

DRAFT

DESIGN BUILD CONTRACT

BETWEEN

THE CITY OF HOUSTON

AND

TBD

FOR

IAH Terminal A Curbside Improvements

PROJECT No. 673C

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

DESIGN BUILD CONTRACTOR:

CITY:

TBD

THE CITY OF HOUSTON, TEXAS

By_
Name:
Title:
Email:

By_
Mayor

APPROVED AS TO FORM:

ATTEST:

By_
Name:
Title:
Email:

By_
City Secretary

Tax ID NO. 14402294053

APPROVED:

Director, Houston Airport System

COUNTERSIGNED:

City Controller

DATE COUNTERSIGNED:

("Effective Date")

APPROVED AS TO FORM:

Senior Assistant City Attorney

L.D. File No. _

This **DESIGN BUILD CONTRACT** ("Contract") is entered into and effective as of the Effective Date, by and between the **CITY OF HOUSTON, TEXAS**, a home-rule city (the "City") and **TBD** ("DESIGN BUILD CONTRACTOR"), a **Corporation** authorized to do business in the State of Texas (each also referred to as "Party" individually or "Parties" collectively).

The City is: The City of Houston, Texas

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

DESIGN BUILD CONTRACTOR is: TBD

Address for Written Notice: TBD

E-mail address: TBD

The Project is: IAH Terminal A Curbside Improvements

Project Location: George Bush Intercontinental Airport

Project No: P673C

DESIGN-BUILD CONTRACTOR's Lead Design Firm Designer is: TBD

RECITALS

WHEREAS, the City intends to build a new Terminal A Curbside Improvements project to improve vehicular flow and efficiency at all Terminal A curbsides. The project includes, but not limited to, demolition of existing helixes, constructing a new vehicle bridge connecting existing parking garages, elevated roadway(s) and other work as described in the Advanced Design Bid Document (ADBD)

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

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

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

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

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

WHEREAS, on TBD the City initiated negotiations with the DESIGN BUILD CONTRACTOR, which negotiations have concluded with this Agreement;

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

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

ARTICLE 1. THE PROJECT

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

ARTICLE 2. CONTRACT DOCUMENTS AND INTERPRETATION

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

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

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

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

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

ARTICLE 3. GENERAL PERFORMANCE REQUIREMENTS

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

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

3.3 Information Provided by or on Behalf of the City. The City makes no representation or warranty with respect to any information provided to the DESIGN BUILD CONTRACTOR by or on behalf of the City in connection with this Contract. The DESIGN BUILD CONTRACTOR shall assess all risks related to the Project and independently verify and confirm all information supplied to it by or on behalf of the City and upon which the DESIGN BUILD CONTRACTOR elects to rely in connection herewith. Except as may reasonably be requested by the DESIGN BUILD CONTRACTOR, expressly permitted by this Contract and General Conditions, and provided there is no resulting increase to the GMP or the Contract Time (unless otherwise agreed by the Director in his sole discretion), DESIGN BUILD CONTRACTOR, and expressly established in the GMP), shall have no right to relief hereunder, or to make any claim against the City, or to seek any adjustment to compensation or the Contract Times as the result of any error, omission, or insufficiency relating to any information provided to the DESIGN BUILD CONTRACTOR by or on behalf of the City in connection with this Contract.

3.4 Related Projects. The DESIGN BUILD CONTRACTOR acknowledges that the City may undertake other capital projects at or near the Project ("Related Projects") and agrees to accept the obligations of the DESIGN BUILD CONTRACTOR concerning the Related Projects, as set forth in the General Conditions. Nothing in the Contract Documents shall be interpreted as granting the DESIGN BUILD CONTRACTOR exclusive occupancy of the Project Site. The DESIGN BUILD

CONTRACTOR must ascertain to its own satisfaction the scope of the Project and the nature of any other contracts that have been or may be awarded for any Related Project(s).

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

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

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

the DESIGN BUILD CONTRACTOR with respect to any certification to be made by the DESIGN BUILD CONTRACTOR hereunder. The designated representative shall be the Director's primary contact for the performance of the Work and shall be available, as required, for the benefit of the City and the Project.

3.8 Meetings. Meetings are to be conducted in the manner described in the Contract Documents unless otherwise agreed in writing by the Director.

ARTICLE 4. PRECONSTRUCTION SERVICES

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

4.2 Notice to Proceed. The DESIGN BUILD CONTRACTOR shall commence performing Preconstruction Services (including Design Services) upon the date specified in a Notice to Proceed with Preconstruction Services issued by the Director. The DESIGN BUILD CONTRACTOR is not entitled to reimbursement for any costs incurred for performance of Preconstruction Phase Services and Design Services incurred prior to the performance before issuance of a Notice to Proceed. The DESIGN BUILD CONTRACTOR acknowledges that the Preconstruction Services (including Design Services) are segregated into discrete tasks associated with the advancement of the Preconstruction Services, as identified in **Exhibit "B"**, and that a Notice to Proceed with Preconstruction Services may be limited to certain specifically identified tasks. The City will therefore have the right to issue multiple Notices to Proceed with respect to Preconstruction Services, identifying the Preconstruction Services tasks to be performed by the DESIGN BUILD CONTRACTOR.

4.3 Existing Conditions. DESIGN BUILD CONTRACTOR acknowledges that it was afforded unrestricted access to the existing improvements and conditions on the Project Site and it has thoroughly investigated those conditions. The results of DESIGN BUILD CONTRACTOR's investigation shall be deemed to be taken into account in establishing the Guaranteed Maximum Price of the Work. Therefore, DESIGN BUILD CONTRACTOR may not make and is not entitled to any claim for any adjustment to the Contract Time, Preconstruction Phase Services Fee, or the GMP arising from Project conditions that DESIGN BUILD CONTRACTOR discovered or, in the exercise of reasonable care, should have discovered in DESIGN BUILD CONTRACTOR's investigation of the Project site.

4.4 Design Errors and Omissions. Before proceeding with the Construction Phase Services, DESIGN BUILD CONTRACTOR shall review the Drawings, Specifications, and other Construction Documents and notify the Director of any errors, omissions, or discrepancies in the Construction Documents of which it is aware. DESIGN BUILD CONTRACTOR is responsible for discovering and correcting any defect, error, omission, conflict, inconsistency, failure to comply with the Contract Documents, or lack of clarity in the Construction Documents. DESIGN BUILD CONTRACTOR shall be responsible for all costs, including the cost of redoing or remedying the Work and time delays resulting from any defect, error, omission, conflict, inconsistency, lack of clarity, or failure to comply with the Contract Documents in the Construction Documents.

4.5 Additional Preconstruction Phase Services

4.5.1 Provision of Additional Preconstruction Services shall apply only when necessary, as determined by the Director in his sole discretion and as authorized in writing by the Director related to the purpose of the Agreement, and when sufficient funding is allocated for such services. City, as provided in **Article 9** of the Agreement, shall pay for the following Additional Preconstruction Phase Services, in addition to the compensation for Basic Preconstruction Services, if authorized by the Director in writing:

4.5.1.1. Provide financial, feasibility or other special studies;

4.5.1.2. Provide planning surveys, site evaluations, environmental studies or comparative studies of prospective sites;

4.5.1.3. Prepare special surveys, studies and submissions required for approvals by governmental authorities or others having jurisdiction over the Project;

4.5.1.4. Provide services relative to future facilities, systems, and equipment that are not intended to be constructed during the Contract Administration Services;

4.5.1.5. Provide detailed estimates of construction cost beyond the scope based on current area, volume, or similar unit costs as required in the Contract Documents (but providing estimating to prepare the GMP proposal is part of Basic Preconstruction Phase Services);

4.5.1.6. Provide analyses of owning and operating costs, or detailed quantity surveys, inventories of material, equipment, and labor;

- 4.5.1.7. Make revisions in drawings, specifications, or other documents when the revisions are inconsistent with written approvals or instructions previously given, or during Construction Documents Phase, making revisions to Construction Documents required by the enactment or revision of codes, laws, or regulations subsequent to the preparation of the Construction Documents or due to other causes not within the control of DESIGN BUILD CONTRACTOR;
- 4.5.1.8. Prepare Drawings, Specifications, supporting data and provide other services in connection with a change to approved Construction Documents to the extent that such services are in excess of the Basic or other Additional Pre-Construction Services required of DESIGN BUILD CONTRACTOR pursuant to the Contract Documents, as determined by the City Engineer in his sole discretion; provided that such changes are not necessitated by an act or omission of DESIGN BUILD CONTRACTOR. In the event a Change Order is caused by an act or omission of DESIGN BUILD CONTRACTOR, DESIGN BUILD CONTRACTOR is required to prepare the Drawing, Specifications, and supporting data at no expense to City;
- 4.5.1.9. Provide land survey services to supplement any legal description and site information provided by City, and to include, but not be limited to, as applicable to the Project, grades of streets, alleys, pavements, adjoining property; rights-of-way, restrictions, easements, encroachments, deed restrictions, contours of the site, locations, dimensions and complete data pertaining to existing buildings, other improvements and trees, as well as information concerning available services and utility lines both public and private, above and below grade, including inverts and depths, in accordance with the Project requirements. DESIGN BUILD CONTRACTOR, if authorized by the Director, shall commission a signed and sealed survey prepared by a registered land surveyor acceptable to the Director;
- 4.5.1.10. Provide geotechnical investigation and engineering services beyond that required for the design of the Project in Basic Preconstruction Phase Services. Such services may include, as applicable to the Project, test borings, test pits, soil bearing values, percolation tests and similar investigations and engineering services with reports and appropriate recommendations in accordance with the Project requirements. DESIGN BUILD CONTRACTOR, if authorized by the City Engineer, shall commission the completion of a signed and sealed geotechnical investigation by a registered geotechnical Subcontractor acceptable to the Director;
- 4.5.1.11. Provide cultural resource reconnaissance or surveying services as defined in the General Rules of Practice and Procedures, Chapter 41 of the Texas Antiquities Committee, to supplement the site information provided by City and to identify potential historic or prehistoric sites in the Project areas affected by improvements planned as part of the Project. Performance of the reconnaissance, if authorized by the City Engineer, shall be in accordance with procedures promulgated by the Texas Antiquities

Committee in conformance with the Antiquities Code of Texas, and signed by a professional archaeologist acceptable to the Texas Antiquities Committee and the Director. For the purpose of this Agreement, the Director is authorized to approve the archaeologist's permit applications for the cultural resource reconnaissance or surveys on behalf of City;

- 4.5.1.12. Provide data processing and photographic production techniques when used in connection with another Additional Preconstruction Phase Service; and
- 4.5.1.13. Any other Additional Preconstruction Phase Services mutually agreed to by Director and DESIGN BUILD CONTRACTOR.

4.6 Ownership and Use of Work Products.

- 4.6.1 DESIGN BUILD CONTRACTOR conveys and assigns to the City its entire interest and full ownership worldwide in and to any work, invention, notes, plans, computations, data bases, tabulations, exhibits, reports, underlying data, photographs and other work products, and any modifications or improvements to them (collectively "Documents"), and the copyrights, patents, trademarks, trade secrets, and any other proprietary rights therein (collectively "Proprietary Rights") that DESIGN BUILD CONTRACTOR, its agents, employees, contractors, and Subconsultants (collectively "Authors") develop, write, or produce under this Contract (collectively "Works").
- 4.6.2 The Authors shall not claim or exercise any Proprietary Rights related to the Works. If requested by the Director, DESIGN BUILD CONTRACTOR shall place a conspicuous notation on any Works which indicates that the City owns the Proprietary Rights.
- 4.6.3 DESIGN BUILD CONTRACTOR shall execute all documents required by the Director to further evidence this assignment and ownership. DESIGN BUILD CONTRACTOR shall cooperate with the City in registering, creating, and enforcing Proprietary Rights arising under this Contract. If DESIGN BUILD CONTRACTOR's assistance is requested and rendered under this Section, the City shall reimburse DESIGN BUILD CONTRACTOR for all out-of-pocket expenses it incurs in rendering assistance, subject to the availability of funds. On termination of this Contract, or if requested by the Director, DESIGN BUILD CONTRACTOR shall deliver all Works to the City. DESIGN BUILD CONTRACTOR shall obtain written agreements from the Authors which bind them to the terms in this Section.
- 4.6.4 All Works developed, written, or produced under this Contract for use as a contribution to a collective work; a part of a motion picture or other audiovisual work; a translation; a supplementary work; a compilation; an instructional text; a test; answer material for a test; or an atlas, are "works made for hire."

- 4.6.5 DESIGN BUILD CONTRACTOR may retain copies of the Documents for its archives. DESIGN BUILD CONTRACTOR shall not otherwise use, sell, license, or market the Documents.
- 4.6.6 Confidentiality: DESIGN BUILD CONTRACTOR, its agents, employees, contractors, consultants and Subconsultants shall hold all City information, data, and Documents (collectively, the "Information") that they receive, or to which they have access, in strictest confidence. DESIGN BUILD CONTRACTOR, its agents, employees, contractors, and Subconsultants shall not disclose, disseminate, or use the Information unless the Director authorizes it in writing. DESIGN BUILD CONTRACTOR shall obtain written agreements from its agents, employees, contractors, consultants and Subconsultants which bind them to the terms in this Section.

ARTICLE 5 GUARANTEED MAXIMUM PRICE PROPOSAL

5.1 GMP Submittal. The DESIGN BUILD CONTRACTOR shall take all appropriate measures in accordance with 49 C.F.R. 1520 and other applicable laws to protect all proprietary, privileged, confidential, or otherwise Sensitive Security Information ("SSI") that may come into the DESIGN BUILD CONTRACTOR's possession as a result of this Contract.

5.2 CGMP. The Parties anticipate that there may be some phases of Construction that are ready for commencement before the GMP Amendment Date. In addition to the Advanced Packages set forth in **Exhibit "B"**, the DESIGN BUILD CONTRACTOR may recommend such phases or elements of the Construction ("Advance Packages") to the Director, as appropriate, during performance of the Preconstruction Services. The Director shall have the sole discretion to authorize an Advance Package pursuant to this Section and **Exhibit "B"** but has no obligation to enter into any CGMP Amendment. Prior to any such authorization, the DESIGN BUILD CONTRACTOR shall provide the Director with a CGMP Submittal in accordance with **Section 5.4** and **Exhibit "F"**.

5.3 CGMP Submittal. The DESIGN BUILD CONTRACTOR shall prepare and submit the CGMP Submittal upon 90% design for both Phases 1A and 1B in accordance with **Exhibits "E" and "F"** and all other applicable Contract Standards. In the event the Director believes the CGMP Submittal does not comply with the requirements of the Contract and **Exhibit "F"**, the Director shall provide written notice to the DESIGN BUILD CONTRACTOR of any additions, corrections, or revisions required to achieve such compliance. The DESIGN BUILD CONTRACTOR, without any increase in the Preconstruction Phase Services Fee, shall promptly take all necessary rectification action, making multiple re-submittals, if required.

5.4 CGMP Negotiation and Execution. If the Director agrees to authorize the commencement of a portion of Construction under a CGMP Submittal, the DESIGN BUILD CONTRACTOR and Director shall negotiate and enter into a CGMP Amendment. A CGMP Amendment at a minimum shall incorporate and definitively address all of the items identified in **Exhibit "F"** and shall contain any other commercial terms and conditions specific to the Advanced Package (but shall not alter the terms and conditions of this Contract). Advanced Packages may be structured in a manner that provides for the commencement of the related Construction at any time determined by the Parties.

5.5 CGMP Amendment. If the Director determines to accept the CGMP Submittal, following negotiations at the election of the Director in his sole discretion and subject to approval by the Director, the Parties will enter into the CGMP Amendment and the CGMP Amendment Date will be established hereunder. Subject to the appropriation of funds, the Director has the authority to enter into a CGMP Amendment. Upon the Director's approval of a CGMP Amendment, the CGMP Amendment shall become a part of this Contract for all purposes.

5.6 Complete Pricing. It is the intention of the Parties that each CGMP Submittal, and any associated CGMP Amendment, includes complete pricing for the Work to be performed thereunder. Accordingly, all such amounts in CGMP Amendments shall be excluded in determining the Cost of the Work for the GMP Amendment. The Construction Services Fee, however, is intended to and shall be applicable to all construction whether performed as part of the CGMP Amendment or otherwise with the Construction Services. The Parties acknowledge and agree that the Preconstruction Services Fee and the Construction Services Fee were negotiated by the Parties prior to the Effective Date and included in the Contract as executed on the Effective Date and shall not be the subject of the CGMP and/or GMP Submittal or the CGMP and/or GMP Amendment.

5.7 CGMP Compensation. The City shall pay the CGMP for the Advanced Package Work to the DESIGN BUILD CONTRACTOR for Work properly performed and completed pursuant to the terms of the CGMP Amendment in accordance with, and subject to the limitations contained in this Contract, notwithstanding the fact that no GMP Amendment will be in effect at the time the Parties execute a CGMP Amendment. City agrees to release all retainage related to Advanced Package Work when DESIGN BUILD CONTRACTOR completes the CGMP Work pursuant to the CGMP Amendment terms. All related Warranties, as applicable, for Work performed under the CGMP will commence upon substantial completion of the CGMP Work, notwithstanding any other provision in this contract.

5.8 GMP Submittal. The DESIGN BUILD CONTRACTOR shall prepare and submit the GMP Submittal upon 60% of Design Development for Phase 1A, Phase 1B and Phase 2 in accordance with **Exhibit "F"** and all other applicable Contract Standards. In the event the Director believes the GMP Submittal does not comply with the requirements of the Contract including **Exhibit "F"**, the Director shall provide written notice to the DESIGN BUILD CONTRACTOR of any additions, corrections, or revisions required to achieve such compliance. The DESIGN BUILD CONTRACTOR, without any increase in the Preconstruction Services Fee, shall promptly take all necessary rectification action, making multiple re-submittals, if required.

5.9 GMP Amendment. If the Director determines to accept the GMP Submittal, following negotiations at the election of the Director in his sole discretion and subject to approval by the City Council, the Parties will enter into the GMP Amendment and the GMP Amendment Date will be established hereunder and thereupon the Construction Services shall commence. Upon City Council approval, the GMP Amendment shall become a part of this Contract for all purposes.

5.10 Failure to Reach a GMP. In the event the City rejects the GMP Amendment, the City, in its sole discretion, may direct the DESIGN BUILD CONTRACTOR at no additional cost to the City, to adjust the design and/or scope to attempt to bring the Guaranteed Maximum Price to an amount acceptable to the City or the City may elect to end its attempt to reach an agreement with the DESIGN BUILD CONTRACTOR. In the event DESIGN BUILD CONTRACTOR's scope of work is reduced by the Director, then the Director and DESIGN BUILD CONTRACTOR shall attempt to negotiate a

new GMP. In the event the City elects to end its attempts to reach an agreement with the DESIGN BUILD CONTRACTOR, the DESIGN BUILD CONTRACTOR does hereby assign all rights to any agreement with DESIGN BUILD CONTRACTOR to the City effective upon written notice of acceptance by the City to the DESIGN BUILD CONTRACTOR. The City shall be entitled to use any intellectual property developed by or on behalf of DESIGN BUILD CONTRACTOR for this Project for the completion, maintenance, and further development of the Terminal A Curbside Improvements Facility, or for any other purpose, without additional compensation to DESIGN BUILD CONTRACTOR.

ARTICLE 6. CONSTRUCTION SERVICES

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

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

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

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

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

6.6 The DESIGN BUILD CONTRACTOR warrants, represents, covenants, and agrees to notify Director in writing within five days of encountering, of anything within its knowledge which it discovers

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

6.7 The DESIGN BUILD CONTRACTOR warrants, represents, covenants, and agrees to furnish efficient business administration and superintendence and perform its services hereunder in the and in the most expeditious and economical manner consistent with the requirements of the Contract Documents.

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

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

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

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

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

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

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

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

6.16 DESIGN BUILD CONTRACTOR and any of its design professionals, consultants, the Subcontractors and Suppliers and their agents and employees warrant that the information provided to City about the qualifications, including financial information and past performance, is accurate, has not materially changed, and does not omit information that would materially affect those qualifications and that DESIGN BUILD CONTRACTOR is financially sound, fully solvent, and experienced in and fully qualified to perform the type of Work to be performed under this Contract.

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

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

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

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

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

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

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

6.24 DESIGN BUILD CONTRACTOR shall establish, implement, and follow a quality control program for the Work during all Construction Services. DESIGN BUILD CONTRACTOR shall provide Director with a copy of the written quality control program.

6.25 DESIGN BUILD CONTRACTOR shall provide Value Engineering suggestions to Director. Whenever the term "Value Engineering" is used in conjunction with this Contract or the Project, it

has its commonly accepted meaning within the construction industry and does not imply the practice of professional engineering without a license. If any Value Engineering activities constitute the professional practice of engineering, then such activities shall be performed by an engineer licensed in Texas.

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

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

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

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

6.30 DESIGN BUILD CONTRACTOR acknowledges that the Project site is, and at all times during the Work will be, within or around critically important areas of the operational airfield at IAH. DESIGN BUILD CONTRACTOR agrees that at all times when any forces are mobilized to strictly adhere to rules and instructions regarding permitted activities and physical locations on the airfield given by any authorized HAS personnel. Such instructions will include, without limitation, demobilizing from Work areas on minutes' notice to allow aircraft movement; coordination of phased work areas to keep aircraft paths open and operational; vigilant cleaning and removal of all foreign object debris caused by its Work from any areas on which aircraft may travel. DESIGN BUILD CONTRACTOR agrees and warrants that all delays and disruptions within the reasonable contemplation of those knowledgeable of airfield operations (including absolute deference to aircraft operations) caused by such adherence to rules and instructions or coordination for activities as specified herein have been taken into account in preparing the Guaranteed Maximum Price and that DESIGN BUILD CONTRACTOR will not seek any increase in the Guaranteed Maximum Price or the

Contract Time on account of such adherence and coordination. DESIGN BUILD CONTRACTOR agrees that the City's needs arising from its ongoing airport operations as described herein has been expressly contemplated by DESIGN BUILD CONTRACTOR and shall not constitute active interference by the City.

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

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

ARTICLE 7. LIQUIDATED DAMAGES

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

7.2 Failure to Achieve Milestones. DESIGN BUILD CONTRACTOR and City agree that failure to achieve the Project milestones in this Section by the dates set forth in the agreed upon Guaranteed Maximum Price proposal will cause damages to City and that actual damages from such harm are difficult to estimate accurately. Therefore, DESIGN BUILD CONTRACTOR and City agree that DESIGN BUILD CONTRACTOR and Surety are liable for and shall pay to City the amounts below per Day, on a cumulative basis, as liquidated damages and not as a penalty, for each and every Day or portion of a Day of delay beyond the milestone dates established in the approved Guaranteed Maximum Price proposal for the Project. DESIGN BUILD CONTRACTOR and City agree that the amounts of liquidated damages fixed in this Section are reasonable forecasts of just compensation for harm to City resulting from DESIGN BUILD CONTRACTOR's failure to

achieve the milestones set forth herein. These liquidated damages shall be City's sole remedy for damages from delay by DESIGN BUILD CONTRACTOR except that City shall be entitled to recover all of its actual, direct, and consequential damages in the event liquidated damages are determined to be unenforceable, and City shall also be entitled to City's remedies under Article 14 of the General Conditions. Liquidated damages for each of the Project milestones are as follows:

7.2.1 Substantial Completion of Phase Milestones: \$500 per Day.

7.2.1.1. Completion of Preconstruction milestone (including 100%Design) is 236 Calendar Days duration from the date of the first Notice to Proceed.

7.3 High Sulfur Diesel Fuel Usage. The DESIGN BUILD CONTRACTOR and City agree that incidents of high sulfur diesel fuel usage by DESIGN BUILD CONTRACTOR will cause damages to City and that actual damages from such harm are difficult to estimate accurately. Therefore, DESIGN BUILD CONTRACTOR and City agree that DESIGN BUILD CONTRACTOR and Surety are liable for and shall pay to City the amount stipulated in this Section as liquidated damages. DESIGN BUILD CONTRACTOR and City agree that DESIGN BUILD CONTRACTOR and Surety are liable for and shall pay to City, as liquidated damages and not as a penalty, the amount equal to **\$1200** per diesel operating vehicle or piece of motorized equipment per incidence of high sulfur diesel fuel usage per Day. DESIGN BUILD CONTRACTOR and City agree that the amount of liquidated damages fixed in this Section is a reasonable forecast of just compensation for harm to City resulting from an incident of high sulfur diesel fuel usage. An incident of high sulfur diesel fuel usage as used herein means use of fuel in breach of the General Conditions. DESIGN BUILD CONTRACTOR and City agree that in the event the amount of liquidated damages set forth in this Section are held to be unenforceable for any reason, City shall be entitled to recover its actual direct damages, if any, resulting from incidence of high sulfur diesel fuel usage as may be authorized by the laws of Texas.

ARTICLE 8. TIME

8.1 Time of the Essence. Time limits stated in the Contract Documents are of the essence. DESIGN BUILD CONTRACTOR is responsible for schedule development and updating and reporting throughout the Project, including Preconstruction Services and Construction Services. DESIGN BUILD CONTRACTOR shall comply in all regards with requirements set forth in the Contract Documents. The anticipated date for submitting a GMP shall be the date specified in the Preconstruction Services Notice to Proceed. The Contract Time is 684 Calendar Days from Notice

to Proceed for Preconstruction Services to Final Completion of the Work, excluding the GMP approval period (which is the time from DESIGN BUILD CONTRACTOR submission of the GMP Submittal to Notice to Proceed for Construction Services unless extended by Change Order).

- 8.1.1 A phase of Construction shall be deemed to commence on the Date of Commencement of the Work specified in a Notice to Proceed for a phase of Construction after approval of the CGMP or GMP proposal.
- 8.1.2 DESIGN BUILD CONTRACTOR shall achieve Final Completion of the Work on or before the date agreed to in the GMP Submittal, subject to time extensions granted by Change Order.
- 8.1.3 THE TIMES SET FORTH FOR COMPLETION OF THE WORK IN THE NOTICE TO PROCEED WITH CONSTRUCTION AND THE GMP SUBMITTAL ARE AN ESSENTIAL ELEMENT OF THIS CONTRACT.

8.2 The DESIGN BUILD CONTRACTOR shall complete all services in accordance with the completion dates set forth in the Preconstruction Services Schedule (Exhibit “E”), as such dates may be adjusted in accordance with the General Conditions. The DESIGN BUILD CONTRACTOR recognizes that the Preconstruction Services Schedule is of the essence and that the City shall be entitled to the recovery of damages from the DESIGN BUILD CONTRACTOR as set forth in Article 6.2.1 for the DESIGN BUILD CONTRACTOR’s failure to comply with the Preconstruction Services Schedule, subject to the terms and conditions of the Contract Documents. .

ARTICLE 9 CONTRACT COMPENSATION

9.1 General Payment Requirements.

- 9.1.1 In addition to the payment terms set forth in this Article, the general requirements for payment, including the procedures and timing for the Applications for Payment, for DESIGN BUILD CONTRACTOR’s Services are set forth in Article 9 of the General Conditions.
- 9.1.2 As of the Effective Date, the maximum amount payable to the DESIGN BUILD CONTRACTOR under this Contract is as follows:

DESIGN BUILD CONTRACTOR’s Preconstruction (including Design Services) Price:

Pre-Construction Services Lump Sum price minus Design:	TBD
Design Services Lump Sum price:	TBD
DESIGN BUILD CONTRACTOR’s Fee percentage:	TBD%

Agreed Cost of the Work for Preconstruction Services (including Design Services) \$TBD

- 9.1.2.1. The DESIGN BUILD CONTRACTOR shall plan and design the Project in such a manner that the Agreed Cost of the Work for Preconstruction Services (including Design Services) does not exceed the sum of \$TBD without the express written approval of the Director. The Agreed Cost of Work may be increased or decreased by the Director, in his sole discretion.
- 9.1.2.2. The DESIGN BUILD CONTRACTOR shall monitor and participate in updating the Probable Cost of the Work throughout the design process. If at any time the Probable Cost of the Work, for all work designed and specified, exceeds or becomes likely to exceed the updated Agreed Cost of the Work, the DESIGN BUILD CONTRACTOR shall immediately notify the Director. Upon becoming aware that the Probable Cost of the Work will exceed the current Agreed Cost of the Work, the Director, in his sole discretion, may by written notice: (i) increase the Agreed Cost of the Work (ii) reduce the scope, or (iii) require a re-design of the Project by DESIGN BUILD CONTRACTOR until such time as the Probable Cost of the Work is less than or equal to the Agreed Cost of the Work.
- 9.1.2.3. There shall be no increase in the DESIGN BUILD CONTRACTOR's compensation for any such re-design to maintain the Agreed Cost of the Work.
- 9.1.2.4. For purposes of **Section 9.1.2**, inclusive of all sections therein, no person other than the Director may provide written authorization to change the Agreed Cost of the Work specified herein.
- 9.1.3 As of the Effective Date, the maximum amount payable to the DESIGN BUILD CONTRACTOR under this Contract is \$TBD, which is the total amount for compensation for the performance of Preconstruction Services (including Design Services) Without limiting any term or condition hereunder with respect to payments to the DESIGN BUILD CONTRACTOR, the DESIGN BUILD CONTRACTOR's entitlement to, and the City's obligation to pay, any additional compensation to the DESIGN BUILD CONTRACTOR for the performance of the Work will be dependent upon the execution of a CGMP Amendment and/or the GMP Amendment. The DESIGN BUILD CONTRACTOR recognizes that the City has no obligation hereunder to enter into any such amendment. In the event the Director and DESIGN BUILD CONTRACTOR agree on a GMP and the Director authorizes DESIGN BUILD CONTRACTOR to proceed with Construction Services, DESIGN BUILD CONTRACTOR's compensation shall be calculated under **Section 9.3**.

9.2 Preconstruction Services Price

Subject to the City’s limit of appropriation for properly performed and completed Preconstruction Services, the City shall pay the DESIGN BUILD CONTRACTOR a lump sum amount of \$TBD, which shall be payable in accordance with the following milestone payment schedule:

Design Milestone Value

Develop 60% Design	\$ T B D
Develop 90% Design	\$ TBD
Develop 100% Design	\$ TBD

Budgeting

GMP

GMP Proposal Preparation	\$ TBD
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Bidding and Permitting	\$ TBD
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Construction Administration	\$ TBD
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TOTAL PRECONSTRUCTION AND DESIGN SERVICES PRICE	\$TBD
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9.2.1 City will pay DESIGN BUILD CONTRACTOR based on the funding authorized for each Stage of design and based on invoices showing the percentage of services performed during the preceding month for Preconstruction Services based upon the allocation of the Preconstruction Services Price set forth above and per the Stage of design (DD, CD, etc.). City and DESIGN BUILD CONTRACTOR will negotiate and agree upon the final design solution and the time allotted for the performance of the design to 100% Design Development stage, preparation of the GMP, and design to 100% Construction Documents. The Preconstruction Services Price shall be full compensation to DESIGN BUILD CONTRACTOR for all Preconstruction Services for design, including all costs, overhead, and profit. The Preconstruction Services Price shall also include full compensation for the DESIGN BUILD CONTRACTOR for all

DESIGN BUILD CONTRACTOR Preconstruction Services, including all costs, overhead, and profit.

- 9.2.2 All payment requests for Preconstruction Services shall be submitted on an Application for Payment in accordance with the milestone payment schedule identified in **Section 9.2.1** above and include all required attachments identifying payments to DESIGN BUILD CONTRACTOR, as well as to all Subcontractors.
- 9.2.3 DESIGN BUILD CONTRACTOR shall not be entitled to an increase in the Preconstruction Services amount set forth in this Section because of Project Schedule extensions or delays, or changes in the scope of the proposed Project, unless such extensions, delays, or changes are material and significant as determined by the Director in his reasonable, sole discretion.
- 9.2.4 During the Preconstruction Services, the Director shall have the right but not the obligation, to negotiate performance incentives, and the City and DESIGN BUILD CONTRACTOR may amend this Contract to incorporate such incentives, if any, provided that the DESIGN BUILD CONTRACTOR has then met all its obligations under this Contract as determined by the Director in his sole discretion.

9.3 Construction Services Payments

- 9.3.1 Pursuant to the terms of this Contract, City shall pay DESIGN -BUILD CONTRACTOR for DESIGN BUILD CONTRACTOR's proper and complete performance of the Construction Services, the Cost of the Work and the DESIGN BUILD CONTRACTOR's Fee, up to the limit of the applicable CGMP or the GMP in accordance with the payment provisions of the General Conditions Payment by City shall be deemed full compensation to DESIGN BUILD CONTRACTOR for the performance of the Construction Services. In the General Conditions, references to adjustments in "cost" or "costs" refer to Costs of the Work as defined below, and references to DESIGN BUILD CONTRACTOR's "home/branch office overhead" and "profit" refer to DESIGN BUILD CONTRACTOR's Fee.
- 9.3.2 DESIGN BUILD CONTRACTOR shall not receive any fee for Work deleted by Modifications. The DESIGN BUILD CONTRACTOR's Fee shall be compensation in full to DESIGN BUILD CONTRACTOR for all overhead and profit and all costs not otherwise recoverable.
- 9.3.3 The sum of the Cost of the Work and DESIGN BUILD CONTRACTOR's Fee is guaranteed by DESIGN BUILD CONTRACTOR not to exceed whatever Guaranteed Maximum Price Director and DESIGN BUILD CONTRACTOR may agree upon in writing, subject to additions and deductions by Change Order as provided in the Contract Documents. This maximum sum is referred to in the Contract Documents as the Guaranteed Maximum Price. Costs that would cause the Guaranteed Maximum Price to be exceeded shall be paid by DESIGN BUILD CONTRACTOR without reimbursement by City. No Change Order shall affect the Guaranteed Maximum Price unless the Change Order specifies the exact total change to the Guaranteed Maximum Price.

- 9.3.4 In the event that the DESIGN BUILD CONTRACTOR is required to pay or bear the burden of any new federal, state, or local tax, or of any rate increase of an existing tax (except a tax on income) with respect to its forces and/or its performance of the Work as a result of any statute, court decision, written ruling, or regulation taking effect after the Effective Date of this Contract, the Guaranteed Maximum Price shall be increased by the amount of the new tax or tax increase upon proof satisfactory to the Director that such increase has been applied to DESIGN BUILD CONTRACTOR.
- 9.3.5 If the sum of the Cost of the Work and the DESIGN BUILD CONTRACTOR's Fee for the Construction Services is less than the Guaranteed Maximum Price for such Services, then all such savings shall all be retained by City.
- 9.3.6 Subject to the City's appropriation of funds, in full consideration of DESIGN BUILD CONTRACTOR's Construction Services the City shall pay the DESIGN BUILD CONTRACTOR's Fee of 7.85% of the Cost of the Work, in addition to a lump sum price of \$1,527,506.00 for the DESIGN BUILD CONTRACTOR's Preconstruction and Design Services. DESIGN BUILD CONTRACTOR agrees that if the Guaranteed Maximum Price, inclusive of CGMPs, increases or decreases from the amount originally agreed upon, the DESIGN BUILD CONTRACTOR's Fee will increase or decrease based upon the actual Cost of the Work. Notwithstanding anything in the Contract Documents to the contrary, DESIGN BUILD CONTRACTOR shall not earn a fee on the lump sum price of the DESIGN BUILD CONTRACTOR. DESIGN BUILD CONTRACTOR's Fee is inclusive of DESIGN BUILD CONTRACTOR's profit, general overhead and all expenses in connection with maintaining and operating DESIGN BUILD CONTRACTOR's main office and any branch office, including:
- 9.3.6.1. Salaries of persons employed in the main or branch offices of the DESIGN BUILD CONTRACTOR whose time is devoted to the general conduct of the DESIGN BUILD CONTRACTOR's business for the Project, such as project executives, operations managers, contract administrators, office managers, stenographers, plan clerks, file clerks, and draftsmen except to the extent that their time is actually spent on the Project and are identified on **Exhibit "D"**.
- 9.3.6.2. Outside services and their expenses for estimating, personnel, accounting, budget control, audit and management information systems (other than Preconstruction Services) relating to accounting in DESIGN BUILD CONTRACTOR's office and even if at the Project site, except as specifically identified herein.
- 9.3.6.3. Interest on the DESIGN BUILD CONTRACTOR's capital or on money borrowed by the DESIGN BUILD CONTRACTOR, including the capital employed by the DESIGN BUILD CONTRACTOR in the performance of the Work.
- 9.3.6.4. Amounts required to be paid by DESIGN BUILD CONTRACTOR for Federal and/or State income and franchise taxes.
- 9.3.7 In addition to the payment procedures described in the General Conditions, the following payment procedures shall apply:

- 9.3.7.1. The Schedule of Values may be revised from time to time to adjust allocations of costs to various line items as the costs become better known, but such adjustment shall be subject to the approval of the Director, which shall not be unreasonably withheld. Under no circumstances shall the Schedule of Values exceed a CGMP and/or the GMP for the Project. The DESIGN BUILD CONTRACTOR's Fee, labor and expenses for General Conditions Work, labor and expenses for any self-performed Work, and the contingency shall be shown as separate line items on the Schedule of Values.
- 9.3.7.2. The Schedule of Values submitted shall maintain the originally established value for each work classification line item and shall contain any revisions to costs or cost estimates for each such classification. The format and tracking method of the original Schedule of Values and of all updates thereto shall be subject to the approval of Director.
- 9.3.7.3. Payment for DESIGN BUILD CONTRACTOR's Fee shall be in the same proportion to the total fee as the amount requested for the Cost of the Work relative to the total Cost of the Work used in deriving the Guaranteed Maximum Price, inclusive of any CGMPs.
- 9.3.7.4. DESIGN BUILD CONTRACTOR shall submit a monthly cost breakdown, including cost elements for staff labor and expenses over the duration of the construction period to Director for approval. Payment for DESIGN BUILD CONTRACTOR's General Conditions shall be made on a monthly basis per the approved breakdown.
- 9.3.7.5. Payment for the Cost of the Work shall be made based on percentages of completion of each portion of the Work listed in Schedule of Values as of the end of the period covered by the Application for Payment, in accordance with the General Conditions.
- 9.3.7.6. Retainage as specified in the General Conditions will be applied to the entire amount requested in the CGMP and/or GMP, as applicable. Retainage will not be held on the cost of the City's standard "pass-through" items, such as building permits, payment and performance bonds, , Preconstruction and Design Services, and insurance costs. Retainage will be reduced for the Project and the Project will be closed out consistent with the relevant provisions of the General Conditions.
- 9.3.7.7. At all times, the estimated cost of performing the uncompleted and unpaid portion of the Work shall not exceed the unpaid balance of the Guaranteed Maximum Price (less retainage on Work previously completed).
- 9.3.7.8. Payments to Subcontractors shall be made based on the same percentage of Work completed that is allocable to that Subcontractor for each respective Schedule of Values classification including applicable retainage. Retainage may be released for early performing subcontractors or small and/or minority, disadvantaged businesses as their scope of work is completed in their respective phase.

- 9.3.7.9. With each application for payment, DESIGN BUILD CONTRACTOR shall submit a certified release of all claims, known or that should reasonably be known, and liens against the City, stating “In consideration for the payment requested herein and upon receipt of such payment, DESIGN BUILD CONTRACTOR waives and releases all claims and liens of every sort against City relating to or arising out of the Work performed, except for such claims as have been properly submitted in writing in accordance with the Contract Documents.” The final request for payment shall not be made until DESIGN BUILD CONTRACTOR delivers to City a complete release by DESIGN BUILD CONTRACTOR of all claims and liens of any sort arising out of the performance of the Work, affidavits from Subcontractors indicating they have been paid in full, other than amounts remaining to be paid to the DESIGN BUILD CONTRACTOR for Work performed by that Subcontractor (which amounts shall be stated), a complete release of all claims and liens from all Subcontractors (except that, as to amounts remaining to be paid to that Subcontractor, such release may be made contingent upon City making payment to DESIGN BUILD CONTRACTOR) and an affidavit that so far as DESIGN BUILD CONTRACTOR has knowledge or information, the release includes and covers all materials and services over which DESIGN BUILD CONTRACTOR has control for which a lien could be filed, but DESIGN BUILD CONTRACTOR may, if any Subcontractor or consultant refuses to furnish a required affidavit or release, furnish a bond satisfactory to Director to indemnify City against any claim or lien of any sort and any related costs, including attorneys’ fees. If any claim or lien of any sort remains unsatisfied after all payments are made, DESIGN BUILD CONTRACTOR shall refund to City all moneys City may be compelled to pay in discharging such lien, including all costs and reasonable attorneys’ fees, and City shall have all remedies at law and in equity.
- 9.3.7.10. The aggregate total of payments to DESIGN BUILD CONTRACTOR shall not exceed the total of the actual Cost of the Work as verified by Director from DESIGN BUILD CONTRACTOR’s final accounting plus the applicable DESIGN BUILD CONTRACTOR’s Fee as certified for payment in accordance with the Contract, but in no event more than the Guaranteed Maximum Price and approved Change Orders to Guaranteed Maximum Price plus the Preconstruction Services Fee. If payments made to DESIGN BUILD CONTRACTOR exceed that which is due and owing pursuant to this **Article 8**, then DESIGN BUILD CONTRACTOR shall promptly refund such excess to City.
- 9.3.8 In addition to the City’s other rights and any provision hereof to the contrary notwithstanding and to the extent reasonably necessary to protect itself, City shall not be obligated to make any payment (whether a progress payment or final payment) to DESIGN BUILD CONTRACTOR hereunder if any one or more of the following conditions exist:
- 9.3.8.1. The DESIGN BUILD CONTRACTOR is in breach or default under this Contract;

- 9.3.8.2. Any part of such payment is attributable to services, which are not performed in accordance with this Contract; provided, however, such payment shall be made as to the part thereof attributable to services which were performed in accordance with this Contract;
 - 9.3.8.3. The DESIGN BUILD CONTRACTOR has failed to make payments promptly to Subcontractors or other third parties used in connection with the services for which City has made payment to DESIGN BUILD CONTRACTOR; or
 - 9.3.8.4. If Director determines that the amount remaining under the Guaranteed Maximum Price will not be sufficient to complete the services in accordance with this Contract, no additional payments will be due DESIGN BUILD CONTRACTOR hereunder unless and until DESIGN BUILD CONTRACTOR, at DESIGN BUILD CONTRACTOR's sole cost, performs a sufficient portion of the remaining services so that such portion of the amount remaining under the Guaranteed Maximum Price is determined by City to be sufficient to so complete the then remaining Work.
- 9.3.9 Nothing contained herein shall require the City to pay the DESIGN BUILD CONTRACTOR an aggregate amount exceeding the Guaranteed Maximum Price or to make payment if in the City's belief the cost to complete the Work would exceed the Guaranteed Maximum Price less previous payments to DESIGN BUILD CONTRACTOR.
- 9.3.10 No partial payment made hereunder shall be, or shall be construed to be, final acceptance or approval of that part of the Work to which such partial payment relates, or a release of DESIGN BUILD CONTRACTOR of any of DESIGN BUILD CONTRACTOR's obligations hereunder or liabilities with respect to such Work.
- 9.3.11 DESIGN BUILD CONTRACTOR shall promptly pay all bills validly due and owing for labor and material performed and furnished by DESIGN BUILD CONTRACTOR-Related Entities in connection with the performance of the Preconstruction and Construction Services.
- 9.3.12 City shall have the right to verify and audit for a period of seven years after final payment for the Construction Services, the details set forth in DESIGN BUILD CONTRACTOR's billings, certificates, accountings, cost data, and statements, including all underlying costs and expenses in the Cost of the Work, either before or after payment therefor, by (1) inspecting the books and records of DESIGN BUILD CONTRACTOR with respect to the Project during normal business hours; (2) examining any reports with respect to this Project; (3) interviewing DESIGN BUILD CONTRACTOR's business employees; (4) visiting the Project site; and (5) other reasonable action. City shall have the right to audit all costs, the basis for those costs, and all underlying expenses relating to DESIGN BUILD CONTRACTOR's performance herein, including but not limited to, the Cost of the Work, particularly, without limitation, labor rates and hourly salary rates set forth in **Exhibit "D"**.

- 9.3.13 DESIGN BUILD CONTRACTOR shall establish and maintain a reasonable accounting system that enables the City to readily identify DESIGN BUILD CONTRACTOR's assets, expenses, costs of goods, and use of funds. The City and its authorized representatives shall have the right to audit, to examine, and to make copies of or extracts from all financial and related records (in whatever form they may be kept, whether written, electronic, or other) relating to or pertaining to this Contract kept by or under the control of the DESIGN BUILD CONTRACTOR, including, but not limited to those kept by the DESIGN BUILD CONTRACTOR, its employees, agents, assigns, successors, and subcontractors. Such records shall include, but not be limited to, accounting records, written policies and procedures; subcontract files (including proposals of successful and unsuccessful bidders, bid recaps, etc.); all paid vouchers including those for out-of-pocket expenses; other reimbursement supported by invoices; ledgers; cancelled checks; deposit slips; bank statements; journals; original estimates; estimating work sheets; contract amendments and change order files; back charge logs and supporting documentation; insurance documents; payroll documents; timesheets; memoranda; and correspondence.
- 9.3.14 Design-Build Contractor shall, at all times during the term of this Contract and for a period of seven years after the termination or completion of this Contract, maintain such records, together with such supporting or underlying documents and materials. The DESIGN BUILD CONTRACTOR shall at any time requested by the City, whether during or after completion of this Contract, and at DESIGN BUILD CONTRACTOR's own expense make such records available for inspection and audit (including copies and extracts of records as required) by the City. Such records shall be made available to the City during normal business hours at the DESIGN BUILD CONTRACTOR's office or place of business and subject to a three-day written notice. In the event that no such location is available, then the financial records, together with the supporting or underlying documents and records, shall be made available for audit at a time and location that is convenient for the City.
- 9.3.15 DESIGN BUILD CONTRACTOR shall ensure the City has these rights with DESIGN BUILD CONTRACTOR's employees, agents, assigns, successors, and subcontractors, and the obligations of these rights shall be explicitly included in any subcontracts or agreements formed between the DESIGN BUILD CONTRACTOR and any subcontractors to the extent that those subcontracts or agreements relate to fulfillment of the DESIGN BUILD CONTRACTOR's obligations to the City. Costs of any audits conducted under the authority of this right to audit and not addressed elsewhere will be borne by the City unless the audit identifies overpricing or overcharges (of any nature) by the DESIGN BUILD CONTRACTOR to the City in excess of one-half of one percent (.5%) of the total contract billings, the DESIGN BUILD CONTRACTOR shall reimburse the City for the costs of the audit up to the amount of overpricing or overcharges. DESIGN BUILD CONTRACTOR shall be given a reasonable opportunity to review and dispute in writing such findings, and the Director shall consider such information if provided to the City. If the audit discovers substantive findings related to fraud, misrepresentation, or non-performance, the City may recoup the costs of the audit work from the DESIGN BUILD CONTRACTOR. Any adjustments and/or payments that must be made as a result of any such audit or inspection of the DESIGN BUILD CONTRACTOR's invoices and/or records shall be

made within a reasonable amount of time (not to exceed 90 days) from presentation of the City's findings to DESIGN BUILD CONTRACTOR.

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

9.4 Cost of the Work.

9.4.1 Definition. The term Cost of the Work, or Cost of Work, are all Direct and Indirect Costs of Construction Services plus any actual costs for CGMP Work which the DESIGN BUILD CONTRACTOR necessarily incurs to properly perform the Work in strict compliance with the Contract Documents. Cost of Work does not include the DESIGN BUILD CONTRACTOR's Fee. Cost of the Work shall not include costs not necessarily incurred or incurred at higher than permitted rates or amounts Cost of the Work includes only the items set forth in this Section, which shall all be subject to verification by audit.

9.4.1.1. Direct Costs are the costs necessary to furnish and install the permanent elements of the project, such as structure, exterior envelope, interior finishes, vertical transportation, mechanical electrical and plumbing systems, etc. Direct costs include, but are not limited to: (i) costs for Subcontract Work self-performed by DESIGN BUILD CONTRACTOR, (ii) (ii) subcontractor and supplier, and their sub-tier subcontractors and suppliers, costs for labor, equipment, and materials furnished to the Project; (iii) equipment designed, specified, selected, or provided by the Design Consultant and to be incorporated by the DESIGN BUILD CONTRACTOR into the Project; (iv) Alternates; (v) Unit Priced Work; (vi) Contingency; (vii) Miscellaneous Costs; and (viii) Pass-Through Items.

9.4.1.2. Indirect Costs – or General Conditions Costs, are field office overhead and costs normally arising from performing Division 00 and 01 of the Project Manual. All such costs are the costs associated with the jobsite management of the project, including, but not limited to, items such as project management staff, jobsite trailers, telephones, administration, temporary roads, temporary utilities, permits, fees, general hoisting, safety and cleaning, not specifically associated with individual elements being erected. Cost of the Work shall not include costs not incurred, or incurred at higher than permitted rates or amounts. Cost of the Work includes only the items set forth by the Director, which actual shall all be subject to verification by audit

9.4.2 General Conditions of the Work

9.4.2.1. Labor Costs.

- a. Actual hourly wages paid to construction workers directly employed by DESIGN BUILD CONTRACTOR who perform construction of the Work at the Project site or, with the Director's prior written consent, at off-site workshops, when available. For hourly workers employed by the DESIGN BUILD CONTRACTOR, DESIGN BUILD CONTRACTOR shall provide certified payrolls and any other documentation requested by City to verify wages and hours, and compliance with the City's wage rates identified in **Exhibit "H"**. The City requires Contractor to document Actual wages and labor burden separately which may be less than Allowable wages in Exhibit "D". Actual wages paid may include premium payments for overtime work or night work for time actually spent in the performance of the Work when such premium payments have been demonstrated to be in accordance with the DESIGN BUILD CONTRACTOR's normal business practice and is included in the Guaranteed Maximum Price. Premium time shall not accrue prior to the completion of 40 hours per week of work by any given individual.

- b. Allowable Hourly Rate (Actual Wages or salaries inclusive of Labor Burden) of DESIGN BUILD CONTRACTOR's Key Personnel who are identified on **Exhibit "D"** together with their Allowable Rate – but only for documented time when directly involved in performance of the Work. DESIGN BUILD CONTRACTOR shall identify actual wages and salaries of Key Personnel within fourteen (14) Calendar Days from NTP for Preconstruction Services and upon submission of DESIGN BUILD CONTRACTOR's Construction Services Guaranteed Maximum Price proposal and upon submission of CGMP's. Allowable Hourly Rate means the rate for a particular staff classification identified in **Exhibit "D"**, which includes actual wages or salaries (inclusive of Labor Burden). The salaries of DESIGN BUILD CONTRACTOR's supervisory personnel are subject to a not-to-exceed increase of 4% per year; the first year beginning on the date that Director approves DESIGN BUILD CONTRACTOR's Construction Services Maximum Guaranteed Price proposal. The 4% increase shall be available to DESIGN BUILD CONTRACTOR each year thereafter not to exceed seven years or at the completion or termination of this Contract, whichever occurs first. The annual not-to-exceed increase of 4% is available hereunder only to the extent it reflects a concurrent and equal increase in the supervisory personnel's salaries or wages. Notwithstanding the foregoing, DESIGN BUILD CONTRACTOR shall be permitted to amend its wage rates annually on April 1st of each calendar year to reflect the actual wages or salaries of its personnel and shall submit the same to the Director for approval. Any increase or portion thereof not used in a given year shall expire and does not "bank" or "accumulate." Notwithstanding, Cost of the Work for purposes of calculating payment for DESIGN BUILD CONTRACTOR's supervisory and administrative personnel when directly involved in performance of the Work shall be based on the "actual hourly pay rate" set forth in **Exhibit "D"**. Projected wage increases should be reflected in the Guaranteed Maximum Price Proposal. Actual wages paid may include premium payments for overtime work or night

work for time actually spent in the performance of the Work when such premium payments have been demonstrated to be in accordance with the DESIGN BUILD CONTRACTOR's normal business practice and is included in the Guaranteed Maximum Price. Premium time shall not accrue prior to the completion of 40 hours per week of work by any given individual. Labor Burden for overtime payments shall be eliminated or reduced to equal the DESIGN BUILD CONTRACTOR's actual substantiated cost for such burden. Should DESIGN BUILD CONTRACTOR require employees, other than those listed on **Exhibit "D"**, DESIGN BUILD CONTRACTOR shall provide written notice to the Director setting forth all the information described above. If for any reason, Director reasonably objects to any such employee, DESIGN BUILD CONTRACTOR shall not use that employee to perform on the Project. Failing reasonable objection by the Director, the employee, together with the employee's daily billing rate, shall automatically become a part of **Exhibit "D"**. The Labor Burden rate shall be based on the actual cost of direct wages or salaries of DESIGN BUILD CONTRACTOR's employees incurred in the interest of the Project. For billing purposes only, this rate shall be established annually, subject to verification by the City's auditors based on the DESIGN BUILD CONTRACTOR's Labor Burden for the previous year. The components which comprise the Labor Burden, as set forth in **Exhibit "A" – 2.1.78** shall not change throughout the term of the Project. The City shall be allowed to audit the actual cost of labor burden each year, and City shall be entitled to a refund to the extent that it has paid DESIGN BUILD CONTRACTOR more than its actual Labor Burden costs. Initially, the labor burden will be set at 55% subject to verification by the City's auditors. It will be reset each year based on the audited rate for the prior year. Under no circumstances shall the City pay more for labor burden than the percentage established for billing purposes for any given year. Labor Burden for overtime payments shall be eliminated or reduced to equal the DESIGN BUILD CONTRACTOR's actual substantiated cost for such burden.

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

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

9.4.3 Subcontractor Costs

- 9.4.3.1. Payments actually made by DESIGN BUILD CONTRACTOR to Subcontractors for prosecution of the Work in accordance with the

requirements of their agreements with DESIGN BUILD CONTRACTOR, but only for agreements to the extent they have been specifically consented to in writing by Director. Consent to such agreements shall not create any liability for City and shall not excuse DESIGN BUILD CONTRACTOR from complying with the terms of this Agreement.

9.4.4 Costs of Materials and Equipment Incorporated in the Completed Construction

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

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

- a. Costs, including transportation, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment, and hand tools not customarily owned by the construction workers, which are provided by DESIGN BUILD CONTRACTOR at the site and fully consumed in the performance of the Work; and if not fully consumed, then the cost shall be based on the cost of the item less its fair market value. Cost for items previously used by DESIGN BUILD CONTRACTOR shall mean fair market value prior to use on the Project. The cost for hand and small tools shall not exceed 3% of the direct payroll costs for employees of DESIGN BUILD CONTRACTOR.
- b. Rental charges for temporary facilities, machinery, equipment, excluding hand tools which are provided at the Project site, whether rented from DESIGN BUILD CONTRACTOR or others, and costs of transportation, installation, minor repairs and replacements, dismantling and removal thereof. The aggregate rental charges for an item used on this Project (including the rental charges for items used to replace it) shall not under any circumstances exceed 75% of the value of that item or 75% of any applicable option purchase price, whichever is lower. Machinery and equipment owned by DESIGN BUILD CONTRACTOR or any person affiliated with or owned or controlled by DESIGN BUILD CONTRACTOR or persons affiliated with DESIGN BUILD CONTRACTOR shall not be charged at more than the market rate for such equipment in the Houston area or 90% of current published rental rates of the Associated Equipment Dealers, for such equipment, whichever is less.
- c. Costs of removal of debris from the Project site.
- d. Costs of postage and parcel delivery charges, standard and reasonable

intellectual

- e. Travel
- f. telephone service at the Project site and reasonable petty cash expenses of the Project site office, incurred directly and solely in support of the Work, and all incurred at the Project site.
- g. Area specific site periodic and final clean up, not previously included, and in accordance with all Applicable Laws and regulations.

9.4.4.3. Other Costs

9.4.5 Miscellaneous Costs

- 9.4.5.1. Sales, use or similar taxes imposed by a governmental authority that are related to the Work and for which DESIGN BUILD CONTRACTOR is liable. Notwithstanding, City is a home-rule municipal corporation and DESIGN BUILD CONTRACTOR shall avail itself of all exemptions which may exist for such taxes based on City's status.
- 9.4.5.2. Fees and assessments for building permits and for other permits and inspections that DESIGN BUILD CONTRACTOR is required by the Contract Documents to pay for or obtain.
- 9.4.5.3. Premiums for insurance and bonds to the extent directly attributable to this Agreement. Any premium allocation plan to this Project by DESIGN BUILD CONTRACTOR must be approved by the City's Legal Department.
 - a. Testing fees pursuant to the Contract Documents, except those related to defective or nonconforming Work for which reimbursement is excluded.
 - b. Utility company charges including meter fees, tap fees and utility consumption charges.
 - c. Costs of cell phones and vehicles, not otherwise included in the Labor Burden, for those employees approved by the Director.
 - d. Costs of on-site computers, printers, monitors, software, maintenance and other electronic equipment approved in advance and in writing by the Director, used solely for the Project
- 9.4.5.4. Payments actually made by DESIGN BUILD CONTRACTOR to Subcontractors for prosecution of the Work, including DESIGN BUILD CONTRACTOR, in accordance with the requirements of their agreements with DESIGN BUILD CONTRACTOR, but only for agreements to the extent they have been specifically consented to in writing by Director. Consent to such agreements shall not create any liability for City and shall

not excuse DESIGN BUILD CONTRACTOR from complying with the terms of this Contract.

- 9.4.5.5. City shall be entitled to take possession of excess materials not incorporated into the Work, or at Director's option, DESIGN BUILD CONTRACTOR shall sell such materials and deduct the gross proceeds from the Cost of the Work.
- 9.4.6 Alternates as identified in the Contract Documents
- 9.4.7 Unit Priced Work as identified in the Contract Documents
- 9.4.8 Contingency allowed by the Contract Documents, and identified as a line item in the Schedule of Values
- 9.4.9 Sales, use, or similar taxes imposed by a governmental authority that are related to the Work and for which DESIGN BUILD CONTRACTOR is liable. Notwithstanding, City is a home-rule municipal corporation and DESIGN BUILD CONTRACTOR shall avail itself of all exemptions which may exist for such taxes based on City's status.
- 9.4.10 Intellectual property royalties and licenses for items specifically required by the Contract Documents which are, or will be, incorporated into the Work. If a particular design, process, or product of a particular manufacturer is required by City, then costs of payments made in accordance with legal judgments against DESIGN BUILD CONTRACTOR resulting from suits for such infringement, payments of settlements made with City's written consent, and reasonable legal fees related to the infringement are eligible as a Cost of the Work and shall not be included in the calculation of DESIGN BUILD CONTRACTOR's Fee or the Guaranteed Maximum Price (but shall still be subject to the limit covered by the Appropriated Funds). Notwithstanding the foregoing, if DESIGN BUILD CONTRACTOR had reason to believe the required design, process, or product is an infringement, such payments and fees shall not be a Cost of the Work and DESIGN BUILD CONTRACTOR shall be responsible for such payments, fees and losses unless DESIGN BUILD CONTRACTOR notifies Director of the potential infringement promptly before proceeding and in writing.
- 9.4.11 That portion of the cost of subcontractor default insurance or similar product for enrolled subcontractors or suppliers, which comprises only the risk transfer premium, and not prefunded deductibles or any other deposits, prepayments or charges of any type, and only as agreed to in advance by the Director following full transparency into the policy and the charges.
- 9.4.12 That portion of the reasonable travel and subsistence expenses of DESIGN BUILD CONTRACTOR's personnel that are consistent with the City's travel policies and incurred while traveling solely in the discharge of duties directly connected with the Work, but not including travel expenses or commuting expenses incurred within Houston and its extra-territorial jurisdiction.

- 9.4.13 Any hazardous materials handling, abatement and disposal cost(s).
- 9.4.14 Other costs approved in advance in writing by Director at Director's sole option and discretion.
- 9.4.15 Pass Through Items not included in the calculations for the DESIGN BUILD CONTRACTOR's fee.
 - 9.4.15.1. Fees and assessments for building permits and for other permits and inspections that DESIGN BUILD CONTRACTOR is required by the Contract Documents to pay for or obtain.
 - 9.4.15.2. Premiums for insurance and bonds to the extent directly attributable to this Contract, including without limitation professional liability insurance and pollution insurance. Any premium allocation plan to this Project by DESIGN BUILD CONTRACTOR must be approved by the City's Legal Department.
 - 9.4.15.3. Cash Allowances as identified in the Contract Documents.

9.5 Costs Not Included in the Cost of the Work.

- 9.5.1 The Cost of the Work shall not include the items listed in this Section:
 - 9.5.1.1. Except as provided in **Section 9.4.2**, salaries and other compensation of DESIGN BUILD CONTRACTOR's personnel stationed at DESIGN BUILD CONTRACTOR's principal office or offices other than the Project site office.
 - 9.5.1.2. Expenses of DESIGN BUILD CONTRACTOR's principal office and offices other than the Project Site office.
 - 9.5.1.3. Overhead and general expenses.
 - 9.5.1.4. Markup imposed by DESIGN BUILD CONTRACTOR on other direct costs (ODCs) such as reimbursable expenses and pass-through costs from DESIGN BUILD CONTRACTOR and its Subcontractors and Suppliers.
 - 9.5.1.5. DESIGN BUILD CONTRACTOR's capital expenses, including interest on DESIGN BUILD CONTRACTOR's capital employed for the Work.
 - 9.5.1.6. Rental costs of machinery and equipment, except as specifically provided in this Contract.
 - 9.5.1.7. Costs due in whole or in part to the fault or negligence of DESIGN BUILD CONTRACTOR, Subcontractors, anyone directly or indirectly employed by any of them, or for whose acts any of them may be liable, including but

not limited to costs of the correction of damaged, defective or nonconforming Work, disposal and replacement of materials and equipment incorrectly ordered or supplied, and making good damage to property.

- 9.5.1.8. Costs of entertainment.
- 9.5.1.9. Costs incurred or that should have been incurred for Preconstruction Phase Services.
- 9.5.1.10. Any legal, accounting, professional, or other similar costs incurred by DESIGN BUILD CONTRACTOR, including costs incurred in connection with the prosecution or defense of any dispute, mediation, arbitration, litigation, or other proceeding related to or arising from the Project.
- 9.5.1.11. Any sales, use, income, franchise, and similar taxes paid by DESIGN BUILD CONTRACTOR. Any fines, penalties, sanctions, or other levies assessed by any governmental body against DESIGN BUILD CONTRACTOR.
- 9.5.1.12. The cost of any and all insurance deductibles and self-insured retentions payable by DESIGN BUILD CONTRACTOR, and all uninsured losses and costs, whether due to the failure of DESIGN BUILD CONTRACTOR or any Subcontractor to procure and maintain insurance as and to the extent required by the Contract Documents, or otherwise.
- 9.5.1.13. Costs that would cause the Guaranteed Maximum Price to be exceeded.
- 9.5.1.14. All profit, profit expectations and costs associated with profit sharing plans such as personnel bonuses, incentives, and rewards, company stock options, or any other like expenses of DESIGN BUILD CONTRACTOR.
- 9.5.1.15. Legal and administrative costs to review and negotiate this Contract and all other Contract Documents.
- 9.5.1.16. Costs incurred by DESIGN BUILD CONTRACTOR resulting from the failure of DESIGN BUILD CONTRACTOR or its Subcontractors to coordinate their work with that of City and its other contractors, if any, after agreeing to schedules therefor.
- 9.5.1.17. Liquidated damages imposed by City.
- 9.5.1.18. Any costs arising out of the intentional acts or negligence of DESIGN BUILD CONTRACTOR, its Subcontractors, or any person or entity for whom any of them may be liable, including, without limitation, costs related to defective, rejected, or nonconforming Work within the Contract Time.

- 9.5.1.19. Costs including, but not limited to, the failure to perform of any Subcontractor or the bankruptcy or insolvency of any Subcontractor.
- 9.5.1.20. Costs for licenses, re-inspections and improperly timed permits and inspections that are the responsibility of the DESIGN BUILD CONTRACTOR to obtain.
- 9.5.1.21. Costs related to warranty work over and above the warranty work indicated in the Contract Documents.
- 9.5.1.22. Costs associated with deferred compensation and bonuses.
- 9.5.1.23. Costs associated with Subcontractor default insurance or similar products, except for the actual risk transfer premium as specifically allowed in **Section 9.4**.
- 9.5.1.24. Any other cost not specifically and expressly described in this Contract as a Cost of the Work.
- 9.5.1.25. Notwithstanding anything in the Contract Documents to the contrary, the Lump Sum fee for DESIGN BUILD CONTRACTOR's Preconstruction Phase and Design Services and/or other costs or expenses for Design-Build Contractor's Design Services (except for construction administration as set forth in **Section 9.4.3.1** above) shall not be included in the Cost of the Work.

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

- 9.6.1 Proceeds of the sale of all tools, surplus materials, construction equipment, and temporary structures which have been charged to the Work other than by way of rental, and remaining after completion, whether such sale is made to the City, the DESIGN BUILD CONTRACTOR, or to some other party; and any such sale, if made to others than the City, shall be at fair market price. Upon completion of the Work or when no longer required, all tools, construction equipment and materials charged to the Cost of the Work shall be sold by DESIGN BUILD CONTRACTOR (unless turned-over to the City as set forth above) and the DESIGN BUILD CONTRACTOR shall use its best efforts to obtain the highest price in respect of such sales.
- 9.6.2 If City makes funds available to DESIGN BUILD CONTRACTOR, discounts earned by the DESIGN BUILD CONTRACTOR through advance or prompt payments. DESIGN BUILD CONTRACTOR shall provide sufficient advance notice of available discounts and the need for funds to be available to the City for the City to obtain the benefit of the discounts. The DESIGN BUILD CONTRACTOR shall obtain all possible trade and time discounts on bills for material furnished and shall pay said bills within the highest discount periods. The DESIGN BUILD CONTRACTOR shall purchase materials for this Project in such quantities as will provide the most advantageous prices to the City.

- 9.6.3 Reasonable market value as approved by the Director at the time of removal of all materials, tools, and equipment actually purchased for the Work and charged as a Cost of the Work and which is retained by the DESIGN BUILD CONTRACTOR upon completion of the Work.
- 9.6.4 Rebates, discounts, or commissions allowed to and collected by the DESIGN BUILD CONTRACTOR from suppliers of materials or from Subcontractors, together with all other refunds, returns, or credits received for return of materials, or on bond premiums, dividends or other compensation received from the surety or insurance and sales taxes.
- 9.6.5 DESIGN BUILD CONTRACTOR shall reimburse City for deposits made by City and not returned to City due to the negligent or intentional acts of the DESIGN BUILD CONTRACTOR. Should DESIGN BUILD CONTRACTOR not promptly so reimburse City upon demand, City shall be entitled to recover said amount from DESIGN BUILD CONTRACTOR, including, but not limited to, by deducting the amount from payments due the DESIGN BUILD CONTRACTOR.

9.7 Limit of Appropriation.

- 9.7.1 The City's duty to pay money to the DESIGN BUILD CONTRACTOR for any purpose under this Contract is limited in its entirety by the provisions of this Section.
- 9.7.2 In order to comply with Article II, Sections 19 and 19a of the City's Charter and Article XI, Section 5 of the Texas Constitution, the City has allocated the sum of \$TBD for Preconstruction Phase and Design Services as Appropriated Funds to pay money due under this Contract for Work, as may be required (the "Original Appropriation"). The executive and legislative officers of the City, in their sole discretion, may appropriate additional funds for this Contract (the "Supplemental Appropriation"), but they are not obligated to do so.
- 9.7.3 The aggregate of all sums duly authorized by the City to be allocated to pay money due under this Contract, including the Original Appropriation and all Supplemental Appropriations, constitute the Appropriated Funds. The City shall never be obligated to pay any money under this Contract in excess of the Appropriated Funds. The DESIGN BUILD CONTRACTOR must assure itself that sufficient Appropriated Funds have been made to pay for services it provides. If Appropriated Funds are exhausted, the DESIGN BUILD CONTRACTOR's only remedy is suspension or termination of its performance under this Contract and the DESIGN BUILD CONTRACTOR has no other remedy in law or in equity against the City and no right to damages of any kind.
- 9.7.4 The DESIGN BUILD CONTRACTOR shall closely monitor expenditures under this Contract and shall notify the Director when amounts payable by the City hereunder for authorized Work are equal to 60% of the Appropriated Funds, even if such amounts payable have not yet been billed to the City. At such point, if additional amounts payable by the City hereunder for the DESIGN BUILD CONTRACTOR's continued performance of the authorized Work would exceed the amount of remaining Appropriated Funds, the DESIGN BUILD CONTRACTOR has the right to suspend

performance of the authorized Work by seven days' advance written notice to the Director describing the cause and the DESIGN BUILD CONTRACTOR's planned suspension. Once Appropriated Funds have been increased, the DESIGN BUILD CONTRACTOR shall resume performance of the authorized Work and may be entitled to equitable adjustment in accordance with the applicable provisions of the Contract Documents. If after more than 180 days Appropriated Funds have not been increased, the DESIGN BUILD CONTRACTOR shall have the right to terminate its performance in accordance with the applicable provisions of the Contract Documents. However, termination shall not relieve DESIGN BUILD CONTRACTOR of its continuing obligations to the City already incurred. The City shall not under any circumstances be obligated to seek a Supplemental Appropriation.

ARTICLE 10. REPRESENTATIONS AND WARRANTIES

10.1 Representations and Warranties of the City. The City represents and warrants that:

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

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

- 10.2.1 The DESIGN BUILD CONTRACTOR is a Corporation, duly organized, validly existing, and in good standing under the laws of Texas. The DESIGN BUILD CONTRACTOR has the authority to do business in the State of Texas and in any state in which it conducts its activities, with the full legal right, power and authority to enter into and perform its obligations under this Contract.
- 10.2.2 This Contract has been duly authorized, executed and delivered by all necessary corporate action of the DESIGN BUILD CONTRACTOR and constitutes a legal, valid and binding obligation of the DESIGN BUILD CONTRACTOR, enforceable against the DESIGN BUILD CONTRACTOR in accordance with its terms, except to the extent that its enforceability may be limited by the Bankruptcy Code or by equitable principles of general application.
- 10.2.3 To the best of its knowledge after due inquiry, neither the execution nor delivery by the DESIGN BUILD CONTRACTOR of this Contract nor the performance by the DESIGN BUILD CONTRACTOR of its obligations in connection with the transactions contemplated hereby nor the fulfillment by the DESIGN BUILD CONTRACTOR of the terms or conditions hereof: (a) conflicts with, violates, or results in a breach of any constitution, law, governmental regulation, by-laws, or certificates of incorporation

applicable to the DESIGN BUILD CONTRACTOR; or (b) conflicts with, violates or results in a breach of any order, judgment, or decree, or any contract, agreement, or instrument to which the DESIGN BUILD CONTRACTOR is a party or by which the DESIGN BUILD CONTRACTOR or any of its properties or assets are bound, or constitutes a default under any of the foregoing.

- 10.2.4 No approval, authorization, order or consent of, or declaration, registration, or filing with, any Governmental Authority is required for the valid execution and delivery of this Contract by the DESIGN BUILD CONTRACTOR except as such have been duly obtained or made.
- 10.2.5 Except as disclosed in writing to the City, there is no legal proceeding, at law or in equity, before or by any court, arbitral tribunal, or other Governmental Authority pending or, to the best of the DESIGN BUILD CONTRACTOR's knowledge after due inquiry, overtly threatened or publicly announced against the DESIGN BUILD CONTRACTOR, in which an unfavorable decision, ruling, or finding could reasonably be expected to have a material and adverse effect on the execution and delivery of this Contract by the DESIGN BUILD CONTRACTOR or the validity, legality, or enforceability of this Contract against the DESIGN BUILD CONTRACTOR, or any other agreement or instrument entered into by the DESIGN BUILD CONTRACTOR in connection with the transactions contemplated hereby, or on the ability of the DESIGN BUILD CONTRACTOR to perform its obligations hereunder or under any such other agreement or instrument.
- 10.2.6 Except as disclosed in writing to the City, there are no material and adverse claims or demands based in environmental, contract, or tort law pending or threatened against the DESIGN BUILD CONTRACTOR or any of its Affiliates with respect to any facilities designed or constructed by the DESIGN BUILD CONTRACTOR or any of its Affiliates that would have a material and adverse effect upon the ability of the DESIGN BUILD CONTRACTOR to perform the Work.
- 10.2.7 Neither the DESIGN BUILD CONTRACTOR nor any of its Affiliates has any knowledge of any material violation of any law, order, rule, or regulation with respect to any facilities designed or constructed by the DESIGN BUILD CONTRACTOR or any of its Affiliates.
- 10.2.8 The information supplied, and representations and warranties made by the DESIGN BUILD CONTRACTOR in all submittals made in response to the RFQ with respect to the DESIGN BUILD CONTRACTOR (and to its knowledge, all information supplied in such submittals with respect to any Affiliate or DESIGN BUILD CONTRACTOR-Related Entity) are true, correct, and complete in all material respects.
- 10.2.9 The DESIGN BUILD CONTRACTOR is under no obligation, commitment or impediment of any kind, whether contractual or otherwise, that will limit or prevent performance of its obligations under this Contract.
- 10.2.10 The DESIGN BUILD CONTRACTOR is financially secure and no action relating to the Bankruptcy Code or suspension of payments by the DESIGN BUILD

CONTRACTOR or any Affiliate has, to the best of its knowledge after due inquiry, been taken or is threatened.

10.2.11 The DESIGN BUILD CONTRACTOR:

- 10.2.11.1. has examined, carefully studied, and thoroughly understands the Contract Documents;
- 10.2.11.2. has visited the Project site and has become familiar with and is satisfied as to the general, local, and Project Site conditions that may affect cost, progress, and performance of the Work;
- 10.2.11.3. is familiar with and is satisfied as to all Applicable Laws that may affect cost, progress, and performance of the Work;
- 10.2.11.4. has carefully studied all information concerning the Project site and the performance of the Work which have been identified or made available by the City prior to the Effective Date; and
- 10.2.11.5. is prepared to perform the Work in accordance with Contract Standards and subject to the terms and conditions of the Contract Documents.

ARTICLE 11. MWBE COMPLIANCE

11.1 DESIGN BUILD CONTRACTOR shall comply with the City's Minority, Women and Small Business Enterprise ("MWSBE") programs as set out in Chapter 15, Article V of the City of Houston Code of Ordinances. DESIGN BUILD CONTRACTOR shall make good faith efforts to award subcontracts or supply agreements to DBEs as follows: TBD% DBE for design and professional services; TBD% DBE for Construction Services. DESIGN BUILD CONTRACTOR acknowledges that it has reviewed the requirements for good faith efforts on file with the City's Office of Business Opportunity and will comply with them.

ARTICLE 12. BONDS AND INSURANCE

12.1 Within 10 days of the date the DESIGN BUILD CONTRACTOR executes this Contract, DESIGN BUILD CONTRACTOR shall provide performance and payment bonds on forms prescribed by City in **Exhibit "G"**, unless in the discretion of the Director, the DESIGN BUILD CONTRACTOR furnishes a security bond acceptable to the Director to ensure that the DESIGN BUILD CONTRACTOR will furnish the required performance and payment bonds when a CGMP or the GMP is established. The penal sum of the payment and performance bonds shall be equal to the construction budget, as specified in the request for qualifications, or as otherwise specified by the Director.

12.2 DESIGN BUILD CONTRACTOR shall cause its design professional(s) to purchase and maintain professional liability, worker's compensation, automobile liability, commercial general liability and excess insurance, covering the Preconstruction Phase Services and Construction Phase Services provided under this Contract, as is acceptable to and approved by the Director. The

insurance shall have minimum policy limits set forth in Article 11 of the General Conditions. The premium for the insurance will be at no expense to the City. DESIGN BUILD CONTRACTOR shall cause its design professional(s) to maintain the insurance throughout the course of the Work and for a minimum of two years following the Date of Substantial Completion. Each design professional's professional liability insurance policy is required to be furnished to the Director prior to performance. No policy providing the insurance shall be cancelled, materially altered, or allowed to expire without 30 days' prior written notice to Director.

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

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

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

12.6 City shall be entitled, upon request, and without expense, to receive copies of the policies and all endorsements thereto and may make any reasonable requests for deletion, or revision or modification of particular policy terms, conditions, limitations, or exclusions, except where policy provisions are established by law or regulation binding upon either of the Parties or the underwriter of any of such policies or to the extent that such deletion, revision, or modification results in increased costs for insurance premiums and City does not agree to compensate DESIGN BUILD CONTRACTOR for such increased costs after receiving notice from DESIGN BUILD CONTRACTOR of such increased costs. To the extent the losses should have been covered by insurance required by the Contract Documents that DESIGN BUILD CONTRACTOR failed to provide, then actual losses not covered by insurance as required by this Article shall be paid by the DESIGN BUILD CONTRACTOR.

12.7 DESIGN BUILD CONTRACTOR shall also procure Pollution Liability Insurance as authorized and approved by the Director, to provide insurance coverage for DESIGN BUILD CONTRACTOR with respect to its obligations, if any, whether included in the GMP, directed or

agreed to by change order for hazardous materials abatement, handling and disposal. The actual limits will be reviewed and mutually agreed upon as part of the establishment of the GMP.

12.8 City shall have the option of obtaining its own insurance coverage for part or all of the Terminal A Curbside Improvements Facility project. In the event City's insurance provides coverage for some or all of DESIGN BUILD CONTRACTOR's obligations under this Contract, City shall have the option of replacing all or part of DESIGN BUILD CONTRACTOR's insurance with the City's insurance.

12.9 City intends to establish an Owner Controlled Insurance Program ("OCIP") for this Project. In the event City procures an OCIP, DESIGN BUILD CONTRACTOR may participate in the OCIP. If and when the OCIP is established, the Director shall send notice to DESIGN BUILD CONTRACTOR and DESIGN BUILD CONTRACTOR must respond within 10 days either opting into or out of the OCIP. If DESIGN BUILD CONTRACTOR opts into the OCIP, the insurance requirements described in Sections 10.3 through 10.6 shall be eliminated. If DESIGN BUILD CONTRACTOR opts out of the OCIP, all insurance requirements described herein remain mandatory.

ARTICLE 13. TERMINATION AND SUSPENSION

13.1 Termination rights shall be as provided in the General Conditions and Applicable Laws.

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

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

14.1 Exhibits. All exhibits hereto are hereby incorporated herein by reference.

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

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

between these Articles and the General Conditions of the Contract, then the provision which provides the greatest benefit to City shall govern.

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

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

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

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

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

14.9 Notices. All notices, consents, approvals, demands, requests or other communications provided for or permitted to be given under any of the provisions of this Agreement shall be in writing and shall be deemed to have been duly given or served when delivered by hand delivery or when deposited in the U.S. mail by registered or certified mail, return receipt requested, postage prepaid, and addressed as set forth in the preamble or to such other person or address as may be given in writing by either party to the other in accordance with the aforesaid and, in accordance with Paragraph 13.4 of the General Conditions.

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

14.11 Independent Contractor. DESIGN BUILD CONTRACTOR recognizes that it is engaged as an independent contractor and acknowledges that City will have no responsibility to provide transportation, insurance, or other fringe benefits normally associated with employee status. DESIGN BUILD CONTRACTOR, in accordance with its status as an independent contractor, covenants and agrees that it shall conduct itself consistent with such status, that it will neither hold itself out as nor claim

to be an officer, partner, employee, or agent of City by reason hereof, and that it will not by reason hereof make any claim, demand or application to or for any right or privilege applicable to an officer, partner, employee or agent of City, including, but not limited to, unemployment insurance benefits, social security coverage, or retirement benefits. DESIGN BUILD CONTRACTOR hereby agrees to make its own arrangements for any of such benefits as it may desire and agrees that it is responsible for all income taxes required by Applicable Law.

14.12 DESIGN BUILD CONTRACTOR'S DEBT. IF DESIGN BUILD CONTRACTOR, AT ANY TIME DURING THE TERM OF THIS CONTRACT, INCURS A DEBT, AS THE WORD IS DEFINED IN SECTION 15-122 OF THE HOUSTON CITY CODE OF ORDINANCES, IT SHALL IMMEDIATELY NOTIFY THE CITY CONTROLLER IN WRITING. IF THE CITY CONTROLLER BECOMES AWARE THAT DESIGN BUILD CONTRACTOR HAS INCURRED A DEBT, IT SHALL IMMEDIATELY NOTIFY DESIGN BUILD CONTRACTOR IN WRITING. IF DESIGN BUILD CONTRACTOR DOES NOT PAY THE DEBT WITHIN 30 DAYS OF EITHER SUCH NOTIFICATION, THE CITY CONTROLLER MAY DEDUCT FUNDS IN AN AMOUNT EQUAL TO THE DEBT FROM ANY PAYMENTS OWED TO DESIGN BUILD CONTRACTOR UNDER THIS CONTRACT, AND DESIGN BUILD CONTRACTOR WAIVES ANY RECOURSE THEREFOR. DESIGN BUILD CONTRACTOR SHALL FILE A NEW AFFIDAVIT OF OWNERSHIP, USING THE FORM DESIGNATED BY CITY, BETWEEN FEBRUARY 1 AND MARCH 1 OF EVERY YEAR DURING THE TERM OF THIS CONTRACT.

14.13 Anti-Boycott of Israel. DESIGN BUILD CONTRACTOR certifies that DESIGN BUILD CONTRACTOR is not currently engaged in, and agrees for the duration of this Agreement not to engage in, the boycott of Israel as defined by Section 808.001 of the Texas Government Code.

14.14 Human Trafficking. The requirements and terms of the City of Houston's Zero Tolerance Policy for Human Trafficking and Related Activities, as set forth in Executive Order 1-56, as revised from time to time, are incorporated into this Agreement for all purposes. The DESIGN BUILD CONTRACTOR has reviewed Executive Order 1-56, as revised, and shall comply with its terms and conditions as they are set out at the time of the Effective Date. The DESIGN BUILD CONTRACTOR shall notify the City's Chief Procurement Officer, City Attorney, and the Director of any information regarding possible violation by the DESIGN BUILD CONTRACTOR or its subcontractors providing services or goods under this Contract.

14.15 Confidentiality. DESIGN BUILD CONTRACTOR, its agents, employees, contractors, and Subconsultants shall hold all City information, data, and Documents (collectively, the "Information") that they receive, or to which they have access, in strictest confidence. DESIGN BUILD CONTRACTOR, its agents, employees, contractors, and Subconsultants shall not disclose, disseminate, or use the Information unless the Director authorizes it in writing. DESIGN BUILD CONTRACTOR shall obtain written agreements from its agents, employees, contractors, and Subconsultants which bind them to the terms in this Section in substantially the same form as shown in **Exhibit K**.

14.16 Sensitive Security Information. The DESIGN BUILD CONTRACTOR shall take all appropriate measures in accordance with 49 C.F.R. 1520 and other applicable laws to protect all proprietary, privileged, confidential, or otherwise Sensitive Security Information ("SSI") that may come into the DESIGN BUILD CONTRACTOR's possession as a result of this Contract.

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