

**DESIGN-BUILD AGREEMENT**  
**FOR**  
**LUDLOW TAYLOR ELEMENTARY SCHOOL ADDITION**  
**BY AND BETWEEN**  
**THE DEPARTMENT OF GENERAL SERVICES**  
**AND**  
**The KEYSTONE PLUS CONSTRUCTION CORPORATION**  
**CONTRACT NUMBER: DCAM-23-CS-RFP-0025**

## PROJECT INFORMATION

### A. PROJECT SUMMARY

1.	<b>Project Name:</b>	Design-Build Services for Ludlow Taylor ES Addition
2.	<b>Project Address:</b>	659 G Street NE, Washington, DC 20002
3.	<b>Agreement Type:</b>	Design-Build with Guaranteed Maximum Price
4.	<b>Client Agency:</b>	District of Columbia Public Schools (“DCPS” or “Client Agency”)
5.	<b>Design-Builder:</b>	The Keystone Plus Construction Corporation
6.	<b>Agreement Amounts:</b>	
i.	<b>Initial NTE:</b>	\$2,284,679.24 (see Schedule of Values attached as <b>Exhibit Y</b> )
ii.	<b>Project Budget:</b>	\$8,000,000.00
7.	<b>Design-Builder Compensation:</b>	
i.	Design Fee (including Construction Administration):	\$650,471.00
ii.	Design-Build Fee:	\$393,550.00
	a. Base Design-Build Fee: (60% of Design-Build Fee)	\$236,130.00
	b. At-Risk Design-Build Fee: (40% of Design-Build Fee)	\$157,420.00
iii.	Lump Sum General Conditions Cost:	\$614,770.00
iv.	Allowances:	Permit Allowance (including cost for Department of Buildings’ Velocity Program), \$100,000.00; Utility Allowance, \$20,000.00; and Public Space Improvements Allowance, \$60,000.00.
v.	Preconstruction Fee (15% of the Base Design-Build Fee)	\$35,419.50
vi.	Contingency:	To be determined at GMP
8.	<b>Liquidated Damages:</b>	\$2,500.00 per day

9.	<b>Disincentive Fee for Failure to Timely Submit Deliverables:</b>	\$2,000.00 plus \$500.00 per day, per deliverable
10.	<b>GMP Basis Project Documents Submission Date:</b>	September 2, 2024
11.	<b>Substantial Completion Date:</b>	July 15, 2025
12.	<b>Final Completion Date:</b>	January 15, 2026
13.	<b>Administrative Term Expiration Date:</b>	July 15, 2026
14.	<b>Letter Contract:</b>	
	<b>Period of Performance</b>	From December 8, 2023, through September 30, 2024.
	<b>NTE Amount:</b>	\$995,000.00
15.	<b>GMP Basis Project Documents</b>	Design Development Documents
16.	<b>Key Personnel Replacement:</b>	\$25,000.00 per replacement
17.	<b>Assumptions and Clarifications</b>	Exhibit Z

## **DESIGN-BUILD AGREEMENT**

### **LUDLOW TAYLOR ELEMENTARY SCHOOL ADDITION**

#### **DCAM-23-CS-RFP-0025**

THIS AGREEMENT (“Agreement” or “Contract”) is made by and between the DISTRICT OF COLUMBIA GOVERNMENT (the “District”), acting by and through its **DEPARTMENT OF GENERAL SERVICES** (the “Department” or “DGS”), and **THE KEYSTONE CONSTRUCTION CORPORATION** a company duly organized under the laws of the District of Columbia, and with a place of business at 1925 Minnesota Avenue SE, Suite A, Washington, DC 20020 (the “Design-Builder” or “Contractor” and collectively, with the Department, the “Parties”).

### **RECITALS**

**WHEREAS**, the Department issued a Request for Proposals date August 11, 2023 (the “RFP”) to engage a design-builder to prepare a design for and to construct and complete the work at Ludlow Taylor Elementary School (“Ludlow ES”) Addition located at 659 G Street NE, Washington, DC 20002 (the “Project”);

**WHEREAS**, the Department intends to implement the Project through a design-build approach. The scope of work for the Project will be divided into two phases: (i) the design and preconstruction phase; and (ii) the construction phase;

**WHEREAS**, the Department requires that the Project be completed no later than July 15, 2025 (“Substantial Completion Date”);

**WHEREAS**, the Design-Builder submitted a proposal entitled “Design-Build Services for Ludlow ES addition,” dated September 13, 2023, to provide design-build services for the Project;

**WHEREAS**, the Department retained the Design-Builder to provide design-build services for the Project, which is to include design, preconstruction, construction and construction administration services for Ludlow ES addition;

**WHEREAS**, the Design-Builder will provide the architectural, engineering, construction, and related services necessary to complete the Project, subject to the terms and conditions set forth in this Agreement;

**WHEREAS**, the Department has retained the services of a program manager (the “Program Manager”) to advise it concerning the Project;

**WHEREAS**, the Department has established a budget and the Design-Builder will conduct its work in accordance with an underlying budget for the Project, which includes but is not limited to all design fees, hard and soft construction costs, fees, general conditions of the Design-Builder, and including an allowance for the maintenance of the school and grounds per the maintenance and operations plan until achieving Final Completion (such budget, the “Project Budget”); and

**WHEREAS**, the Department and the Design-Builder entered into a letter contract dated December 8, 2023 (the “Letter Contract”) pursuant to which the Design-Builder was authorized

to proceed with certain design, preconstruction, abatement, and demolition services in furtherance of the Project.

**NOW, THEREFORE**, the Department and Design-Builder, for the consideration set forth herein, mutually agree as follows.

## **Article 1 - DEFINITIONS**

### **Section 1.1. Administrative Term.**

The Agreement shall have an administrative term (the “Administrative Term”) that runs from the effective date of the notice to proceed to the Administrative Term Date set forth in the Project Information section above. In addition, within this time the Design-Builder shall execute and submit a Final Release of Liens and Claims in a form and format required by a Contracting Officer (“CO” or “Contracting Officer”), inclusive of providing the Department with a complete set of any product manuals (“O&M”) and training videos, if applicable. The Administrative Term is established for the sole purpose of permitting the Department’s Office of the Chief Financial Officer to process payments in the event any payments become due. Notwithstanding the foregoing, nothing herein shall be construed to extend the Substantial Completion Date, extend the Final Completion Date, or, limit the Department’s ability to assess liquidated damages thereon.

### **Section 1.2. Agreement.**

The terms “Agreement” or “Contract” shall mean this entire, integrated agreement between the Department and the Design-Builder with respect to the Project, consisting of this document and the Exhibits thereto, including but not limited to the Standard Contract Provisions (Construction Contracts and Architectural/Engineering Services Contracts), the construction documents released for the Design-Builder’s use and any change orders, contract modifications or change directives that have been executed by the Department.

### **Section 1.3. Client Agency.**

The governmental or quasi-governmental entity, represented by the Department, requesting the Project.

### **Section 1.4. Construction Documents.**

The final Drawings and Specifications, as prepared, sealed by the Design-Builder’s architect in accordance with the law, and issued by the Design-Builder for the purpose of obtaining bids from potential trade subcontractors and material suppliers for use in constructing the Project.

### **Section 1.5. Construction Phase Services.**

Services provided throughout the construction phase during which the Design-Builder shall carry out the bulk of the construction and manage the completion of the design for the Project, including construction administration services.

### **Section 1.6. Cost of General Conditions.**

The Cost of General Conditions shall mean the lump sum amount the Design-Builder is entitled to recover for general conditions and is further described in **Section 8.2** of this Agreement.

### **Section 1.7. Contract Documents.**

The term “Contract Project Document(s)” refers to one or more components of the Project documents that comprise the Agreement between the Department and the Design-Builder, including any modifications or changes thereof, the drawings and specifications, and any addenda to the RFP issued thereto.

**Section 1.8. Design and Preconstruction Phase Services.**

The services to be provided under Article 3 constitute the design & preconstruction phase services to be performed by the Design-Builder.

**Section 1.9. Drawings.**

The drawings are the graphic and pictorial portions of the Contract Project Documents, wherever located and wherever issued, showing the design, locations, and dimensions of the Work, generally including plans, elevations, sections, details, schedule, and diagrams.

**Section 1.10. Final Completion.**

The point at which Substantial Completion has been achieved, all punchlist items noted at Substantial Completion have been completed and all Project documents the Design-Builder is required to deliver to the Department as a condition to receive final payment have been delivered.

**Section 1.11. Final Completion Date.**

The date established in the Agreement by which the Design-Builder shall achieve Final Completion. The Final Completion Date may be modified only by Change Order or Change Directive in accordance with the Agreement.

**Section 1.12. Fully Complete.**

To undertake all of the Work necessary to fully construct and complete the Project and execute all tasks necessary to obtain the final certificate of occupancy for the Project from the District of Columbia; submit final lien releases from the Design-Builder and Subcontractors and material suppliers; complete all punchlist items to the Department's approval and sign-off; and cause all representations, warranties, and guarantees to be honored and otherwise fulfill all of the requirements set forth in the Agreement.

**Section 1.13. Guaranteed Maximum Price or GMP.**

The maximum amount, including, but not limited to, the design-build fee and the Cost of the Work that will be paid to the Design-Builder to Fully Complete the Project as set forth in Article 4. The Guaranteed Maximum Price ("GMP") may be modified only by Change Order, Contract Modification, or Change Directive in accordance with the Agreement. The GMP shall be established in the GMP Amendment.

**Section 1.14. Hazardous Material.**

Hazardous Material includes but is not limited to, any toxic substance or hazardous chemical defined or regulated pursuant to federal, state, or local laws relating to pollution, treatment, storage or disposal of waste, or protection of human health or the environment. Such laws include, without limitation, the comprehensive environmental response, Compensation and Liability Act, the Resource Conservation and Recovery Act, the Clean Water Act, the Clean Air Act, and laws relating to emission, spills, leaks, discharges, releases or threatened releases of toxic material. The term Hazardous Materials shall also include petroleum and petroleum bi-products.

**Section 1.15. Notice to Proceed.**

A written notice to proceed, signed by the Department's Contracting Officer, directing the Design-Builder to proceed with the Project or any portion of the Project ("Notice to Proceed" or "NTP").

**Section 1.16. Project Schedule.**

The schedule for the Project ("Project Schedule") agreed upon by the Department and the

Design-Builder. Such schedule shall include a baseline schedule as updated periodically by the Design-Builder, approved by the Department. The Project Schedule shall not be changed except by a Contract Modification, Change Order or Change Directive issued by the Department's CO or Contracting Officer. The Project Schedule shall be in a form and contain such detail as may be agreed upon by the Parties.

#### **Section 1.17. Self-Performed Work.**

The parties hereby agree that "Self-Performed Work" means and shall encompass trade work performed by employees of: (1) the Design-Builder; (2) any entity that is a partner or member of the entity comprising the Design-Builder; (3) any entity that controls, is controlled by, or is under common control with the Design-Builder; or (4) any entity that controls, is controlled by, or is under common control with any entity that is part of the Design-Builder. Self-Performed Work is distinguished from trade work performed by subcontractors unaffiliated with the Design-Builder or the entities of which the Design-Builder is comprised.

#### **Section 1.18. Services.**

The services to be provided pursuant to the Agreement which shall include the Design & Preconstruction Phase Services and the Construction Phase Services necessary to deliver the Project.

#### **Section 1.19. Specifications.**

The Specifications are that portion of the Contract Project documents consisting of the written requirements for materials, equipment, construction systems, standards and workmanship for the Work, and performance of related services.

#### **Section 1.20. Standard Contract Provisions.**

The District of Columbia Department of General Services Standard Contract Provisions, General Provisions (Construction Contracts and Architectural/Engineering Services Contracts), as amended, is attached hereto as **Exhibit J** and incorporated herein.

#### **Section 1.21. Subcontractor.**

Any person, natural or legal, to whom the Design-Builder delegates the performance of any portion of the Work required by the Agreement. The term "Subcontractor," used without a qualifier, shall mean a subcontractor in direct contractual privity with the Design-Builder. "Subcontractors at all tiers" shall mean not only those Subcontractors in direct contractual privity with the Design-Builder and not the Department, but also those performing Work pursuant to sub-subcontracts, and so on. "Subcontractors" shall include both those who are retained to perform labor only and those who are retained both to perform labor and to supply material or equipment. "Subcontractors" shall also include design professionals who are not the Design-Builder's employees and to whom the Design-Builder delegates any part of its responsibilities under the Agreement, except that references to "trade Subcontractors" shall exclude design professionals.

#### **Section 1.22. Substantial Completion.**

Substantial Completion shall mean that all of the following have occurred: (1) the construction and installation work have been completed with only minor punchlist items remaining to be completed; (2) a temporary certificate of occupancy and all other required permits or approvals have been obtained; (3) all Operation and Maintenance Manuals have been finalized, submitted, and approved; and must be submitted to the Department six months prior to Substantial Completion; (4) required trainings per Turnover Manual have been scheduled within thirty (30) days of the Substantial Completion Date; the Design-Builder shall provide final videotaped recordings within thirty (30) days of the Substantial Completion Date; (5)

Draft Warranties have been submitted and approved; all clean-up required by the Agreement has been completed; (6) the Project has obtained DC Department of Health approval of the kitchen and health suite; (7) the Project site has been deep cleaned and cleared of any debris; (8) the Project is ready for the Department and Client Agency to use it for its intended purpose; (9) all equipment, supplies, materials and items to be installed have been installed in accordance with the manufacturer's specifications and industry standards and have undergone and passed the requisite testing and inspections; and (10) commissioning is complete, and a final punchlist is documented with completion dates established. "Minor punchlist items" are defined for this purpose as items that, in the aggregate, can be completed within thirty (30) days without interfering with the Department or Client Agency's normal use of the Project.

**Section 1.23. Substantial Completion Date.**

The date established herein by which the Design-Builder shall achieve Substantial Completion. The Substantial Completion Date may be modified only by Change Order, Contract Modification, or Change Directive in accordance with the Agreement.

**Section 1.24. Work.**

The term "Work" refers to any and all work done in the performance of the services necessary, at any and all phases of the Agreement, to Fully Complete the Project.



## **Article 2 - GENERAL PROVISIONS**

### **Section 2.1. Letter Contract**

The Parties acknowledge that certain of the investigation, design, and preconstruction activities described in Article 3 of this Agreement were performed pursuant to the Letter Contract between the Parties dated December 8, 2023. Pursuant to the terms of the Letter Contract, upon execution of this Agreement by the Department (the “Agreement Effective Date”), the Letter Contract shall automatically terminate and shall merge into and be superseded by this Agreement. The Parties agree that any services provided or work performed pursuant to the merged Letter Contract, and prior to the Agreement effective Date, shall be governed by the terms and conditions of this Agreement.

### **Section 2.2. Term and Termination**

The period of performance under this Agreement shall commence from the date of execution of the Letter Contract by the Department and shall terminate upon the expiration of the Administrative Term or upon termination by the Department pursuant to Articles 5 and 6 of the Standard Contract Provisions (Construction Contracts) and Article 8 of the Standard Contract Provisions (Architectural & Engineering Services Contracts).

### **Section 2.3. Relationship of Parties.**

The Design-Builder accepts the relationship of trust and confidence established with the Department by this Agreement, and covenants with the Department to furnish the Design-Builder’s reasonable skill and judgment and to cooperate with the Program Manager in furthering the interests of the Department. The Design-Builder shall use its best efforts to perform the Work and complete the Project in an expeditious and economical manner consistent with the interests of the Department. The Department shall endeavor to promote harmony and cooperation among the Department, Design-Builder, Program Manager, and other persons or entities employed by the Department for the Project. In performing its duties under this Agreement, the Design-Builder shall at all times use the standard of care used by Design-Builders that construct projects similar to the Project in type, size, and scope in large, urban areas. Whenever the term “competent” is used herein to describe the Design-Builder’s actions or duties, that term shall refer to the level of competence customarily possessed by those Design-Builders that construct projects similar to the Project in type, size, and scope in large, urban areas.

### **Section 2.4. Confidentiality of Information**

The Design-Builder shall assure and keep all information and data obtained throughout the performance of the Project whether related to the Agreement, the Work in all of its aspects, the Department, and the Department’s employees confidential, during and following the term of the Agreement and shall not use the information in connection with any other matters; nor shall it disclose any such information to any other person, firm or corporation, unless disclosure is required pursuant to a court order, subpoena or other regulatory authority. The Design-Builder shall not be divulged of confidential information without the individual’s and the Department’s written consent and only in accordance with the District’s or Federal government’s laws, codes and regulations. The Design-Builder and any subcontractors who utilize, access, or store personally identifiable information as part of the performance of this Agreement are required to safeguard this information and immediately notify the Department of any breach or suspected breach in the security of such information. The Design-Builder and all subcontractors shall allow the Department to both participate in the investigation of incidents and exercise control over decisions regarding external reporting. The Design-Builder, Subcontractor, and

their respective employees working on this Project may be required to sign a confidentiality statement.

### **Section 2.5. Project Description.**

The Design-Builder shall provide design-build services required for a fully modernized facility of Ludlow ES, located at 659 G Street NE, Washington, DC 20002. The Design-Builder shall provide a new addition to provide additional permanent capacity to meet the projected enrollment at the school. The addition shall contain classrooms, academic support areas, and administrative functions. The addition shall also incorporate the required structural support system for a future floor addition for a separate future modernization project. The Design-Builder shall include the design and installation of an exterior marquee sign based on the DCPS standards. The Design-Builder shall coordinate and advise on a design that is most advantageous to add a new addition that is aligned with the DCPS Ed Specs.

Generally, the Design-Builder's responsibilities shall include, but will not be limited to, the following:

- a) To confirm the design and construction of the Project in accordance with the RFP Documents, including all applicable attachments.
- b) To provide all design, construction, and construction management services necessary to implement the goals of the Project, inclusive of, but not limited to, the following: (i) civil, architectural, electrical, structural, and mechanical design services as required for the Project; and (ii) construction management services inclusive of budgeting, value engineering ("Value Engineering"), scheduling, Project phasing, Project administration, management, and coordination of subcontractors. Design scope shall also include full design and specifications, with a minimum of two options for basis-of-design for each, of the furniture, fixtures, and equipment ("FF&E") for GMP pricing.
- c) To conduct subsurface investigation work if and as required for the Project.
- d) To furnish and provide all materials, management, personnel, equipment, hazardous material abatement, supervision, labor and other services necessary to complete the Project.
- e) To provide the necessary design, consultants and documentation for all permitting, zoning, historic preservation and US Commission of Fine Arts approvals.
- f) To provide move coordination and logistics support for the Project.
- g) To confirm the design and construction meet the requirements of Appendix Z of the 2017 DC Energy Conservation Code and can be certified Net Zero Energy through the International Living Future Institute's ("ILFI") Zero Energy Building program or U.S. Green Building Council's ("USGBC") LEED Zero program.
- h) If applicable, the Design-Builder shall obtain Chapter 2 and Chapter 3 permits from the Department of Energy and Environment ("DOEE") prior to the installation of a boiler.

The Design-Builder shall provide the Department with a GMP based on the Design Development Documents. In addition to this Early Start Agreement, the District anticipates a subsequent GMP package. The process by which the GMP will be formed is more fully described in this Agreement. Construction and construction administration services for early authorized work may also occur.

During the Construction Phase, the Design-Builder shall construct the Project and provide construction administration services. During the Construction Phase, the Design-Builder shall be required to cause the Work to be completed in a manner consistent with the design documents and phasing plan approved by the Department and shall provide all labor, materials,

insurance, bonds, and equipment necessary to fully complete the Project in accordance with the drawings, specifications, Project Schedule, and Project Budget that are issued for the Project. The Design-Builder shall be responsible for paying for and obtaining all necessary permits and to pay all necessary fees for utility connections and the like.

#### **Section 2.6. Program Manager.**

The Department has engaged a Program Manager to provide certain program management functions. Such Program Manager shall, at all times, be acting solely for the benefit of the Department, not the Design-Builder. **The Design-Builder hereby acknowledges and agrees that only a duly authorized and designated Contracting Officer shall have the authority to issue Change Orders, Contract Modifications, or Change Directives on the Department's behalf. As of the date that this Agreement is executed, the Department's duly authorizing Contracting Officers are set forth in Exhibit I.**

#### **Section 2.7. General Description of Design-Builder's Duties.**

Generally, the Design-Builder shall perform the Services in a professional workmanlike manner. The Design-Builder shall supply and furnish at the location where the Work is to be performed all design service, labor, materials, equipment, tools, services, and supervision, and shall bear all items of expense, necessary to complete and satisfactorily perform this Agreement, except such items that the Department, in this Agreement, specifically agrees to supply or furnish to or for the use of Design-Builder. Any labor, materials, equipment, tools, services, or supervision not specifically described in this Agreement, but which may be fairly implied as required thereby or necessary to properly complete the Work, shall be deemed within the Scope of the Work and shall be provided by the Design-Builder at Design-Builder's sole expense.

The Design-Builder will be required to work with the Department and the Project stakeholders through a collaborative design process to advance the programmatic Ed Specs to a fully realized Project in accordance with the available Project budget. The Design-Builder will be required to engage in extensive pre-design and preconstruction efforts to ensure that the design is developed in a manner consistent with the Department's goals for the Project (e.g., programmatic, budgetary, schedule, and quality), to develop a comprehensive Project phasing; to solicit competitive trade bids for the construction work and to develop an acceptable GMP and corresponding scope and schedule for the work, and to implement the requisite construction and other work necessary no later than the Substantial Completion Date. The Design-Builder will be required to provide move coordination and logistics support. The Design-Builder shall be responsible for all items of cost except for those items set forth in **Section 9.7** of this Agreement and will be required to provide a "turn-key" Project ready for occupancy by DCPS.

#### **Section 2.8. Warranties and Representations**

1. All disclosures, representations, warranties, and certifications the Design-Builder makes in its proposal in response to the RFP shall remain binding and in effect throughout the term of the Agreement. The Design-Builder reaffirms that all such disclosures, representations, warranties, and certifications are true and correct.
2. If any disclosure, representation, warranty or certification the Design-Builder has made or makes pursuant to the RFP or the Agreement, including, without limitation, representations concerning the Design-Builder's construction or design experience and qualifications, claims or litigation history or financial condition, is materially

inaccurate, that shall constitute a material breach of the Agreement, entitling the Department to any and all available remedies.

3. The terms and conditions of this **Section 2.8** shall apply during both the Design & Preconstruction and Construction Phases.

**Section 2.9. Responsibility for Agents and Contractors.**

At all times and during both the Design & Preconstruction and Construction Phases, the Design-Builder shall be responsible to the Department for any and all acts and omissions of the Design-Builder's agents, employees, subcontractors, sub-subcontractors, material suppliers, laborers, and agents and employees of the subcontractors, sub-subcontractors, material suppliers, and laborers performing or supplying Work in connection with the Project.

**Section 2.10 Building Information Modeling.** Building Information Modeling ("BIM") is required to be used throughout the lifecycle of the Project, including all Project phases from Project planning and concept design through construction, as-built, and into facilities management. The BIM requirements are provided as **Exhibit S**. It is expected by the Department that all team members are to be committed to the use of BIM in the Project, share their ideas of BIM expertise with the team, provide BIM data as requested by other team members, look for cost savings and schedule improvements during the entire Project duration, and endeavor to leave as a legacy a fully updated, as-built, facility management ready building information model.

## **Article 3 - DESIGN-BUILDER'S DESIGN & PRECONSTRUCTION SERVICES**

### **Section 3.1. Preconstruction Services.**

During the design and preconstruction phase, the Design-Builder, in consultation with the Department, shall: (i) develop a conceptual plan and cost estimates; (ii) develop a draft final conceptual site plan/response and cost estimate; (iii) prepare and submit soft and hard copies of the complete set of 35% Schematic Design Documents; (iv) prepare and submit soft and hard copies of the complete set of 60% Design Development Documents, Specifications and Design-Builder's cost estimate and schedule; (v) prepare soft and hard copies of the complete set of 95% Construction Documents, Specifications and Design-Builder's cost estimate and schedule; (vi) review existing condition assessment and recommendation; and (vii) obtain all necessary building permits to support the Project Schedule.

Without limiting the generality of the foregoing, during the Preconstruction Phase, the Design-Builder shall: (i) work with its Architect and any design consultants to advance the design for the Project in consultation with the Client Agency, the Department, and its Program Manager; (ii) obtain bids from trade subcontractors to perform the work described in the Design Development Documents and provide bid tabulations to the Department; (iii) engage in any Value Engineering and scoping exercises necessary to return the cost of the work to the Project Budget; (iv) engage in preconstruction activities, including identifying any long-lead items; (v) develop a GMP proposal for the Project; and (vi) enter into a GMP for the Project. Throughout the Design & Preconstruction Phase, the Design-Builder shall schedule and attend regular meetings with the Department, the Program Manager, and the Design-Builder's Architect/Engineer.

**Section 3.1.1. Building System Assessment.** If requested by the Department, within fourteen (14) days after the Preconstruction NTP is issued, the Design-Builder shall conduct an assessment report of the building systems and submit a written report to the Department that assesses whether the existing building systems can accommodate the new space or if additional systems need to be added as part of this Project. Such report shall take into consideration the nature of this Project and the proposed educational specifications ("Ed Specs"). This report shall assess all of the building's key systems, including, but not limited to HVAC, kitchens, roof, windows, electrical, lighting, audiovisual equipment, intercom, fire alarms, and plumbing.

**Section 3.1.1.1 Baseline Schedule.** Within ten (10) days after the Preconstruction NTP is issued, the Design-Builder shall prepare and submit a Baseline Schedule for the Project (the "Baseline Schedule"). The Baseline Schedule shall be subject to review and approval by the Department, and the Design-Builder shall incorporate such adjustments to the Baseline Schedule as may be requested by the Department. The Baseline Schedule shall be prepared in a critical path method ("CPM") in a sufficient level of detail to permit the Department and the Design-Builder and any other affected parties to properly plan the Project. The Baseline Schedule shall show: (i) key design milestones and bid packages; (ii) release dates for long-lead items; (iii) release dates for key subcontractors; and (iv) Substantial and Final Completion Dates. The Baseline Schedule shall include durations and logic ties for all relevant Project activities. The Baseline Schedule must also be submitted in Primavera 6 native format and shall be updated by the Design-Builder, at a minimum, on a bi-weekly basis. In addition to the bi-weekly Project schedule, a weekly 3-week look ahead schedule shall be required.

The Project schedule is attached hereto as **Exhibit B**.

**Section 3.1.1.2 Concept Design.** No later than twelve (12) weeks after the Preconstruction NTP is issued, the Design-Builder shall prepare and submit a proposed concept design for the Ed Specs. As part of the concept design phase, the Department requires three (3) concept options or alternatives. Each of the concept designs shall contain at least the level of detail contemplated in industry best practices for a concept design. The design submittal shall specifically identify any deviations from the Educational Specifications and shall explain the rationale and cost implications associated with such deviation. The Department shall have the right to disapprove the concept design submittal for any reason. Following the review of the concept design submissions by DCPS and the Department, the Department shall approve a final concept design. The Design-Builder shall make revisions to the concept design submission as necessary to incorporate comments, feedback, and other direction provided by DCPS and the Department. The Design-Builder's pricing shall assume that such revisions will be required, and such revisions shall not entitle the Design-Builder to additional compensation. The requirements for the Concept Design are as referenced in **Exhibit W**.

**Section 3.1.1.3 Preliminary Budget Estimate.** Concurrently with the delivery of the concept design, the Design-Builder shall submit a detailed cost estimate of the proposed design (such estimate, the "Preliminary Budget Estimate"). With regard to building systems (i.e. roofs, doors, HVAC, security, IT, etc.), the Preliminary Budget Estimate shall be prepared on a "system" basis that identifies the key building systems or functions and allocates an estimated cost for each such system. The Design-Build Fee, the cost of general conditions, and contingencies shall be broken out into separate line items. The primary purpose of the Preliminary Budget Estimate is to aid the Department and the Client Agency in understanding the costs associated with key elements of the Project to better prioritize and manage the use of the funding allocated to this Project. All estimates shall be broken out into three categories: renovation, new construction, and site work, where applicable.

#### **Section 3.1.1.4 (Reserved)**

**Section 3.1.1.5 Construction Management Plan.** The Design-Builder shall submit a draft of its construction management and project phasing plan ("Construction Management Plan") within fourteen (14) days after the Preconstruction NTP is issued to include, but is not limited to, noise control, hours for construction and deliveries, truck routes, trash and debris removal plan, traffic and parking control, communications procedures, emergency procedures, quality control procedures, dust control, public street cleaning and repair, planned occupancy of public ways, erosion control, tree protection plan, vibration monitoring, existing and adjacent building surveys plan, temporary fire protection measures, Project signage, pest control, construction staging plan, and construction logistics plan.

**Section 3.1.1.6 Disincentive Fee for Failure to Timely Provide Deliverables.** The Design-Builder acknowledges that the Department is engaging the Design-Builder to provide an extensive level of preconstruction support services to minimize the potential for cost overruns, schedule delays, or the need for extensive Value Engineering/re-design late in the Project and that the deliverables required under this **Section 3.1** are

key to identify the value of such services. In the event the Design-Builder fails to deliver any of the deliverables required in **Section 3.1** (and unless such failure is the result of any event of Force Majeure), the Design-Builder shall be subject to a disincentive fee in the amount of Two Thousand Dollars (\$2,000.00) plus Five Hundred Dollars (\$500) per day after receiving written notice from the CO of failure to submit such deliverables.

**Section 3.1.1.7 Additional Preconstruction Services.** In addition to those items enumerated above, the Design-Builder shall provide such preconstruction services as are necessary to properly advance the Project. These services shall include but are not limited to, scheduling, estimating, shop-drawings, the ordering of long-lead materials, condition assessments, conservator studies, archeological studies, recommended testing, additional geotechnical testing, and monitoring of historic assets.

### **Section 3.1.2 Reserved**

**Section 3.1.3 Design Services; Design Reviews.** The Design-Builder shall meet with the representatives of the Department and Client Agency throughout the Design & Preconstruction Phase as the design progresses in order that these representatives and other stakeholders can have input in and approve the design direction at appropriate times. The Design-Builder shall ensure that the design is developed in a manner consistent with the Project budget, *i.e.*, designed-to-budget, as well as the programmatic requirements set forth and attached hereto as **Exhibit A** and the Department's other requirements for the Project. The Project shall be designed in such a way so as to achieve, at a minimum, LEED for SCHOOLS – GOLD principles. All Design Documents shall be prepared by the Design-Builder's duly licensed architects and engineers. The GMP basis documents and all interim design submissions shall be subject to review and approval by the Department, and the Design-Builder shall be required to revise these Project documents to address concerns raised by the Department and/or other Project stakeholders, and such revisions shall not entitle the Design-Builder to an increase in the Design Fee.

**Section 3.1.3.1 Design Management.** During the Design and Preconstruction Phase, the Design-Builder, in consultation with the Department, shall: (i) develop conceptual plan and cost estimates; (ii) develop a draft final conceptual site plan/response and cost estimate; (iii) prepare and submit soft and hard copies of the complete set of 35% Schematic Design Documents; (iv) prepare and submit soft and hard copies of the complete set of 60% Design Development Documents, Specifications, and Design-Builder's cost estimate and schedule; (v) prepare soft and hard copies of the complete set of 95% Construction Documents, Specifications and Design-Builder's cost estimate and schedule; (vi) review existing condition assessment and recommendation; and (viii) obtain all necessary building permits to support the Project Schedule.

Without limiting the generality of the foregoing, during the Preconstruction Phase, the Design-Builder shall: (i) work with its Architect and any design consultants to advance the design for the Project in consultation with the Client Agency, the Department, and its Program Manager; (ii) obtain bids from trade subcontractors to perform the work described in the Design Development Documents and provide bid tabulations to the Department; (iii) engage in any Value Engineering and scoping exercises necessary to return the cost of the work to the Project Budget; (iv) engage in preconstruction activities, including identifying any long-lead items; (v) develop a GMP proposal for

the Project; and (vi) enter into a GMP for the Project. Throughout the Design & Preconstruction Phase, the Design-Builder shall schedule and attend regular meetings with the Department, the Program Manager, and the Design-Builder's Architect.

Between the time the Preconstruction NTP is issued and the time the GMP is accepted by the Department, the Design-Builder shall use commercially reasonable best efforts to ensure that: (i) the design evolves in a manner that is consistent with the Department's budget and programmatic requirements, as the same were defined and established by the Department at the end of the concept design; (ii) the design work is properly coordinated; and (iii) the required design deliverables are produced on or before the dates contemplated in the Project Schedule. As part of this undertaking, the Design-Builder shall provide the following:

**Section 3.1.3.1.1 Schematic Design.** The Design-Builder shall prepare a schematic design that is a logical development of the approved concept design and is consistent with the Project Schedule, Project Budget, and programmatic requirements. The schematic design shall contain at least the level of detail contemplated in a schematic design under industry best practices. The design submittal shall specifically identify any deviations from the approved concept design and shall explain the rationale, cost, and time implications associated with such deviation. The Department shall have the right to disapprove the schematic design submittal for any reason. The Design-Builder shall provide maintenance and repair cost services for major design components and mechanical, electrical, and plumbing ("MEP") systems selected at the schematic design phase, which includes conducting a 40-year life cycle cost analysis, which includes a detailed list of replacement costs, maintenance costs, an estimate of repair costs, anticipated energy costs, and a list of other relevant life cycle costs. Following a review of the schematic design submission by DCPS and the Department, the Design-Builder shall make revisions to the schematic design submission as necessary to incorporate comments, feedback, and other directions provided by DCPS and the Department. The Design-Builder's pricing shall assume that such revisions will be required, and such revisions shall not entitle the Design-Builder to additional compensation. The requirements and tasks for the Schematic Design are as referenced in **Exhibit W**.

**Section 3.1.3.1.2 Schematic Budget Estimate Update.** Concurrent with the submission of the schematic design, the Design-Builder shall submit a budget update. The budget update shall be submitted in the same format as the preliminary budget estimate and shall show variations from the preliminary budget estimate. The Design-Builder shall include a cost estimate and the Value Engineering analysis and detailed recommendation for Project savings (even if the Project is not over budget). To the extent the budget update shows an overrun from the approved budget, the Design-Builder shall submit Value Engineering (not scope reductions, but true Value Engineering that allows the design to meet all Project requirements within budget) suggestions that would return the Project to budget. Only the Department shall have the authority to increase the Project Budget, and absent such direction, the Design-Builder shall proceed on the assumption that the budget remains as originally directed by the Department.



**Section 3.1.3.1.3 Constructability/Sole Source/Long-Lead Time Memorandum.**

Concurrently with the schematic design budget estimate, the Design-Builder shall prepare a memorandum identifying key construction concerns related to the Project. Such memorandum shall: (i) assess the constructability issues related to the Project, including site logistics; (ii) identify any items where the design is predicated on a single manufacturer and, if so, identify at least two (2) comparable products; and (iii) identify any long-lead delivery items that could adversely affect the schedule contemplated in this Agreement. To the extent any such long-lead items are identified, the memorandum shall make recommendations for addressing such items.

**Section 3.1.3.1.4 Entitlements.** The Design-Builder shall prepare, as part of the design and pre-construction phase, such materials and make such presentations as are necessary to obtain the required land use and entitlement approvals. Approvals may be required from but not limited to: (i) the Office of Zoning, (ii) Office of Planning (“OP”), and (iii) the Commission of Fine Arts (“CFA”).

**Section 3.1.4 Design Development Phase & Early Release Packages.**

The Design-Builder shall prepare a set of design development documents (“Design Development Documents”) that is a logical development of the approved schematic design and is consistent with the Department’s schedule, budget, and programmatic requirements. Prior to the full Design Development Submission, the Design-Builder shall submit a progress set of drawings, specifications, and budget at the half-way point through the Design-Builder’s Design Development phase. The full Design Development Documents shall contain at least the level of detail contemplated in industry best practices for design development documents. The design submittal shall specifically identify any deviations from the approved schematic design and shall explain the rationale and cost implications associated with such deviation. The Design-Builder shall include a cost estimate and Value Engineering analysis and detailed recommendation for Project savings (even if the Project is not over budget). The Design-Builder shall provide maintenance and repair cost services, which include conducting a 40-year life cycle cost analysis, which includes a detailed list of replacement costs, maintenance costs, an estimate of repair costs, anticipated energy costs, and a list of other relevant life cycle costs. The Design-Builder shall further refine and expand upon the Maintenance and Operations Plan that was submitted in the Schematic Submission. The Department shall have the right to disapprove the Design Development Documents submittal for any reason.

**Section 3.1.4.1 Design Development Submission.** The Design-Builder shall prepare the design development submission for review and comment by the Client Agencies and the Department. Such design development submission shall include the elements and information listed below:

The design development submittal shall include at least, but not limited to, the following:

- a) Detailed and dimensioned plans, wall sections, building sections, and schedules;
- b) Draft Specifications for materials, systems, and equipment;
- c) Complete code compliance analysis and drawing;
- d) Space-by-space equipment layouts for key spaces. As part of the design development phase, the Design-Builder and/or the Design-Builder’s architect and any design consultants shall confer with representatives from

DCPS and the Department regarding these layouts to confirm that they are acceptable to DCPS;

- e) A final design and layout for FF&E;
- f) An interior finish schedule;
- g) Preliminary designs for all building system upgrades, including low voltage/AV/IT. With regard to HVAC systems, the submission should include: (i) a detailed description of the proposed mechanical systems; (ii) their general layout, including “Single-Line Diagrams” (aka “Riser Diagrams”); and (iii) any required load calculations. The HVAC design solution would also include preliminary layouts of other major components of the HVAC system, including the type and location of energy recovery units (“ERUs”), variable air volume (“VAV”) boxes, condensing units, and any related system appurtenances;
- h) Updated LEED scorecard;
- i) Present the design to CFA, OP, HPO, and other regulatory agencies as required;
- j) Register the Project with the U.S. Green Building Council (“USGBC”) to obtain LEED certification and pay all registration fees;
- k) Register the Project with ILFI or U.S. Green Buildings;
- l) Register the Project with International Well Building Institute (“IWBI”) for WELL Gold Certification;
- m) Participate in SIT Meetings, and community meetings as required by DGS/DCPS;
- n) Coordinate with the DC HPO and other agencies, commissions, groups, etc., as required to assess and determine historic and/or archeological significance and requirements. Attend meetings and hearings if necessary;
- o) Respond in writing to all DCPS and DGS comments on plans;
- p) Prepare a presentation and provide a minimum of three (3) presentation boards for each community meeting and present/display onsite. Presentation boards shall be in full color and include at least four (4) 3-D renderings; Presentations shall also include a digital slide presentation;
- q) Coordinate final utility plans as required;
- r) Act as scribe for all design-related meetings. Distribute meeting minutes to all attendees;
- s) Baseline Schedule monthly updates in the format set forth in the RFP; and
- t) Prepare and submit one (1) electronic copy in PDF of Design Development Documents, including detailed specifications, Cost Estimate, and schedule to the District staff for review and approval. (60% plan review).

Components to include, but are not limited to:

- i. Site plans, paving layouts, traffic circulation, lighting, signage, and utilities;
- ii. Floor plans, Structural, Civil, Architectural, mechanical, electrical, and plumbing (“MEP”), Fire Protection and landscaping, etc.;
- iii. Exterior elevations, rendering and color palette;
- iv. Building sections and details as required;
- v. Interior elevations, casework and millwork elevations as required;
- vi. Playground equipment, if applicable;
- vii. Stormwater management;
- viii. Food service or other equipment as required;

- ix. LEED Information as appropriate;
- x. WELL Score Card;
- xi. Final Draft of the “Percent for Art” Public Art Package to be used as the scope for the Artists’ RFP;
- xii. Cost Estimate;
- xiii. Value Engineering analysis and detailed recommendation for Project savings (even if the Project is not over budget);
- xiv. Energy Report that includes all recommended strategies applicable to achieving the energy consumption goals (EUI requirements);
- xv. Maintenance and Operations Plan; and
- xvi. Quality Control Plan.

**Section 3.1.4.2 Early Release Packages/Long Lead Materials/Abatement & Demolition.**

**Section 3.1.4.2.1 Abatement & Selective Demolition.** Once the schematic design has been approved, the Department may release the Design-Builder to commence hazardous material abatement and interior demolition, or other early activities, as applicable. It is envisioned that this work may be released in advance of the GMP.

**Section 3.1.4.2.2 Long Lead Materials.** The Department will release funding for long-lead items once the Design Development Documents have been approved. If the Design-Builder believes an earlier release is required in order to meet the Project Schedule, it shall advise the Department and make a recommendation as to the requested release date. Any decision to authorize an early funding release shall be made by the Department in its sole and absolute discretion.

**Section 3.1.4.2.3 Permits.** The Design-Builder shall be responsible for preparing and submitting all of the required permit applications that are necessary to complete the Project. The Design-Builder shall develop a list of the required permits and shall track the progress of all such permits through the review process. The Design-Builder shall update the Department with the status of each permit that is required for the Project. The Design-Builder shall engage such permit expeditors as the Design-Builder deems necessary or appropriate in light of the Project’s Schedule.

## **Article 4 – FORMATION OF GMP PROPOSAL**

### **Section 4.1 General.**

The Design-Builder shall provide the Department with a GMP based on the Design Development Document. The District anticipates an Early Start Agreement (“ESA”) and subsequent one GMP package.

During the Design & Preconstruction Phase, the Design-Builder shall cause the Design-Builder’s Architect to prepare the design development documents, which will serve as the GMP basis project documents (“GMP Basis Project Documents”). Based upon the GMP Basis Project Documents, the Design-Builder shall propose a GMP (referred to as the “GMP Proposal”), which shall be submitted in accordance with this Article. The Design-Builder acknowledges and understands that the GMP Basis Project Documents will be incomplete at the time it submits its GMP Proposal. Although complete construction Project Documents will not be available and many details will not be shown on GMP Basis Project Documents or will otherwise need to be adjusted, the GMP proposed in the Design-Builder’s GMP Proposal shall be intended to represent the Design-Builder’s offer for the Final Completion of the Project. If the Design-Builder’s GMP Proposal is acceptable to the Department, it shall be memorialized in the form of an amendment to this Agreement (such amendment, the “GMP Amendment”). Such amendment shall be in the form of **Exhibit L** attached hereto.

As part of the GMP Amendment, the Design-Builder shall certify that the GMP established thereby: (i) contains sufficient amounts to perform all Work necessary for the Final Completion of the Project; and (ii) contains sufficient amounts to provide and construct any items or facilities that are not contained in the GMP Basis Project Documents, but which are necessary for a fully functioning facility that meets the programmatic requirements established for the Project. The Design-Builder will further covenant and agree in the GMP Amendment that it will perform all of the construction work necessary for the Final Completion of the Project, including, without limitation, aspects of the Work that are not shown on the GMP Basis Project Documents, but which are a logical development of the design intent reflected in the GMP Basis Project Documents, for an amount not to exceed the GMP.

### **Section 4.2 Review of GMP Basis Project Documents.**

The Department has selected the Design-Builder, in large part, because of its special expertise in constructing similar projects. Before submitting its GMP, the Design-Builder shall review the GMP Basis Project Documents for accuracy, constructability, and completeness and shall bring such deficiencies to the attention of the Department and shall cause its Architect to address any such deficiencies. To the extent that any such deficiencies in the GMP Basis Project Documents could have been identified by such review by a competent Design-Builder, such deficiencies shall not be the basis for a change in the GMP or delaying the Project Schedule.

### **Section 4.3 Contingency.**

The Cost of the Work shall include a contingency, which shall be a sum established by the Department and the Design-Builder to cover, among other things, costs necessary to address scope expansion that is a logical development of the design, issues arising from or as a result of deficiencies in the GMP Basis Project Documents and other costs which are properly reimbursable as Cost of the Work but not the basis for a Change Order, such as costs that were not reasonably foreseeable as of the effective date of this Agreement, including such items as emergencies, unforeseeable changes in market conditions for materials or labor, or subsurface,

soils or site conditions that were neither known nor reasonably discoverable as of the effective date of the Agreement (the “Contingency”). During the Construction Phase, the Design-Builder shall keep the Program Manager and the Contracting Officer informed as to the status of the Contingency and shall, at a minimum: (i) advise the Program Manager and Contracting Officer when draws reach 3% upon the contingency in a timely manner; and (ii) provide the Program Manager and Contracting Officer with running status of the Contingency balance at least once every two (2) weeks.

#### **Section 4.4 Trade Bids.**

**Section 4.4.1 Subcontractors and Suppliers; Bidding Procedures.** During the Design & Preconstruction Phase, the Design-Builder shall seek to develop subcontractor interest in the Project. Within fifteen (15) days after the completion of the schematic design, the Design-Builder shall provide to the Department for its review and approval a written submission on the proposed bidding procedures. Such procedures shall include (i) a list of proposed trade packages; (ii) a list of trade subcontractors that will be invited to bid on each such package; and (iii) a narrative description of the process. At least three (3) potential subcontractors shall be identified for each trade package. A copy of this deliverable must be submitted to both the Program Manager and the Contracting Officer. In the event the Department does not approve the proposed bidding procedures within fifteen (15) days after its receipt, such procedures shall be deemed approved unless the Department advises that such is still under review.

**Section 4.4.2 Bidding.** Following the Department’s approval of the Design Development Documents, the Design-Builder shall manage the trade bidding process in accordance with the approved bidding procedures and shall use commercially reasonable best efforts to solicit at least three (3) qualified and bona fide bids for each trade package that has an expected value in excess of One Hundred Thousand Dollars (\$100,000). Trade packages shall not be parceled, split, or divided to avoid the \$100,000 threshold. In addition to the information normally required in such bids, the Design-Builder shall also require subcontractors to provide an estimate of the percentage of labor hours performed in completing the subcontracted work that will be performed by District residents. The Design-Builder shall carefully document its procedures for making available bid packages to potential bidders, the contents of each bid package, discussions with bidders at any pre-bid meetings, bidders’ compliance with bid requirements, all bids received, the Design-Builder’s evaluations of all bids, and the basis for the Design-Builder’s recommendation as to which bidders should be chosen. The Department shall be afforded access to all such records at all reasonable times so that, among other things, it may independently confirm the Design-Builder’s adherence to all requirements set forth in the Agreement, including, without limitation, affirmative action requirements and subcontracting requirements.

**Section 4.4.3 Bid Tab.** As part of the negotiations leading up to the GMP, the Design-Builder shall provide to the Department tabulations of the trade bids solicited and copies of all trade bids. In general, the bid tab shall be presented in a tabular format that compares the bids received and any other relevant information (i.e. exclusions, past performance history, etc.). The bid tabulation shall include scope assessments and identify the required leveling of the trade submitted. To the extent that the Design-Builder’s award recommendation is based on scoping adjustments, the Design-Builder shall clearly identify the scoping adjustment and the need for such adjustments. Such bid tabulation shall include LSDBE utilization information in addition to price and other information. Such bid tabulations as well as copies of the bids shall be submitted to the Department’s Program Manager. The Design-Builder represents and warrants that the bid tabs so submitted shall fairly represent the results of the subcontractor

bidding process and that the Design-Builder shall not misrepresent any such data to the Department or its Program Manager.

#### **Section 4.5 Value Engineering.**

Based on the trade bids received, the Design-Builder shall prepare a written report of suggested Value Engineering strategies necessary to reconcile the costs of constructing the Project Budget, if necessary. The Design-Builder shall meet with the Department's representatives to discuss any Value Engineering and changes in the scope necessary to ensure that the Department's schedule and programmatic requirements are met and that the budget is not exceeded. The Design-Builder shall cause the Design-Builder's Architect to implement and price any approved Value Engineering strategies.

#### **Section 4.6 Basis of Guaranteed Maximum Price.**

Based on the trade bids, the Design-Builder shall submit a GMP proposal to the Department. The GMP Proposal shall include the following elements:

- a) A list of drawings, specifications, addenda, general, supplementary, and other conditions on which the GMP is based.
- b) A list of unit prices and allowance items and a statement of their basis. The Design-Builder shall include the following allowances: Permit Allowance (including the cost for Department of Buildings' ("DOB") Velocity Program) (\$100,000.00), Utility Allowance (\$20,000.00), and Public Space Improvements Allowance (\$60,000.00).
- c) Assumptions and clarifications made in preparing the GMP Proposal, noting, in particular, any exclusions. The assumptions and clarifications shall take precedence over the drawings and specifications. The Design-Builder shall prepare a separate memorandum that highlights any differences between the then approved drawings and the modifications made in the assumptions and clarifications. Such memorandum shall specifically address any changes in the Project aesthetics, functionality, or performance.
- d) The proposed GMP, including a statement of the detailed cost estimate organized by trade categories, allowances, contingency, and other items and the fees that comprise the GMP.
- e) An update to the Project's schedule to which the Design-Builder will agree to be bound. This update shall be prepared in the same level of detail and in the same manner as the Baseline Schedule, and without any change, to the Substantial and Final Completion Dates unless approved by the Department's Contracting Officer.
- f) A subcontracting plan setting forth the names and estimated dollar volume of the work that will be performed by LSBDEs, as certified by the Department of Small and Local Business Development, upon which the GMP is based.
- g) A summary of Capital Cost vs Operating Cost Eligibility
- h) A list of Additive Alternates or Deductive Alternates with defined executable dates, if any.
- i) GMP and any Council Package cost estimate summary shall be broken down into two categories as applicable: Renovation, and Sitework.
- j) Each GMP may include an agreed-upon sum as the Design-Builder's Contingency and the Owner Allowance (s), each of which shall be identified as a separate line item in the GMP's Schedule of Values.
  - A. Construction contingency
    - i. The Design-Builder's Contingency shall be utilized to compensate for the increased Cost of the Work incurred by the Design-Builder due to unforeseen

circumstances relating to construction of that Project which resulted in an unavoidable increase in costs, except when deemed the responsibility of the Department in accordance with this Contract. If the Design-Builder fails to include all of the required scope of work in the bid packages, Design-Builder Contingency may be used to purchase the omitted scope, until the Design-Builder's Contingency balance reaches zero or until the balance equals the anticipated subcontractor modifications. All requests to use the Design-Builder's Contingency shall be submitted as a Request for Change Order ("RCO"). Charges to the Design-Builder's Contingency shall not become due and payable until the RCO is approved in writing by the Department's Contracting Officer and becomes a Change Order. If the Design-Builder's Contingency reaches zero, any cost overruns or charges that could have been charged to the Design-Builder's Contingency shall be the sole responsibility of the Design-Builder.

ii. If bids are received below the applicable line items in the GMP, the surplus will be added to the Design-Builder's Contingency for that Project. If bids exceed the agreed-upon line items in a GMP, the deficiency will be charged to the Design-Builder's Contingency for that Project, however, such events shall not be cause to increase the GMP.

iii. Once all subcontracts anticipated by a GMP have been awarded, including any self-performed work, the Department may require the Design-Builder to reduce the Design-Builder's Contingency to an amount as agreed to by the parties to reflect the Design-Builder's risk from that point in the Project forward.

iv. Upon Final Completion of the Project, any remaining Design-Builder's Contingency, if any, shall be reduced to zero by a Contract Modification and the Design-Builder shall have no entitlement to the balance.

#### **B. Owner contingency**

i. The Department retains the right to increase the GMP in lieu of charging any cost to the Owner contingency. Any unused Contingency, whether Department Contingency or the Design-Builder Contingency, shall be reconciled to a zero balance via a Contract Modification upon Final Completion.

ii. When the Design-Builder proposes to use the Owner contingency, the Design-Builder shall prepare an RCO, identifying the amount sought to be charged to the Owner contingency, the reasons why the amount should be charged to that Contingency and demonstrating to the satisfaction of the Department that the costs to be incurred are necessary for the Work and are the responsibility of the Department. At all times, the Design-Builder shall avoid and mitigate Department Contingency costs whenever possible. Before payment or as part of an audit, the Design-Builder and the Department shall have authority to verify the actual costs incurred. No costs may be charged to the Owner contingency until the RCO is approved in writing by the Department and becomes a Change Order.

iii. The Owner contingency shall be an amount, determined by the Department, which will be available to compensate the Design-Builder for the increased Cost of the Work incurred by the Design-Builder due to a Contract Modification or to other increases in the Cost of the Work which the Department determines, in its sole discretion, is its responsibility. The Department may increase, decrease or eliminate the Owner contingency at any time.

#### **Section 4.7 Department Review of GMP Proposal.**

The Design-Builder shall meet with the Department to review the GMP Proposal and the written statement of its basis. In the event that the Department discovers any inconsistencies

or inaccuracies in the information presented, the Department shall promptly notify the Design-Builder, who shall make appropriate adjustments to the GMP Proposal, its basis, or both.

#### **Section 4.8 Department Acceptance of GMP Proposal.**

The Department and the Design-Builder shall meet to negotiate the terms of the GMP Proposal. If the GMP Proposal is acceptable to the Department, the Department shall submit the resulting GMP Amendment to the Council for the District of Columbia. **The GMP shall be subject to review and approval by the Council for the District of Columbia in the event it exceeds the previously approved contract value by more than \$1 million. In such an event, the GMP shall not be effective until so approved.** Please note that the Council submission and approval timeline varies, and Offerors should plan for 60-90 days on average for this process, taking into consideration that Council is not in session over the summer months.

#### **Section 4.9 GMP Amendment.**

In the event, that the Department and the Design-Builder are unable to agree upon the GMP or the schedule for the Project, the Department shall have the right to terminate the Agreement and assume any trade subcontracts held by the Design-Builder. In such an event, the Design-Builder shall only be entitled to Fifty percent (50%) of the Preconstruction Fee.

#### **Section 4.10 Assignment Upon Failure to Reach GMP.**

In the event that the Department and the Design-Builder are unable to agree upon a GMP, the Department shall have the right to terminate this Agreement, and if requested by the Department, the Design-Builder shall assign any trade subcontracts and its agreement with the Design-Builder's Architect to the Department upon such terms and conditions and at the time requested by the Department. In such an event, the Design-Builder shall forfeit fifty percent (50%) of the Preconstruction Fee.

#### **Section 4.11 Certification.**

As part of the GMP Proposal submitted in accordance with this Article, the Design-Builder agrees to specifically acknowledge and declare that the Contract Project Documents are sufficiently complete to have enabled the Design-Builder to determine the Cost of the Work therein in order to enter into the GMP Amendment and to enable the Design-Builder to agree to construct the Work outlined therein in accordance with applicable laws, statutes, building codes and regulations to the best of Design-Builder's knowledge, and otherwise to fulfill all its obligations hereunder. The Design-Builder shall further acknowledge that it has visited the site, examined all conditions affecting the Work, is fully familiar with all of the conditions thereon and affecting the same, and, has carefully examined all drawings and specifications provided to it.

#### **Section 4.12 Unsafe Materials and Hazardous Materials**

**Section 4.12.1** The Design-Builder shall not bring, spill or release onto the site asbestos, polychlorinated biphenyls ("PCBs"), or any other Hazardous Material that is not customarily used in a facility of the type and similar to the Project, and shall bring it to the Department's attention any specification of such Hazardous Materials in the Design Documents. If the Design-Builder believes that anything in the Agreement would require that it use or bring onto the site asbestos, PCBs, or any Hazardous Material that is not customarily used in a facility of the type and similar to the Project, it shall immediately inform the Department and seek direction before proceeding.

**Section 4.12.2** The Design-Builder shall abate and remove Hazardous Materials on or within the site as necessary to complete the Work contemplated by this Agreement. The Design-



Builder shall comply with all laws, including, without limitation, the requirements of the Environmental Protection Agency (“EPA”) and all jurisdictional agencies, as well as all laws relating to safety, health welfare, and protection of the environment, in removing, treating, encapsulating, passivating, and/or disposing of Hazardous Materials, including, but not limited to, removal, treatment, encapsulation, passivation, and/or disposal of the Hazardous Materials. If any notices to governmental authorities are required, the Design-Builder shall also give those notices at the appropriate times. The Design-Builder shall ensure abatement subcontractors and disposal sites are appropriately licensed and qualified.

**Section 4.12.3** The Design-Builder shall be entitled to submit a change request in accordance with Article 3 of the Standard Contract Provisions (Construction Contracts) in the event the Design-Builder encounters Hazardous Materials beyond those contemplated in the Contract Documents.

**Section 4.12.4** The Design-Builder shall keep detailed records documenting Work done so that the Department may independently verify compliance with all laws, the number of units actually removed, treated, and/or disposed of, and the appropriate unit price(s) applicable to the Work.

## **Article 5 – CONSTRUCTION PHASE**

### **Section 5.1 General.**

The Construction Phase shall not commence until the Department issues a NTP for Construction Phase Services. The Design-Builder shall, through subcontractors or, with the written consent of the Department, with the Design-Builder's own forces, perform all of the Work necessary to construct the Project so that it is complete, safe, and properly built in strict accordance with the approved Construction Project documents and the other requirements of this Agreement. Without limitation, the Design-Builder shall provide all of the labor, materials, tools, equipment, temporary services, and facilities necessary to complete the Project in accordance with the drawings, specifications, Schedule, and Budget that are issued for the Project. The Design-Builder shall be responsible for paying for and obtaining all necessary permits and paying all necessary fees for utility connections. The Work shall be carried out in a good and workmanlike, first-class manner, and in a timely fashion. All materials and equipment to be incorporated into the Project shall be new and previously unused unless otherwise specified by the Department and shall be free of manufacturing or other defects.

**Section 5.1.1 Construction Administration.** The Design-Builder, through its Architect/Engineer, shall provide construction administration services to support the construction phase of the Project.

The Work shall include, but is not limited to, the following:

- a. Manage all aspects of the Project.
- b. Manage weekly progress meetings. Site visits are included in the Design-Build Fee.
- c. Provide completed Quality Control checklists for implementation of the Project.
- d. Review and process shop drawing submissions, RFIs, etc.
- e. Prepare meeting notes and records of decisions/changes made.
- f. Conduct pre-closeout inspections.
- g. Review closeout documents for completeness, such as As-Built Drawings based on the Contractor's red line drawings and/or coordinated set developed during the subcontractor coordination process. As-Built Drawings should be transmitted to DGS in hard copy, PDF, CAD, and BIM formats.

**Section 5.1.2 Unrenovated Portions of the Structure.** In constructing the Project, the Design-Builder shall ensure that unrenovated portions of existing structures, if any, including, but not limited to, the mechanical, plumbing, electrical systems, and other building systems are not adversely affected. All unrenovated portions of the structures should function, at a minimum, at the level of functionality that existed immediately prior to the construction of the Project. If any unrenovated portion of the Project functions at a lower level of functionality as a result of the Design-Builder's Work, the Design-Builder shall be back-charged the costs incurred by the Department in addressing the decreased functionality.

### **Section 5.2 Design Completion.**

**Section 5.2.1 Mid-Point Construction Project Document Review.** Based on the approved Design Development Documents and any approved Value Engineering, the Design-Builder shall prepare a set of Construction Documents. It is contemplated that the Construction Documents will be issued in several different sets (i.e. architectural, electrical, mechanical, structural, etc.). As each such set reaches a point where it is approximately fifty percent (50%) complete, the Design-Builder shall prepare and submit a progress printing to the Department

for its review and comment.

**Section 5.2.2 Construction Project Document Review & Coordination.** The Design-Builder shall complete each of the Construction Documents packages in a manner that addresses the concerns raised by the Department during the review contemplated in **Section 5.2.1** for such package. The Design-Builder shall issue one or more sets of permit documents to the Department for its review and approval (“Permit Set”). With regard to each such set, the Design-Builder shall highlight (or bubble) any aspect of the design that represents a material deviation from the approved Design Development Documents and shall address in a narrative format the impact, if any, such departure shall have on the Project’s aesthetics, functionality or performance. The Department shall have the right to disapprove the Construction Documents for any reason. If the Department disapproves of the Construction Documents, the Design-Builder will not be entitled to any additional compensation. If, however, the Department disapproves a Construction Document that is a logical extension of the approved Design Development Documents, the Design-Builder will be entitled to an adjustment to the GMP and/or the Project Schedule unless such a package departs from the Scope of Work fairly reflected in the GMP Drawings and Specifications and in such event the Design-Builder shall be required to prepare a revised design that complies with the GMP drawings and specifications (“Drawings and Specifications”) and without any entitlement to an increase in the GMP or an adjustment of the Project Schedule.

**Section 5.2.3. Code Review.** The Design-Builder shall submit the Permit Set to the DOB in order to obtain the necessary building permits for the Project. The Design-Builder shall monitor the permit process and shall incorporate any changes or adjustments required by the Code Official. The Design-Builder shall also issue any such changes to the Department for its review and approval. In this submittal, the Design-Builder’s Architect shall highlight (or bubble) any aspect of the design that represents a material deviation from the permit set Project documents and shall address in a narrative format the impact, if any, such departure shall have on the Project’s aesthetics, functionality or performance. Subsequent to obtaining the necessary building permits, the Design-Builder shall prepare one or more sets of “issued for construction Project documents” (the “IFC Set(s)”).

**Section 5.2.4. Design Changes.** If it should become necessary to amend any of the approved IFC Set(s), the Design-Builder shall prepare an amendment to the drawings and shall submit such amendment to the Department for its review and approval. In this submittal, the Design-Builder shall highlight (or bubble) any aspect of the design that represents a material deviation from the permit set documents and shall address in a narrative format the impact, if any, such departure shall have on the Project’s aesthetics, functionality or performance. In the event the Department does not approve such document within ten (10) business days after issuance, unless otherwise denied, such document shall be deemed approved, provided however that the Department has not advised that such document is still under review.

**Section 5.2.5 Third Party Contractors.** The Department will hire third party contractors for plan review and for testing and material inspections. The Design-Builder shall coordinate and work with the Program Manager and third-party plan reviewer during the building permit process.

**Section 5.2.6 Final Maintenance and Operations Plan.** The Design-Builder shall submit, for the Department’s review, a final Maintenance and Operations Plan. The Maintenance and Operations Plan shall be based on the final IFC Set(s). The approved Maintenance and Operations Plan shall form the basis of the Design-Builder’s maintenance of the building following Substantial Completion.

## **Section 5.3 Subcontracting and Administration**

**Section 5.3.1** It is contemplated that all or substantially all of the construction of the Project will be carried out by trade subcontractors and that those trade subcontracts will be awarded through the competitive bid process contemplated in **Section 4.4**. The Design-Builder shall enter into a written agreement with each subcontractor. The trade subcontractors will be underwritten contracts with the Design-Builder. All subcontracts and agreements for the supply of equipment or materials awarded for the Project shall be fixed-price contracts unless otherwise expressly authorized by the Department, in writing. It is understood and agreed, however, that certain trade packages (such as the mechanical and electrical packages) may be awarded on a design-assist or design-build basis and that such trade packages may be awarded on such other basis subject to the Department's consent as to the bidding procedures and economic structure with regard to those packages. The Design-Builder and its affiliates may not carry out trade work with its own forces without the Department's written permission, which permission may be withheld or conditioned by the Department in its sole and absolute judgment.

**Section 5.3.2** In addition to the open book reporting requirements set forth in **Section 5.10**, the Design-Builder shall provide to the Department a copy of all quotes or proposals submitted by potential subcontractors.

**Section 5.3.3** The Design-Builder shall develop a purchasing strategy to address the expedited schedule and conditions of this Project and shall include appropriate provisions in the subcontracts to minimize the cost impact associated with such conditions. Such strategies may include, but are not limited to: (i) obtaining from subcontractors unit price quotes for typical coordination items; (ii) setting aside allowances for coordination work; and (iii) such other techniques as may be employed by the Design-Builder.

**Section 5.3.4** The Design-Builder shall carefully document its procedures for making available bid packages to potential bidders, the contents of each bid package, discussions with bidders at any pre-bid meetings, bidders' compliance with bid requirements, all bids received, the Design-Builder's evaluations of all bids, and the basis for the Design-Builder's recommendation as to which bidders should be chosen. The Department shall be afforded access to all such records at all reasonable times so that, among other things, it may independently confirm the Design-Builder's adherence to all requirements set forth in the Agreement including, without limitation, affirmative action requirements and subcontracting requirements.

**Section 5.3.5** The Department may, in its sole discretion, reject any or all bids and proposals received for any bid package, and may require the Design-Builder to obtain new or revised bids or proposals.

**Section 5.3.6** The Department may, in its sole discretion, direct the Design-Builder to accept a bid from a qualified bidder other than the bidder to whom the Design-Builder recommends award of a subcontract or supply agreement. If the Department chooses this option, it shall issue a Change Order to the Design-Builder for any difference between the cost of the subcontractor supply agreement awarded and the bid price of the subcontractor or supplier recommended by the Design-Builder, but without any adjustment to the Design-Build Fee.

**Section 5.3.7** The Department must approve all subcontractors and suppliers. The Department may elect to review the form of any subcontractor agreement with a material supplier to ensure that such contract incorporates the contractual provisions required by this Agreement.

**Section 5.3.8** The Design-Builder must contract for the provision of all services and materials for the Project (other than Self-Performed Work which must be authorized in advance and in writing by the Department) via written subcontracts or, for contracts requiring the provision of materials or equipment only, and not labor, via written supply agreements. All subcontracts and supply agreements shall include the following provisions:

**Section 5.3.8.1** that, to the extent of the work or supply within the agreement's scope, the subcontractor or supplier is bound to the Design-Builder for the performance of all obligations which the Design-Builder owes the Department under the Agreement;

**Section 5.3.8.2** that the subcontractor or supplier is not in privity with the Department and shall not seek compensation directly from the Department on any third-party beneficiary, quantum meruit, or unjust enrichment claim, or otherwise, except as may be permitted by any applicable mechanic's lien law;

**Section 5.3.8.3** that the Department is a third-party beneficiary of the subcontractor supply agreement, entitled to enforce any rights thereunder for its benefit;

**Section 5.3.8.4** that the subcontractor or supplier consents to the assignment of its agreement to the Department, at the Department's sole option, if the Design-Builder is terminated for default;

**Section 5.3.8.5** that the subcontractor or supplier shall comply immediately with a written order from the Department to the Design-Builder to suspend or stop work;

**Section 5.3.8.6** that the subcontractor or supplier shall maintain records of all Work it is requested or authorized to do on a time and material or cost-plus basis, or with respect to claims that it has asserted on a time and materials or cost-plus basis, during the Project and for a period of time specified in the General Conditions and requiring the subcontractor or supplier to make those records available for review or audit by the Department during that time;

**Section 5.3.8.7** that the subcontractor shall obtain and maintain, throughout the Project, workers' compensation insurance in accordance with the laws of the District of Columbia (this provision is not applicable to supply agreements);

**Section 5.3.8.8** that, if the Department terminates the Agreement for convenience, the Design-Builder may similarly terminate the subcontractor supply agreement for convenience, and that the subcontractor or supplier shall, in such a case, be entitled only to the costs set forth in Article 6 of the Standard Contract Provisions (Construction Contracts);

**Section 5.3.8.9** that the Department shall have the right to enter into a contract with the subcontractor or supplier for the same price as its subcontractor supply agreement priceless amounts already paid if the Design-Builder files a voluntary petition in bankruptcy or has an involuntary petition in bankruptcy filed against it;

**Section 5.3.8.10** that the subcontractor or supplier shall not be entitled to payment for defective or non-conforming work, materials, or equipment, and shall be obligated promptly to repair or replace non-conforming work, materials, or equipment at its own cost;

**Section 5.3.8.11** a provision requiring that subcontractors and suppliers promptly pay subcontractors and suppliers at lower tiers, imposing upon the subcontractors and suppliers a duty to pay interest on late payments, and barring reimbursement for interest paid to lower-tier subcontractors or suppliers due to a subcontractor's or supplier's failure to pay them in a timely fashion;

**Section 5.3.8.12** a provision requiring that all subcontractor at all tiers comply with the provisions of Article 13 (Economic Inclusion Goals); provided, however, that the Design-Builder may, in its reasonable discretion impose a different LSDBE subcontracting goal on some or all of its subcontractor; provided, further, however, that nothing in this provision shall be deemed to excuse the Design-Builder from using its best efforts to achieve the LSDBE subcontracting goal on an aggregate basis for the Project;

**Section 5.3.8.13** a provision that allows the Design-Builder to withhold payment from the subcontractor if the subcontractor does not meet the requirements of the subcontract;

**Section 5.3.8.14** lien and claim release and waiver provisions substantially identical to those in this Agreement.

**Section 5.3.9** Within seven (7) calendar days of receiving any payment from the Department that includes amounts attributable to Work performed or materials or equipment supplied by a subcontractor or supplier, the Design-Builder shall either pay the subcontractor or supplier for its proportionate share of the amount paid to the Design-Builder for the subcontractor's or supplier's Work or materials or equipment or notify the Department and the subcontractor or supplier, in writing, of the Design-Builder's intention to withhold all or part of the payment and state the reason for the withholding. All monies paid to the Design-Builder under the Agreement shall be used first to pay amounts due to subcontractor or suppliers supplying labor or materials for the Project and only money remaining after such payments are made may be used for other items such as the Design-Build Fee. Monies paid by joint check shall be deemed to have been paid fully to the subcontractor or supplier named as a joint payee unless the Department agrees otherwise in writing. Any interest paid to subcontractor or suppliers because the Design-Builder has failed to pay them in a timely fashion shall not be reimbursable as part of the Cost of the Work.

**Section 5.3.10** The Design-Builder shall not enter into any profit sharing, rebate, or similar arrangement with any subcontractor or supplier at any tier with respect to the Project or the Work to be carried out for the Project.

**Section 5.3.11** The Design-Builder shall not substitute or replace any subcontractor or supplier approved by the Department without the Department's Contracting Officer and DSLBD's prior written consent.

**Section 5.3.12** The Department has the right to contact subcontractor or suppliers at all tiers, or material or equipment suppliers directly to confirm amounts due and owing to them or amounts paid to them for Work on the Project, and to ascertain from the Subcontractor or suppliers at all tiers their projections of the cost to complete their work or to supply their material or equipment, or the existence of any claims or disputes. In doing so, the Department shall not issue any directions to Subcontractor or Suppliers at any tier.

**Section 5.3.13** If it comes to the Department's attention that a subcontractor or supplier has not been paid in a timely fashion (other than for disputed amounts), and if the Design-Builder fails to cure the problem within five (5) calendar days after the Department gives it written notice of the failure to pay, the Department may make payments to the subcontractor or supplier and Design-Builder by joint check. If the payment was already made to the contractor, the joint check be for future payments (if any).

**Section 5.3.14** The Design-Builder shall be required to provide an evaluation of each of its subcontractor's performance by completing and submitting to the Department the subcontractor Performance Evaluation Form set forth as **Exhibit O**, as follows:

- (a) Within ninety (90) days of initiating the Construction Phase; and
- (b) Within thirty (30) days after the Final Completion of the Project.

**Section 5.3.15** The Design-Builder shall be required to provide the Contracting Officer a certificate of insurance for each subcontractor before such subcontractor begins work.

**Section 5.4 Weekly Progress Meetings & Schedule Updates.**

The Design-Builder shall schedule and conduct, at a minimum, weekly progress meetings following the Design-Builder's generated agenda at which the Department, the Design-Builder's Architect, the Program Manager, the Design-Builder, and appropriate Subcontractor can discuss the status of the Work. The Design-Builder shall prepare and promptly distribute meeting minutes. In addition, the Design-Builder shall submit bi-weekly schedule updates which shall reflect actual conditions of Project progress as of the date of the update. The update shall reflect the actual progress of construction, identify any developing delays, regardless of their cause, and reflect the Design-Builder's best projection of the actual date by which Substantial Completion and Final Completion of the Project will be achieved. Via a narrative statement (not merely a critical path method schedule), the Design-Builder shall identify the causes of any potential delay and state what, in the Design-Builder's judgment, must be done to avoid or reduce that delay. The Design-Builder shall point out, in its narrative, changes that have occurred since the last update, including those related to major changes in the scope of work, activities modified since the last update, revised projections of durations, progress, and completion, revisions to the schedule logic or assumptions, and other relevant changes. Any significant variance from the previous schedule or update shall also be identified in a narrative, together with the reasons for the variance and its impact on Project completion. All Schedule updates shall be in a native format reasonably acceptable to the Department (e.g., Primavera). The Department may make reasonable requests during the Project for changes to the format or for further explanation of the information provided. Submission of updates showing that Substantial Completion or Final Completion of the Project will be achieved later than the applicable scheduled completion date shall not constitute requests for an extension of time and shall not operate to change the scheduled completion date(s). The Department's receipt of, and lack of objection to, any scheduled update showing Substantial Completion or Final Completion later than the dates agreed upon in the Project Schedule shall not be regarded as the Department's agreement that the Design-Builder may have an extension of time, or as a waiver of any of the Department's rights, but merely as the Design-Builder's representation that, as a matter of fact, Substantial Completion or Final Completion of the Project may not be completed by the agreed-upon date in the Project Schedule. Changes to the scheduled completion dates may be made only in the circumstances and only by the methods set forth in this Agreement.

## **Section 5.5 Written Reports.**

The Design-Builder shall provide written reports to the Department on the progress of the entire Work at least monthly from Preconstruction Notice to Proceed until the Final Completion of the Project. The monthly report shall include: (i) an updated schedule analysis, including any plans to correct defective or deficient work or recover delays; (ii) an updated cost report; (iii) a monthly review of cash flow; (iv) a quality control report; and (v) progress photos. Such written report shall include the following elements:

**Section 5.5.1 Construction Progress Update.** Each monthly update shall contain a narrative description of the Project progress and a critical path method schedule in Primavera format, including any plans to correct defective or deficient work or for time lost due to delays.

**Section 5.5.2 Cost Update.** The monthly update shall reflect, by GMP line item, the original line-item amount, approved, pending, and projected Change Order amounts, the cost incurred to date, the projected cost to complete the Work of the line item, and any variance between the actually approved budgeted balance of the line item and the projected cost to complete. A clear distinction must be made between approved Change Orders and those merely requested or anticipated. The report shall explain all variances including “buy-outs” or final actual costs including those below their respective GMP line item. In addition, the report must disclose any instances in which the Design-Builder has transferred amounts from one line item to another, or from the Contingency to any other line item. Neither submission nor the Department’s failure to reject an update reflecting that the projected cost to complete the Project exceeds the GMP will operate to increase the GMP or waive the Department’s right to enforce the Guaranteed Maximum Price. If the report reflects budget overruns, it must also include a recovery plan.

**Section 5.5.3 Economic Inclusion Report.** The monthly report shall include a detailed summary of the Design-Builder’s efforts and results with respect to the economic inclusion goals set forth in this Agreement. Such report shall be in a format acceptable to the Department and shall include, at a minimum: (i) the Design-Builder’s overall performance with respect to the goals; (ii) a listing of subcontracts and agreements with material suppliers during the month and the percentage of those subcontracts and agreements with material suppliers awarded to LSDBEs; (iii) a listing of subcontracts during the month and the estimated percentage of the labor hours to be worked by District of Columbia residents pursuant to those subcontracts; and (iv) a description of the major subcontracting and supply opportunities that will be solicited during the next three (3) months and the actions being taken to meet the subcontracting goals.

**Section 5.5.4 Cash Flow Update.** If there have been any changes to the anticipated cash flow for the Project, such changes shall be disclosed and explained in the monthly report. If there are no such changes, the report shall so state.

**Section 5.5.5 Quality Assurance Report.** The monthly report shall include a detailed summary of the steps that are being employed to ensure quality construction and workmanship. Each report shall specifically address issues that were raised by the Department and/or its Program Manager during the prior month and outline the steps that are being taken to address such issues.

**Section 5.5.6 Progress Photos.** The monthly report shall include updated progress photos that shall detail changes in the Work during the month. The Design-Builder shall also maintain a daily log containing a record of weather, Subcontractor working on the site, number of workers, major equipment on the site, Work accomplished, problems encountered, and other similar relevant data as the Department may reasonably require. The log shall be available to the



Department, the Design-Builder's Architect, and the Program Manager, and on a monthly basis, a copy of the log shall be submitted to the Department.

#### **Section 5.6 Cost Control System.**

The Design-Builder shall use a system of cost control for the Work in a format consistent with the GMP Drawings & Specifications and approved by the Department, which shall include, without limitation, regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Design-Builder shall identify variances between actual and estimated costs and report the variances to the Department, the Design-Builder's Architect, and the Program Manager at regular intervals.

#### **Section 5.7 Key Personnel.**

**Section 5.7.1** To carry out its duties, the Design-Builder shall provide at least the key personnel identified in **Exhibit F** to this Agreement ("Key Personnel"), who shall carry out the functions identified in **Exhibit F**. Among other things, the Key Personnel shall include:

##### **A – Key Personnel of the Design-Builder:**

- i. Project Manager
- ii. Superintendent
- iii. Project Executive

##### **B – Key Personnel of the Design-Builder's Architect/Engineer**

- i. Project Manager
- ii. Project Architect
- iii. Principal in Charge
- iv. Lead Mechanical Engineer

It is contemplated that these Key Personnel will work from the design stage, purchasing, and throughout the bulk of the fieldwork. The Design-Builder's obligation to provide adequate staffing is not limited to providing the Key Personnel but is determined by the needs of the Project. The Design-Builder shall not replace any of the Key Personnel without the Department's prior written approval. If any of the Key Personnel become unavailable to perform services in connection with the Agreement due to death, disability, or separation from the employment of the Design-Builder or any affiliate of the Design-Builder, then the Design-Builder shall promptly notify the Department's Contracting Officer and propose a replacement acceptable to the Department. The Department shall be entitled to complete information before approving such replacement, including, but not limited to, a current resume of the proposed replacement to include qualifications and experience.

**Section 5.7.2** Certain members of the Design-Builder's Key Personnel shall be subject to a replacement fee for their removal or reassignment by the Design-Builder. Those members of the Design-Builder's Key Personnel subject to a replacement fee shall be identified in **Exhibit F** as subject to the replacement fee provisions. In the event there is no delineation in **Exhibit F** of those members of the Design-Builder's Key Personnel subject to the replacement fee provisions of this Agreement, then all of the Key Personnel shall be subject to the replacement fee provisions of this Agreement.

**Section 5.7.2.1 Removal or Replacement of Key Personnel.** Subject to the terms of **Section 5.7.1**, if the Design-Builder replaces one of the key personnel listed in **Exhibit**

**F** as being subject to a replacement fee, without the prior written consent of the Department, then the Design-Builder shall pay to the Department's Contracting Officer the amount set forth in the Project Information section of this Agreement as replacement fee and not a penalty, to reimburse the Department for its administrative costs arising from the Design-Builder's failure to provide the Key Personnel. The foregoing replacement fee amount shall not bar recovery of any other damages, costs, or expenses other than the Department's internal administrative costs.

**Section 5.7.2.2** In addition, the Department shall have the right, to be exercised in its sole discretion, to remove, replace, or to reduce the scope of services of the Design-Builder in the event that a member of the Key Personnel has been removed or replaced by the Design-Builder without the prior written consent of the Department's Contracting Officer. In the event, that the Department exercises the right to remove, replace or to reduce the scope of services of the Design-Builder, the Department shall have the right to enforce the terms of this Agreement and to keep-in-place those members of the Design-Builder's team not removed or replaced and the remaining members shall complete the services required under this Agreement in conjunction with the new members of the Design-Builder's team approved by the Department's Contracting Officer.

#### **Section 5.8 Qualified Personnel/Cooperation.**

The Design-Builder shall employ on the Project only those employees and Subcontractor who will work together in harmony and who will cooperate with one another on the Project. The Design-Builder shall enforce strict discipline, good order, and harmony among its employees and its Subcontractor and shall remove from the site any person who is unfit for the work or fails to conduct herself or himself in a proper and cooperative manner. If the Department requests the removal of any person as unfit or as having behaved inappropriately, the Design-Builder shall promptly comply.

#### **Section 5.9 Warranty.**

The Design-Builder warrants to the Department that materials and equipment furnished under the Project Documents will be of good quality and new unless otherwise required or permitted by the Contract documents, that for the one (1) year period following the Substantial Completion Date the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Contract documents. The Design-Builder's warranty excludes remedies 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 from normal usage. The Design-Builder shall use commercially reasonable efforts to schedule a joint inspection of the Project during the eleventh month after Substantial Completion is achieved. During such inspection, the Design-Builder and a representative of the Department shall walk the Project to identify any necessary warranty work.

#### **Section 5.10 Open Book Reporting.**

The Design-Builder shall maintain an open-book reporting system with the Department, allowing the Department or its consultants access to the Design-Builder's Subcontractor and material suppliers, invoices, purchase orders, Change Order estimates, records for Self-Performed Work, and other relevant Project documentation and sources of information concerning the Work or costs. The Department shall not use its access to the Subcontractor to give instructions or directions to them. All instructions or directions shall be given only to the Design-Builder.

## **Section 5.11 Claims for Additional Time.**

**Section 5.11.1** Time is of the essence of this Agreement. The Project must be Substantially Complete no later than the Substantial Completion Date set forth within the Project Information Section above.

**Section 5.11.2** The Design-Builder will perform the Work so that it shall achieve Substantial Completion by the Substantial Completion Date. Unless the failure to achieve Substantial Completion by the Substantial Completion Date is a result of an Excusable Delay, as defined in **Section 5.11.3**, the delay shall be deemed Non-Excusable, and the Design-Builder shall not be entitled to an extension of time. Without limiting the generality of the foregoing, delays for the following reasons shall be regarded as Non-Excusable and shall not entitle the Design-Builder to an extension of time:

**Section 5.11.2.1** Delays due to job site labor disputes, work stoppages, or suspensions of work;

**Section 5.11.2.2** Delays due to adverse weather, unless the Design-Builder establishes that the adverse weather was of a nature and duration in excess of averages established by data from the U.S. Department of Commerce, National Oceanic and Atmospheric Administration for the Project locale for the ten (10) years preceding the effective date of the Agreement. For purposes of this clause, whether shall only be deemed “adverse” if the weather in question was more severe than that encountered at the Project site over the last ten (10) years for the month in question. Such determinations shall be made based on the number of rain/snow days or the cumulative precipitation total for the month in question. Notwithstanding the foregoing, named storms shall conclusively be deemed “adverse”;

**Section 5.11.2.3** Delays due to the failure of the Design-Builder or Subcontractor or material suppliers at any tier to perform in a timely or proper fashion, without regard to concepts of negligence or fault; or

**Section 5.11.2.4** Delays due to Site Conditions whether known or unknown as of the effective date of the Agreement, foreseeable or unforeseeable at that time, naturally occurring or man-made; provided, however, that delays due to differing Site Conditions as permitted by Article 4, Section A of the Standard Contract Provisions (Construction Contracts) or Hazardous Materials Remediation shall be deemed an Excusable Delay.

**Section 5.11.3** The Design-Builder shall be entitled to an adjustment in the Substantial Completion Date due to an Excusable Delay. The term “Excusable Delay” shall mean:

**Section 5.11.3.1** Delays due to adverse weather other than those that are classified as a Non-Excusable delay in accordance with **Section 5.11.2.2** of this Agreement;

**Section 5.11.3.2** Delays due to acts of God, war, unavoidable casualties, civil unrest, and other similar causes of delay that are beyond the control of the Design-Builder; provided, however, that in no event shall a Non-Excusable Delay or the action or inaction of the Design-Builder, or any of its employees, agents, Subcontractor or material suppliers be deemed an Excusable Delay; or

**Section 5.11.3.3** Delays caused by differing Site Conditions as permitted by Article 4, Section A of the Standard Contract Provisions (Construction Contracts) or Hazardous Materials Remediation as contemplated in **Section 5.11.2.4** of this Agreement;

**Section 5.11.3.4** Delays due to suspensions of work;

**Section 5.11.3.5** Delays caused by the Client Agency or separate contractors of the Client Agency to the extent such delays are not concurrent with delays caused by the Design-Builder or any of its employees, agents, subcontractor or material suppliers; or

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

**Section 5.11.4** If the Design-Builder wishes to make a claim for an adjustment in the time allotted per the Project Schedule, written notice as provided herein shall be given. The Design-Builder's claim shall include an estimate of the cost and of the probable effect of delay on the progress of the Work. In the case of continuing delay, only one claim is necessary.

**Section 5.11.5** In no event shall the Design-Builder be entitled to an increase in the GMP or the Design-Build Fee as a result of either an Excusable or Non-Excusable Delay; provided, however, that to the extent that a delay is: (i) an Excusable Delay; (ii) of unreasonable duration; (iii) caused solely by the Department; and (iv) not concurrent with any other delay, then the Design-Builder shall be entitled to receive its actual costs, including all direct and indirect costs, bonds and insurances resulting from such extended duration. It is understood that the Design-Builder shall not be entitled to any profit or home office overhead, including, but not limited to, an increase in the Design-Build Fee, on any amounts to which the Design-Builder may be entitled pursuant to the preceding sentence.

## **Section 5.12 Site Safety and Clean-Up.**

**Section 5.12.1** The Design-Builder will be required to provide a safe and efficient site, with controlled access. As part of this obligation, the Design-Builder shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the Project, and shall comply with the requirements set forth in Article 16, **Section F** of the Standard Contract Provisions (Construction Contracts).

**Section 5.12.2 Safety Plan.** Prior to the start of construction activities, the Design-Builder shall prepare a safety plan for the construction phase conforming to OSHA 29 CFR 1926 (such plan, the "Safety Plan"). Pursuant to OSHA 29 CFR 1926, the Design-Builder shall provide all employees with the necessary Personal Protective Equipment ("PPE") to comply with all COVID-19 regulations, and shall additionally require anyone on site to comply with any PPE requirements. This Safety Plan developed by the Design-Builder shall describe the proposed separation and the specific nature of the safety measures to be taken including fences and barriers that will be used as well as the site security details. The Safety Plan will be submitted to the Department and Client Agency for their review and approval prior to the commencement of construction. Once the Safety Plan has been approved, the Design-Builder shall comply with it at all times during construction. The Design-Builder shall be required to revise the Safety Plan as may be requested by the Department or Client Agency at any time, including, but not limited to, as necessary to address any new national or local COVID-19 regulations,

recommendations, or restrictions. The cost of revising and complying with the plan shall not entitle the Design-Builder to an increase in the GMP. In the event the Design-Builder fails to provide the Safety Plan, the Design-Builder will not be permitted to commence the Construction Phase until the Safety Plan is submitted, and in no event shall any resulting delay constitute an Excusable Delay. Additionally, the Design-Builder shall comply with the requirements of Article 27, **Section A** of the Standard Contract Provisions (Construction Contracts).

**Section 5.12.3 Safety Barriers/Fences.** As part of its responsibility for Project safety, the Design-Builder shall install such fences and barriers as may be necessary to separate the construction areas of the site from those areas that are then being used by the Client Agency for educational purposes. The Design-Builder shall describe in the Safety Plan the proposed separation and the specific nature of the fences and barriers that will be used.

**Section 5.12.4 Site Security.** The Design-Builder shall be responsible for site security and shall be required to provide such watchmen as are necessary to protect the site from unwanted intrusion. Site Security shall be included in the Design-Builder's General Conditions Cost.

**Section 5.12.5 Exculpation.** The right of the Department and Client Agency to comment on the Safety Plan and the nature and location of the required fences and barriers shall in no way absolve the Design-Builder from the obligation to maintain a safe site.

**Section 5.12.6 Site Cleanliness.** During the Agreement performance and/or as directed by the Department's Program Manager, as the installation is completed, the Design-Builder shall ensure that the site is clear of all extraneous materials, rubbish, or debris.

### **Section 5.13 Workhours, Site Office, and Coordination with Client Agency and Community**

**Section 5.13.1 Workhours.** The Design-Builder shall comply with the Noise Ordinance and neither it nor its subcontractor shall undertake work on the Project site other than at the times and sound level permitted by the Noise Ordinance.

**Section 5.13.2 Site Office.** Throughout the Project, the Design-Builder shall provide and maintain a fully equipped construction office for the Project site. The Design-Builder shall, at all times, provide and maintain a fully equipped construction office for DGS staff assigned to the Project. The cost for these Site Office(s) shall be included as part of the Design-Builder's general conditions cost.

**Section 5.13.3 Parking.** The Design-Builder shall organize its work in such a manner so as to minimize the impact of its operations on the surrounding community. To the extent that the number of workers on the site is likely to have an adverse impact on neighborhood parking, the Design-Builder shall develop a parking plan for those individuals working on the site that is reasonably acceptable to the Department.

**Section 5.13.4 Wheel Washing Stations.** The Design-Builder shall provide wheel washing stations on-site so as to prevent the accumulation of dirt and other refuse on the streets surrounding the Project site.

**Section 5.13.5 Outreach Plan.** The Design-Builder shall keep the Department informed of the construction activities and their potential impact on the community and shall develop a community outreach plan (the "Outreach Plan"). The Design-Builder shall submit the

Outreach Plan to the Department prior to its implementation which shall be subject to the Department's review and approval.

**Section 5.13.6 Supervision.** Throughout the Work, the construction office shall be managed by personnel competent to oversee the Work at all times while construction is underway. Such personnel shall maintain full-time, on-site construction supervision and provide daily inspections, quality control, monitoring, coordination of various trades, record drawings, and daily work log.

#### **Section 5.14 Close-out & FF&E.**

**Section 5.14.1** A detailed list of FF&E requirements will be developed during the design & Preconstruction Phase and attached hereto as **Exhibit N**.

**Section 5.14.2 Punchlist.** Promptly before Substantial Completion, the Design-Builder shall cause the Design-Builder's Architect to develop a punchlist. Once the punchlist is prepared, the Design-Builder shall inspect the work along with representatives from the Department. The punchlist shall be revised to reflect additional work items that are discovered during such inspection. The Design-Builder shall correct all punchlist items no later than ninety (30) days after Substantial Completion is achieved.

**Section 5.14.3 Warranties & Manuals.** Prior to Substantial Completion and no later than fifteen (15) days following Substantial Completion, the Design-Builder shall prepare and submit the following Project documentation: (i) a complete set of product manuals ("O&M"), training videos, warranties, etc.; (ii) attic stock; (iii) an equipment schedule; (iv) a proposed schedule of maintenance for the new building; (v) environmental, health and safety Project documents for the renovated building; and (vi) all applicable inspection certificates/permits (boiler, elevator, emergency evacuation plans, health inspection, etc.) for the new building. No later than thirty (30) days following Substantial Completion, the Design-Builder shall prepare and submit: (i) a complete set of its Project files; and (ii) a set of record drawings, including BIM models.

**Section 5.14.4 Support for Initial Heating & Cooling Season.** The Design-Builder and its mechanical subcontractor shall provide support to the Client Agency and the Department during system start-up and in initial operation for the first heating and cooling season after Substantial Completion is achieved.

**Section 5.14.5 Training.** The Design-Builder shall provide training to Client Agency staff on all of the building systems. The Design-Builder shall be required to schedule such training sessions and shall use commercially reasonable efforts to ensure all such training occurs prior to Final Completion. All training shall be electronically recorded and turned over to the Department for future use.

**Section 5.14.6** The Design-Builder shall assist Client Agency in relocating FF&E and other items as necessary within the renovated building, as well as for cleaning and other move-in services as directed by the Department. The GMP shall include an allowance and scope of work for these activities. This allowance is in addition to cleaning services that would otherwise be required by the Design-Builder, including, but not limited to, the obligation to deliver a broom clean building at the end of construction.

**Section 5.15 Salvaged and Stored Items.** The Design-Builder shall be responsible for salvaging and storing all items as identified by the Department, and to the benefit of the

Department, in accordance with all applicable District laws and regulations, after notifying the Department and receiving the Department's permission to proceed.

#### **Section 5.16 Protection of Existing Elements.**

The Design-Builder shall protect all existing features, public utilities, and other existing structures during construction. The Design-Builder shall protect existing site improvements, trees, and shrubs from damage during construction. Protection extends to the root systems of existing vegetation. The Design-Builder shall not store materials or equipment, or drive machinery, within the drip line of existing trees and shrubs.

#### **Section 5.17 Sediment and Erosion Control.**

The Design-Builder shall be responsible for installing sediment and erosion control measures in accordance with DOEE guidelines, inclusive of, but not limited to: silt fencing, inlet protection, stabilized construction entrances, and other control measures. The Design-Builder shall be responsible for scheduling and coordination of DOEE Kick-Off Meeting.

#### **Section 5.18 Quality Control.**

**Section 5.18.1 General Obligation.** The Design-Builder shall be responsible for all activities necessary to execute, manage, control, and document work for ensuring compliance with the contract documents. The Design-Builder's responsibility includes ensuring adequate quality control services are provided by the Design-Builder's employees, its subcontractor, vendors & suppliers at all levels from concept to completion including site assessment-investigations/discovery, schematic design development, pre-construction, construction, and closeout phases. All contract-related work activities and their implementation procedures described within this quality control plan shall also address safety, measures to ensure regulatory permit & code compliance, submittal management, change document processing/incorporation, reporting, and all other functions necessary to achieve the highest levels of quality during design and construction efforts. The Design-Builder's Quality Control ("QC") Plan submittal must include statements affirming compliance with DGS QC Program requirements. These requirements describe design & construction phase stipulations driving satisfactory integration of Definable Features of Work ("DFOWs") identified by DGS as being essential to overall Project success.

**Section 5.18.2 Quality Control Plan.** Within thirty (30) days after the Notice to Proceed (NTP), the Design-Builder shall develop a Quality Control plan for the Project (the, "Quality Control Plan"). A draft of the Quality Control Plan shall be submitted to the Department and shall be subject to the Department's review and approval. This draft shall comply with the guidelines and include at a minimum, the necessary components for Quality Control Plan development described within the Department's Quality Control Master Program (**Exhibit U**). The Quality Control Plan shall be tailored to the specific products/type of construction activities contemplated in the Design Development Documents, and in general, shall include a table of contents, quality control team organization, and hierarchical arrangement detailing ongoing, regular interaction/coordination within the Design-Builder's teams, duties/responsibilities of quality control personnel, submittal procedures, schedule of specified inspection & testing requirements, deficiency correction procedures, issues & conflicts resolution, RFI documentation process, change management, as-built record-keeping of contract documents and a listing of customized quality control procedures, that will be required to ensure key elements of the Work are executed in conformance with design documents. Examples of a few key elements that necessitate focused attention and involvement of competent agencies include MEP-Energy systems startup/commissioning, security systems

integration, and building envelope multi-trade coordination. Mockup construction requirements must be incorporated into the plan, in order to establish a minimum standard of acceptance by the Department, for the Project's most visible and critical structural-architectural building elements like CIP concrete and exterior facades. The Quality Control Plan must clearly describe requirements addressing the involvement of qualified personnel for critical building elements and any delegated design features that require engineered solutions, backed by supporting analysis data.

The Quality Control Plan must clearly describe quality control measures such as using Department's Quality Control Master Program 3-phase checklists recommended to be undertaken by both design & construction teams. Prior to the construction phase commencing, the Design-Builder must advise the Department regarding the status of their drawing & specification documents, from a percentage completion standpoint. For that matter, the design phase quality control effort shall provide metrics to gauge whether the design documents – drawings & specifications – are as complete as possible, prior to the Design-Builder's groundbreaking. DGS QC Program Design Phase Checklists include metrics to perform this evaluation of design documents. Similarly, the Quality Control Plan must describe in detail the quality control mechanisms proposed to be implemented by the Design-Builder for ensuring adherence with design documents by way of minimal rework and maintaining the highest standards of construction. The Quality Control Plan must detail a description of any 3<sup>rd</sup> parties suggested to be hired by the Department such as building envelope consultants and commissioning agents.

**Section 5.18.3 Implementation.** During the Construction Phase, the Design-Builder shall perform regular quality control inspections and create reports using the 3-phase inspection checklists included within the DGS Quality Control Master Program manuals based on such inspections pursuant to the Quality Control Plan. The quality control reports with the 3-phase Checklists shall be provided to the Department electronically on a monthly basis. The Design-Builder shall incorporate a quality control section in the progress meetings to discuss outstanding deficiencies, testing/inspections, and upcoming Work. The monthly report shall include a detailed summary of the steps that are being employed to provide quality construction and workmanship. The monthly report should specifically address issues raised during the month and outline the steps that are being used to address such issues. The following are the components that must at a minimum be included within the monthly Quality Control report submitted to DGS. All components must be updated regularly, and current versions included with monthly submissions to the Department.

1. A written narrative of Quality Control activities for the month supported by embedded, cross-referenced photos. Should include 3-phase checklists compiled on a regular basis as part of the Design-Builder's ongoing quality control efforts.
2. CPM updates and analysis reflecting the status of critical submittals affecting work progress, elaborated further within the descriptive work narrative accompanying CPM baseline schedule and subsequent, regular updates' submissions to the Department.
3. Deficiency tracking log.
4. Test & Inspections log recording all related activities for the month and cumulative for the Project. This must correspond to and cross-reference the Project's testing & inspections schedule described above with **Section 5.18.2**.
5. Submittal Schedule detailing the status of all project submittals.



### **Section 5.19 Acceleration.**

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

Given the nature of the Project and the fact that there is a fixed date upon which the Client Agency plans to occupy the building, the Design-Builder hereby: (i) acknowledges that this provision is a material inducement upon which the Department has relied in entering into this Agreement; and (ii) represents and warrants that it has included sufficient funding in the GMP in order to comply with the requirements of this section.

### **Section 5.20 Corrective Action Plan.**

Subject to the terms of this section, the Department shall have the right to direct the Design-Builder to revise the provisions of the Quality Control Plan if, in the reasonable judgment of the Department, the craftsmanship of the Work being installed fails to comply with generally applicable industry standards, requirements set forth in the specifications that are reasonably related to the quality of craftsmanship quality, or any provisions set forth in this Agreement (each a "Quality Control Event"). In the event that the Department or its Program Manager determines that a Quality Control Event has occurred, the Department shall provide the Design-Builder with written notice of the occurrence of such Quality Control Event and the Design-Builder shall be required to provide the Department with a corrective action plan that is reasonably designed to address the concerns raised in such notice within three (3) days after receipt of such notice (each instance, a "Corrective Action Plan"). If the Department and the Design-Builder are unable to agree on the terms of the Corrective Action Plan within five (5) days after the issuance of the notice (i.e. within forty-eight (48) hours after the receipt of the proposed corrective action plan), the Department shall have the right to direct such corrective action measures as the Department, in its reasonable judgment, deems necessary. Such directive may include adjustments to the procedural provisions set forth in the Quality Control Plan and/or may impose additional requirements on the manner in which Work is being performed. Provided the Department complies with the notice provisions of this section, the cost of any such corrective action directed under this section shall not justify an adjustment to the GMP or the Substantial Completion Date.

### **Section 5.21**

- a. Use of Department's Electronic Project Management Information System (ProjectTeam).** The Design-Builder shall utilize the Department's current project management software, ProjectTeam, to submit any and all project documentation

required to be provided by the Design-Builder for the Project, including, but not limited to: (i) requests for information; (ii) submittals; (iii) meeting minutes; (iv) invoices/applications for payment (full package including all forms required by DGS); (v) certified payrolls (in addition to upload via LCP Tracker); (vi) drawings and specifications; (vii) GMP and any Submissions that require approval by DC Council (viii) punchlist; and (ix) other Project documents as may be designated by the Department.

Electronic storage and transmission of information via ProjectTeam system shall be compliant with the provisions of DGS document security.

- b. Invoice Submittal.** The Design-Builder shall create and submit payment requests in an electronic format through the DC Vendor Portal, <https://vendorportal.dc.gov>. The Design-Builder shall submit proper invoices on a monthly basis. To constitute a proper invoice, the Design-Builder shall enter all required information into the Portal after selecting the applicable purchase order number which is listed on the Design-Builder's profile.

#### **Section 5.22 Conformance with Laws.**

It shall be the responsibility of the Design-Builder to perform under the Agreement in conformance with the Department's Procurement Regulations and all applicable statutes, laws, codes, ordinances, regulations, rules, requirements, orders, and policies of governmental bodies, including, without limitation, the U.S. Government and the District of Columbia government; and it is the sole responsibility of the Design-Builder to determine the Procurement Regulations, statutes, laws, codes, ordinances, regulations, rules, requirements and orders that apply and their effect on the Design-Builder's obligations thereunder. Given the requirements for the Project, the Department may, at its sole discretion: (i) apply for variance to the requirement of adhering to the Green Building Act on the Project; and (ii) consider deferring the scope of work associated with stormwater management to a later phase of the Project.

#### **Section 5.23 Licensing, Accreditation, and Registration**

The Design-Builder and all of its subcontractor and subconsultants (regardless of tier) shall comply with all applicable District of Columbia, state, and federal licensing, accreditation, and registration requirements and standards necessary for the performance of the Agreement. Without limiting the generality of the foregoing, all drawings shall be signed and sealed by a professional architect or engineer licensed in the District of Columbia.

#### **Section 5.24 Construction Phase Deliverables.**

The deliverables set forth in **Exhibit C** are required during the Construction Phase.

#### **Section 5.25 Close-Out Deliverables.**

The deliverables set forth in **Exhibit N** are required during the Project's Close-Out and prior to Final Payment, as set forth in **Section 10.12** and below:

Deliverables shall include those outlined in **Exhibit T** (DGS Close-Out Manual) including but not limited to the below items. If there is a conflict between **Exhibit T** and the deliverable list below, **Exhibit T** shall prevail.

- a) A complete set of the Design-Builder's Project files.
- b) A complete set of product manuals (O&M), training videos, warranties, etc.
- c) As-built record drawings.
- d) Attic stock and schedule.
- e) Equipment schedule.
- f) Proposed schedule of maintenance.
- g) Environmental, health & safety documents.
- h) LEED – Preliminary Construction Review.
- i) All applicable inspection certificates/permits (boiler, elevator, emergency evacuation plans, health inspection, etc.).
- j) Final Maintenance and Operations Plan.

## **Article 6 – DESIGNATED REPRESENTATIVES**

### **Section 6.1 Department's Designated Representative.**

The Department designates the individual(s) identified in **Exhibit I** as its representative with express authority to bind the Department with respect to all matters requiring the Department's approval or authorization. Subject to the limitations on their authority specified in **Exhibit I**, these representative(s) shall have the exclusive authority to make decisions on behalf of the Department concerning estimates and schedules, construction budgets, changes in the Work, and execution of Change Orders, Contract Modifications or Change Directives, and shall render such decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or performance of the Work of the Design-Builder. In order for the Department to effectively manage the Project and assure that the Design-Builder does not receive conflicting instructions regarding the Work, the Design-Builder shall promptly notify the Department's representative upon receiving any instructions or other communication in connection with the Design-Builder's Work from any employee of the Department or other purported agent of the Department other than the Department's designated representative.

### **Section 6.2 Design-Builder's Designated Representative.**

The Design-Builder designates the individual(s) identified in **Exhibit H** as its representative with express authority to bind the Design-Builder with respect to all matters requiring the Design-Builder's approval or authorization. In addition, the Department retains the right to approve candidates to serve as on-site personnel in accordance with each candidate's experience with similar projects and local marketplace conditions. Once approved, individuals cannot be changed without the Department's prior approval. During the entire term of the Agreement, it is agreed that the Design-Builder's designated representative will devote his or her time exclusively to the Project, unless the Department consents to a reduction in time. All services provided by the Design-Builder shall be performed in accordance with the highest professional standards recognized and adhered to by design-builders that build first-class state-of-the-art buildings and projects that are similar to the Project in large urban areas.

## **Article 7 – COMPENSATION AND PAYMENTS FOR DESIGN & PRECONSTRUCTION PHASE SERVICES**

### **Section 7.1 Compensation**

**Section 7.1.1** The Department shall compensate and make payments to the Design-Builder for Design & Preconstruction Services in accordance with this Article 7 and Article 10. For Preconstruction Services, the Design-Builder's compensation shall be as set forth in the Project Information section of this Agreement (the "Preconstruction Fee"). The Preconstruction Fee shall be the Design-Builder's sole compensation for Preconstruction Phase Services. The Preconstruction Fee shall include, but not be limited to, amounts necessary to compensate the Design-Builder for:

- Profit;
- Home Office Overhead;
- Fringe Benefits associated with staff costs;
- Payroll taxes associated with staff costs;
- Staff costs associated with obtaining permits and approvals during the Design & Preconstruction Phase;
- Out-of-house consultants;
- Travel, Living, and Relocation expenses;
- Job vehicles;
- Office equipment including but not limited to:
  - Computer hardware and software;
  - Fax machines; and
  - Copying machines;
- Office supplies;
- Telephone; and
- Local delivery and overnight delivery costs.

**Section 7.1.2** The Department shall compensate and make payments to the Design-Builder for design services in accordance with Article 7 and Article 10. For design services, including construction administration services provided during the construction phase, the Design-Builder's compensation shall not exceed the amount set forth in the Project Information section of this Agreement (the "Design Fee").

### **Section 7.2 Payments**

**Section 7.2.1** Payments for Design & Preconstruction Phase Services shall be made monthly over the anticipated duration of the Design & Preconstruction Phase following presentation and acceptance of the Design-Builder's invoice and shall be in proportion to services performed. In no event, however, will the aggregate of the Design-Builder's monthly invoices for Design & Preconstruction Phase Services exceed the Preconstruction Fee plus the Design Fee.

**Section 7.2.2** Payments are due and payable in accordance with Article 9 of this Agreement. Amounts unpaid after the date of which payments are due shall bear interest in accordance with the Quick Payment Act.

## **Article 8 – COMPENSATION FOR CONSTRUCTION PHASE SERVICES**

### **Section 8.1 Compensation.**

The Department shall compensate and make payments to the Design-Builder for Construction Phase Services in accordance with this Article 8 and Article 10. For the Construction Phase Services, the Design-Builder's total compensation shall be as set forth in the Project Information section of this Agreement (the "Design-Build Fee"). The Design-Builder acknowledges and agrees that the percentage of the total amount of the Design-Build Fee set forth in the Project Information section of this Agreement is at risk (the "At Risk Portion"), and the Design-Builder shall only be entitled to the At-Risk Portion as set forth below. Unless and until the Design-Builder's entitlement to any subset of the At-Risk Portion is determined by the Department, the Design-Builder shall only be entitled to bill for the portion of the Design-Build Fee that is not at risk (the "Base Design-Build Fee"). The Design-Build Fee shall be billed in accordance with Article 10, to be paid in equal monthly installments over the anticipated duration of the Construction Phase. To the extent that the duration of the Agreement is extended, the then remaining amounts of the Design-Build Fee will be re-allocated such that the then-existing portion of the Design-Build Fee shall be evenly spread over the then remaining duration of the Construction Phase.

**Section 8.1.1 Award Fee Pool.** The At-Risk Portion shall be used to establish and fund an award fee pool ("the Award Fee Pool"). Within sixty (60) days after approval and fully execution of this Agreement, the Department shall appoint a committee that will determine entitlement to those portions of the Award Fee Pool so designated below (such committee, the "Award Fee Evaluation Committee"). The Award Fee Evaluation Committee will consist of: (i) the Department's Deputy Director for Capital Construction or their designee; (ii) DCPS Chief of Facilities or their designee; (iii) DGS Capital Construction representative; and (iv) DCPS Facilities representative. Committee members shall not include an individual who has day-to-day interactions or involvement on the Project, or an individual who is presently involved in an active project with the Design-Builder.

**Section 8.1.2** The Design-Builder may earn the At-Risk Portion of the Design-Build Fee in accordance with **Exhibit R**.

### **Section 8.2 Lump Sum General Conditions Cost.**

The Design-Builder shall not be entitled to recover more than the amount set forth in the Project Information section of this Agreement for the Cost of General Conditions (such amount, the "Lump Sum General Conditions Cost"). If, as a result of any Change Order(s) or Change Directive(s): (i) the Project durations extends 30 days or more beyond the Substantial Completion Date; and (ii) the Design-Builder can demonstrate to the satisfaction of the Department that such additional Costs of General Conditions are reasonable and not due to any fault of the Design-Builder, its Subcontractor, material men, consultants or anyone making claims thereunder, the Design-Builder may request a Change Order to adjust the Lump Sum General Conditions Cost. To the extent the Design-Builder incurs Costs of General Conditions in excess of the Lump Sum General Conditions Cost, the Design-Builder shall not be entitled to reimbursement for such amounts unless the Department authorizes, in writing, an increase to the Lump Sum General Conditions Cost. Nonetheless, in such an event, if the Design-Builder exceeds the Lump Sum General Conditions Cost, the Design-Builder shall continue to be required to adequately staff the Project.

### **Section 8.3 Initial Not-to-Exceed Amount.**

Unless and until the GMP Amendment is executed and approved by the Council for the District of Columbia, this Agreement shall have an initial not-to-exceed amount as set forth in the Project Information section of this Agreement (the “Initial NTE”). In no event shall the Design-Builder be entitled to recover more than the Initial NTE unless the Design-Builder is authorized to exceed the Initial NTE by the Department in advance and in writing. Prior to expending or committing any portion of the Initial NTE, the Design-Builder shall obtain the Department’s written approval of such expenditure or commitment, as well as a determination as to whether the work will qualify as a “capital” expense under the Department’s financial guidelines to the extent capital money is to be expended. In making such a request, the Design-Builder shall submit an itemized breakdown of the work that the Design-Builder seeks to release using funds from the Initial NTE as well as the associated costs of such work.

### **Section 8.4 Project Budget.**

The Department has established the Project Budget as set forth in the Information section of this Agreement. When the GMP is established, such GMP shall not exceed the Project Budget, and such GMP shall include any and all amounts which may be due to the Design-Builder pursuant to this Agreement. In no event shall the Design-Builder be entitled to recover more than the GMP unless the Design-Builder is authorized to exceed the GMP by the Department in advance and in writing. The Design-Builder shall inform the Department’s Contracting Officer at least fifteen (15) calendar days in advance, if the Design-Builder encounters any foreseen or unforeseen project-related events, which might reasonably affect: (i) existing Project Budget; or (ii) DC council-authorized appropriations.

### **Section 8.5 No Adjustments to Fee.**

It is the Department’s intent to engage the Design-Builder to develop a GMP that meets the programmatic requirements set forth in **Exhibit A** by the Client Agency and the Project Budget as set forth herein (*i.e.* designed to budget), to allow for Substantial Completion of the Work to be achieved no later than the Substantial Completion Date. The Design-Builder shall be entitled to an adjustment to the Design-Build Fee at the time the GMP is established to the extent, and only to the extent, that: (i) the Department makes additions to the scope that, when measured relative to the program, cause the GMP to exceed the Design-Builder’s original concept estimate by more than five percent (5%); or (ii) the Department makes additions to the scope provided for herein which (other than for punchlist or warranty work) which requires the Design-Builder’s services at the Project to extend 30 days or more beyond the Substantial Completion Date. With regard to Change Orders issued after the GMP is established, and in accordance with **Section 18.8**, the Design-Builder shall be entitled to an increase in the Design-Build Fee to the extent, and only to the extent, that: (i) the Department has added a new programmatic element to the Project; or (ii) the Department made additions to the GMP scope which (other than punchlist or warranty work) require the Design-Builder’s services at the Project to extend 30 days or more beyond the Substantial Completion Date.

### **Section 8.6 Reserved**

### **Section 8.7 Direct Cost of Work**

“Direct Cost of the Work” shall mean labor, material, and other costs reasonably and necessarily incurred in the proper performance of the Work as approved by the Department and shall include, but not be limited to:

**Section 8.7.1 Labor.** Payment will be made for direct labor costs plus indirect labor costs such as insurance, taxes, fringe benefits and welfare provided such costs are considered reasonable.

Indirect costs shall be itemized and verified by receipted invoices. If verification is not possible, up to five percent (5%) of direct labor costs may be allowed.

**Section 8.7.2 Rented Equipment.** Payment for required equipment rented from an outside company that is neither an affiliate of nor a subsidiary of, the Design-Builder will be based on receipted invoices which shall not exceed rates given in the current edition of the Rental Rate Blue Book for Construction Equipment published online by Data Quest. If actual rental rates exceed manual rates, written justification shall be furnished to the Contracting Officer for consideration. No additional allowance will be made for overhead and profit. The Design-Builder shall submit written certification to the Contracting Officer that any required rented equipment is neither owned by nor rented from the Design-Builder or an affiliate of or subsidiary of the Design-Builder.

**Section 8.7.3 Design-Builder's Equipment.** Payment for required equipment owned by the Design-Builder or an affiliate of the Design-Builder will be based solely on an hourly rate derived by dividing the current appropriate monthly rate by 176 hours. No payment will be made under any circumstances for repair costs, freight and transportation charges, fuel, lubricants, insurance, any other costs, and expenses, or overhead and profit. Payment for such equipment made idle by delays attributable to the Government will be based on one-half the derived hourly rate under this subsection.

**Section 8.7.4 Materials.** Incorporated and unincorporated materials as permitted under **Section 9.1.**

**Section 8.7.5** Direct Cost of the Work does not, however, include home office overhead, field supervision, general conditions, or profit of either the subcontractor or the Design-Builder. No personnel above the level of a working foreman shall be considered a Direct Cost of the Work.



## **Article 9 – COST OF THE WORK FOR CONSTRUCTION PHASE**

### **Section 9.1 Cost of the Work.**

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

**Section 9.1.1** Payments made by the Design-Builder to Subcontractor and suppliers, other than design subconsultants, but only in accordance with the subcontracts and supply agreements;

**Section 9.1.2** Payments made by the Design-Builder to its design consultants and subconsultants; provided, however, that the Design-Builder shall not be reimbursed for the costs of design services and construction administration services in excess of the Design Fee;

**Section 9.1.3** All amounts due to the Design-Builder under the terms of the Department’s written authorization for the Design-Builder to perform any portion of the Work as Self-Performed Work. If authorization for the Design-Builder to engage in Self-Performed Work is not on a fixed-price basis, then, as to that Work, the following costs shall be within the Cost of the Work:

- (a) **Labor.** Properly documented wages actually paid to Project foremen, construction workers, and other personnel in the direct employ of the Design-Builder, while engaged in approved Self-Performed Work, together with contributions, assessments, payroll taxes, or fringe benefits required by the laws or applicable collective bargaining agreements.
- (b) **Incorporated Materials.** The cost, net of trade discounts, of all materials, products, supplies, and equipment incorporated into the Self-Performed Work, including, without limitation, costs of transportation and handling.
- (c) **Unincorporated Materials.** The cost of materials, products, supplies, and equipment not actually installed or incorporated into the Self-Performed Work, but required to provide a reasonable allowance for waste or spoilage, subject to the Design-Builder’s agreement to turn unused excess materials over to the Department at the completion of the Project or, at the Department’s option, to sell the material and pay the proceeds to the Department or give the Department a credit in the amount of the proceeds against the Cost of the Work.

**Section 9.1.4** Royalty and license fees paid for use of a design, process, or product if its use is required by this Agreement or has been approved in advance by the Department;

**Section 9.1.5** Fees for obtaining all required approvals or permits associated with any abatement, demolition, utilities abandonment, and utility relocation (including utility connection fees), including any and all building and/or trade permits fees;

**Section 9.1.6** All performance and payment bonds and general liability insurance. The Department may, in its sole discretion, allow the Design-Builder to recover the costs of subcontractor default insurance at a mutually agreed-upon rate in lieu of trade level bonds, provided that such insurance be approved by the Department in advance and after being presented with a cost-benefit analysis of such use;

**Section 9.1.7** All fees and other costs necessarily incurred to carry out testing and inspection required by the Agreement or applicable laws, or otherwise to maintain proper quality

assurance. The costs the Design-Builder incurs to schedule and coordinate any additional testing and inspections the Department may decide to conduct itself shall be within the Cost of the Work unless the additional testing establishes that the Work tested was defective or otherwise failed to satisfy requirements set forth in the Agreement, in which case the Design-Builder shall pay the costs, without reimbursement;

**Section 9.1.8** All bonds to jurisdictional agencies (utilities, stormwater management, land disturbance, and grading);

**Section 9.1.9** The Lump Sum General Conditions Cost; and

**Section 9.1.10** Costs of repairing or correcting damaged or nonconforming Work executed by the Design-Builder's Architect, or Design-Builder's other consultants, Subcontractor, or suppliers, provided that such damaged or nonconforming Work was not caused by negligence or failure to fulfill a specific responsibility of the Design-Builder, and only to the extent that the cost of repair or correction is not recoverable by the Design-Builder from insurance, sureties, subcontractor or suppliers. It is understood that the cost of repairing, correcting damaged or nonconforming Work that was Self-Performed shall not be reimbursable in any event.

## **Section 9.2 Lum Sum General Conditions Cost.**

The Contractor's Lump Sum General Conditions Cost shall be the extent of what the Contractor is entitled to recover for the cost of General Conditions. General Conditions may include, but are not limited to:

- a. Cost of construction staff;
- b. Fringe Benefits associated with construction staff;
- c. Payroll taxes and payroll insurance associated with construction staff;
- d. Staff costs associated with obtaining permits and approvals;
- e. Out-of-house consultants, including, but not limited to, permit expeditors, safety managers, and schedulers;
- f. Job vehicles;
- g. The field office(s) for the Design-Builder and Department, including, but not limited to: (i) trailer purchase and/or rental; (ii) field office installation, relocation and removal; (iii) utility connections and charges during the Construction Phase; (iv) furniture; and (v) office supplies;
- h. Office equipment including, but not limited to: (i) computer hardware and software; (ii) fax machines; (iii) copying machines; (iv) voice/data system installation and use charges; and (v) job radios;
- i. Local delivery and overnight delivery costs;
- j. Field computer network;
- k. First aid facility;
- l. Printing cost for drawings, bid packages, etc.;
- m. BIM Cost (software, seats, hardware);
- n. Parking costs for the construction staff;
- o. Salting sidewalks and shoveling snow on sidewalks that surround the site; and
- p. Exterior site fencing, fence wrapping and construction signage.

## **Section 9.3 Costs Not to Be Reimbursed.**

All costs not specifically listed in **Section 9.1** as being within the Cost of the Work are excluded from the Cost of the Work and shall not be reimbursable. In particular, but without limitation,

the Cost of the Work does not include any of the following:

- a) Any personnel or labor costs other than those provided for in **Section 9.1.3 (a)**.
- b) Fees for any permits or licenses the Design-Builder requires to conduct its general business operations.
- c) Capital expenses and interest on capital employed for the Work.
- d) The cost of home or regional offices, it being understood that compensation for such costs included in the Design-Build Fee.
- e) Sales or use taxes unless the Design-Builder establishes that applicable law required payment of such taxes.
- f) Costs due to the errors or omissions of the Design-Builder or its subcontractor or suppliers at all tiers, negligent or otherwise.
- g) Costs due to breach of Contract by the Design-Builder or its subcontractor or material suppliers at all tiers, including, without limitation, costs arising from defective or damaged work or its correction, disposal of materials or equipment erroneously supplied, and repairs to property damaged by the Design-Builder or its subcontractor or material suppliers at all tiers.
- h) Any costs incurred in performing work of any kind before Preconstruction NTP unless specifically authorized by the Department in advance and in writing.
- i) Direct or indirect costs of any kind, except those expressly included in **Section 9.1**.

#### **Section 9.4 Discounts, Rebates, And Refunds.**

**Section 9.4.1** Cash discounts obtained on payments made by the Design-Builder shall accrue to the Department if: (i) before making such payment(s), the Design-Builder included them in an Application for Payment and received payment therefor from the Department; or (ii) the Department has deposited funds with the Design-Builder with which to make such payment(s). All other cash discounts shall accrue to the Design-Builder. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Department, and the Design-Builder shall make provisions so that such amounts can be secured.

**Section 9.4.2** Amounts that accrue to the Department in accordance with the provisions of **Section 9.4.1** shall be credited to the Department as a deduction from the Cost of the Work.

#### **Section 9.5 Facilitating Tax Exempt Purchases.**

The Department expects that the Project will qualify as tax-exempt under applicable laws. Upon request, the Department will provide the Design-Builder with the necessary information relating to the tax exemption. In the event, that any savings are attributable to the tax-exempt status of the Project, the Design-Builder shall not be entitled to share in such savings.

#### **Section 9.6 Accounting Records.**

The Design-Builder shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under the Agreement. The Design-Builder's accounting and control systems shall be satisfactory to the Department. The Department, its representatives, and the Department's accountants shall be afforded access to the Design-Builder's records, books, correspondence, instruction, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda, and other data relating to this Project, and the Design-Builder shall preserve such Project documentation relating to the Project for a period of three years after final payment, or for such longer period as may be required by law.

**Section 9.7 Excluded Cost Elements.**

It is the Department's intent that the Design-Builder provides a turnkey solution for the implementation of the Project, and the Project Budget set herein has been developed based on such a framework. The Design-Builder shall advance the Project in a manner consistent with such budget and the understanding that only the commissioning and 3<sup>rd</sup> party plan review cost element are excluded from the Project Budget set forth herein.

## **Article - 10 - CONSTRUCTION PHASE PAYMENTS**

### **Section 10.1 Progress Payments.**

The Design-Builder shall be compensated in a series of progress payments and a Final Payment, for Work completed in accordance with the Agreement, and for which proper Applications for Payment have been submitted and approved. The amount of each progress payment shall be as follows:

The Cost of Work completed to date

Plus Cost of Work for Pay Period x 60% Design-Build Fee

Current approved estimated

Cost of Work through Final Completion

Plus Any subset of the Design-Build Fee to which the Department has determined the Design-Builder to be Entitled

Minus Applicable retainage

Minus Amounts previously paid by the Department

### **Section 10.2 Retention.**

The Department shall withhold from each progress payment an amount equal to ten percent (10%) of the payment related to: (i) each Subcontract and supply agreement; (ii) the Preconstruction Fee; (iii) Design-Build Fee; (iv) General Conditions Costs; and (v) the Cost of the Work-related to each item of Self-Performed Work, until such time as fifty percent (50%) of the then currently budgeted cost associated with each such item has been invoiced, at which point the Department may cease retaining against such item; provided, however, that retention shall not be held on the costs of bonds, insurances, and those elements of the general requirements which consist of a single, insulated effort such as dumpster disposal and safety carpentry. The Department at its sole and absolute discretion may elect to increase the retention of any trade subcontractor up to ten percent (10%), in the event the Department determines that the situation so warrants. The Department also in its sole and absolute discretion, may elect to reduce the retainage relating to a particular trade subcontractor, or the Cost of the Work-related to a specific item of Self-Performed Work to zero upon: (a) satisfactory completion of such Work; (b) submission of all required warranties, certifications, and operating or maintenance instructions with respect to that Work; and (c) execution of appropriate waivers of lien and releases of claims. However, in no event shall the total retainage held by the Department be reduced to an amount that is less than two and one-half percent (2.5%) of the GMP.

### **Section 10.3 Stored Materials.**

The Department shall not be required to pay for materials stored at the site or stored at other locations absent prior written authorization to do so, which authorization may be withheld at the Department's sole discretion. If the Department expressly agrees to pay for materials stored at the site but not yet incorporated into the Work, the Application for Payment may also include a request for payment of the cost of such materials, if the materials have been delivered to the site, and suitably stored. Such requests shall be documented by appropriate invoices and bills of sale. Payment for stored materials shall be conditioned also on the Design-Builder's representation that it has inspected the material and found it to be free from defect and otherwise in conformity with this Agreement, and on satisfactory evidence that the materials

are insured under the builder's risk policy. Further, if the Design-Builder requests the Department to allow payments for storage of materials offsite, the Design-Builder shall be required, inter alia, to agree to the execution of proper Project documentation to afford the Department a secured interest in the materials upon payment.

#### **Section 10.4 Design-Builder's Certification.**

Each Application for Payment shall be accompanied by the Design-Builder's signed certification that:

**Section 10.4.1.** all amounts paid to the Design-Builder on the previous Application for Payment that were attributable to subcontractor work or to materials or equipment being supplied by any supplier have been paid over to the appropriate Subcontractor and suppliers;

**Section 10.4.2.** that all amounts currently sought for subcontractor work or supply of materials or equipment are currently due and owing to the Subcontractor and material or equipment suppliers;

**Section 10.4.3.** that all Work, materials or equipment for which payment is sought is, to the best of the Design-Builder's knowledge, free from defect and meets all of the requirements set forth in the Agreement:

**Section 10.4.4.** that the Design-Builder's subcontracts include the clauses required by subparagraphs (1) through (4) of D.C. Official Code §2-221.02(d) (2017).

**Section 10.4.5.** The Design-Builder shall not include in an Application for Payment amounts for Work for which the Design-Builder does not intend to pay.

#### **Section 10.6 Lien Waivers.**

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

#### **Section 10.7 Warranty of Title.**

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

#### **Section 10.8 Submission.**

On the twenty-fifth day of each month, the Design-Builder shall submit to the Department (with a copy to the Program Manager) an Application for Payment, which Application for Payment shall cover the entire month during which the Application for Payment is submitted. All amounts formally submitted via Application for Payment and not disputed by the

Department shall be due and payable on the last day of the month following submission or, if that is not a business day, on the following business day. If the Design-Builder and Department are unable to agree on the amounts properly due and owing, the Department shall pay in accordance with its good faith determination, and the Design-Builder may protest and pursue a claim as provided in this Agreement and the Standard Contract Provisions (Construction Contracts and Architectural and Engineering Services Contracts).

**Section 10.9 Right to Withhold Payments.**

The Department will notify the Design-Builder within fifteen (15) days after receiving any Application for Payment of any defect in the Application for Payment or the Design-Builder's performance which may result in the Department's declining to pay all or a part of the requested amount. The Department may withhold payment from the Design-Builder, in whole or part, as appropriate, if:

**Section 10.9.1** the Work is defective, and such defects have not been remedied; or

**Section 10.9.2** the Department has determined that the Design-Builder's progress has fallen behind the Project Schedule, and the Design-Builder fails, within ten (10) calendar days of the Department's written demand, to provide the Department with a realistic and acceptable Recovery Plan in accordance with **Section 5.19**; or

**Section 10.9.3** the Design-Builder's monthly schedule update reflects that the Design-Builder has fallen behind the Project Schedule, and the Design-Builder fails to include, in the same monthly report, a realistic and acceptable Recovery Plan in accordance with **Section 5.19**; or

**Section 10.9.4** the Design-Builder has failed to provide reports in full compliance with **Section 5.5** of this Agreement; or

**Section 10.9.5** the Design-Builder has failed to pay subcontractor or suppliers promptly or has made false or inaccurate certifications that payments to subcontractor or suppliers are due or have been made; or

**Section 10.9.6** any mechanic's lien has been filed against the Department, the site or any portion thereof or interest therein, or any improvements on the site, even though the Department has paid all undisputed amounts due to the Design-Builder, and the Design-Builder, upon notice, has failed to remove the lien, by bonding it off or otherwise, within ten (10) calendar days; or

**Section 10.9.7** the Department has reasonable evidence that the Work will not be completed by the Substantial Completion Date, as required, that the unpaid balance of the GMP would not be adequate to cover actual or liquidated damages arising from the anticipated delay; or

**Section 10.9.10** the Department has reasonable evidence that the Work cannot be completed for the unpaid balance of the GMP; or

**Section 10.9.11** the Design-Builder is otherwise in substantial breach of this Agreement including, without limitation, failures to comply with LSDBE Utilization requirements; or

**Section 10.9.12** the Application for Payment is incomplete, unsubstantiated, and/or does not contain sufficient documentation for evaluation by the Contracting Officer.

**Section 10.10 Payment Not Acceptance.**

Payment of any progress payment or final payment shall not constitute acceptance of Work that is defective or otherwise fails to conform to the Agreement or a waiver of any rights or remedies the Department may have with respect to defective or nonconforming Work.

**Section 10.11 Department Not Obligated to Others.**

The Department shall have no obligation to pay or be responsible in any way for payments to a consultant or subcontractor performing portions of the Work.

**Section 10.12 Final Payment.**

A final payment ("Final Payment") shall be made by the Department to the Design-Builder when: (i) Final Completion has been achieved; (ii) all deliverables set forth in **Section 5.14**, and **Exhibit N** have been delivered to and are accepted by the Department; (iii) the Design-Builder provides the Department a complete set of product manuals ("O&M"), training videos, and warranties, as applicable; and (iv) a complete final Application for Payment and a final accounting for the Cost of the Work has been submitted by the Design-Builder and reviewed by the Department and, to the extent the Department determines appropriate, the Department's accountants. The Department shall make the Final Payment not more than thirty (30) days after the Department verifies the amount of the final payment set forth in a complete final Application for Payment.

**Section 10.12.1** The amount of the Final Payment shall be calculated as follows:

**Section 10.12.1.1** Take the sum of the Cost of the Work substantiated by the Design-Builder's final accounting and the Design-Build Fee; but not more than the GMP.

**Section 10.12.1.2** Subtract amounts, if any, for which the Department withholds pursuant to the Agreement.

**Section 10.12.1.3** Subtract the aggregate of previous payments made by the Department. (If the aggregate of previous payments made by the Department exceeds the amount due the Design-Builder, the Design-Builder shall promptly reimburse the difference to the Department).

**Section 10.12.1.4** The Final Payment shall take into account any savings accruing to the Department or the Design-Builder.

**Section 10.12.1.5** The Department will review and report in writing on the Design-Builder's final accounting within 30 days after delivery of the final accounting to the Department by the Design-Builder. Based upon Department's determination of the Cost of the Work, and provided the other conditions of **Section 10.12.1** have been met, the Department will, within fifteen (15) days after the Department's determination, notify the Design-Builder of any amount that the Department will withhold and the reasons therefor. The time periods stated in this **Section 10.12.1.5** supersede those for typical progress payments.

**Section 10.12.1.6** If the Department determines that the Cost of the Work is other than that claimed by the Design-Builder, the Design-Builder shall be entitled to proceed in accordance with Article 3 of the Standard Contract Provisions (Construction Contracts). Pending a final resolution of the disputed amount, the Department shall pay the Design-Builder the amount that the Department determines to be appropriate.



## **Article-11 - INSURANCE**

- A. **GENERAL REQUIREMENTS.** The Contractor at its sole expense shall procure and maintain, during the entire period of performance under this contract, the types of insurance specified below. The Contractor shall submit a Certificate of Insurance to the Contracting Officer (CO) giving evidence of the required coverage prior to commencing performance under this contract. In no event shall any work be performed until the required Certificates of Insurance signed by an authorized representative of the insurer(s) have been provided to, and accepted by, the CO.

The Government of the District of Columbia shall be included in all policies, where applicable and allowable by law, required hereunder to be maintained by the Contractor and its subcontractors (except for workers' compensation and professional liability insurance) as an additional insureds for claims against The Government of the District of Columbia relating to this contract, with the understanding that any affirmative obligation imposed upon the insured Contractor or its subcontractors (including without limitation the liability to pay premiums) shall be the sole obligation of the Contractor or its subcontractors, and not the additional insured. The additional insured status under the Contractor's and its subcontractors' Commercial General Liability insurance policies shall be effected using the ISO Additional Insured Endorsement form CG 20 10 11 85 (or CG 20 10 07 04 **and** CG 20 37 07 04) or such other endorsement or combination of endorsements providing coverage at least as broad and approved by the CO in writing. All of the Contractor's and its subcontractors' liability policies (except for workers' compensation and professional liability insurance) shall be endorsed using ISO form CG 20 01 04 13 or its equivalent so as to indicate that such policies provide primary coverage (without any right of contribution by any other insurance, reinsurance or self-insurance, including any deductible or retention, maintained by an Additional Insured) for all claims against the additional insured arising out of the performance of this Statement of Work by the Contractor or its subcontractors, or anyone for whom the Contractor or its subcontractors may be liable. These policies shall include a separation of insureds clause applicable to the additional insured.

If the Contractor and/or its subcontractors maintain broader coverage and/or higher limits than the minimums shown below, the District requires and shall be entitled to the broader coverage and/or the higher limits maintained by the Contractor and subcontractors.

### **B. INSURANCE REQUIREMENTS**

1. Commercial General Liability Insurance ("CGL") - The Contractor shall provide evidence satisfactory to the CO with respect to the services performed that it carries a CGL policy, written on an occurrence (not claims-made) basis, on Insurance Services Office, Inc. ("ISO") form CG 00 01 04 13 (or another occurrence-based form with coverage at least as broad and approved by the CO in writing), covering liability for all ongoing and completed operations of the Contractor and under all subcontracts, covering claims for bodily injury, including without limitation sickness, disease or death and mental anguish of any persons, broad form property damage, including loss of use resulting therefrom, personal and advertising injury, and including coverage for liability arising out of an Insured Contract (including the tort liability of another assumed in a contract) and acts of terrorism (whether caused by a foreign or domestic source). Such coverage shall have limits of liability of not less than \$1,000,000 each occurrence, a \$2,000,000 general aggregate.

The Commercial General Liability shall be further endorsed to:

- a) To the fullest extent permitted by law, provide additional insured coverage using ISO form CG 2015 0413 (or it's equivalent) to The Government of the District of Columbia
- b) Coverage available to the additional insureds shall apply on a primary and non-contributing basis as respects any other insurance, deductibles, or self-insurance available to the additional insureds
- c) A waiver of subrogation in favor of The Government of the District of Columbia
- d) Any Annual Aggregate shall apply on a per location or per project basis (where applicable)
- e) Defense costs shall be in addition to and not erode the limits of liability

2. Automobile Liability Insurance - The Contractor shall provide evidence satisfactory to the CO of commercial (business) automobile liability insurance written on ISO form CA 00 01 10 13 (or another form with coverage at least as broad and approved by the CO in writing) including coverage for all owned, hired, borrowed and non-owned vehicles and equipment used by the Contractor in connection with work under this agreement, with a minimum combined single limit of \$1,000,000 for bodily injury or death and property damage, including loss of use thereof. Such policy or policies of automobile liability insurance shall be written on an "occurrence" (as opposed to a "claims made") basis.

Auto Physical Damage Coverage - The Contractor shall provide auto physical damage insurance to cover "loss" to a covered "auto" or its equipment:

- a) Comprehensive - Fire, lightning or explosion; theft; windstorm, hail or earthquake; flood; mischief or vandalism; or the sinking, burning, collision or derailment of any conveyance transporting the covered "auto".
- b) Collision Coverage - Caused by: The covered "auto's" collision with another object or the covered "auto's" overturn.

The Commercial Auto Liability policy shall be further endorsed to:

- a. To the fullest extent permitted by law, provide additional insured coverage to The Government of the District of Columbia
- b. Coverage available to the additional insureds shall apply on a primary and non-contributing basis as respects any other insurance, deductibles, or self-insurance available to the additional insureds
- c. A waiver of subrogation in favor of The Government of the District of Columbia
- d. Defense costs shall be in addition to and not erode the limits of liability
- e. If applicable, include Form CA 99 48 03 06 Pollution Liability - Broadened Coverage for Covered Autos - Business Auto, Motor Carrier and Truckers (or it's equivalent)

3. Workers' Compensation Insurance - The Contractor shall provide evidence satisfactory to the CO of Workers' Compensation insurance in accordance with the statutory mandates of the District of Columbia or the jurisdiction in which the contract is performed.

Employer's Liability Insurance - The Contractor shall provide evidence satisfactory to the CO of employer's liability insurance as follows: \$500,000 per accident for injury; \$500,000 per employee for disease; and \$500,000 for policy disease limit.

The Workers Compensation and Employers Liability shall be further endorsed to:

- a) Include a Waiver of Subrogation in favor of The Government of the District of Columbia.
  - b) Where applicable, include United States Longshore and Harbor Workers Compensation Act (USL&H)
  - c) Where applicable, include Jones Act Coverage for seamen or crew members on an “if any” basis.
4. Network Security/Privacy (Cyber) Liability Insurance covering acts, errors, omissions, breach of contract, and violation of any consumer protection laws arising out of Contractor’s operations or services with a limit of \$2,000,000 per claim and in the aggregate. Such coverage shall include but not be limited to, third party and first party coverage for loss or disclosure of any data, including personally identifiable information and payment card information, network security failure, violation of any consumer protection laws, unauthorized access and/or use or other intrusions, infringement of any intellectual property rights (except patent), unintentional breach of contract, negligence or breach of duty to use reasonable care, breach of any duty of confidentiality, invasion of privacy, or violations of any other legal protections for personal information, defamation, libel, slander, commercial disparagement, negligent transmission of computer virus, or use of computer networks in connection with denial of service attacks. Such coverage shall include regulatory defense and fines/penalties in any jurisdiction anywhere in the world. Such coverage shall include contractual privacy coverage for data breach response and crisis management costs that would be incurred by Contractor on behalf of The Government of the District of Columbia in the event of a data breach including legal and forensic expenses, notification costs, credit monitoring costs, and costs to operate a call center. Contractor shall maintain coverage in force during the term of this Agreement and for an extended reporting period of not less than two (2) years after.
5. Professional Liability Insurance (Errors & Omissions) - The Contractor shall provide Professional Liability Insurance (Errors and Omissions) to cover liability resulting from any error or omission in the performance of professional services under this Contract. The policy shall provide limits of \$1,000,000 per claim or per occurrence for each wrongful act and \$2,000,000 annual aggregate. The Contractor warrants that any applicable retroactive date precedes the date the Contractor first performed any professional services for the Government of the District of Columbia and that continuous coverage will be maintained or an extended reporting period will be exercised for a period of at least ten years after the completion of the professional services. Limits may not be shared with other lines of coverage.
6. Commercial Umbrella or Excess Liability - The Contractor shall provide evidence satisfactory to the CO of commercial umbrella or excess liability insurance with minimum limits of \$10,000,000 per occurrence and \$10,000,000 in the annual aggregate, following the form and in excess of all liability policies. All liability coverages must be scheduled under the umbrella and/or excess policy. The insurance required under this paragraph shall be written in a form that annually reinstates all required limits. Coverage shall be primary to any insurance, self-insurance or reinsurance maintained by The Government of the District of Columbia and the “other insurance” provision must be amended in accordance with this requirement and principles of vertical exhaustion.

7. Crime Insurance (3rd Party Indemnity) - The Contractor shall provide a Crime policy including 3<sup>rd</sup> party fidelity to cover the dishonest acts of Contractors, its employees and/or volunteers which result in a loss to the District. The Government of the District of Columbia shall be included as loss payee. The policy shall provide a limit of \$15,000 per occurrence.
8. Environmental Liability/Contractors Pollution Liability Insurance - The Contractor shall provide evidence satisfactory to the CO of environmental liability insurance covering losses caused by pollution or other hazardous conditions arising from ongoing or completed operations of the Contractor. Such insurance shall apply to bodily injury, property damage (including loss of use of damaged property or of property that has been physically injured), clean-up costs, transit and non-owned disposal sites. Coverage shall extend to defense costs and expenses incurred in the investigation, civil fines, penalties and damages or settlements. There shall be neither an exclusion nor a sublimit for mold or fungus-related claims. The minimum limits required under this paragraph shall \$2,000,000 per occurrence and \$2,000,000 in the annual aggregate. If such coverage is written on a claims-made basis, the Contractor warrants that any retroactive date applicable to coverages under the policy precedes the Contractor's performance of any work under the Contract and that continuous completed operations coverage will be maintained for at least ten (10) years or an extended reporting period shall be purchased for no less than ten (10) years after completion.

The Contractor also must furnish to the CO Owner certificates of insurance evidencing environmental liability insurance maintained by third party transportation and disposal site operators(s) used by the Contractor for losses arising from facility(ies) accepting, storing or disposing hazardous materials or other waste as a result of the Contractor's operations. Such coverages must be maintained with limits of at least the amounts set forth above.

The Environmental Liability policy shall be further endorsed to include The Government of the District of Columbia as an Additional Insured.

9. Employment Practices Liability - The Contractor shall provide evidence satisfactory to the CO with respect to the operations performed to cover the defense of claims arising from employment related wrongful acts including but not limited to: Discrimination, Sexual Harassment, Wrongful Termination, Workplace Torts, "Bullying" in "any location" and "by any means," including the Internet, whether between employees of contractor or against third parties. Employment Practices Liability coverage must specifically state Third Party Liability coverage is included. Contractor will indemnify and defend The Government of the District of Columbia should it be named co-defendant or be subject to or party of any claim. Coverage shall also extend to Temporary Help Firms and Independent Contractors hired by Contractor. The policy shall provide limits of not less than \$1,000,000 for each wrongful act and \$2,000,000 annual aggregate for each wrongful act.
10. Installation-Floater Insurance - For projects not involving structural alterations, the contractor shall provide an installation floater policy with a limit equal to the Property values being installed as part of the project. The policy shall cover property while located at the project site, at temporary locations, or in transit; deductibles will be the sole responsibility of the contractor.

11. Sexual/Physical Abuse & Molestation - The Contractor shall provide evidence satisfactory to the CO with respect to the services performed that it carries \$1,000,000 per occurrence limits; \$2,000,000 aggregate of affirmative abuse and molestation liability coverage. Coverage should include physical abuse, such as sexual or other bodily harm and non-physical abuse, such as verbal, emotional or mental abuse; any actual, threatened or alleged act; errors, omission or misconduct. This insurance requirement will be considered met if the general liability insurance includes an affirmative sexual abuse and molestation endorsement for the required amounts or through a separate stand alone sexual abuse and molestation policy with confirmation there are no exclusions for abuse or assault & battery under the General Liability. So called “silent” coverage or “shared” limits under a commercial general liability or professional liability policy will not be acceptable. Limits may not be shared with other lines of coverage. The applicable policy may need to be submitted to the ORM for compliance review.

### **Construction Projects Controlled by the District**

For construction projects controlled by the District, the District will procure the following policies with the District listed as the first named insured. Since the District will control the placement of the policies, the District should not contractually bind itself to secure coverage broader than the minimum that satisfy the interests of the Contractor.

Builders Risk – The District shall purchase and maintain, in a company authorized to do business in the jurisdiction in which the project is located, builders risk insurance, written on an “all risk”, special causes of loss or equivalent form. Builders risk coverage will include boiler and machinery / equipment breakdown, earthquake and flood perils. Building ordinance and terrorism coverage will be included.

The deductible shall not exceed \$25,000 except for earthquake, flood, windstorm, water damage or other perils at the discretion of the District and as available in the insurance industry.

The project limit shall equal the replacement value of the structure, including coverage for property in transit and stored off premises.

At the discretion of the District, builders risk coverage will extend to soft costs and delayed completion.

Builders risk insurance shall include the interests of The Government of the District of Columbia, the Contractor, Subcontractors and Sub – subcontractors in the project.

### **C. SUBCONTRACTOR INSURANCE REQUIREMENTS**

Any and all subcontractors engaged by Contractor for work under this agreement shall be required to have the same insured required of Contractor. Should the Contractor wish to propose different insurance requirements than outlined below, then, prior to commencement of work by the subcontractor, the Contractor shall submit in writing the name and brief description of work to be performed by the subcontractor on the Subcontractors Insurance Requirement Template provided to the Office of Risk Management (ORM). ORM will determine the insurance requirements applicable to the subcontractor and promptly deliver such requirements in writing to the Contractor. In

either instance, the Contractor must provide proof of the subcontractor's required insurance prior to commencement of work by the subcontractor.

**D. PRIMARY AND NONCONTRIBUTORY INSURANCE**

The insurance required herein shall be primary to and will not seek contribution from any other insurance, reinsurance or self-insurance including any deductible or retention, maintained by the Government of the District of Columbia.

**E. DURATION.** The Contractor shall carry all required insurance until all contract work is accepted by The Government of the District of Columbia and shall carry listed coverages for ten years for construction projects following final acceptance of the work performed under this contract and two years for non-construction related contracts.

**F. LIABILITY.** These are the required minimum insurance requirements established by The Government of the District of Columbia. However, it is understood that The Government of the District of Columbia does not in any way represent that the insurance or the limits of insurance specified herein are sufficient or adequate to protect your interests or liabilities and will not in any way limit the contractor's liability under this contract.

**G. CONTRACTOR'S PROPERTY.** Contractor and subcontractors are solely responsible for any loss or damage to their personal property, including but not limited to tools and equipment, scaffolding and temporary structures, rented machinery, or owned and leased equipment. A waiver of subrogation shall apply in favor of The Government of the District of Columbia.

**H. MEASURE OF PAYMENT.** The Government of the District of Columbia shall not make any separate measure or payment for the cost of insurance and bonds. The Contractor shall include all of the costs of insurance and bonds in the contract price.

**I. NOTIFICATION.** The Contractor shall ensure that all policies provide that the CO shall be given thirty (30) days prior written notice in the event of cancellation, non-renewal, or material changes to the extent such cancellation or material changes results in Contractor no long complying with the above requirements. The Contractor shall provide the CO with ten (10) days prior written notice in the event of non-payment of premium. The Contractor will also provide the CO with an updated Certificate of Insurance should its insurance coverages renew during the contract. The Government of the District of Columbia may reasonably change the above insurance coverage requirements during the Term by giving Contractor at least 30 days' notice of the change. Contractor must comply, at your expense, and deliver to the CO evidence of compliance before the change becomes effective.

**J. CERTIFICATES OF INSURANCE.** The Contractor must send to CO, at least 10 days after execution of this Agreement, certificates of insurance evidencing the required insurance coverage and endorsements required herein. Contractor must also provide us with evidence of renewal before the expiration date of each insurance policy. Contractor is responsible for providing us with 30 days advanced written notice if the certificate of insurance by the insurer has been canceled, reduced in coverage, or otherwise altered. Certificates of insurance must reference the corresponding contract number. Evidence of insurance shall be submitted to:

**The Government of the District of Columbia  
And emailed to the attention of:**

Peter Henry Lyonga  
Contracting Officer  
Department of General Services  
Contracts & Procurement Division  
3924 Minnesota Avenue, NE, 5<sup>th</sup> Floor  
Washington, DC 20019  
[peterhenry.lyonga@dc.gov](mailto:peterhenry.lyonga@dc.gov)

The CO may request and the Contractor shall promptly deliver updated certificates of insurance, endorsements indicating the required coverages, and/or certified copies of the insurance policies. If the insurance initially obtained by the Contractor expires prior to completion of the contract, renewal certificates of insurance and additional insured and other endorsements shall be furnished to the CO prior to the date of expiration of all such initial insurance. For all coverage required to be maintained after completion, an additional certificate of insurance evidencing such coverage shall be submitted to the CO on an annual basis as the coverage is renewed (or replaced).

- K. **DISCLOSURE OF INFORMATION.** The Contractor agrees that The Government of the District of Columbia may disclose the name and contact information of its insurers to any third party which presents a claim against The Government of the District of Columbia for any damages or claims resulting from or arising out of work performed by the Contractor, its agents, employees, servants or subcontractors in the performance of this contract.
- L. **CARRIER RATINGS.** All Contractor's and its subcontractors' insurance required in connection with this contract shall be written by insurance companies with an A.M. Best Insurance Guide rating of at least A- VII or better (or the equivalent by any other rating agency) and licensed in the District of Columbia.
- M. **WARRANTIES.** When applicable, the Contractor should be named as an additional insured on the applicable manufacturer's/distributor's Commercial General Liability policy using Insurance Services Office, Inc. ("ISO") form CG 20 15 04 13 (or another occurrence-based form with coverage at least as broad). CO should collect, review for accuracy, and maintain all warranties for goods and services.

## **Article 12- BONDS**

### **Section 12.1 Performance Bond and Payment Bond.**

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



## **Article–13 - ECONOMIC INCLUSION REQUIREMENTS**

### **Section 13.1 LSDBE Utilization.**

If the Design-Builder subcontracts any work, at least (35%) of the dollar volume of the Agreement shall be subcontracted with small business enterprises (“SBE”). If there are insufficient qualified SBEs then the subcontracting may be satisfied by subcontracting (35%) of the dollar volume to any qualified certified business enterprises (“CBE”). For subcontracted work, pass through entities will not count toward this goal. In order to count toward the subcontracting requirement, the SBE must perform at least (35%) of the work that is being counted toward the goal with its own forces. The Local, Small, and Disadvantaged Business Enterprises (“LSDBE”) certification shall be, in each case, as of the effective date of the applicable subcontract. Supply agreements with material suppliers shall be counted toward meeting this goal. The Design-Builder has developed a Subcontracting Plan that is attached hereto as **Exhibit D**. The Design-Builder shall comply with the terms of the SBE Subcontracting Plan in making purchases and administering its subcontracts and supply agreements.

### **Section 13.2 Mandatory Subcontracting Requirements**

**Section 13.2.1** Unless the Director of the Department of Small and Local Business Development (DSLBD) has approved a waiver in writing, in accordance with D.C. Official Code § 2-218.51, for all contracts in excess of \$250,000, at least 35% of the dollar volume of the contract shall be subcontracted to qualified small business enterprises (SBEs).

**Section 13.2.2** If there are insufficient SBEs to completely fulfill the requirement of **Section 13.2.1**, then the subcontracting may be satisfied by subcontracting 35% of the dollar volume to any qualified certified business enterprises (CBEs); provided, however, that all reasonable efforts shall be made to ensure that SBEs are significant participants in the overall subcontracting work.

**Section 13.2.3** A prime contractor that is certified by DSLBD as a small, local or disadvantaged business enterprise shall not be required to comply with the provisions of **Sections 13.2.1 and 13.2.2**.

**Section 13.2.4** Except as provided in **Sections 13.2.1 and 13.2.2**, a prime contractor that is a CBE and has been granted a proposal preference pursuant to D.C. Official Code § 2-218.43, or is selected through a set-aside program, shall perform at least 35% of the contracting effort with its own organization and resources and, if it subcontracts, 35% of the subcontracting effort shall be with CBEs. A CBE prime contractor that performs less than 35% of the contracting effort shall be subject to enforcement actions under D.C. Official Code § 2-218.63.

**Section 13.2.5** A prime contractor that is a certified joint venture and has been granted a proposal preference pursuant to D.C. Official Code § 2-218.43, or is selected through a set-aside program, shall perform at least 50% of the contracting effort with its own organization and resources and, if it subcontracts, 35% of the subcontracting effort shall be with CBEs. A certified joint venture prime contractor that performs less than 50% of the contracting effort shall be subject to enforcement actions under D.C. Official Code § 2-218.63.

**Section 13.2.6** Each CBE utilized to meet these subcontracting requirements shall perform at least 35% of its contracting effort with its own organization and resources.

### **Section 13.3 Subcontracting Plan (Exhibit D)**

If the Design-Builder is required by law to subcontract under this Agreement, then the subcontracting plan submitted with its Proposal, may only be amended with the prior written approval of the Contracting Officer and Director of DSLBD, as previously stated herein; and, any reduction in the dollar volume of the subcontracted portion resulting from an amendment of the Subcontracting Plan shall inure to the benefit of the District. The Subcontracting Plan shall include the following:

- (1) The name and address of each subcontractor;
- (2) A current certification number of the small or certified business enterprise;
- (3) The scope of work to be performed by each subcontractor; and
- (4) The price that the prime contractor will pay each subcontractor.

### **Section 13.4 Copies of Subcontracts**

Within twenty-one (21) days of the date of award, the Contractor shall provide fully executed copies of all subcontracts identified in the subcontracting plan to the Contracting Officer (CO), District of Columbia Auditor and the Director of DSLBD.

### **Section 13.5 Subcontracting Plan Compliance Reporting**

**Section 13.5.1** If the Contractor has a subcontracting plan required by law for this contract, the Contractor shall submit a quarterly report to the Contracting Officer, District of Columbia Auditor, and the Director of DSLBD. The quarterly report shall include the following information for each subcontract identified in the subcontracting plan:

- (A) The price that the prime contractor will pay each subcontractor under the subcontract;
- (B) A description of the goods procured or the services subcontracted for;
- (C) The amount paid by the prime contractor under the subcontract; and
- (D) A copy of the fully executed subcontract, if it was not provided with an earlier quarterly report.

**Section 13.5.2** If the fully executed subcontract is not provided with the quarterly report, the prime contractor will not receive credit toward its subcontracting requirements for that subcontract.

## **Section 13.6 Annual Meetings**

Upon at least 30-days written notice provided by DSLBD, the Contractor shall meet annually with the CO, CA, District of Columbia Auditor and the Director of DSLBD to provide an update on its subcontracting plan.

## **Section 13.7 DSLBD Notices**

The Contractor shall provide written notice to the DSLBD and the District of Columbia Auditor upon commencement of the contract and when the contract is completed.

## **Section 13.8 Enforcement and Penalties for Breach of Subcontracting Plan**

**Section 13.8.1** A contractor shall be deemed to have breached a subcontracting plan required by law if the contractor (i) fails to submit subcontracting plan monitoring or compliance reports or other required subcontracting information in a reasonably timely manner; (ii) submits a monitoring or compliance report or other required subcontracting information containing a materially false statement; or (iii) fails to meet its subcontracting requirements.

**Section 13.8.2** A contractor that is found to have breached its subcontracting plan for utilization of CBEs in the performance of a contract shall be subject to the imposition of penalties, including monetary fines in accordance with D.C. Official Code § 2-218.63.

**Section 13.8.3** If the CO determines the Contractor's failure to be a material breach of the contract, the CO shall have cause to terminate the contract under the default provisions in **Article 16** of the Contract.

**Section 13.8.4** Neither the Design-Builder nor a subcontractor may remove a subcontractor or tier-subcontractor if such subcontractor or tier-subcontractor is certified as an LSDBE company unless the Department approves of such removal, in writing. The Department may condition its approval upon the Design-Builder developing a plan that is, in the Department's sole and absolute judgment, adequate to maintain the level of LSDBE participation in the Project.

## **Section 13.9 Equal Employment Opportunity and Hiring of District Residents**

**Section 13.9.1** For contracts for services in the amount of \$300,000 or more, the Design-Builder shall comply with the First Source Employment Agreement Act of 1984, as amended, D.C. Official Code § 2-219.01 et seq. ("First Source Act").

**Section 13.9.2** The Design-Builder shall enter into and maintain during the term of the Contract, a First Source Employment Agreement (the "Employment Agreement") (**Exhibit V**) with the District of Columbia Department of Employment Service's (DOES), in which the Design-Builder shall agree that: (a) The first source for finding employees to fill all jobs created in order to perform the Contract shall be the First Source Register; and (b) The first source for finding employees to fill any vacancy occurring in all jobs covered by the Employment Agreement shall be the First Source Register.

**Section 13.9.3** If applicable, the Design-Builder shall comply with subchapter X of Chapter II of Title 2, and all successor acts thereto, including but not limited to the Workforce Intermediary Establishment and Reform of First Source Amendment Act of 2011, and the rules and regulations promulgated thereunder, including, but not limited to the following requirements:

- a) At least twenty percent (20%) of journey worker hours by trade shall be performed by District residents;
- b) At least sixty percent (60%) of apprentice hours by trade shall be performed by District residents;
- c) At least fifty-one percent (51%) of the skilled laborer hours by trade shall be performed by District residents; and
- d) At least seventy percent (70%) of common laborer hours shall be performed by District residents.

**Section 13.9.4** The Design-Builder shall not begin the performance of the Contract until its Employment Agreement has been accepted by DOES. Once approved, the Employment Agreement shall not be amended except with the approval of DOES.

**Section 13.9.5** The Design-Builder agrees that at least 51% of the new employees hired to perform the Contract shall be District residents. The Design-Builder shall ensure that at least fifty-one percent (51%) of the Design-Builder and every sub-consultants and subcontractor's employees hired after the effective date of the Agreement, or after such subconsultant or subcontractor enters into a contract with the Design-Builder, to work on the Project shall be residents of the District of Columbia. This percentage shall be applied in the aggregate, and not trade by trade.

**Section 13.9.6** The Contractor's hiring and reporting requirements under the First Source Act and any rules promulgated thereunder shall continue for the term of the Contract.

**Section 13.9.7** The CO may impose penalties, including monetary fines of 5% of the total amount of the direct and indirect labor costs of the Contract, for a willful breach of the Employment Agreement, failure to submit the required hiring compliance reports, or deliberate submission of falsified data.

**Section 13.9.8** If the Design-Builder does not receive a good faith waiver, the CO may also impose an additional penalty equal to 1/8 of 1% of the total amount of the direct and indirect labor costs of the Contract for each percentage by which the Design-Builder fails to meet its hiring requirements.

**Section 13.9.9** Any contractor which violates, more than once within a 10-year timeframe, the hiring or reporting requirements of the First Source Act shall be referred for debarment for not more than five (5) years.

**Section 13.9.10** The Design-Builder may appeal any decision of the CO pursuant to this clause to the DC Contract Appeals Board located at 4<sup>41</sup> 4th Street, NW, Suite 350N, Washington, DC 20001.

**Section 13.9.11** The provisions of the First Source Act do not apply to nonprofit organizations which employ 50 employees or less.

**Section 13.9.12** Construction projects or contracts covered by this Section of the Contract shall be subject to the hiring and reporting requirements set forth in this section until construction is completed and a final certificate of occupancy has been issued.

## **Section 13.10 Economic Inclusion Reporting Requirements**

**Section 13.10.1** Upon execution of the Agreement, the Design-Builder and all its member firms, if any, and each of its Subcontractor shall submit to the Department a list of current employees and apprentices that will be assigned to the Agreement, the date they were hired and whether or not they live in the District of Columbia.

**Section 13.10.2** The Design-Builder and its constituent entities shall comply with subchapter X of Chapter II Title 2, and subchapter II of Chapter 11 of Title 1 of the D.C. Code, and all successor acts thereto and the rules and regulations promulgated thereunder. The Design-Builder and all member firms and Subcontractor shall execute a First Source Agreement with the District of Columbia Department of Employment Services (“DOES”) prior to beginning work at the Project site.

**Section 13.10.3** The Design-Builder shall maintain detailed records relating to the general hiring of District of Columbia and community residents.

**Section 13.10.4** The Design-Builder shall be responsible for: (i) including the provisions of **Section 9.3** in all subcontracts; (ii) collecting the information required in **Section 9.3** from its Subcontractor; and (iii) providing the information collected from its Subcontractor in the reports required to be submitted by the Design-Builder pursuant to **Section 9.3**.

### **Section 13.10.5. Service Contract Act Provision. Reserved**

**Section 13.10.6 Living Wage Act.** In addition to the requirements set forth in the First Source Employment Agreement, the Design-Builder shall comply with all applicable provisions of the Living Wage Act of 2006, **Exhibit Q**, as amended (codified at D.C. Official Code §§ 2-220.01 et seq.) and its implementing regulations.

**Section 13.10.7 Apprenticeship Act.** The D.C. Apprenticeship Act of D.C. Law 2-156, (as amended, the Act) may apply to these Projects. As applicable, the Design-Builder firms and their subcontractor selected to perform work on the Projects on a craft-by-craft basis may be required to comply with the Act. If applicable, all terms and conditions of the D.C. Apprenticeship Council Rules and Regulations shall be implemented, and the selected Design-Builder firms shall be liable for any subcontractor non-compliance. Thirty-Five percent (35%) of all apprentice hours worked on the Project shall be worked by District residents.

## **Section 13.11 WAY TO WORK AMENDMENT ACT OF 2006**

**Section 13.11.1.** Except as described in **Section 13.11.8** below, the Design-Builder shall comply with Title I of the Way to Work Amendment Act of 2006, effective June 8, 2006 (D.C. Law 16-118, D.C. Official Code §2-220.01 et seq.) (“Living Wage Act of 2006”), for contracts for services in the amount of \$100,000 or more in a 12-month period.

**Section 13.11.2** The Design-Builder shall pay its employees and subcontractor who perform services under the Contract no less than the current living wage.

**Section 13.11.3** The Design-Builder shall include in any subcontract for \$15,000 or more a provision requiring the subcontractor to pay its employees who perform services under the Contract no less than the current living wage rate.

**Section 13.11.4** The DOES may adjust the living wage annually and Design-Builder will find the current living wage rate on its website at [www.does.dc.gov](http://www.does.dc.gov).

**Section 13.11.5** The Design-Builder shall provide a copy of the Fact Sheet attached within **Exhibit Q** to each employee and subcontractor who performs services under the Contract. The Design-Builder shall also post the Notice attached within **Exhibit Q** in a conspicuous place in its place of business. The Design-Builder shall include in any subcontract for \$15,000 or more a provision requiring the subcontractor to post the Notice in a conspicuous place in its place of business.

**Section 13.11.6** The Design-Builder shall maintain its payroll records under the Contract in the regular course of business for a period of at least three (3) years from the payroll date, and shall include this requirement in its subcontracts for \$15,000 or more under the Contract.

**Section 13.11.7** The payment of wages required under the Living Wage Act of 2006 shall be consistent with and subject to the provisions of D.C. Official Code §32-1301 et seq.

**Section 13.11.8** The requirements of the Living Wage Act of 2006 do not apply to:

- (1) Contracts or other agreements that are subject to higher wage level determinations required by federal law;
- (2) Existing and future collective bargaining agreements, provided, that the future collective bargaining agreement results in the employee being paid no less than the established living wage;
- (3) Contracts for electricity, telephone, water, sewer or other services provided by a regulated utility;
- (4) Contracts for services needed immediately to prevent or respond to a disaster or imminent threat to public health or safety declared by the Mayor;
- (5) Contracts or other agreements that provide trainees with additional services including, but not limited to, case management and job readiness services; provided that the trainees do not replace employees subject to the Living Wage Act of 2006;
- (6) An employee under 22 years of age employed during a school vacation period, or enrolled as a full-time student, as defined by the respective institution, who is in high school or at an accredited institution of higher education and who works less than 25 hours per week; provided that he or she does not replace employees subject to the Living Wage Act of 2006;
- (7) Tenants or retail establishments that occupy property constructed or improved by receipt of government assistance from the District of Columbia; provided, that the tenant or retail establishment did not receive direct government assistance from the District;
- (8) Employees of nonprofit organizations that employ not more than 50 individuals and qualify for tax exemption pursuant to Section 501(c)(3) of the Internal Revenue Code of 1954, approved August 16, 1954 (68A Stat. 163; 26 U.S.C. § 501(c)(3));
- (9) Medicaid provider agreements for direct care services to Medicaid recipients, provided, that the direct care service is not provided through a home care agency, a community residence facility, or a group home for mentally retarded persons as those terms are defined in Section 2 of the Health-Care and Community Residence Facility, Hospice, and Home Care Licensure Act of 1983, effective February 24, 1984 (D.C. Law 5-48; D.C. Official Code § 44-501); and
- (10) Contracts or other agreements between managed care organizations and the Health Care Safety Net Administration or the Medicaid Assistance Administration to provide health services.

**Section 13.11.9** The Mayor may exempt a contractor from the requirements of the Living Wage

Act of 2006, subject to the approval of the Council, in accordance with the provisions of Section 109 of the Living Wage Act of 2006.

#### **Section 13.12 SPECIAL PROVISIONS RELATED TO THE COVID-19 EMERGENCY**

**Section 13.12.1** The Contractor is required to comply with Mayor's Order 2021-099, COVID-19 Vaccination Certification Requirement for District Government Employees, Contractors, Interns, and Grantees, dated August 10, 2021, and all substantially similar vaccine requirements, including any modifications to this Order, unless and until they are rescinded or superseded. At the request of the District government, Contractors may be asked to provide certification of compliance with this requirement and/or documents and records in support of this certification.

## **Article–14 - LIQUIDATED DAMAGES AND DISINCENTIVE FEES**

### **Section 14.1 Delay in Submission of Deliverables.**

Subject to the terms set forth in **Sections 3.1.2** and **4.1**, if the Design-Builder fails to provide any of the deliverables set forth in **Exhibit C**, the Design-Builder shall pay to the Department a disincentive fee in the amount set forth in the Project Information section of this Agreement for each such deliverable that is not timely submitted.

### **Section 14.2 Delay in Substantial Completion.**

If the Design-Builder fails to achieve Substantial Completion of the Project by the Substantial Completion Date, the Parties acknowledge and agree that the actual damage to the Department for the delay will be impossible to determine, and in lieu thereof, the Design-Builder shall pay to the Department, as fixed, agreed and liquidated delay damages in the amount set forth in the Project Information section of this Agreement per day for each calendar day of delay for failure to meet the applicable Substantial Completion Date.

The Design-Builder and the Department agree that the liquidated damages set forth in this Article do not constitute, and shall not be deemed, a penalty but represent a reasonable approximation of the damages to the Department associated with a delay in the Project. These damages shall not apply if the delay is the result of force majeure and the Design-Builder otherwise complies with the provisions set forth in the Standard Contract Provisions (Construction Contracts and Architectural/Engineering Services Contracts).

**Section 14.3 Early Completion.** In the event the Design-Builder achieves Substantial Completion of the Project prior to the Substantial Completion Date, the Design-Builder shall maintain the completed Project, at its own expense, until such time that the Department agrees to occupy and use the Project for its intended use.



## **Article–15 - MISCELLANEOUS PROVISIONS**

**Section 15.1 Ownership and Use of Project Documents.** The Drawings, Specifications, and other Project Documents prepared by the Design-Builder’s Architect and copies thereof furnished to the Design-Builder, are for use solely with respect to this Project. They are not to be used by the Design-Builder, Subcontractor, Sub-subcontractor, or suppliers on other projects, or for additions to this Project outside the scope of the Work, without the specific written consent of the Department, and the Design-Builder’s Architect. The referenced Drawing, Specifications, and other Project Documents shall become the property of the Department. The District will be the sole owner of all project drawings, specifications, and other Project Documents and the Design-Builder shall provide the District with a complete set of “as-built” within sixty (60) days of final completion.

### **Section 15.2 Assignment.**

The Department and Design-Builder respectively bind themselves, their partners, members, joint venturers, constituent entities, successors, assigns, and legal representatives to the other party hereto and to partners, members, joint venturers, constituent entities, successors, assigns, and legal representatives of such other party in respect to covenants, agreements, and obligations contained in the Agreement. Neither party to the Agreement shall assign the Agreement or its rights and obligations under the Agreement, without the written consent of the other party. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Agreement.

### **Section 15.3 Buy American Act Provision.**

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

**Section 15.3.1** In accordance with the Buy American Act (41 U.S.C. § 10a-10d), and Executive Order 10582, December 17, 1954 (3 CFR, 1954-58 Comp., p. 230), as amended by Executive Order 11051, September 27, 1962 (3 CFR, 1059—63 Comp., p. 635), the Design-Builder agrees that only domestic construction material will be used by the Design-Builder, subcontractor, material men and suppliers in the performance of the Agreement, except for non-domestic material listed in the Agreement.

“Components” as used in this section, means those articles, materials and supplies incorporated directly into the end products.

“Domestic end product”, as used in this section, means, (1) an unmanufactured end product mined or produced in the United States, or (2) an end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States, exceeds 50 percent of the cost of all its components.

Components of foreign origin of the same class or kind as the products shall be treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic.

“End Products”, as used in this section, means those articles, materials, and supplies to be acquired for public use under this Contract.

The Design-Builder shall deliver only domestic end products, except those:

1. For use outside the United States;
2. That the District determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality;
3. For which the District determines that domestic preference would be inconsistent with the public interest; or
4. For which the District determines the cost to be unreasonable.

**Section 15.3.2 Domestic Construction Material.** “Construction material” means any article, material, or supply brought to the construction site for incorporation in the building or work. An unmanufactured construction material is a “domestic construction material” if it has been mined or produced in the United States. A manufactured construction material is a “domestic construction material” if it has been manufactured in the United States and if the cost of its components which have been mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. “Component” means any article, material, or supply directly incorporated in construction material.

**Section 15.3.3 Domestic Component.** A component shall be considered to have been “mined, produced, or manufactured in the United States” regardless of its source, in fact, if the article, material, or supply in which it is incorporated was manufactured in the United States and the component is of a class or kind determined by the Government to be not mined, produced or manufactured in the United States in sufficient and reasonably available commercial quantities and of satisfactory quality.

**Section 15.3.4 Foreign Material.** When steel materials are used in a project a minimal use of foreign steel is permitted. The cost of such materials cannot exceed one-tenth of one percent of the total project cost or \$2,500,000, whichever is greater.

#### **Section 15.4 Davis-Bacon Act Provision and Title 29 CFR Part 5.5.**

The Design-Builder agrees that the construction work performed under this Agreement shall be subject to the Davis-Bacon Act (40 U.S.C. §§ 3142-3148) **Exhibit G1** and Title 29 Code of Federal Regulations (“CFR”) part 5.5 **Exhibit G2**. The wage rates applicable to this Project are attached as **Exhibits G1 and Exhibit G2**. The Design-Builder further agrees that it and all of its subcontractor shall comply with the regulations implementing the Davis-Bacon Act and such regulations are hereby incorporated by reference. At such time as the Design-Builder is preparing its GMP, the Design-Builder shall include the current Davis-Bacon wage rates in its GMP.

#### **Section 15.5 The Quick Payment Clause**

##### **Section 15.5.1 Interest Penalties to Contractors**

**Section 15.5.1.1** The District will pay interest penalties on amounts due to the Design-Builder under the Quick Payment Act, D.C. Official Code §2-221.01 *et seq.*, as amended, for the period beginning on the day after the required payment date and ending on the date on which payment of the amount is made. Interest shall be calculated at the rate of 1.5% per month. No interest penalty shall be paid if payment for the completed delivery of the item of property or service is made on or before the required payment date. The required payment date shall be:

- a. The date on which payment is due under the terms of the Contract;
- b. Not later than 7 calendar days, excluding legal holidays, after the date of delivery of meat or meat food products;
- c. Not later than 10 calendar days, excluding legal holidays, after the date of delivery of a perishable agricultural commodity; or
- d. 30 calendar days, excluding legal holidays, after receipt of a proper invoice for the amount of the payment due, if a specific date on which payment is due is not established by contract;

**Section 15.5.1.2** Any amount of an interest penalty which remains unpaid at the end of any 30-day period shall be added to the principal amount of the debt and thereafter interest penalties shall accrue on the added amount.

**Section 15.5.1.3** No interest penalty shall be due to the Design-Builder if payment for the completed delivery of goods or services is made on or after:

- a. 3rd day after the required payment date for meat or a meat food product<sup>5</sup>;
- b. 5th day after the required payment date for an agricultural commodity; or
- c. 15th day after any other required payment date in the case of any other item.

## **Section 15.5.2 Payments to Subcontractor**

**Section 15.5.2.1** The Design-Builder must take one of the following actions within seven (7) days of receipt of any amount paid to the Design-Builder by the District for work performed by any subcontractor under this contract:

- a. Pay the subcontractor for the proportionate share of the total payment received from the District that is attributable to the subcontractor for work performed under the Contract; or
- b. Notify the Contracting Officer and the subcontractor, in writing, of the Design-Builder's intention to withhold all or part of the subcontractor's payment and state the reason for the nonpayment.

**Section 15.5.2.2** The Design-Builder must pay any subcontractor or supplier interest penalties on amounts due to the subcontractor or supplier beginning on the day after the payment is due and ending on the date on which the payment is made. Interest shall be calculated at the rate of 1.5% per month. No interest penalty shall be paid on the following if payment for the completed delivery of the item of property or service is made on or before:

- a. The 3rd day after the required payment date for meat or a meat product;
- b. The 5th day after the required payment date for an agricultural commodity; or
- c. The 15th day after the required payment date for any other item.

**Section 15.5.2.3** Any amount of an interest penalty that remains unpaid by the Design-Builder at the end of any 30-day period shall be added to the principal amount of the debt to the subcontractor and thereafter interest penalties shall accrue on the added amount.

**Section 15.5.2.4** A dispute between the Design-Builder and subcontractor relating to the amounts or entitlement of a subcontractor to a payment or a late payment interest

penalty under the Quick Payment Act does not constitute a dispute to which the District of Columbia is a party. The District may not be interpleaded in any judicial or administrative proceeding involving such a dispute.

### **Section 15.5.3 Subcontractor Quick Payment Clause Flow-Down Requirements**

**Section 15.5.3.1** The Design-Builder shall include in each subcontract under this Contract a provision requiring the subcontractor to include in its contract with any lower-tier subcontractor or supplier the payment and interest clauses required under paragraphs (1) and (2) of D.C. Official Code §2-221.02(d).

### **Section 15.5.4 Requirements for Change Order Payments**

**Section 15.5.4.1** The Department and the Design-Builder are prohibited from requiring the a Prime Contractor or a subcontractor to undertake any work that is determined to be beyond the original scope of the Prime Contra'tor's or a subcontra'tor's contract or subcontract, including work under a District-issued change order, when the additional work increases the contract price beyond the not-to-exceed price or negotiated maximum price of the underlying contract, unless the Contracting Officer:

- a. Agrees with the Prime Contractor and, if applicable, the subcontractor on a price for the additional work;
- b. Obtains a certification from the Chief Financial Officer that there are sufficient funds to compensate the Prime Contractor and, if applicable, the subcontractor for the additional work;
- c. Has made a written, binding commitment with the Prime Contractor to pay for the additional work within 30 days after the Prime Contractor submits a proper invoice for the additional work to the CO; and
- d. Gives written notice of the funding certification from the Chief Financial Officer to the Prime Contractor.

**Section 15.5.4.2** The Design-Builder is required to include in its subcontracts a clause that requires the Prime Contractor to:

- a. Within 5 business days of receipt of the notice required under subparagraph (A)(iv) of this paragraph, provide the subcontractor with notice of the approved amount to be paid to the subcontractor based on the portion of the additional Work to be completed by the subcontractor;
- b. Pay the subcontractor any undisputed amount to which the subcontractor is entitled for any additional work within 10 days of receipt of payment for the additional Work from the District; and
- c. If the Prime Contractor withholds payment from a subcontractor, notify the subcontractor in writing and state the reason why payment is being withheld and provide a copy of the notice to the CO.

**Section 15.5.4.3** The Department, Design-Builder, Design-Builder Architects, or a subcontractor are prohibited from declaring another party to the contract to be in default or assessing, claiming, or pursuing damages for delays in the completion of the construction due to the inability of the parties to agree on a price for the additional work.

#### **Section 15.5.4.4 Authorized Changes By The Contracting Officer**

- a. The CO is the only person authorized to approve changes in any of the requirements of this Contract.
- b. The Design-Builder shall not comply with any order, directive, or request that changes or modifies the requirements of this Contract unless issued in writing and signed by the CO.
- c. In the event the Design-Builder effects any change at the instruction or request of any person other than the CO, the change will be considered to have been made without authority and no adjustment will be made in the Contract price to cover any cost increase incurred as a result thereof.

**Section 15.6 Contract Work Hours and Safety Standards Act Provision.** The Design-Builder agrees that the applicable work performed under this Agreement shall be subject to the Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 327-333).

**Section 15.7 False Claims Act.** Design-Builder shall be governed by all laws and regulations prohibiting false or fraudulent statements and claims made to the DC government, including the prescriptions set forth in District of Columbia Code Official Code §22-2514 and §§2-381.01 *et seq.* In the event that it is discovered that the Design-Builder has made a false, fraudulent, or unsupported statement or claim to the Department, the Department may terminate this Agreement without liability.

**Section 15.8 Interpretation of Contract and Order of Precedence.** All of the Project documents comprising the Agreement should be read as complementary so that what is called for by one is called for by all. Ambiguities shall be construed in favor of a broader scope of Work for the Design-Builder, as the intent of the Agreement is, with specifically identified exceptions, to require the Design-Builder to assume entire responsibility for the construction of the Project. If there is any inconsistency among the Project documents comprising the Agreement, the order of precedence among them is as follows, with the first listed Project document having the highest priority:

1. This Agreement and its Modifications, Change Orders, Change Directives and any Exhibits thereto;
2. The Department's Standard Contract Provisions (Construction Contracts and Architectural/Engineering Services Contracts), as amended, and any missing term in this Agreement shall be addressed in accordance with the Standard Contract Provisions; and
3. The Construction documents released or approved by the Department.

**Section 15.9 Independent Contractor.** The Design-Builder and the Design-Builder's employees: (1) shall perform the services specified herein as independent contractors, not as employees or agent of the District, or joint venture or partner with the District; (2) shall be responsible for their own management and administration of the work required and bear sole responsibility for complying with any and all technical, schedule, financial requirements or constraints attendant to the performance of this Agreement; (3) shall be free from supervision or control by any government employee with respect to the manner or method of performance of the service specified; but (4) shall, pursuant to the government's right and obligation to inspect, accept or reject work, comply with such general direction of the CO, or the duly authorized representative of the CO as is necessary to ensure accomplishment of the Agreement

objectives. The Design-Builder shall have exclusive authority to manage, direct, and control the work, and shall be responsible for all means, methods, techniques, sequences, and procedures, as well as for Project safety.

**Section 15.10 No Third-Party Beneficiary Rights.** Nothing in this Agreement shall be construed as creating third-party beneficiary rights in any person or entity, except as otherwise expressly provided in this Agreement.

**Section 15.11 Media Releases.** Neither the Design-Builder, its employees, agents or Subcontractor or material suppliers shall make any press release or similar media release related to the Project unless such press release have been discussed with the Department prior to its issuance.

**Section 15.12 Construction.** This Agreement shall be construed fairly as to all Parties and not in favor of or against any party, regardless of which party prepared the Agreement.

**Section 15.13 Notices.** All notices or communications required or permitted under the Agreement shall be in writing and shall be hand delivered or sent by telecopier or by recognized overnight carrier to the intended recipient at the address stated below, or to such other address as the recipient may have designated in writing. Any such notice or communication shall be deemed delivered as follows: if hand delivered, on the day so delivered, if sent by telecopier, on confirmation of successful transmission, and if sent by recognized overnight carrier, the next business day.

If to the Department:

George Lewis, Associate Director  
and Chief Procurement Officer  
Department of General Services  
3924 Minnesota Avenue, NE  
Washington, DC 20019

If to the Design-Builder:

Carlos Perdomo  
President  
The Keystone Plus Construction Corporation  
1925 Minnesota Avenue, Suite A  
Washington, DC 20020

This section shall be read as imposing minimum requirements for distribution of required contractual notices, and not as displacing distribution requirements with respect to design documents, construction submittals, periodic reports, and other Project documents.

**Section 15.14 Limitations.** The Design-Builder agrees that any statute of limitations applicable to any claim or suit by the Department arising from this Agreement or its breach shall be controlled by applicable District of Columbia law.

**Section 15.15 Survival.** All agreements warranties and representations of the Design-Builder contained in the Agreement or in any certificate or Project document furnished pursuant to the Agreement shall survive termination or expiration of the Agreement.

**Section 15.16 No Waiver.** If the Department waives any power, right, or remedy arising from the Agreement or any applicable law, the waiver shall not be deemed to be a waiver of the power, right, or remedy on the later recurrence of any similar events. No act, delay, or course of conduct by the Department shall be deemed to constitute the Department's waiver, which may be effected only by an express written waiver signed by the Department.

**Section 15.17 Remedies Cumulative.** Unless specifically provided to the contrary in the Agreement, all remedies set forth in the Agreement are cumulative and not exclusive of any

other remedy the Department may have, including, without limitation, at law or in equity. The Department's rights and remedies will be exercised at its sole discretion, and shall not be regarded as conferring any obligation on the Department to exercise those rights or remedies for the benefit of the Design-Builder or any other person or entity.

**Section 15.18 Headings/Captions.** The headings or captions used in this Agreement or its table of contents are for convenience only and shall not be used in interpreting the Agreement.

**Section 15.19 Entire Agreement; Modification.** The Agreement supersedes all contemporaneous or prior negotiations, representations, course of dealing, or agreements, either written or oral. No modifications to the Agreement shall be effective against the Department unless made in writing and signed by both the Department and the Design-Builder, unless otherwise expressly provided to the contrary in the Agreement. Notwithstanding the foregoing, nothing herein shall be construed to limit the Department's ability to unilaterally modify the Agreement.

**Section 15.20 Severability.** In the event any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement, and in lieu of each such invalid, illegal or unenforceable provision, there shall be added automatically as a part of this Agreement a provision as similar in terms to such invalid, illegal or unenforceable provision as may be possible and be valid, legal and enforceable; each part of this Agreement is intended to be severable.

**Section 15.21 Anti-Deficiency Acts.** The obligations and responsibilities of the Department under the terms of the Agreement, or any subsequent agreement entered into pursuant to this Agreement or referenced herein (to which the Department is a party), are and shall remain subject to the provisions of: (i) the federal Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, 1349-1351, 1511-1519 (2004) (the "**Federal ADA**"), and D.C. Official Code §§ 1-206.03(e) and 47-105 (2001); (ii) the District of Columbia Anti-Deficiency Act, D.C. Official Code §§ 47-355.01 – 355.08 (2004 Supp.)(the "**D.C. ADA**" and (i) and (ii) collectively, as amended from time to time, the "**Anti- Deficiency Acts**"); and (iii) **Section 446** of the District of Columbia Home Rule Act, D.C. Official Code § 1-204.46 (2001). Pursuant to the Anti-Deficiency Acts, nothing in this Agreement shall create an obligation of the Department in anticipation of an appropriation by Congress for such purpose, and the Department's legal liability for payments and other charges under this Agreement shall not arise or obtain in advance of the lawful availability of appropriated funds for the applicable fiscal year as approved by Congress. **IN ACCORDANCE WITH § 446 OF THE HOME RULE ACT, D.C. CODE § 1-204.46, NO DISTRICT OF COLUMBIA OFFICIAL IS AUTHORIZED TO OBLIGATE OR EXPEND ANY AMOUNT UNDER THE AGREEMENT OR CONTRACT DOCUMENTS UNLESS SUCH AMOUNT HAS BEEN APPROVED, IS LAWFULLY AVAILABLE, AND APPROPRIATED BY ACT OF CONGRESS.**

**Section 15.21.1** The Department agrees to exercise all lawful authority available to it to satisfy the financial obligations of the Department that may arise under this Agreement. During the term of this Agreement, the Mayor of the District of Columbia or other appropriate official shall, for each fiscal period, include in the budget application submitted to the Council of the District of Columbia the amount necessary to fund the Department's known potential financial obligations under this Agreement for such fiscal period. In the event that a request for such appropriations is excluded from the budget approved by the Council and submitted to Congress by the President for the applicable fiscal year or if no appropriation is made by Congress to pay any amounts due under this Agreement for any period after the fiscal year for which

appropriations have been made, and in the event appropriated funds for such purposes are not otherwise lawfully available, the Department will not be liable to make any payment under this Agreement upon the expiration of any then-existing appropriation, the Department shall promptly notify the Contractor and this Agreement shall immediately terminate upon the expiration of any then-existing appropriation.

**Section 15.21.2** Notwithstanding the foregoing, no officer, employee, director, member or other natural person or agent of the District or Department shall have any personal liability in connection with the breach of the provisions of this section or in the event of non-payment by the Department under this Agreement.

**Section 15.21.3** This Agreement shall not constitute an indebtedness of the District and/or the Department nor shall it constitute an obligation for which the Department is obligated to levy or pledge any form of taxation or for which the District has levied or pledged any form of taxation. No District of Columbia Official or employee is authorized to obligate or expend any amount under this Agreement unless such amount has been appropriated by Act of Congress and is lawfully available.

**Section 15.22 Time.** Time, if stated in a number of days, will be calendar days and thus include Saturdays, Sundays, and holidays, unless otherwise stated herein.

**Section 15.23 Americans With Disabilities Act of 1990 (“ADA”).** During the performance of this Contract, the Design-Builder and any of its Subcontractor shall comply with the ADA. The ADA makes it unlawful to discriminate in employment against a qualified individual with a disability. *See 42 U.S.C. §12101 et seq.*

**Section 15.24 Contracts in Excess of One Million Dollars.** Any contract in excess of \$1,000,000 shall not be binding or give rise to any claim or demand against the District until approved by the Council of the District of Columbia and signed by the Contracting Officer.

**Section 15.25 Gratuities Not to Benefit Provisions.**

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

**Section 15.26.1** In the event the Agreement is terminated as provided in Article 16 of this Agreement, the Department shall be entitled:

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



**Section 15.26.2** No member of, nor delegate to Congress, Mayor or City Council Member, nor the Department nor employee of the District or employee of the Department shall be admitted to any share or part of the Agreement or to any benefit that may arise therefrom, and all agreements entered into by the CO of the Department in which he or she be personally interested as well as all agreements made by the Department in which the Mayor or City Council Member or employee of the District shall be personally interested shall be void and no payments shall be made on any such contracts by the Department; but this provision shall not be construed or extend to the agreement if the share of or benefit to the member of, or delegate to Congress, Mayor or City Council Member, or employee of the District is de minimis.

**Section 15.27 Ethical Standards for the Department's Employees And Former Employees.** The Department expects the Design-Builder to observe the highest ethical standards and to comply with all applicable laws, rules, and regulations governing ethical conduct or conflicts of interest. Neither the Design-Builder, nor any person associated with the Design-Builder, shall provide (or seek reimbursement for) any gift, gratuity, favor, entertainment, loan, or other thing of value to any employee of the District or the Department not in conformity with applicable law, rules or regulations. The Design-Builder shall not engage the services of any person or persons in the employment of the Department or the District for any work required, contemplated, or performed under the Agreement. The Design-Builder may not assign to any former employee or District employee or agent who has joined the Design-Builder's firm any matter on which the former employee, while employed by the Department, had material or substantial involvement in the matter. The Design-Builder may request a waiver to permit the assignment of such matters to former personnel on a case-by-case basis. The Design-Builder shall include in every subcontract a provision substantially similar to this section so that such provisions shall be binding upon each Design-Builder or vendor.

#### **Section 15.28 Non-Discrimination in Employment Provisions.**

##### **Section 15.28.1 District of Columbia Human Rights Act**

- a. The Design-Builder shall not discriminate in any manner against any employee or applicant for employment that would constitute a violation of the District of Columbia Human Rights Act, effective December 13, 1977, as amended (D.C. Law 2-38; D.C. Official Code § 2-1401.01 *et seq.*) ("Act", as used in this clause). The Design-Builder shall include a similar clause in all subcontracts, except subcontracts for standard commercial supplies or raw materials. In addition, the Design-Builder agrees, and any subcontractor shall agree, to post in conspicuous places, available to employees and applicants for employment, a notice setting forth the provisions of this non-discrimination clause as provided in **Section 251** of the Act.
- b. Pursuant to Mayor's Order 85-85, (6/10/85), Mayor's Order 2002-175 (10/23/02), Mayor's Order 2011-155 (9/9/11) and the rules of the Office of Human Rights, Chapter 11 of Title 4 of the D.C. Municipal Regulations, the following clauses apply to the Contract:
  1. The Design-Builder shall not discriminate against any employee or applicant for employment because of race, color, religion, national origin, sex, age,

marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, or physical handicap.

2. The Design-Builder agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, or physical handicap. The affirmative action shall include, but not be limited to, the following:
  - i. Employment, upgrading, or transfer;
  - ii. Recruitment or recruitment advertising;
  - iii. Demotion, layoff, or termination;
  - iv. Rates of pay, or other forms of compensation; and
  - v. Selection for training and apprenticeship.
3. Unless otherwise permitted by law and directed by the Department, the Design-Builder agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Department setting forth the provisions paragraphs 1 and 2 of **Section 15.28.1(b)** of this Agreement, concerning non-discrimination and affirmative action.
4. The Design-Builder shall, in all solicitations or advertisements for employees placed by or on behalf of the Design-Builder, state that all qualified applicants will receive consideration for employment pursuant to the non-discrimination requirements set forth in **Section 15.28.3**.
5. The Design-Builder agrees to send to each labor union or representative of workers with which it has a collective bargaining agreement, or other contract or understanding, a notice to be provided by the Department, advising each labor union or workers' representative of the Design-Builder's commitments under this **Section 15.28.1**, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
6. The Design-Builder agrees to permit access by the Department to all books, records and accounts pertaining to its employment practices for purposes of investigation to ascertain compliance with this **Section 15.28.1**, and to require under terms of any subcontractor agreement each subcontractor to permit access of the Subcontractor, books, records, and accounts for such purposes.
7. The Design-Builder shall include in every subcontract this **Section 15.28.1** so that such provisions shall be binding upon each subcontractor or vendor.
8. The Design-Builder shall take such action with respect to any subcontract as the CO may direct as a means of enforcing these provisions, including sanctions for noncompliance; provided, however, that in the event the Design-Builder becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the Department, the Design-Builder may request the District to enter into such litigation to protect the interest of the District.

## **Section 15.28.2 Pregnant Workers Fairness**

- a.** The Design-Builder shall comply with the Protecting Pregnant Workers Fairness Act of 2016, D.C. Official Code § 32-1231.01 *et seq.* (PPWF Act).
- b.** The Design-Builder shall not:
  - 1. Refuse to make reasonable accommodations to the known limitations related to pregnancy, childbirth, related medical conditions, or breastfeeding for an employee, unless the Design-Builder can demonstrate that the accommodation would impose an undue hardship;
  - 2. Take an adverse action against an employee who requests or uses a reasonable accommodation in regard to the employee's conditions or privileges of employment, including failing to reinstate the employee when the need for reasonable accommodations ceases to the employee's original job or to an equivalent position with equivalent:
    - i. Pay;
    - ii. Accumulated seniority and retirement;
    - iii. Benefits; and
    - iv. Other applicable service credits;
  - 3. Deny employment opportunities to an employee, or a job applicant, if the denial is based on the need of the employer to make reasonable accommodations to the known limitations related to pregnancy, childbirth, related medical conditions, or breastfeeding;
  - 4. Require an employee affected by pregnancy, childbirth, related medical conditions, or breastfeeding to accept an accommodation that the employee chooses not to accept if the employee does not have a known limitation related to pregnancy, childbirth, related medical conditions, or breastfeeding or the accommodation is not necessary for the employee to perform her duties;
  - 5. Require an employee to take leave if a reasonable accommodation can be provided; or
  - 6. Take adverse action against an employee who has been absent from work as a result of a pregnancy-related condition, including a pre-birth complication.
- c.** The Design-Builder shall post and maintain in a conspicuous place a notice of rights in both English and Spanish and provide written notice of an employee's right to a needed reasonable accommodation related to pregnancy, childbirth, related medical conditions, or breastfeeding pursuant to the PPWF Act to:
  - 1. New employees at the commencement of employment;
  - 2. Existing employees; and
  - 3. An employee who notifies the employer of her pregnancy, or other condition covered by the PPWF Act, within 10 days of the notification.
- d.** The Design-Builder shall provide an accurate written translation of the notice of rights to any non-English or non-Spanish speaking employee.
- e.** Violations of the PPWF Act shall be subject to civil penalties as described in the PPWF Act.

### **15.28.3 UNEMPLOYED ANTI-DISCRIMINATION**

- a. The Design-Builder shall comply with the Unemployed Anti-Discrimination Act of 2012, D.C. Official Code § 32-1361 *et seq.* (“Anti- Discrimination Act”).
- b. The Design-Builder shall not:
  - 1. Fail or refuse to consider for employment, or fail or refuse to hire, an individual as an employee because of the individual's status as unemployed; or
  - 2. Publish, in print, on the Internet, or in any other medium, an advertisement or announcement for any vacancy in a job for employment that includes:
    - i. Any provision stating or indicating that an individual's status as unemployed disqualifies the individual for the job; or
    - ii. Any provision stating or indicating that an employment agency will not consider or hire an individual for employment based on that individual's status as unemployed.
- c. Violations of the Unemployed Anti-Discrimination Act shall be subject to civil penalties as described in the Anti- Discrimination Act.

### **Section 15.29 ASSIGNMENT OF CONTRACT PAYMENTS**

- a. Subject to this **Section 15.29**, in accordance with Title 27 DCMR Section 3250, the Design-Builder may assign due or to become due as a result of the performance of this Design-Builder to a bank, trust company, or other financing institution funds.
- b. Any assignment shall cover all unpaid amounts payable under this Agreement and shall not be made to more than one party.
- c. Notwithstanding an assignment of Contract payments, the Design-Builder, not the assignee, is required to prepare invoices. Where such an assignment has been made, the original copy of the invoice must refer to the assignment and must show that payment of the invoice is to be made directly to the assignee as follows:

“Pursuant to the instrument of assignment dated \_\_\_\_\_, make payment of this invoice to (name and address of assignee).”

### **Section 15.30 FREEDOM OF INFORMATION ACT (“FOIA”)**

The District of Columbia Freedom of Information Act, at *D.C. Official Code § 2-532 (a-3)*, requires the District to make available for inspection and copying any record produced or collected pursuant to a District contract with a private contractor to perform a public function, to the same extent as if the record were maintained by the agency on whose behalf the contract is made. If the Design-Builder receives a request for such information, the Design-Builder shall immediately send the request to the PM designated in **Section 1.3** of this Agreement who will provide the request to the FOIA Officer for the agency with programmatic responsibility in accordance with the D.C. Freedom of Information Act. If the agency with programmatic responsibility receives a request for a record maintained by the Design-Builder pursuant to the Contract, the PM will forward a copy to the Design-Builder. In either event, the Design-Builder is required by law to provide all responsive records to the PM within the timeframe designated by the PM. The FOIA Officer for the agency with programmatic responsibility will determine the releasability of the records. The District will reimburse the Design-Builder for the costs of searching and copying the records in accordance with *D.C. Official Code §2-532* and Chapter 4 of Title 1 of the *D.C. Municipal Regulations*.

### **Section 15.31 NONPROFIT FAIR COMPENSATION ACT OF 2020, D.C. Code § 2-222.01 et seq.**

**Section 15.31.1** Nonprofit organizations, as defined in the Act, shall include in their rates the indirect costs incurred in the provision of goods or performance of services under this RFTOP pursuant to the nonprofit organization's unexpired Negotiated Indirect Cost Rate Agreement (“NICRA”). If a nonprofit organization does not have an unexpired NICRA, the nonprofit organization may elect to instead include in its rates its indirect costs:

- (a) As calculated using a de minimis rate of 10% of all direct costs under this Contract;
- (b) By negotiating a new percentage indirect cost rate with the awarding agency;
- (c) As calculated with the same percentage indirect cost rate as the nonprofit organization negotiated with any District agency within the past 2 years; however, a nonprofit organization may request to renegotiate indirect costs rates in accordance with Section 15.31.2; or
- (d) (As calculated with a percentage rate and base amount, determined by a certified public accountant, as defined in the Act, using the nonprofit organization's audited financial statements from the immediately preceding fiscal year, pursuant to the OMB Uniform Guidance, and certified in writing by the certified public accountant.

**Section 15.31.2** If this Contract is funded by a federal agency, indirect costs shall be consistent with the requirements for pass-through entities in 2 C.F.R. § 200.331, or any successor regulations.

**Section 15.31.3** The Contractor shall pay its subcontractor which are nonprofit organizations the same indirect cost rates as the nonprofit organization subcontractor would have received as a prime contractor.

**Section 15.32 CAMPAIGN FINANCE REFORM ACT**

Prior to the execution of this Contract, the Design-Builder shall complete and submit to the Department a completed Campaign Finance Reform Act Self-Certification Form, **Exhibit X**, pursuant to D.C. Official Code § 1-1161.01.

**Section 15.33 Equal Employment Opportunity (“EEO”)**

Each Offeror shall submit an EEO policy form substantially in the form of **Exhibit P**.

**Section 15.34 DGS Close Out Manual**

Deliverables shall include those outlined in **Exhibit T**.

## **ARTICLE - 16- TERMINATION OR SUSPENSION**

**Section 16.1** All terminations or suspensions arising out of or under this Agreement shall be in accordance with the terms of the Standard Contract Provisions (Construction Contracts and Architectural/Engineering Services Contracts).

**Section 16.2 Failure to Agree Upon GMP.** The Department shall have the right to terminate this Agreement in the event that the Department and the Design-Builder are unable to agree upon a GMP for the Project and the Department shall have the right, but not the obligation, to assume any of the Design-Builder's trade subcontracts upon such terms and conditions as requested by the Department. The Department's decision to terminate under this section shall be made in the Department's sole and absolute judgment and shall not be subject to review by any reviewing body, including, but not limited to, arbitrators appointed under this Agreement or any court of competent jurisdiction.

**Section 16.3 Termination for Default.** The Department may terminate the Agreement for default if the Design-Builder fails to perform any of its duties or obligations under the Agreement. In particular, but without limitation, the Department may terminate the Agreement if:

1. The Design-Builder fails to perform the Work diligently, in accordance with the Project Schedule or to make such progress in the Work as the Department reasonably believes is necessary to complete the Project within the time required by the Agreement; or
2. The Design-Builder fails to perform the Work in a good and workmanlike manner or to correct defects in the Work promptly upon notice by the Department; or
3. The Department reasonably determines that the Design-Builder has abandoned the Work, or has failed to pay laborers, mechanics, materialmen, Subcontractor or suppliers when payment is due; or
4. The Design-Builder becomes insolvent, makes an assignment for the benefit of creditors, files a voluntary petition under any chapter of the Bankruptcy Code or has an involuntary petition filed against it under any chapter of the Bankruptcy Code, or the Design-Builder has a receiver appointed, or files for dissolution or otherwise is dissolved; or
5. The Design-Builder fails to pay its debts in a timely manner or becomes insolvent, the Department reasonably determines that the Design-Builder does not have the financial ability to carry out its obligations under the Agreement and the Design-Builder fails to give the Department prompt and reasonable assurances of its ability to perform.

**Section 16.3.1** The Department shall provide the Design-Builder with written notice of its intent to terminate the Agreement, under this section.

**Section 16.3.2** If the Department terminates the Agreement for default, the Department will have the right to take over the Work, to accept assignment of some or all Subcontracts or

agreements with material suppliers, to take possession of the Project, to take and use all tools, equipment and supplies then being used in connection with the Work, and to finish the Project by whatever method it deems expedient, including accepting assignment of all outstanding Subcontracts and Supply Agreements.

**Section 16.4 Termination for Convenience.** The Department may terminate the Contract in whole or specified part, for its convenience, for any reason. The notice of termination shall state the effective date of termination, the extent of the termination, and any specific instructions. The termination for convenience that arises out of or under this Agreement shall be in accordance with the terms of the Standard Contract Provisions (Construction Contracts and Architectural/Engineering Services Contracts).

**Section 16.5 Continued Responsibility After Termination.** If the Design-Builder is terminated, for default, for Convenience or otherwise, the Design-Builder shall remain responsible for defects or non-conformities in all Work performed to the date of the termination.



## **Article - 17 – OTHER CONDITIONS AND SERVICES**

This Agreement and the rights and obligations of the Department and Design-Builder herein are subject to the approval of the Council for the District of Columbia.

## **Article 18 – CHANGES IN THE WORK**

**Section 18.1 Changes Authorized.** In accordance with the Standard Contract Provisions (Construction Contract) and the Standard Contract Provisions for Architectural and Engineering services Contracts, the Department may, without invalidating the Agreement, and without notice to or approval of any surety, order changes in the Work, including additions, deletions or modifications. Any such change must be conveyed by the Department to the Design-Builder via a written Change Directive or Change Order.

**Section 18.2 Executed Change Directive/Change Order Required.** Only a written Change Directive or Change Order, executed by the Department's Contracting Officer, may make changes to the Agreement. In particular, but without limitation, a written Change Directive or Change Order executed by the Department's Contracting Officer is the only means by which changes may be made to the Substantial or Final Completion Dates, the Design-Build Fee, or the Guaranteed Maximum Price.

### **Section 18.3 Department-Initiated Changes**

1. If the Department wishes to make a change in the Work or to accelerate the Work, it will execute and issue to the Design-Builder a written Change Directive, either directing the Design-Builder to proceed at once with the changed Work or directing it to not to proceed, but to inform the Department, in writing, of the amount, if any, by which the Design-Builder believes that Substantial or Final Completion Dates and/or the GMP should be adjusted to take the Change Order or Change Directive into account.
2. Within ten (10) days of receiving a Change Directive, the Design-Builder shall provide the Department with a written statement of all changes in the Agreement, including, without limitation, any changes to the Substantial or Final Completion Dates or the GMP to which it believes it is entitled as a result of the Change Directive. If additional time is sought, a schedule analysis supporting the requested extension should be included. The schedule analysis should include a written narrative explanation. If a change in the GMP is sought (or if the Department has requested a deduct change), the statement should include a breakdown, by line item, of the estimated cost changes attributable to the proposed change. The Department may request, and the Design-Builder shall provide, further cost breakdowns, clarifications, project documentation or back-up if the Department reasonably believes such additional information is needed to understand and evaluate the request. The additional information required may include cost and pricing data in accordance with the Department's regulations. Any requested adjustment to the GMP shall be limited to increased Cost of the Work due to the Change Directive. The Design-Builder is not entitled to any markup on any kind of Change Orders except as authorized in **Section 18.8**, and if so authorized, any mark-up shall be in accordance with **Section 18.11**.
3. If the Department has not yet directed the Design-Builder to proceed with the change described by a Change Directive, the Department may rescind it. If the Department wishes to proceed or has already directed the Design-Builder to proceed, the Design-Builder shall immediately proceed with the changed Work and, the Department and the Design-Builder shall use their good faith best efforts to reach an agreement upon the modifications to the Substantial or Final Completion Dates, and/or the GMP that is justified by the Change Directive. If the Department and the Design-Builder reach an

agreement, the agreement shall be set forth in a Change Order and the Design-Builder shall also execute it, at which point it will become binding on both Parties.

4. If the Parties fail to reach an agreement within sixty (60) days after the Department receives the Design-Builder's detailed statement pursuant to **Section 18.3.2**, and such other Project documentation as the Department may request, the Design-Builder may assert a claim in accordance with the Agreement. In such a case, and subject to adjustment via the claims and disputes process, the Department shall unilaterally grant the Design-Builder such adjustments, if any, to the Substantial or Final Completion Dates, the Guaranteed Maximum Price, and/or the Preconstruction or Design-Build Fee as the Department has judged to be appropriate.

**Section 18.4 Notice of Change Event.** The Design-Builder must give the Department written notice of any Change Event within ten (10) calendar days of the date on which the Design-Builder knew, or reasonably should have known, of the Change Event. To the extent available, the notice must state the nature of the Change Event and describe, generally, all changes in the Agreement to which the Design-Builder believes it is entitled. Such notice is an express condition precedent to any claim or request for adjustment to the Substantial or Final Completion Dates, or the GMP arising from the Change Event and, if the notice is not given within the required time, the Design-Builder will have waived the right to any adjustment to the Substantial or Final Completion Dates, or the GMP arising from the Change Event.

**Section 18.5 Detailed Change Request.** Within twenty (20) days after giving notice of a Change Event, the Design-Builder shall submit a written Change Request to the Department describing, in reasonable detail, all adjustments it seeks to the Substantial or Final Completion Dates or the GMP as a result of the Change Event. The Change Request shall include the same information as described in **Section 18.3** with respect to any Agreement changes the Design-Builder seeks due to the Change Event, and the amount of any requested adjustment to the GMP shall be limited in accordance with that **Section 18.3**.

**Section 18.6 Changes to GMP.** Subject to the condition precedent that the Design-Builder have complied with the notice and documentation provisions of this Article, and subject to the limitations stated in this Agreement, the Design-Builder is entitled to an adjustment to the GMP in the following cases:

1. If the Department issues a Change Directive or Change Order that directs the Design-Builder to proceed with work which is beyond the scope of Work included within this Agreement; or
2. The Design-Builder encounters differing site conditions or Hazardous Materials not identified in the Preconstruction Phase.

**Section 18.7 Deductive Change Orders.** The Department reserves the right to issue deductive Change Orders (reducing the GMP or modifying the Substantial or Final Completion Dates to an earlier date) when changes are effected, by Change Directive or otherwise, which will decrease the cost of completing the Work or the time within which it can be completed.

**Section 18.8 No Adjustments to Fee.** The Design-Builder understands and agrees that the Design-Build Fee shall not be increased or decreased as a result of any Change Orders or Change Directive. In furtherance of this understanding, the Design-Builder agrees that it shall not be entitled to an increase in the Lump Sum General Conditions Cost or the Design-Build Fee by virtue of changes authorized by the Department unless such changes fall outside the

general scope of work contemplated by this Agreement. The term general scope of work shall mean a state-of-the-art educational facility that is consistent with the Department's program of requirements and incorporates sustainable design initiatives. Without limiting the generality of the foregoing, it is understood and agreed that the Design-Builder shall not be entitled to any additional fees or general conditions unless (i) the Department makes additions to the scope provided for in this Agreement that cause the GMP, either individually or in the aggregate, to increase by more than ten percent (10%); or (ii) the Department makes additions to the scope provided for herein which (other than for punchlist or warranty work) require the Design-Builder's services for the Project to extend beyond the Substantial Completion Date.

**Section 18.9 Executed Change Orders or Contract Modifications are Final.** The Design-Builder agrees that any Change Order or Contract Modification executed by the Department and Design-Builder constitutes its full and final adjustment for all costs, delays, disruptions, inefficiencies, accelerations, schedule impacts, or other consequences arising from the change modification in question, whether a Change Directive, or a Change Event, or from any claimed cumulative effect of changes made to the date of the Change Order or Contract Modification, and that no further adjustments in compensation or time shall be sought or made with respect to the Change Directive or the Change Event giving rise to the Change Order or Contract Modification. Although the Parties anticipate that most Change Orders or Contract Modifications will not require an adjustment to the Cost of General Conditions, if the Work described in a Change Order or Contract Modification requires an increase or decrease in the Lump Sum General Conditions Cost (i.e. because such a Change requires additional field staff or other equipment that would be classified as General Conditions Costs), the Change Order or Contract Modification shall contain an increase to the Design-Build Fee adjusting such amount. The cost of processing a Change Order or Contract Modification shall not be considered an event that will require an increase in the Lump Sum General Conditions Cost.

**Section 18.10 Failure to Agree.** If the Design-Builder claims entitlement to a change in the Agreement, and the Department does not agree that any action or event has occurred to justify any change in time or compensation, or if the Parties fail to agree upon the appropriate amount of the adjustment in time or compensation, the Department will unilaterally make such changes, if any, to the Agreement, as it determines are appropriate pursuant to the Agreement. The Design-Builder shall proceed with the Work and the Department's directives, without interruption or delay, and shall make a claim as provided in Article 18 herein. Failure to proceed due to a dispute over a change request shall constitute a material breach of the Contract and entitle the Department to all available remedies for such breach, including, without limitation, termination for default.

**Section 18.11 Mark-Up on Trade Work.**

The maximum mark up for Change Order work shall be as follows:

1. Intervening tier Subcontractor shall be entitled to a mark-up of five percent (5%) (Covering home office overhead, the cost of insurance and bonds, field supervision, general conditions and profit) on Work Performed by lower-tier Subcontractor;
2. To the extent permitted by **Section 18.8**, the Design-Builder shall be entitled to an increase in its Design-Build Fee at a maximum rate of 2% on work performed by Subcontractor. Such markup shall cover the same cost elements that were included in the Design-Build Fee;
3. Direct Cost of the Work shall include, but not be limited to: (Direct Cost of the Work does not, however, include home office overhead, field supervision, general conditions

or profit of either the subcontractor or the Design-Builder. No personnel above the level of a working foreman shall be considered a Direct Cost of the Work).

- (a) **Labor.** Payment will be made for direct labor cost plus indirect labor cost such as insurance, taxes, fringe benefits and welfare provided such costs are considered reasonable. Indirect costs shall be itemized and verified by receipted invoices. If verification is not possible, up to five percent (5%) of direct labor costs may be allowed.
- (b) **Rented Equipment.** Payment for required equipment rented from an outside company that is neither an affiliate of, nor a subsidiary of, the Design-Builder will be based on receipted invoices which shall not exceed rates given in the current edition of the Rental Rate Blue Book for Construction Equipment, published by Data Quest. If actual rental rates exceed manual rates, written justification shall be furnished to the Contracting Officer for consideration. No additional allowance will be made for overhead and profit. The Design-Builder shall submit written certification to the Contracting Officer that any required rented equipment is neither owned by nor rented from the Design-Builder or an affiliate of or subsidiary of the Design-Builder.
- (c) **Design-Builder's Equipment.** Payment for required equipment owned by the Design-Builder or an affiliate of the Design-Builder will be based solely on an hourly rate derived by dividing the current appropriate monthly rate by 176 hours. No payment will be made under any circumstances for repair costs, freight and transportation charges, fuel, lubricants, insurance, any other costs and expenses, or overhead and profit. Payment for such equipment made idle by delays attributable to the Government will be based on one-half the derived hourly rate under this subsection.
- (d) **Materials.** Incorporated and unincorporated materials as permitted under **Section 9.1.**

## Article 19 – CLAIMS & DISPUTE RESOLUTION

All claims or disputes arising out of this Agreement shall be governed by the terms of the Standard Contract Provisions (for Architectural and Engineering Services and Construction Contracts).

## Article 20 - EXHIBITS


Exhibit A	Program Requirements and Educational Specifications
Exhibit B	Project Schedule
Exhibit C	Deliverable List
Exhibit D	SBE Subcontracting Plan
Exhibit E	Reserved
Exhibit F	Key Personnel
Exhibit G1	Davis Bacon Act Wage Determination
Exhibit G2	Title 29 Code of Federal Regulations (CFR) part 5.5
Exhibit H	Design-Builder's Designated Representatives
Exhibit I	Department's Designated Representatives and Contracting Officers
Exhibit J	Standard Contract Provisions (Construction and Architecture/Engineering)
Exhibit K	Form of Lien Waiver
Exhibit L	Form of GMP Amendment
Exhibit M	Reserved
Exhibit N	FF&E and Close-Out
Exhibit O	Subcontractor Performance Evaluation Form
Exhibit P	Equal Employment Opportunity Policy
Exhibit Q	Living Wage Act
Exhibit R	Award Fee Pool
Exhibit S	BIM Requirements
Exhibit T	DGS Close Out Manual
Exhibit U	Quality Control Master Program
Exhibit V	First Source Employment Agreement
Exhibit W	Concept Design, Schematic Design, and Design Development Milestone Requirements
Exhibit X	Campaign Finance Reform Act Self-Certification Form
Exhibit Y	Schedule of Values
Exhibit Z	Assumptions and Clarifications

**IN WITNESS WHEREOF**, the Parties have executed this Agreement (DCAM-23-CS-RFP-0025) through their duly authorized representatives and effective as of the last date written below.

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

By: Peter Henry Lyonga  
Name: Peter Henry Lyonga  
Title: Contracting Officer  
Date: 7/8/2024

**THE KEYSTONE PLUS  
CONSTRUCTION CORPORATION**

By:   
Name: Carlos Perdomo  
Title: President  
Date: 6-11-24