



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

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

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This **AGREEMENT** is made as of the \_\_\_\_\_ day of \_\_\_\_\_ in the  
year of 20\_\_\_\_\_, by and between the following parties, for services in connection with the Project  
identified below.

**OWNER:**  
*(Name and address)*

**DESIGN-BUILDER:**  
*(Name and address)*

**PROJECT:**  
*(Include Project name and location as it will appear in the Contract Documents)*

In consideration of the mutual covenants and obligations contained herein, Owner and Design-Builder agree  
as set forth herein.

## **Article 1**

### **Scope of Work**

**1.1** Design-Builder shall perform all design and construction services, and provide all material, equipment, tools and labor, necessary to complete the Work described in and reasonably inferable from the Contract Documents. The scope of Work shall include all items contained in Design/Builder's Proposal and Scope of Work.

## **Article 2**

### **Contract Documents**

**2.1** The Contract Documents are comprised of the following:

**2.1.1** The Notice Inviting Proposals, Instructions to Proposers, Proposal, Scope of Work and the Proposal Specifications, including the General Conditions of Contract copies of which are annexed hereto, together with all the drawings, plans, and documents specifically referred to in said annexed documents, including Performance and Payment Bonds, if required, are hereby incorporated into and made a part of this Contract, and shall be known as the Contract Documents;

**2.1.2** The Basis of Design Documents, including the Owner's Project Criteria, Design-Builder's Proposal and the Deviation List, if any, contained in the Design-Builder's Proposal, which shall specifically identify any and all deviations from Owner's Project Criteria;

**2.1.3** This Agreement, including all exhibits and attachments, executed by Owner and Design-Builder ;

**2.1.4** All written modifications, amendments, minor changes and Change Orders to this Agreement issued in accordance with DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (2010 Edition) ("General Conditions of Contract"); and

**2.1.5** Construction Documents prepared and approved in accordance with Section 2.4 of the General Conditions of Contract.

## **Article 3**

### **Interpretation and Intent**

**3.1** Design-Builder and Owner, prior to execution of the Agreement, shall carefully review all the Contract Documents, including the various documents comprising the Basis of Design Documents, for any conflicts or ambiguities. Design-Builder and Owner will discuss and resolve any identified conflicts or ambiguities prior to execution of the Agreement.

**3.2** Precedence of Contract Documents

**3.2.1** The Contract Documents are complementary; what is called for by one is as binding as if called for by all. It is the intent of the Contract and all the documents incorporated herein to describe a functionally complete Project and individual systems therein to be designed and constructed in accordance with the requirements of the Contract. Any Work, materials or equipment that may reasonably be inferred from the requirements of the Contract or from prevailing custom or trade usage as being required to produce the intended result will be furnished and performed whether or not specifically called for. When words or phrases which have a well-known technical or construction industry or trade meaning are used to describe Work, materials or equipment, such words or phrases shall be interpreted in accordance with that meaning.

**3.2.2** The Contract Documents establish performance criteria which the final design and construction must meet and, along with the warranty and other requirements in the Contract Documents, establish the minimum design, material, quality, workmanship and other standards

required under the Contract. Design/Builder has responsibility to deliver the fully functional and operational Project described in the Contract.

**3.2.3** Should any discrepancy appear or any misunderstanding arise as to the importance of anything contained in the drawings and the Contract Documents, the matter shall be referred to City, who shall issue with reasonable promptness such written clarifications or interpretations of the requirements, which shall be consistent with the intent of and reasonably inferable from the drawings and Proposal Specifications. It is the intent of the Contract that Design/Builder shall have responsibility to provide a complete and comprehensive design for the Project in order to allow a complete, fully operational Project. City's review of shop drawings, samples and submittals shall not relieve Design/Builder of its responsibility for a complete design complying with the requirements of the Contract and the Proposal incorporated herein; but rather, such review shall be in furtherance of City's monitoring and accepting the design as developed and issued by Design/Builder, consistent with the Contract.

**3.2.4** Conflicts between the Project Technical Requirements, drawings, and conceptual plans, shall look to written documents to establish the overall quality of materials and finishes and the conceptual plans will show the general arrangement of spaces and location for materials. When still in conflict, the higher value, cost or most demanding requirement shall be provided by Design/Builder.

**3.2.5** Wherever in the Contract, or in any orders given by City Engineer, it is provided that Design/Builder shall furnish materials or manufactured articles or shall do work for which no detailed specifications are set forth, the following general specification shall apply:

**3.2.5.1** Design and construction shall meet the standards required to provide City with a first class, fully functional, gas conditioning facility, designed and constructed in a manner consistent with the standards, equipment, and materials found in other first class facilities of the size and type required hereunder.

**3.2.5.2** Materials or manufactured articles shall be of the grade, in quality and workmanship, consistent with the requirements of the Contract and obtainable in the market from firms of established good reputation, or, if not ordinarily carried in stock, shall conform to the usual standards for first-class materials or articles of the kind required, with due consideration of the use to which they are to be put. Work for which no detailed specifications are set forth herein shall conform to the requirements of subparagraph.3.2.5.1 above. All such work shall be consistent with the Contract.

**3.2.6** Generally, whenever any conflict appears in any portion of the Contract, it shall be resolved by application of the order of precedence. The order of precedence of documents shall be, from highest (i.e., "1") to lowest (i.e., "8"): (1) Rules and Regulations of Federal Agencies relating to the source of funds for this Project; (2) Permits from other agencies as may be required by law; (3) Supplemental Contracts, Change Orders, or Contract the one dated later having precedence over another dated earlier; (4) Special Conditions; (5) General Conditions; (6) Project Technical Requirements; (7) City Standard Specifications; (8) Proposal.

**3.3** Terms, words and phrases used in the Contract Documents, including this Agreement, shall have the meanings given them in the General Conditions of Contract.

**3.4** If Owner's Project Criteria contain design specifications: (a) Design-Builder shall be entitled to reasonably rely on the accuracy of the information represented in such design specifications and their compatibility with other information set forth in Owner's Project Criteria, including any performance specifications; and (b) Design-Builder shall be entitled to an adjustment in the Contract Price and/or Contract Time(s) to the extent Design-Builder's cost and/or time of performance have been adversely impacted by such inaccurate design specification.

**3.5** The Contract Documents form the entire agreement between Owner and Design-Builder and by incorporation herein are as fully binding on the parties as if repeated herein. No oral representations or other agreements have been made by the parties except as specifically stated in the Contract Documents.

## Article 4

### Ownership of Work Product

**4.1** The Drawings and Specifications for the Project that are prepared pursuant to the Contract are and shall remain the property of City. Design/Builder shall cause all Sub-contractors or sub-consultants who prepared design documents for the Project to assign to City all rights throughout the world in the nature of copyright and trademark in and to all versions of such design documents. City shall have the right to distribute or to cause the distribution of such drawings and specifications to third parties as may reasonably be necessary in connection with the Project. Design/Builder shall provide City with one complete set of CAD/System disk files of drawings and complete disk files of Specifications in an electronic format compatible with City's format.

**4.2** Any and all artwork, copy, posters, billboards, photographs, videotapes, audiotapes, systems designs, electronic files and/or CAD files, software, reports, diagrams, surveys, source codes or any original works of authorship created by Design/Builder or its Sub-contractors or sub-consultants in connection with services performed under the Contract shall be works for hire as defined under Title 17 of the United States Code, and all copyrights in such works are the property of City. In the event that it is ever determined that any works created by Design/Builder or its Sub-contractors or sub-consultants under the Contract are not works for hire under federal law, Design/Builder hereby assigns all copyrights to such works to City. With the prior written approval of City, Design/Builder may retain and use copies of such works for reference and as documentation of its experience and capabilities.

**4.3** City acknowledges Design/Builder's Construction Documents as instruments of professional service. Nevertheless, the Construction Documents prepared under the Contract shall become the property of City upon completion of the Work. Design/Builder shall not be liable for any unauthorized use or modification of the Construction Documents by City or any person or entity that legally acquires or obtains the Construction Documents from, or through City without the written authorization of Design/Builder.

## Article 5

### Contract Time

**5.1 Date of Commencement.** The Work shall commence within five (5) days of Design-Builder's receipt of Owner's Notice to Proceed ("Date of Commencement") unless the parties mutually agree otherwise in writing.

**5.2 Substantial Completion and Final Completion.**

**5.2.1** Substantial Completion of the entire Work shall be achieved no later than \_\_\_\_\_ (\_\_\_\_\_) calendar days after the Date of Commencement ("Scheduled Substantial Completion Date").

The parties agree that the definition for Substantial Completion is as set forth in Section 1.2.18 of the General Conditions of Contract.

**5.2.2** Interim milestones and/or Substantial Completion of identified portions of the Work ("Scheduled Interim Milestone Dates") shall be achieved as follows: *The Scheduled Interim Milestone Dates shall be as shown in Division 11 of the Request for Proposals.*

**5.2.3** Final Completion of the Work or identified portions of the Work shall be achieved as expeditiously as reasonably practicable. Final Completion is the date when all Work is complete

pursuant to the definition of Final Completion set forth in Section 1.2.7 of the General Conditions of Contract.

**5.2.4** All of the dates set forth in this Article 5 (collectively the "Contract Time(s)") shall be subject to adjustment in accordance with the General Conditions of Contract.

**5.3 Time is of the Essence.** Owner and Design-Builder mutually agree that time is of the essence with respect to the dates and times set forth in the Contract Documents.

**5.4 Liquidated Damages.** Liquidated damages shall be set forth in Division 11 of the Request for Proposals.

## Article 6

### Contract Price

**6.1 Contract Price.** For the monetary consideration of [WRITTEN \$ AMOUNT] DOLLARS AND [WRITTEN CENTS AMOUNT] CENTS (\$[DOLLAR AMOUNT]), as set forth in the Proposal, Design/Builder promises and agrees to perform or cause to be performed, in a good and workmanlike manner, under the direction and to the satisfaction of the City Engineer, and in strict accordance with the Proposal Specifications, all of the work (design, construction) as set forth in the Contract Documents. Of such monetary consideration, Design/Builder further guarantees that the Work shall be designed and constructed for a Contract Price not to exceed [Total Base Bid in words] (\$[in numbers]) (i.e., "GMP"). This Contract Price ("GMP") shall not, under any circumstances, be exceeded without the consent of the City Council for City evidenced by a written Contract amendment approved by the City Council and signed by both Parties to this Contract.

**6.2** The compensation set forth in this Contract shall be the maximum compensation which Design/Builder may receive under this Contract including, but not limited to, all out-of-pocket costs and taxes. If Design/Builder's actual costs incurred are less than the GMP for design and construction of the Work, then compensation by City will be limited to such lesser amount. City shall pay nothing above the compensation listed unless otherwise agreed to in writing by the Parties. Unless otherwise required by State law, a FIVE percent (5%) retention shall be withheld from payments of the Contract Price to Design/Builder by City. The FIVE percent (5%) retention shall be released after the appropriate statutes have expired and all liens and stop payment notices have been released or otherwise cleared to the satisfaction of City.

**6.3** [Reserved]

**6.4** City accepts Design/Builder's Proposal as stated and agrees to pay the consideration stated, at the times, in the amounts, and under the conditions specified in the Contract Documents.

#### **Allowance Items and Allowance Values.**

**6.4.1** Any and all Allowance Items, as well as their corresponding Allowance Values, are set forth in an Exhibit hereto.

**6.4.2** Design-Builder and Owner have worked together to review the Allowance Items and Allowance Values based on design information then available to determine that the Allowance Values constitute reasonable estimates for the Allowance Items. Design-Builder and Owner will continue working closely together during the preparation of the design to develop Construction Documents consistent with the Allowance Values. Nothing herein is intended in any way to constitute a guarantee by Design-Builder that the Allowance Item in question can be performed for the Allowance Value.

**6.4.3** No work shall be performed on any Allowance Item without Design-Builder first obtaining in writing advanced authorization to proceed from Owner. Owner agrees that if Design-Builder is not provided written authorization to proceed on an Allowance Item by the date set forth in the Project schedule, due to no fault of Design-Builder, Design-Builder may be entitled to an adjustment of the Contract Time(s) and Contract Price.

**6.4.4** The Allowance Value for an Allowance Item includes the direct cost of labor, materials, equipment, transportation, taxes and insurance associated with the applicable Allowance Item. All other costs, including design fees, Design-Builder's overall project management and general

conditions costs, overhead and fee, are deemed to be included in the original Contract Price, and are not subject to adjustment, regardless of the actual amount of the Allowance Item.

**6.4.5** Whenever the actual costs for an Allowance Item is more than or less than the stated Allowance Value, the Contract Price shall be adjusted accordingly by Change Order, subject to Section 6.4.4. The amount of the Change Order shall reflect the difference between actual costs incurred by Design-Builder for the particular Allowance Item and the Allowance Value.

## Article 7

### Procedure for Payment

#### **7.1 Progress Payments.**

**7.1.1** Progress payments shall be made by the City to the Design/Builder according to the following procedure:

**7.1.1.1** City will, within ten days of receipt of each Application for Payment, either indicate in writing its acceptance of the Application and state that the Application is being processed for payment, or return the Application to Design/Builder indicating in writing its reasons for refusing to accept the Application. Not more than ten days after accepting such Application the amount will become due and will be paid in the normal course of City business.

**7.1.1.2** No Progress Payment nor any partial or entire use or occupancy of the Project by the City shall constitute an acceptance of any Work not in accordance with the Contract Documents.

**7.2** City may refuse to make the whole or any part of any such payment, or because of subsequently discovered evidence or the results of subsequent inspections or tests, nullify any previous payment, to the extent that is reasonable necessary to protect City from loss because:

**7.2.1** The Work is defective, or completed Work has been damaged requiring correction or replacement; or

**7.2.2** The Contract Price has been reduced by Written Amendment or Change Order; or

**7.2.3** City has been required to correct Defective Work or complete Work in accordance with this Agreement and the Terms and Conditions, or

**7.2.4** City has actual knowledge of the occurrence of any of the events where the City may terminate for cause; or

**7.2.5** Claims have been made against City on account of Design/Builder's performance or furnishing of the Work; or

**7.2.6** Liens have been filed in connection with the Work (City may retain 125% of the total of any stop notice filed), except where Design/Builder has delivered a specific Bond satisfactory to City to secure the satisfaction and discharge of such Liens; or

**7.2.7** City has retained the amount of liquidated damages under the Contract; or

**7.2.8** There are other items entitling City to a set off against the amount for which Application is made.

**7.3 Final Payment.** If City is satisfied that the Work has been completed and Design/Builder's other obligations under the Contract Documents have been fulfilled, City will, within ten days after receipt of the final Application for Payment, give written notice to Design/Builder that the Work is acceptable. Otherwise, City will return the Application to Design/Builder, indicating in writing the reasons for refusing to process final payment, in which case Design/Builder shall make the necessary corrections and resubmit the Application. Thirty days after the presentation to City of the acceptable Application and accompanying documentation, in appropriate form and substance and with City's notice of acceptability, the Notice of Completion will be filed with the City

and County Clerk. After thirty days the amount will become due and will be paid in the normal course of City business to Design/Builder, except for any retention for liquidated damages and any unpaid sums in the amount of 125% of any Lien for which a Bond has not been accepted by City.

**7.4 Record Keeping and Finance Controls.** With respect to changes in the Work performed on a cost basis by Design-Builder pursuant to the Contract Documents, Design-Builder shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management, using accounting and control systems in accordance with generally accepted accounting principles and as may be provided in the Contract Documents. During the performance of the Work and for a period of three (3) years after Final Payment, Owner and Owner's accountants shall be afforded access to, and the right to audit from time-to-time, upon reasonable notice, Design-Builder's records, books, correspondence, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to changes in the Work performed on a cost basis in accordance with the Contract Documents, all of which Design-Builder shall preserve for a period of three (3) years after Final Payment. Such inspection shall take place at Design-Builder's offices during normal business hours unless another location and time is agreed to by the parties. Any multipliers or markups agreed to by the Owner and Design-Builder as part of this Agreement are only subject to audit to confirm that such multiplier or markup has been charged in accordance with this Agreement, with the composition of such multiplier or markup not being subject to audit.

## **Article 8**

### **Termination**

**8.1** This Contract may be terminated as set forth in the General Conditions for this Project. [In addition, following Final Completion and during any maintenance period of the Contract, City may terminate, without liability to Design/Builder for detrimental reliance or any other basis in law or equity, the Contract (i) with cause upon thirty (30) Days' notice to Design/Builder with opportunity to cure the default during same thirty (30) Days and Design/Builder's failure to cure such default; (ii) without cause and at the end of the then current maintenance period upon providing Design/Builder sixty (60) Days' notice prior to the end of such maintenance period; or (iii) in the sole event of non-appropriation relating to this Contract, City shall have the right to terminate this Contract at the end of any fiscal year of City, in the manner and subject to the terms specified in this paragraph as follows: City shall endeavor to give written notice of such termination not less than sixty (60) Days prior to the end of such fiscal year, and shall notify Design/Builder of any anticipated termination. For purposes of this paragraph, "fiscal year" shall mean the twelve month fiscal period of City which commences on July 1 in every year and ends on the following June 30. For purposes of this paragraph, "non-appropriation" shall mean the failure of City or City's governing body to appropriate money for any fiscal year of City sufficient for the continued performance of this Contract by City.]

**8.1.1** In the event of termination by City as set forth above, Design/Builder shall remain fully liable for any Work not completed, liquidated damages, delays to other contractors, materials and equipment provided, designs commenced through the date of termination, consequential damages and any remaining warranty period. If it has not already done so, Design/Builder will immediately deliver to City possession of the Work including all designs, engineering, Project records, cost data, drawings, specifications and contracts, and construction supplies and aids dedicated solely to performing the Work. Design/Builder shall assign all subcontracts to City, however, City may accept or reject said subcontracts at its sole discretion.;

**8.1.2** City and Design/Builder agree that should City's termination for cause be determined by a court of law to be wrongful or without cause, such termination will be treated as a termination for convenience entitling Design/Builder to an equitable settlement for claims and liabilities outstanding at the date of termination and reasonable compensation for work actually performed to the date of termination. No other compensation shall be due Design/Builder for termination for convenience.

**1.1.3** In the event of termination by City following Final Completion as set forth in this section, Design/Builder shall be paid compensation for maintenance services satisfactorily performed prior to the effective date of the notice of termination. In the event of termination with cause, City may withhold an amount that would otherwise be payable as an offset to, but not in excess of, City's damages caused by default of Design/Builder.

**1.1.4** In the event City terminates the Contract with cause, City may exercise any right, remedy (in law or equity), or privilege which may be available to it under applicable laws of the State of California or any other applicable law, or proceed by appropriate court action to enforce the terms of the Contract, or to recover direct, indirect, consequential or incidental damages for the breach of the Contract. No remedy or election hereunder shall be deemed exclusive but shall, wherever possible, be cumulative with all other remedies at law or in equity.

**8.2** Design/Builder shall not be paid on account of loss of anticipated profits or revenue or other economic loss arising out of or resulting from such termination.

## **Article 9**

### **Representatives of the Parties**

#### **9.1 Owner's Representatives.**

**9.1.1** Owner designates the individual listed below as its Senior Representative ("Owner's Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under Section 10.2.3 of the General Conditions of Contract: *(Identify individual's name, title, address and telephone numbers)*

**9.1.2** Owner designates the individual listed below as its Owner's Representative, which individual has the authority and responsibility set forth in Section 3.4 of the General Conditions of Contract: *(Identify individual's name, title, address and telephone numbers)*

#### **9.2 Design-Builder's Representatives.**

**9.2.1** Design-Builder designates the individual listed below as its Senior Representative ("Design-Builder's Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under Section 10.2.3 of the General Conditions of Contract: *(Identify individual's name, title, address and telephone numbers)*

**9.2.2** Design-Builder designates the individual listed below as its Design-Builder's Representative, which individual has the authority and responsibility set forth in Section 2.1.1 of the General Conditions of Contract: *(Identify individual's name, title, address and telephone numbers)*



## Article 10

### Bonds and Insurance

**10.1 Insurance.** Design-Builder and Owner shall procure the insurance coverages set forth in the Insurance Exhibit attached hereto and in accordance with Article 5 of the General Conditions of Contract.

**10.2 Bonds and Other Performance Security.** Design-Builder shall provide the following performance bond and labor and material payment bond or other performance security:

**10.2.1** Prior to City's execution of the Contract, Design/Builder shall provide two good and sufficient surety bonds as described hereunder from a corporate surety admitted by the California Insurance Commissioner to do business in the State of California.

**10.2.2** Design/Builder shall provide the following bonds on forms prescribed by City with the name of the obligee as City in the amount set forth below as security for the faithful performance and payment of all Design/Builder's obligations hereunder for completing the Project:

**10.2.2.1** A Payment Bond for 100% of the Contract Price, to satisfy claims of material suppliers and of mechanics and laborers employed on the Work. The bond shall be maintained by Design/Builder in full force and effect until the completed Work is accepted by City and until all claims for materials and labor are paid, and shall otherwise comply with Chapter 7, title XV, Part 4, Division 3 of the Civil Code.

**10.2.2.2** A Performance Bond for 100% of the Contract Price to guarantee faithful performance of the Work, within the time prescribed, in a manner satisfactory to City, and that all materials and workmanship shall be free from original or developed defects. The bond shall be maintained by Design/Builder in full force and effect until the completed Work is accepted by City and until all claims for materials and labor are paid.

**10.2.3** Each bond shall be signed by both Design/Builder and the Surety and the signature of the authorized agent of the Surety shall be notarized.

**10.2.4** Should any bond become insufficient, Design/Builder shall renew the bond within ten (10) Days after receiving notice from City.

**10.2.5** Changes in the Work or services, or extensions of time, made pursuant to this Contract, shall in no way release Design/Builder or Surety from their obligations. Notice of such changes or extensions shall be waived by the Surety.

**10.2.6** All bonds shall be sufficient surety bonds in the form prescribed by City and shall be issued by such Sureties which are admitted insurers (a corporate surety), admitted by the California Insurance Commissioner to do business in the State of California. All bonds shall satisfy the requirements stated in Section 995.660 of the California Code of Civil Procedure, except as provided otherwise by law or regulation. All bonds signed by an agent must be accompanied by a certified copy of such agent's authority to act. Should any Surety at any time fail to meet these requirements notice will be given to City by Design/Builder to that effect. Design/Builder shall require Surety to provide such notice to Design/Builder and City immediately upon Surety's failure to meet the requirements of a corporate surety in the State of California. No further payments shall be deemed due or shall be made under the Contract until a new Surety shall qualify and be accepted by City.

**10.2.7** If the Surety on any bond furnished by Design/Builder is declared bankrupt or becomes insolvent or its right to do business is terminated in California, Design/Builder shall within seven (7) Days thereafter substitute another bond and Surety, which must be acceptable to City.

10.2.8 Design/Builder shall obtain City's written acceptance of all such security instruments at the time the bond(s) are provided.

## **Article 11**

### **Other Provisions**

**11.1 Other provisions, if any, are as follows:** *(Insert any additional provisions)*

**11.2 CONTRACTOR DEFINED** For the purposes of this Contract, "Design/Builder" means a design/build entity as defined in Article 5, Chapter 4 of the Fresno Municipal Code and includes legal entities that are able to provide appropriately licensed contracting, architectural and engineering services as needed for construction of the Work.

**11.3 CONTROL OF SITE** The care, custody, and control of the Site shall be with Design/Builder until Substantial Completion or termination of this Contract and shall pass from Design/Builder to City upon Substantial Completion or termination, but subject to the warranties, performance and any other continuing obligations of Design/Builder hereunder. From and after Substantial Completion or termination, City shall assume the risk of physical damage to the Site. Design/Builder shall be responsible for and obligated to replace, repair, and reconstruct any portion or all of the Work which is lost, damaged or destroyed prior to the transfer of care, custody, and control of the Work to City, however such loss or damage or destruction shall have occurred. City assumes responsibility for such loss, damage, or destruction after Substantial Completion or termination.

**11.4 SITE CONDITIONS** Design/Builder agrees to fully assume all risks, and costs associated with such risks, in performing the Work and meeting the obligations under this Contract, except for costs associated with materially differing Project Site conditions from those reasonably anticipated after completion of design services which are assumed by City in accordance with the terms set forth herein.

**11.5 NO WAIVER OF DEFAULT** The failure of any Party to enforce against another Party any provision of this Contract shall not constitute a waiver of that Party's right to enforce such a provision at a later time, and shall not serve to vary the terms of this Contract.

**11.6 LICENSES** Design/Builder shall, at its sole cost and expense, keep in effect or obtain, and have possession of, at all times during the term of this Contract any and all licenses, permits, approvals and credentials which are legally required for Design/Builder to practice its profession and design, construct and maintain the Project.

**11.7 MERGER AND MODIFICATION** All prior agreements between the Parties are incorporated in this Contract which constitutes the entire agreement. Its terms are intended by the Parties as a final expression of their agreement with respect to such terms as are included herein and may not be contradicted by evidence of any prior agreement or contemporaneous oral agreement. The Parties further intend this Contract constitutes the complete and exclusive statement of its terms and no extrinsic evidence whatsoever may be introduced in any judicial or arbitration proceeding involving this Contract. This Contract may be modified only in a writing approved by the City Council and signed by all the Parties.

**11.8 COMMUNICATIONS** All communications between City and Design/Builder concerning the Project shall be in writing.

**11.9 EXHIBITS** All exhibits and attachments to which reference is made in this Contract are deemed incorporated in this Contract, whether or not actually attached.

**11.10 COMPLIANCE WITH ALL LAWS**

**11.10.1** Design/Builder shall, at Design/Builder's sole cost, comply with all of the requirements of Municipal, State, and Federal authorities now in force, or which may hereafter be in force, pertaining to this Contract, and shall faithfully observe in all activities relating to or growing out of this Contract all Municipal ordinances and State and Federal statutes, rules or regulations, and permitting requirements now in force or which may hereafter be in force including, without limitation, obtaining a City of Fresno business license where required.

**11.10.2** Design/Builder, its Subcontractors, subconsultants and their employees, in the performance of Design/Builder's work under this Contract shall be responsible for exercising the degree of skill and care required by customarily accepted good professional practices and procedures used in the Design/Builder's field. Any costs for failure to meet the forgoing standard or to correct otherwise Defective Work that requires re-performance of the Work, as directed by City shall be borne in total by Design/Builder and not the City. In the event that Design/Builder fails to perform in accordance with the above standard, Design/Builder will re-perform any task which was not performed to the reasonable satisfaction of City. Any Work re-performed shall be completed within the time limitations originally set forth for the specific task involved. Design/Builder shall work any overtime required to meet the deadline for the task at no additional cost to City. If the re-performance of any task is not feasible within the original time limitations, then Design/Builder shall perform such task within the new schedule for re-performance provided to and accepted by City. The City shall have the option to direct Design/Builder not to re-perform any task which was not performed to the reasonable satisfaction of the City. In the event Design/Builder is so directed, the City and Design/Builder shall negotiate a reasonable settlement for satisfactory Work performed. No previous payment shall be considered a waiver of the City's right to reimbursement. Nothing contained in this clause is intended to limit any of the rights or remedies which City may have under law.

**11.10.2.1** City and its designees may make visits to the Project Site, Suppliers, Subcontractors, and/or demonstration sites as frequently as necessary to review Project accomplishments and management control systems.

**11.10.2.2** Design/Builder and its Subcontractors and subconsultants shall comply with Title VI of the Civil Rights Act of 1964 (42 United States Codes Section 2000d, et seq.)

**11.10.2.3** During the performance of this Contract, Design/Builder and its Subcontractors and subconsultants shall not unlawfully discriminate, harass or allow harassment, against any employee or applicant for employment because of sex, sexual orientation, race, color, ancestry, religious creed, national origin, disability (including HIV and AIDS), medical condition (cancer), age, marital status, and denial of family care leave. Design/Builder and its Subcontractors and subconsultants shall insure that the evaluation and treatment of their employees and applicants for employment are free of such discrimination and harassment. Design/Builder and its Subcontractors and subconsultants shall comply with the provisions of the Fair Employment and Housing Act (Government Code Sections 12990 et seq.) And the applicable regulations promulgated thereunder (California Code of Regulations, Title 2, Section 7285.0 et seq.). The applicable regulations of the Fair Employment and Housing Commission implementing Government Code Section 12990(a-f), set forth in Chapter 5 of Division 4 of Title 2 of the California Code of Regulations are incorporated into this Contract by reference and made a part of it as if set forth in full. Design/Builder and its Subcontractors and subconsultants shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement. Design/Builder shall include this clause in all subcontracts to perform work under this Contract.

**11.10.2.4** Upon written request of City, Design/Builder shall provide detailed documentation of all expenses at any time throughout the Project. In addition, Design/Builder agrees to allow City, upon written request, to have reasonable access to and the right of inspection of all records that pertain to the Project during the term of this Contract and for a period of five (5) years thereafter. Further, Design/Builder agrees to incorporate an audit of this Project within any scheduled audits, when specifically requested by City. Design/Builder shall include a similar right to audit clause in any subcontract.

**11.11 INDEPENDENT CONTRACTOR** This Contract calls for the performance of the services of Design/Builder as an independent contractor. Design/Builder retains the right to control the manner in which the services described herein are performed and Design/Builder will supply all equipment, tools, materials and supplies necessary to perform the services set forth in this Contract. In the furnishing of the work provided for herein, the Design/Builder is acting as an independent contractor. Neither the Design/Builder, nor any of its officers, associates, agents or employees shall be deemed an employee, joint venture, partner or agent of the City for any purpose. However, the City shall retain the right to verify that the Design/Builder is performing its respective obligations in accordance with the terms of the Contract. Because of its status as an independent contractor, Design/Builder and its officers, agents and employees shall have absolutely no right to employment rights and benefits available to City employees. Design/Builder shall be solely liable and responsible for all payroll and tax withholding and for providing to, or on behalf of, its employees all employee benefits including, without limitation, health, welfare and retirement benefits. In addition, together with its other obligations under this Contract, Design/Builder shall be solely responsible, indemnify, defend and save City harmless from all matters relating to employment and tax withholding for and payment of Design/Builder's employees, including, without limitation, (i) compliance with Social Security and unemployment insurance withholding, payment of workers compensation benefits, and all other laws and regulations governing matters of employee withholding, taxes and payment; and (ii) any claim of right or interest in City employment benefits, entitlements, programs and/or funds offered employees of City whether arising by reason of any common law, de facto, leased, or co-employee rights or other theory. It is acknowledged that during the term of this Contract, Design/Builder may be providing services to others unrelated to City or to this Contract.

**11.12 INDEMNIFICATION**

**11.12.1** To the furthest extent allowed by law including California Civil Code Section 2782, the Design/Builder shall indemnify, hold harmless and defend the City and each of its officers, officials, employees, agents and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including, but not limited to personal injury, death at any time and property damage) incurred by the City, the Design/Builder or any other person, and from any and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses), arising or alleged to have arisen directly or indirectly out of performance of this Contract. The Design/Builder's obligations under the preceding sentence shall apply regardless of whether the City or any of its officers, officials, employees, agents or volunteers are passively negligent, but shall not apply to any loss, liability, fines, penalties, forfeitures, costs or damages caused by the sole or active negligence, or willful misconduct, of the City or any of its officers, officials, employees, agents or volunteers.

**11.12.2** If the Design/Builder should subcontract all or any portion of the work to be performed under this Contract, the Design/Builder shall require each subcontractor to indemnify, hold harmless and defend the City and each of its officers, officials, employees, agents and volunteers in accordance with the terms of the preceding paragraph.

**11.12.3** This section shall survive termination or expiration of this Contract.

**11.13 STOP NOTICES OR LIENS** Design/Builder shall not allow any stop notices or liens to be filed on the Project herein, and shall pay all costs and fees to City, including without limitation attorney's fees, incurred by City because of the filing of any such stop notice, lien or legal action relating thereto. Design/Builder agrees City may withhold from any funds held by City concerning the Project herein 125% of the amount of the stop notice, lien or legal action and any additional amounts sufficient to cover costs and fees, including without limitation attorney's fees, incurred by City because of the filing of any stop notice, lien, or legal action relating thereto.

**11.14 EXECUTION** This Contract is effective upon execution. All Parties are equally responsible for authorship of this Contract. Section 1654 of the California Civil Code shall not apply to the interpretation.

**11.15 NOTICES** Any notice required or intended to be given to either party under terms of this Contract shall be in writing and shall be deemed to be duly given if delivered personally or sent by United States registered or certified mail, with postage prepaid, return receipt requested, addressed to the party to which notice is to be given at the party's address set forth on the signature page of the Bid Proposal in the case of the Design/Builder and at the address set forth on the signature page of the Contract in the case of the City, or at such other address as the parties may from time to time designate by written notice. Notices served by

United States mail in the manner above described shall be deemed sufficiently served or given at the time of the mailing thereof.

**11.16 ASSIGNMENT** The Contract is personal to the Design/Builder and there shall be no assignment, transfer, sale, or subcontracting by the Design/Builder of its rights or obligations under the Contract without the prior written approval of the City. Any attempted assignment, transfer, sale or subcontracting by the Design/Builder, its successors or assigns, shall be null and void unless approved in writing by the City.

**11.17 BINDING EFFECT** Subject to the foregoing section, the rights and obligations of this Contract shall inure to the benefit of, and be binding upon, the Parties to the Contract and their heirs, administrators, executors, personal representatives, successors and assigns.

**11.18 TITLE TO DOCUMENTS AND LICENSE TO SOFTWARE** All documents, plans, and drawings, maps, photographs, and other papers, (including, but not limited to, computer or electronic data) or copies thereof prepared by Design/Builder pursuant to the terms of this Contract, shall, upon preparation, become the property of City and may be used by City for any purpose without further compensation or authorization of Design/Builder. Additionally, the complete right or perpetual license of all system and maintenance software, if any, shall be transferred to City.

**11.19 SITE INSPECTION** City shall be allowed to inspect the Site at any time and Design/Builder shall make all areas of the Site available to inspection including, without limitation, any construction trailers or offices at the Site and all plans, drawings, schedules, documents, photographs and other documentation relating to the Project.

**11.20 CORPORATE AUTHORITY** Each individual signing this Contract on behalf of Design/Builder represents and warrants that they are, respectively, duly authorized to sign on behalf of the Design/Builder and to bind the Design/Builder fully to each and all of the obligations set forth in this Contract.

**11.21 NON-INTEREST** No officer or employee of City shall hold any interest in this Contract (California Government Code Section 1090).

**11.22 CUMULATIVE REMEDIES** All City's remedies provided in this Contract are cumulative; that is, in addition to each and every other remedy herein or otherwise provided by law, and City shall have any and all equitable and legal remedies which it would have according to law other than damages for failure to complete the Project within the Contract Time, which damages are covered by the liquidated damages provision herein.

IN WITNESS WHEREOF, the Parties have executed this Contract on the day and year here below written, of which the date of execution by City shall be subsequent to that of Design/Builder's, and this Contract shall be binding and effective upon execution by both Parties.

**OWNER:**

**DESIGN-BUILDER:**

\_\_\_\_\_  
*(Name of Owner)*

\_\_\_\_\_  
*(Name of Design-Builder)*

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

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

\_\_\_\_\_  
*(Printed Name)*

\_\_\_\_\_  
*(Printed Name)*

\_\_\_\_\_  
*(Title)*

\_\_\_\_\_  
*(Title)*

Date: \_\_\_\_\_

Date: \_\_\_\_\_