removal of Work which is not in accordance with the requirements of the Design-Build Documents.

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

### **12.3 ACCEPTANCE OF NONCONFORMING WORK**

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

## **ARTICLE 13 MISCELLANEOUS PROVISIONS**

### **13.1 GOVERNING LAW**

**13.1.1** The Design-Build Contract shall be governed by the laws of the State of New Hampshire.

### **13.2 SUCCESSORS AND ASSIGNS**

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

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

### **13.3 WRITTEN NOTICE**

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

### **13.4 RIGHTS AND REMEDIES**

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

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

### **13.5 TESTS AND INSPECTIONS**

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



- 13.5.2** If the Owner or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection or approval not included under Section 13.5.1, the Owner shall in writing instruct the Design-Builder to make arrangements for such additional testing, inspection or approval by an entity acceptable to the Owner, and the Design-Builder shall give timely notice to the Owner of when and where tests and inspections are to be made so that the Owner may be present for such procedures. Such costs, except as provided in Section 13.5.3, shall be at the Owner's expense.
- 13.5.3** If such procedures for testing, inspection or approval under Sections 13.5.1 and 13.5.2 reveal failure of the portions of the Work to comply with requirements established by the Design-Build Documents, all costs made necessary by such failure, including those of repeated procedures, shall be at the Design-Builder's expense.
- 13.5.4** The Design-Builder shall obtain and deliver promptly to the Owner any occupancy permits, certificates of final inspection of any part of the Design-Builder's Work, and operating permits for any mechanical apparatus, such as elevators, escalators, boilers, air compressors, etc. which may be required by law to permit full use and occupancy of the premises by the Owner. Receipt of such permits or certificates by the Owner shall be a condition precedent to Substantial Completion of the Work.
- 13.5.5** If the Owner is to observe tests, inspections or approvals required by the Design-Build Documents, the Owner will do so promptly and, where practicable, at the normal place of testing.
- 13.5.6** Tests or inspections conducted pursuant to the Design-Build Documents shall be made promptly to avoid unreasonable delay in the Work.

### **13.6 INTEREST**

- 13.6.1** Payments due and unpaid under the Design-Build Documents shall bear interest from the date payment is due at such rate as the parties may agree upon in writing, or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

### **13.7 COMMENCEMENT OF STATUTORY LIMITATION PERIOD**

- 13.7.1** As between the Owner and Design-Builder:

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

### **13.8 LIMITATION OF LIABILITY**

- 13.8.1** No Trustee, officer, director, or employee of the Owner shall ever be personally or individually liable with respect to this Agreement or the Work. Each contract between the Design-Builder and the Contractor(s) shall include the foregoing limitation, which shall be effective if the Owner ever succeeds to the Design-Builder's rights and obligations under a contract.

### **13.9 EQUAL OPPORTUNITY**

**13.9.1** The Design-Builder or any Contractor or Subcontractor shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, or national origin. The Design-Builder shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, religion, color, sex, or national origin. Such action shall include, but not be limited to the following; employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates or pay or other forms of compensation; and selection for training, including apprenticeship. The Design-Builder agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth policies of non-discrimination.

**13.9.2** The Design-Builder and all Contractors or Subcontractors shall, in all solicitations or advertisements for employees placed by them or on their behalf state that all qualified applicants will receive consideration for employment without regard to race, religion, color, sex or national origin.

#### **13.10 REQUIRED COMPLETION DATE**

**13.10.1** In order to meet its educational, financial, or other obligations, the Owner requires substantial completion of the Work by **{as indicated on Proposal Form}**, subject to change by Change Order or Construction Change Directive.

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

#### **14.1 TERMINATION BY THE DESIGN-BUILDER**

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

- .1** issuance of an order of a court or other public authority having jurisdiction which requires all Work to be stopped;
- .2** an act of government, such as a declaration of national emergency which requires all Work to be stopped;
- .3** the Owner has failed to make payment to the Design-Builder in accordance with the Design-Build Documents; or

**14.1.2** The Design-Builder may terminate the Design-Build Contract if, through no act or fault of the Design-Builder or a Contractor, Subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Design-Builder, repeated suspensions, delays or interruptions of the entire Work by the Owner, 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.

**14.1.3** If one of the reasons described in Sections 14.1.1 or 14.1.2 exists, the Design-Builder may, upon seven days' written notice to the Owner, terminate the Design-Build Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including overhead and profit as provided in Section 7.1.4.

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

#### **14.2 TERMINATION BY THE OWNER FOR CAUSE**

**14.2.1** The Owner may terminate the Design-Build Contract if the Design-Builder:

- .1** persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials;

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

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

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

**14.2.3** When the Owner terminates the Contract for one of the reasons stated in Section 14.2.1, the Owner shall be entitled to collect from the Design-Builder all direct, indirect, and consequential damages suffered by the Owner on account of the Design-Builder's default. The Owner shall be entitled to hold all amounts due the Design-Builder at the date of termination until all of the Owner's damages have been established, and to apply such amounts to such damages. In no case shall the Design-Builder be entitled to receive further payment until the Work is finished.

**14.2.4** If the unpaid balance of the Contract Sum exceeds costs of finishing the Work and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Design-Builder. If such costs and damages exceed the unpaid balance, the Design-Builder shall pay the difference to the Owner. This obligation for payment shall survive termination of the Contract.

### **14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE**

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

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

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

### **14.4 TERMINATION BY THE OWNER FOR CONVENIENCE**

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

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

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

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

entitled to receive payment for Work executed and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.