

**City of Sutter Creek**

**Design/Build Contract for**

**ENERGY SERVICES - TREATMENT  
PLANT PROJECT**

**City of Sutter Creek  
18 Main Street  
Sutter Creek, CA 95685**

**DESIGN-BUILD ENERGY SERVICES CONTRACT BETWEEN CITY OF SUTTER  
CREEK AND SCHNEIDER ELECTRIC BUILDINGS AMERICA, INC. FOR THE  
  
WASTEWATER TREATMENT AND ENERGY  
RELATED CAPITAL IMPROVEMENTS PROJECT**

This Design-Build Energy Services Contract (“Contract”) is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2025 by and between the **City of Sutter Creek**, a California municipal corporation (hereinafter referred to as “City”) and **Schneider Electric Buildings Americas, Inc.**, with its principal place of business at 1660 Scenic Avenue, Costa Mesa, CA 92626 (hereinafter referred to as “ESCO”) for the purpose of designing and constructing the Wastewater Treatment And Energy Related Capital Improvements Project (“Project”). City and ESCO are sometimes individually referred to as “Party” and collectively as “Parties.”

**RECITALS**

- A. The City’s mission is to collect, treat, and reuse wastewater in a safe and cost-effective manner as prescribed by state and federal law.
- B. In order to serve its customers, the City is dedicated to forward thinking in planning for facility and operational needs, and achieving maximum cost efficiency and effectiveness.
- C. The City therefore desires to strategically invest and reinvest in operational cost reductions into a sustainable facility with technology enhancements that will lead to compliance with regulatory authorities, minimal operating costs and streamlined operations. To achieve these goals, the City intends to engage ESCO to perform a comprehensive audit of existing facilities for potential energy cost and operational cost savings, develop conceptual and final designs for improvements, and implement physical changes to effectuate energy cost and operational savings.
- D. Because of the unique nature of the Project, City desires to engage a single design-build entity to engineer and implement the Project as authorized by California Government Code section 4217.10 *et seq.*
- E. ESCO desires to perform and assume responsibility for the provision of design and construction services, and such other services as required by the City on the terms and conditions set forth in this Contract. ESCO represents that it is experienced in providing professional planning, design, and construction services to public entities, is appropriately licensed in the State of California to perform such services, and is familiar with the scope of work.

## **TERMS**

### **1. Incorporation of Documents.**

The above referenced recitals are true and correct and are incorporated into this Contract by this reference. This Contract includes and hereby incorporates in full by reference the following Contract Documents, including all exhibits, drawings, specifications and documents therein, and attachments and addenda thereto:

- (a) Design-Build Energy Services Contract
- (b) Attachment 1 to this Contract – Scope of Services
  - (A) Schedule A - Scope of Work
  - (B) Schedule B – Project Implementation
  - ~~(C) Schedule C – Project Performance~~
- (d) Attachment 3 to this Contract – Performance Bond
- (e) Attachment 4 to this Contract – Payment Bond
- (f) Attachment 5 to this Contract – Hourly Rate Schedule
- (g) Attachment 6 to this Contract - Workers Compensation Certification
- (h) Attachment 7 to this Contract – Asbestos & Other Hazardous Materials Certification
- (i) Attachment 8 to this Contract – Wastewater Treatment Performance Guarantee
- ~~(j) Attachment 9 to this Contract – Grant/Loan Compliance Rider~~
- (k) Completed and approved Construction Documents in accordance with the General Conditions

### **2. The ESCO's Basic Obligations and Compensation.**

The ESCO promises and agrees, at its own cost and expense, to furnish to City all design and construction services, labor, materials, tools, equipment, services, and incidental and customary work necessary to fully and adequately complete the Project as described in the Contract Documents (hereinafter the “Scope of Work” or “Work”). The Scope of Work shall consist of four phases: Phase 1 Preliminary Assessment (Project Scoping), Phase 2a Design - Investment Grade Development (Mid-Term Meeting), Phase 2b Design Development (Final Planning), and Phase 3 Construction. The Scope of Work, including all four phases, is more particularly described in Attachment 1. The City shall issue a Notice to Proceed for each Phase.

#### **(a) Phase 1 – Preliminary Assessment**

The ESCO shall commence Phase 1 after receipt of City's Notice to Proceed and complete Phase 1 work within 240 Days of the Notice to Proceed date, unless mutually agreed by both parties to extend. After ESCO fulfills all its Preliminary Assessment responsibilities as noted in Attachment 1, City must determine within sixty (60) days of receiving all Preliminary Assessment deliverables whether to terminate the Contract for convenience or move to Phase 2. City shall notify ESCO in writing of its decision. At a scoping meeting to be held as part of this phase, ESCO shall confirm for City whether recommended improvement measures are viable and financial benefits can be derived by their implementation and guaranteed in an amount sufficient to cover

all costs associated with the Project. This includes the ESCO providing a rough order of magnitude of the Price Proposal.

If ESCO complies with all obligations under the Contract and City terminates the Contract for convenience, City shall pay ESCO only for fees and expenses incurred in this Phase 1 at the rates set forth in Attachment 5. The City will not compensate ESCO for any work required for future phases. All deliverables including but not limited to documents, engineering, and data shall become the exclusive property of City. The total cost for Phase 1 shall not exceed \$543,107 without written approval of the City.

(b) Phase 2A – Mid-Term Investment Grade Audit (IGA)

The ESCO shall commence Phase 2A after receipt of City's Notice to Proceed and complete Phase 2A work within a to be determined period based of Phase 1 deliverable and scope agreement. After ESCO fulfills all of its Mid-Term IGA phase responsibilities as noted in Attachment 1, including providing a reasonable estimate of the Price Proposal based on the most current developed Construction Documents, City must determine within sixty (60) days of receiving all Mid-Term IGA deliverables whether to terminate the Contract for convenience or move to Phase 2B. City shall notify ESCO in writing of its decision.

If ESCO complies with all obligations under the Contract and City terminates the Contract for convenience, in addition to fees City paid for Phase 1, City shall pay ESCO only for design fees and expenses incurred in this Phase 2A at the rates set forth in Attachment 5. The City will not compensate ESCO for any work required for future phases. All deliverables including but not limited to documents, engineering, budget costs, preliminary design, schedule and data shall become the exclusive property of City.

(c) Phase 2B – Final IGA

The ESCO shall commence Phase 2B after receipt of City's Notice to Proceed and complete Phase 2B work within a to be determined period based of Phase 2A deliverable and scope agreement. After ESCO fulfills all of its Final IGA responsibilities as noted in Attachment 1, City must determine within sixty (60) days of receiving all Final IGA deliverables whether to terminate the Contract for convenience or move to Phase 3.

If ESCO complies with all obligations under the Contract and City terminates the Contract for convenience, in addition to fees City paid for Phases 1 and 2A, City shall pay ESCO only for design fees and expenses incurred in this Phase 2B at the rates set forth in Attachment 5. The City will not compensate ESCO for any work required for future phases. All deliverables including but not limited to documents, engineering, budget costs, design, schedule and data shall become the exclusive property of City upon receipt of payment. The deliverables shall include the Construction Documents. The total cost for Phase 2 shall not exceed \$2.2M without written approval of the City

At or before the Final Planning Meeting, ESCO shall present a final scope and price ("Price Proposal") to City in accordance with this Agreement which will include proposed terms for a contractually binding Performance Guarantee in accordance with framework in attachment

#8. In addition to Phase 3 costs, the Price Proposal shall include all design fees and expenses from phases 1, 2A and 2B (subject to the not-to-exceed limits) and shall be a firm offer valid for ninety (90) days from submission. The Price Proposal shall include a schedule of values for the Work, including without limitation a complete breakdown of costs of labor, materials, tools and equipment ("Net Cost") and a statement of their basis, Mark-Up fees for combined overhead and profit, which shall not exceed 25% of the Net Cost of the Work, and taxes which are applicable at the time the Price Proposal is established. Upon receipt of ESCO's Price Proposal, the City may enter into negotiations with ESCO to achieve a mutually acceptable basis on which to proceed. In the event the City discovers any inconsistencies or inaccuracies in the Price Proposal, the City shall promptly give written notice to ESCO, who shall make appropriate adjustments to the Price Proposal, its basis, or both.

(d) Option to Procure Long-Lead Time Materials.

During the performance of Phases 1, 2A and/or 2B, but prior to completion of Phase 2B, ESCO may submit one or more proposals to the City for the procurement of certain materials and equipment that have long manufacturing and/or delivery lead times ("Long-Lead Time Material Procurement Proposal(s)"). The pricing in each Long-Lead Time Material Procurement Proposal shall remain valid for sixty (60) days. The City may accept a Long-Lead Time Material Procurement Proposal by issuing a Long Lead-Time Material Notice to Proceed (an "LLTM-NTP") authorizing and directing ESCO to order those materials and equipment at the price specified in the particular Procurement Proposal.

Concurrently with the issuance of each LLTM-NTP, the City shall allocate, appropriate, and encumber additional funds sufficient to pay for the Long Lead-Time Materials to be procured pursuant to that LLTM-NTP.

Each LLTM-NTP will contain a schedule of values delineating the items to be completed pursuant to each Procurement Proposal. Notwithstanding anything to the contrary contained herein, beginning on the date that is one (1) month following the effective date of an LLTM-NTP, ESCO shall provide monthly invoices to the City seeking payment for the Long Lead-Time Materials procured in the prior month (based on the percentage completion of items delineated on the applicable schedule of values). All such payments shall be separate and apart from, and not included in, the Contract Price. Payment by the City is due within thirty (30) days of the date of each invoice. If any payment is over thirty (30) days late from the due date stated on the invoice, ESCO may charge interest of one percent (1%) of the amount(s) owed for each month overdue and/or may terminate the Agreement.

Upon payment for the solar and battery storage Long Lead-Time Materials, title to the equipment purchased as a result of an LLTM-NTP shall pass to the City and the City shall be responsible for the risk of loss of said equipment, including but not limited to damage, destruction or theft thereof, unless and until a Contract Amendment for the Construction Phase is entered into for installation of said equipment by ESCO. Other Long Lead-Time Materials Procurement Proposals will specify terms of ownership, financing, and storage for that specific materials or equipment.

(e) Phase 3 – Construction Phase

If the City elects to proceed to Phase 3 and is satisfied with ESCO's Price Proposal, then City shall issue a formal Contract Amendment ("Contract Amendment" or "Amendment") establishing the Scope of Work for the Construction Phase, the Contract Price and the Project Completion Date. Approval of the Contract Amendment shall be contingent upon City Council holding a public hearing and finding that all of the requirements of Government Code section 4217.10 *et seq.* are met.

If a Contract Amendment is approved and executed, the City will issue a Notice to Proceed with Construction and ESCO shall begin construction work. ESCO shall perform all construction services, labor, materials, tools, equipment, services, engineering and incidental and customary work necessary to fully and adequately complete Phase 3.

3. **Guaranteed Maximum Contract Price for Construction; Project Completion Date**

(a) Contract Price.

If a Contract Amendment is approved and executed, the City shall pay ESCO a contract price (hereinafter the "Contract Price", Guaranteed Maximum Price" or "GMP") equal to ESCO's Price Proposal as full and complete compensation for Contractor's obligations under the Contract Documents. Payment shall be made in installments in accordance with the progress payment milestones and as set forth in the Attachment 2.

In accordance with Section 22300 of the California Public Contract Code, ESCO may substitute securities for any monies withheld by City to ensure performance of the Contract. Such substitution shall be made at the request and expense of ESCO. Securities equivalent to the amount withheld may be deposited with City or with a state or federally chartered bank as escrow agent. Securities eligible for substitution shall include those listed in Section 16430 of the Government Code, bank or saving and loan certificates of deposit, interest bearing demand deposit accounts, standby letters of credit, or any other security mutually agreed to by ESCO and City.

Except as otherwise provided in this Contract, ESCO shall assume the risk of all costs in excess of the Contract Price in the performance the Work and to provide a fully completed and successfully operational Project, complete in every detail according to the provisions of the Contract Documents and shall not be entitled to additional payments because of such excess costs. Should the ESCO believe that it is entitled to additional compensation, whether money or time, it must request such compensation pursuant to Attachment 2.

(b) Material Storage.

As the ESCO is required to order, obtain, and store materials and equipment sufficiently in advance of its Work at no additional cost or advance payment from City, to assure that there will be no delays, payment by the City for stored material shall be made only in unusual circumstances where the City specifically approves the payment in writing. If payments are to be made for materials and equipment that are not incorporated in the Work on the Project but delivered and suitably stored at a Project Site or at some other location agreed upon in writing by City, the payments shall be conditioned upon submission by ESCO, Subcontractor, or Supplier of bills of sale and such other documents reasonably satisfactory to City to establish City's title to such materials or equipment free of all liens and encumbrances, and otherwise protect City's interest, including, without limitation, provision of applicable insurance and transportation to the Project Site. All stored items shall be inventoried, specified by identification numbers (if applicable), released to City by the sureties and Subcontractors, and, if stored off the Project Site, stored only in a bonded warehouse.

(c) Project Completion Date.

Time is of the essence. The ESCO guarantees that it shall perform and complete all work necessary for Completion which shall be set forth by Contract Amendment prior to the Notice to Proceed with Construction (the "Project Completion Date"). The ESCO agrees that it shall be liable to the City for liquidated damages in an amount of One-Thousand Dollars (\$1,000) per calendar day for each and every calendar day beyond the Project Completion Date that completion of the Project has not been achieved at the Project Site and said damages shall be the City's sole remedy for ESCO's delay and shall not exceed twenty percent (20%) of the Contract Price. If not completed by the Project Completion Date, it is understood that the City will suffer damage, and that it is and will be difficult and/or impossible to ascertain and determine the actual damage which the City will sustain in the event of and by reason of the ESCO's failure to complete the work, and therefore the ESCO shall pay to the City the stipulated sum as fixed and liquidated damages and not as a penalty. Any money due or to become due the ESCO may be retained to cover liquidated damages.

The City is under no obligation to consider early completion of the Project and the Project Completion Date shall not be amended by the City's receipt or acceptance of the ESCO's proposed earlier completion date. Any difference in time between the ESCO's early completion and the Project Completion Date shall be considered a part of the Project float. ESCO shall not be entitled to compensation, and the City will not compensate ESCO, for delays which impact early completion.

#### **4. Funding Compliance**

The City anticipates that the Project may be financed in whole or in part through loans, grants, or other funding assistance provided by state or federal agencies. ~~Attachment 10 "Grant/Loan compliance Rider will be utilized as needed."~~ ESCO acknowledges and agrees that:

(a) Additional Requirements.

If such funding is secured, the ESCO shall comply with all additional terms, conditions, and requirements imposed by the funding agency, including specifically related to ESCO's performance of the Project. The parties will adjust cost and timeline as needed to support additional requirements. Terms, conditions and requirements which may include without limitation:

- Federal cross-cutting requirements under 2 CFR Part 200 ("Uniform Guidance"),
- Davis-Bacon and Related Acts and applicable state prevailing wage requirements,
- Domestic preference requirements under the Build America, Buy America Act (BABA),
- Equal Employment Opportunity (EEO) and nondiscrimination requirements under Title VI of the Civil Rights Act of 1964 and related authorities,
- Section 3 (24 CFR Part 75) labor-hour benchmarks & reporting
- Environmental compliance obligations (CEQA, NEPA, or agency equivalents),
- Debarment and Suspension Certification (2 CFR Part 180).
- Recordkeeping, audit, and reporting obligations, ~~and~~
- Procurement, subcontracting, and small/minority/disadvantaged business enterprise (S/MBE/DBE) requirements.

- Change Order shall: (i) be preceded by the City's Independent Cost Estimate and include a cost/price analysis; (ii) use Time-and-Materials only with a written not-to-exceed and capped rates; and (iii) not use cost-plus-percentage-of-cost. Work performed without prior written authorization is at ESCO's risk and may be non-reimbursable under federal awards. If a change would exceed the approved environmental review or constitute a choice-limiting action under 24 CFR part 58, ESCO shall not proceed until clearance (and, if applicable, AUGF) is obtained

- Other Agency-Specific Provisions as may be required by the funding agreement (examples: USDA RD Guide 27, EPA SRF loan conditions, CDBG contract provisions).

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(b) Contract Amendments.

~~The City may incorporate such requirements by amendment, rider, or supplemental conditions. ESCO shall execute such instruments and cooperate in good faith to implement them.~~

c. Supersession.

In the event of a conflict between this Agreement and a funding agency requirement specifically related to ESCO's performance of the Project, the agency's requirement shall control to the extent required as a condition of funding.

d. Cost Adjustments.



~~If Subject to the terms set forth in this Section 4, if~~ compliance with a subsequently imposed funding requirement ~~materially increases ESCO's cost of~~ ~~time for performance~~, ~~ESCO may request a price adjustment, subject to approval the parties will negotiate~~ ~~aa Change Order adjusting cost and project schedule as needed to support ESCO's compliance with additional requirements imposed by the City and, where required,~~ the funding agency.

ESCO shall execute and provide to City both a Performance Bond and Payment Bond in the amount of the GMP on the forms provided in Attachments 3 and 4. ESCO shall timely submit bonds to the City in accordance with the General Conditions. ESCO shall furnish all insurance as required by the General Conditions. Notwithstanding any provision to the contrary herein, any Payment and Performance Bonds associated with this Contract guarantee only the performance of the construction/installation portion of the Contract, and shall not be construed to guarantee the performance of: (1) any efficiency or energy savings performance guarantees, or (2) any support or maintenance service agreements or work or (3) any other warranties with terms beyond one (1) year in duration from the completion of the installation portion of the Contract. The obligations of the Performance Bond Surety shall continue so long as any construction/installation obligation of ESCO remains. Nothing herein shall limit the City's rights or the ESCO's or Surety's obligations under the Contract, law or equity, including, but not limited to, California Code of Civil Procedure section 337.15.

## **2. Standard of Performance.**

The ESCO's performance shall be consistent with the standards set forth in the Contract and the General Conditions. ESCO shall perform all Work under this Agreement in a skillful and competent manner, consistent with the standards generally recognized as being employed by professionals in the same discipline in the State of California. ESCO represents and maintains that it is skilled in each professional calling necessary to perform the Work. ESCO warrants that all employees and subcontractors shall have sufficient skill and experience to perform the Work assigned to them. ESCO represents that it, its employees and subcontractors have all licenses, permits, qualifications and approvals of whatever nature that are legally required to perform the Work, and that such licenses and approvals shall be maintained throughout the term of this Agreement. ESCO shall perform, at its own cost and expense and without reimbursement from the City, any services necessary to correct errors or omissions which are caused by the ESCO's failure to comply with the standard of care provided for herein. Any employee of the ESCO or its sub-consultants or subcontractors who is determined by the City to be uncooperative, incompetent, a threat to the adequate or timely completion of the Project, a threat to the safety of persons or property, or any employee who fails or refuses to perform the services in a manner acceptable to the City, shall be promptly removed from the Project by the ESCO and shall not be re-employed to perform any of the Work on the Project.

## **3. City's Representative.**

The City hereby designates **Bill Slenter – Owner's Representative** or his or her designee, as the person to act as its representative for the performance of this Contract ("City's Representative"). The City's Representative shall be authorized to act as liaison between City and the ESCO in the administration of this Contract and all work on the Project. The City's

Representative shall have the power to act on behalf of the City for all purposes under this Contract, including for the purpose of approving the design. City may designate new and/or different individuals to act as City's Representative from time to time upon written notice to the ESCO .

**4. ESCO's Representative.**

The ESCO hereby designates **Moses Bchara, Program Manager**, or his or her designee, to act as its representative for the performance of this Contract ("ESCO's Representative"). ESCO's Representative shall have full authority to represent and act on behalf of the ESCO for all purposes under this Contract. ESCO's Representative shall supervise and direct all work on the Project, using his or her best skill and attention, and shall be responsible for all means, methods, techniques, sequences and procedures and for the satisfactory coordination of all portions of the work pursuant to this Contract.

**5. ESCO's Contractor License and Registration.**

The ESCO shall have only appropriately licensed contractors performing work on the Project as required by the Business and Professions Code. The ESCO (**License No. CA# 708952**) shall act as the licensed contractor for the Project. ESCO shall perform all services required under the Contract Documents in a skillful and competent manner, consistent with the standards generally recognized as being employed by professionals qualified to perform such services in the same discipline in the State of California, and the ESCO shall be fully responsible to the City for any damages and/or delays to the Project as specified in the Contract. The licensed contractor shall be registered with the Department of Industrial Relations to perform public work (**DIR Registration No.** To be provided at time of Phase 3 Construction Phase).

**6. ESCO's Design Professional.**

The ESCO shall name a specific person to act as the Design Professional as described in the General Conditions, subject to the approval of the City. The ESCO hereby designates **Bryan Childress** from **Wallace Group** to act as the Design Professional and Architect of Record for the Project. ESCO's Design Professional shall perform all services required under the Contract Documents in a skillful and competent manner, consistent with the standards generally recognized as being employed by professionals qualified to perform such services in the same discipline in the State of California, and the ESCO shall be fully responsible to the City for any damages and/or delays to the Project as specified in the indemnification provisions of the Contract. Any change in the Design Professional shall be subject to the City's prior written approval, which approval shall not be unreasonably withheld. The new Design Professional shall be of at least equal competence as the prior Design Professional. In the event that City and ESCO cannot agree as to the substitution of a new Design Professional, the City shall be entitled to terminate this Contract as described in the General Conditions.

**7. ESCO's Indemnification.**

The ESCO shall provide indemnification and defense as set forth in the General Conditions.

**8. Substitution of Key Personnel.**

ESCO has represented to City that certain key personnel will perform and coordinate the Work under this Contract. Should one or more of such personnel become unavailable, ESCO may substitute other personnel of at least equal competence upon written approval of City. In the event that City and ESCO cannot agree as to the substitution of key personnel, City shall be entitled to terminate this Contract for cause. Any personnel who fail or refuse to perform the Work in a manner acceptable to the City, or who are determined by the City to be uncooperative, incompetent, a threat to the adequate or timely completion of the Project or a threat to the safety of persons or property, shall be promptly removed from the Project by the ESCO at the request of the City. The key personnel for performance of this Contract are as follows: **Moses Bchara** and **Brian Pottinger**.

**9. Notices.**

All notices hereunder and communications regarding interpretation of the terms of the Contract or changes thereto shall be provided by the mailing thereof by registered or certified mail, return receipt requested, postage prepaid and addressed as follows:

**CITY**

Attn: Tom DuBois, City Manager  
City of Sutter Creek  
18 Main Street  
Sutter Creek, CA 95685

**ESCO**

Attn: Tammy Fulop, Vice President  
Schneider Electric Buildings Americas, Inc.  
1650 W. Crosby Road  
Carrollton, TX 75006

Any notice so given shall be considered received by the other party three (3) days after deposit in the U.S. Mail, first class postage prepaid, addressed to the party at the above address. Actual notice shall be deemed adequate notice on the date actual notice occurred, regardless of the method of service.

**10. Authority of Signatories.**

The persons executing this Contract on behalf of their respective Parties represent and warrant that they have the authority to do so under law and from their respective Parties.

**[SIGNATURES CONTINUED ON NEXT PAGE]**

Entered into as of the Effective Date first above written, the Parties hereby execute this Design-Build Contract, as follows:

**ON BEHALF OF THE ESCO**

**ON BEHALF OF THE CITY**

**Schneider Electric Buildings Americas, Inc.**

**City of Sutter Creek**

By:

By:

\_\_\_\_\_  
Name:

\_\_\_\_\_  
Name:

\_\_\_\_\_  
Title:

\_\_\_\_\_  
Title:

Federal Tax ID No.:  
75-2066352

Attest:

\_\_\_\_\_  
[NAME AND TITLE]

Approved as to Form:

\_\_\_\_\_  
[NAME AND FIRM]

Legal Counsel

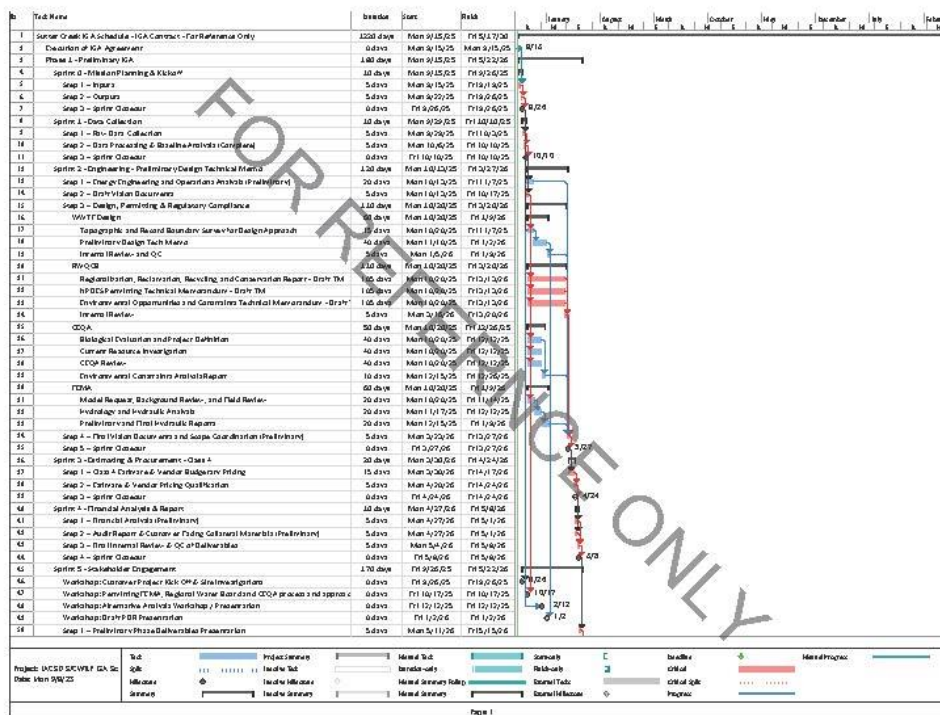
**ATTACHMENT 1**  
**SCOPE OF SERVICES**  
**Schedule A**  
**Scope of Work**  
**[INSERT SCOPE]**

A1-1

General

## Project Implementation

Reference ~~Draft Schedule for Phase 1 attached~~, as a reference only. Phase 2 schedule will be developed ~~in~~ upon approval of Phase 1, and Phase 3 ~~will~~ schedule will be part of the ~~construction agreement~~.



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General

~~Reserved for~~ Construction Amendment

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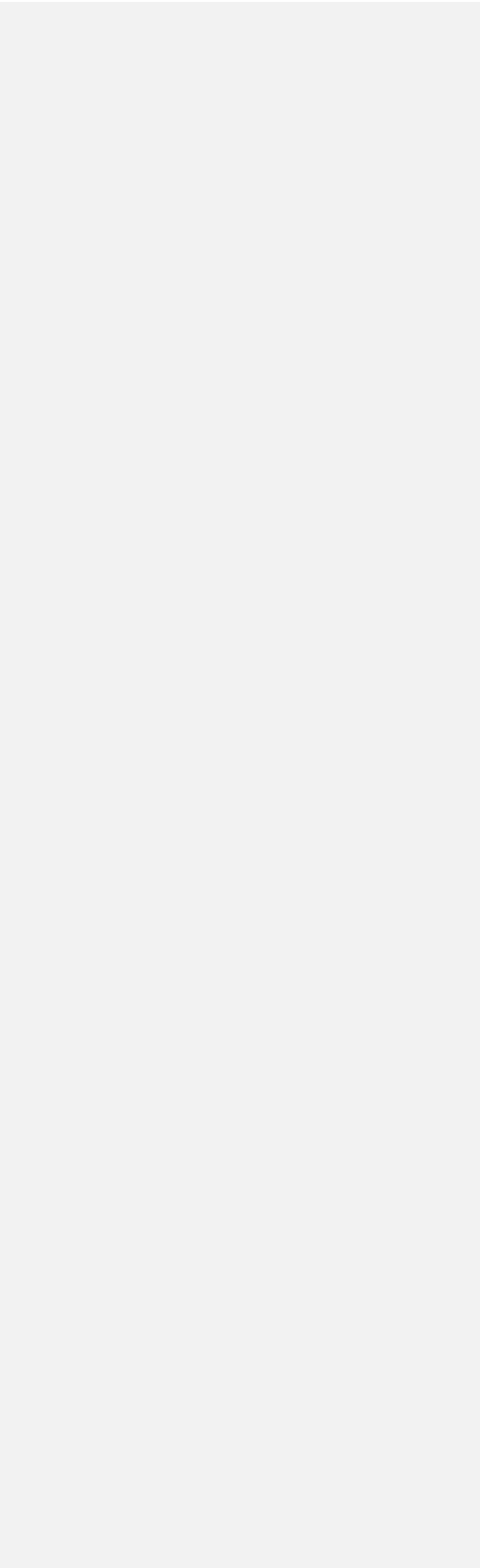
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General



## ATTACHMENT 2 GENERAL CONDITIONS

### ARTICLE 1 - DEFINITIONS AND TERMINOLOGY

#### 1.1 Defined Terms.

A. Wherever used in the Contract Documents and printed with initial capital letters, the terms listed below will have the meanings indicated which are applicable to both the singular and plural thereof. In addition to terms specifically defined below, terms with initial capital letters in the Contract Documents include references to identified articles and paragraphs, and the titles of other documents or forms.

1. Act of God -- Act of God is an earthquake of magnitude 3.5 or higher on the Richter Scale or a tidal wave.
2. Additional Work -- New or unforeseen work will be classified as "Additional Work" when City's Representative determines that it is not covered by the Contract.
3. Applicable Laws -- The laws, statutes, ordinances, rules, codes, regulations, permits, and licenses of any kind, issued by local, state or federal governmental authorities or private authorities with jurisdiction (including utilities), to the extent they apply to the Work.
4. Application for Payment -- Standard AIA form which is to be used by the ESCO during the course of the Work in requesting progress or final payments and which is to be accompanied by such supporting documentation as is required by the Contract Documents.
5. Architect of Record or Engineer of Record ("A/E") -- The individual, partnership, corporation, joint venture, or other legal entity named as the Design Professional in the Contract or any succeeding entity designated by City.
6. Certificate for Payment -- The form signed by City's Representative attesting to the ESCO's right to receive payment for certain completed portions of the Work on the Project in accordance with Article 13.
7. Change Order ("CO") -- A document that authorizes Additional Work or deletion, or revision in the Work or an adjustment in the Guaranteed Maximum Price or the Project Completion Date, issued on or after the Effective Date of the Contract, in accordance with the Contract Documents and in the form contained in the Contract Documents.
8. Change Order Request ("COR") -- A request made by the ESCO for an adjustment in the Guaranteed Maximum Price and/or Project Completion Date as the result of a ESCO-claimed change to the Work.
9. Claim -- A demand or assertion by City or ESCO seeking an adjustment of the Guaranteed Maximum Price or Project Completion Date, or both, or other relief with respect to the terms of the Contract. A demand for money or services by a third party is not a Claim.
10. Construction Documents -- The plans and Technical Specifications prepared by the ESCO for the Project and approved by City. The Construction Documents shall set forth in detail

all items necessary to complete the construction (other than such details customarily provided by others during construction) of the Project in accordance with the Contract Documents. Following commencement of the Construction Phase, Construction Documents become part of the Contract Documents upon their completion and approval by City. All amendments and modifications to the Construction Documents must be approved by City in writing.

11. Construction Documents Phase -- The third of four phases of the Work and will commence with the issuance of the approval of the Schematic Design Phase.
12. Construction Phase -- The fourth phase of the Work and will commence upon final approval of the Construction Documents by City .
13. Construction Work -- That portion of the Work on the Project consisting of the provision of labor, materials, furnishings, equipment and services in connection with the construction of the Project as set forth in the Contract Documents.
14. Contract -- The entire integrated written agreement between City and ESCO concerning the Work. "Contract" may be used interchangeably with "Agreement" in the Contract Documents. The Contract supersedes prior negotiations, representations, or agreements, whether written or oral, and includes all Contract Documents.
15. Contract Documents -- The documents listed in Section 1 of the Contract. Some documents provided by City, including but not limited to reports and drawings of subsurface and physical conditions are not Contract Documents.
16. Contract Times -- The number of days or the dates stated in the Contract Documents and Project Schedule to: achieve defined Milestones, if any, and to complete the Work so that it is ready for final payment.
17. Day -- A calendar day of 24 hours measured from midnight to the next midnight.
18. Defective Work -- Work that is faulty, or deficient; or that does not conform to the Contract Documents; or that does not meet the requirements of any inspection, reference standard, test, or approval referenced in the Contract Documents.
19. Demobilization -- The complete dismantling and removal by the ESCO of all of the ESCO's temporary facilities, equipment, and personnel at the Site.
20. ESCO -- The individual or entity with which City has contracted for performance of the Work.
21. ESCO Representative -- The person or firm identified as the primary contact person and representative of the ESCO as designated in the Contract and who shall not be changed without prior written consent of City .
22. Design Materials -- Any and all documents, shop drawings, electronic information, including computer programs and computer generated materials, data, plans, drawings, sketches, illustrations, specifications, descriptions, models and other information developed, prepared, furnished, delivered or required to be delivered by, or for, the ESCO:

(1) to City under the Contract Documents or; (2) developed or prepared by or for the ESCO specifically to discharge its duties under the Contract Documents.

23. Design Professional -- The individuals or entities who will provide the ESCO with the required architectural, engineering, and other professional services required for the coordinated design of the Project and the administration of construction.
24. Design Work -- The portion of the Work on the Project consisting of the Design services and design deliverables required to be provided in connection with the Design of the Project as set forth in the Contract Documents.
25. City's Representative -- The individual or entity as identified in the Contract to act as City's Representative.
26. Drawings -- The graphic and pictorial portions of the Contract Documents showing the design, location, and dimensions of the Work to be done on the Project, generally including plans, elevations, sections, details, schedules, and diagrams prepared as part of the Design Materials. The Drawings are listed in the List of Drawings.
27. Effective Date of the Contract -- The date indicated in the Contract on which it becomes effective, but if no such date is indicated, it means the date on which the Contract is signed and delivered by the last of the two parties to sign and deliver.
28. Equipment Manufacturer -- Any Separate Contractor that fabricates and/or supplies any of City's provided equipment which is installed in the Project by the ESCO.
29. Excusable Delay -- A delay as described in Article 11 of these General Conditions.
30. Governmental Approvals -- Those governmental actions required to be obtained by City and necessary for the completion of the Project.
31. Guaranteed Maximum Price ("GMP") -- The guaranteed maximum price City will pay for the completion of all Work described in the Contract Documents. The GMP is set forth in the Contract and further described in the cost proposal submitted by the ESCO.
32. Hazardous Materials -- Any substance: the presence of which requires investigation or remediation under any federal, state or local law, statute, regulation, ordinance, order, action, policy, or common law; which is or becomes defined as a "hazardous waste," "hazardous substance," pollutant, or contaminant under any federal, state or local law, statute, regulation, rule or ordinance, or amendments thereto, including, without limitations, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601 et seq. ("CERCLA"), as amended, or the Resource, Conservation and Recovery Act, as amended, 42 U.S.C. Section 6901 et seq. ("RCRA"); which is petroleum, including crude oil or any fraction thereof not otherwise designated as a "hazardous substance" under CERCLA including, without limitation, gasoline, diesel fuel, or other petroleum hydrocarbons; which is toxic, explosive, corrosive, flammable, infectious, radioactive, carcinogenic, mutagenic, or otherwise hazardous and is or becomes regulated by any regulatory agency or instrumentality of the United States; the presence of which on the Site causes or threatens to cause a nuisance upon the Site or to the adjacent properties or poses or threatens to pose a hazard to the health or safety of persons on or about the Site; the presence of which on adjacent properties could constitute a trespass by

the ESCO or the City; or as defined in the California Health and Safety Code. For the purposes of this Contract, "Hazardous Materials" shall also include, but are not limited to, "Underground Storage Tanks." "Underground Storage Tank" shall have the definition assigned to that term by Section 9001 of RCRA, 42 U.S.C. Section 6991, and also shall include: any tank of one thousand one hundred (1,100) gallons or less capacity used for storing motor fuel; any tank used for storing heating oil for consumption on the premises where stored; any septic tank; and any pipes connected to the above items.

33. Holidays -- Holidays occur on:

New Year's Day – January 1  
Martin Luther King Jr. Day – Third Monday of January  
President's Day – Third Monday of February  
Memorial Day – Last Monday in May  
Juneteenth - June 19  
Independence Day – July 4  
Labor Day – First Monday in September  
Columbus Day - Second Monday in October  
Veteran's Day – November 11  
Thanksgiving Day – Fourth Thursday in November  
Friday after Thanksgiving  
Christmas Day – December 25

If any Holiday listed above falls on a Saturday, Saturday and the preceding Friday are both Holidays. If the Holiday should fall on a Sunday, Sunday and the following Monday are both Holidays.

34. Liens – Charges, security interests, or encumbrances upon Project funds, or personal property, including without limitation Stop Payment Notices.
35. Milestones – A principal event specified in the Contract Documents associated with a required completion date or time prior to Completion of all the Work. Failure to achieve Milestones may result in Liquidated Damages as described in the Contract Documents.
36. Notice of Award – The written notice by City to the ESCO stating that upon timely compliance by the ESCO with the conditions precedent listed therein, City will sign and deliver the Contract.
37. Notice of Completion – The form which may be executed by City and recorded by the county where the Project is located constituting final acceptance of the Project.
38. Notice to Proceed -- A written notice given by City to the ESCO fixing the date on which the ESCO may proceed with the applicable work and when Contract Time will commence to run.
39. Notice to Proceed with Construction -- A written notice given by City to the ESCO fixing the date on which the ESCO may proceed with the Construction Phase and when Contract Time will commence to run.

40. Partial Utilization – Use by City of a substantially completed part of the Work prior to Completion of all the Work.
41. Performance Specifications -- That part of the Contract Documents consisting of written requirements for materials, equipment, systems, standards and workmanship as applied to the Work.
42. Project -- The total design and construction of which the Work performed under the Contract Documents may be the whole, or a part, and which may include separate design or construction work performed by City or by Separate Contractors for the Project.
43. Project Completion Date -- The date by which the ESCO and City agree that the Work is operational, ready for use by the City, and fully complete, except for minor items. The Project Completion Date is set forth in the Contract.
44. Project Schedule -- The graphical representation of a practical plan to complete the Work on the Project within the Project Completion Date and other Contract Times. The detailed requirements for the Project Schedule are stated in Article 7.
45. Proposal -- The construction proposal submitted by the ESCO in response to the Request for Proposal for this Project For Phase 3, based on results from Phases 1 and 2.
46. Request for Proposal (“RFP”) -- The request for proposal issued by City for the Project and includes all documents, exhibits, attachments, and addenda thereto.
47. Samples -- Physical examples of materials, equipment, or workmanship that are representative of some portion of the Work and which establish the standards by which such portion of the Work will be judged.
48. Schematic Design Phase -- The second of four phases of the Work. The scope of the Schematic Design Phase is further defined in the Contract Documents.
49. Separate Contractor -- A person, or firm, under separate contract with City performing other work at the Project site which may affect the Work.
50. Shop Drawings -- All drawings, diagrams, illustrations, schedules, and other data or information which are specifically prepared or assembled by or for ESCO and submitted by ESCO to illustrate some portion of the Work.
51. Site -- Lands or areas indicated in the Contract Documents as being furnished by City upon which the Work is to be performed, including rights-of-way and easements for access thereto, and such other lands furnished by City which are designated for the use of ESCO.
52. Stop Payment Notice -- A written notice as defined in Civil Code section 8044.
53. Subcontractor – An individual or entity that has a contract with the ESCO or with a Subcontractor of the ESCO to perform a portion of the Work on the Project. Unless otherwise specifically provided, the term Subcontractor includes Subcontractors of all tiers.
54. Submittal - Written or graphic information and physical samples prepared and supplied by the ESCO demonstrating various portions of the Work.



55. Supplier -- A manufacturer, fabricator, supplier, distributor, material man, or vendor having a direct contract with ESCO or with any Subcontractor to furnish materials or equipment used in the performance of the Work or to be incorporated in the Work.
56. Technical Specifications -- All documents developed by the ESCO and which are ready for final construction.
57. Tier -- The contractual level of a Subcontractor or supplier or consultant with respect to the ESCO. For example, a first tier Subcontractor is under subcontract with the ESCO, a second tier Subcontractor is under subcontract with a first tier Subcontractor, and so forth.
58. Unexcusable Delay -- Any delay other than an Excusable Delay, as further described in Article 11 of these General Conditions, that does not entitle the ESCO to an adjustment of the Guaranteed Maximum Price and does not entitle the ESCO to an adjustment of the Project Completion Date.
59. Warranty -- A written guarantee provided to City by the ESCO that the Work will remain free of defects and perform in accordance with specifications in the Contract Documents for one (1) year from the Project Completion Date
60. Work -- The entire design and construction, or the various separately identifiable parts thereof, required to be provided under the Contract Documents. Work includes and is the result of performing or providing all labor, services, and documentation necessary to produce such design and construction, and furnishing, installing, and incorporating all materials and equipment into such design and construction, all as required by the Contract Documents.

## 1.2 Terminology.

- A. The words and terms below are not defined but, when used in the Contract Documents, have the indicated meaning.
- B. Furnish, Install, Perform, Provide.
1. The word “furnish,” when used in connection with services, materials, or equipment, shall mean to supply and deliver said services, materials, or equipment to the Project site (or some other specified location) ready for use or installation and in usable or operable condition.
  2. The word “install,” when used in connection with services, materials, or equipment, shall mean to put into use or place in final position said services, materials, or equipment complete and ready for intended use.
  3. The words “perform” or “provide,” when used in connection with services, materials, or equipment, shall mean to furnish and install said services, materials, or equipment complete and ready for intended use.
  4. Regardless of whether “furnish,” “install,” “perform,” or “provide” is used in connection with services, materials, or equipment, an obligation of ESCO is implied.

- C. Unless stated otherwise in the Contract Documents, words or phrases that have a well-known technical or construction industry or trade meaning are used in the Contract Documents in accordance with such recognized meaning

## **ARTICLE 2 - PRELIMINARY MATTERS**

### **2.1 Delivery of Contract Documents.**

- A. Before City will execute the Contract, the ESCO shall furnish and file with City a signed Contract in duplicate and the necessary, Certificates of Insurance and Endorsements, Escrow Agreement (if used) and Tax Identification Number, as well as any other documents specified in the Contract Documents.

### **2.2 Bonds.**

- A. ESCO shall submit the Performance and Payment bonds within 5 business days of the City's issuance of a Notice to Proceed with Construction and on the forms provided with the Contract Documents, duly executed by a responsible corporate surety admitted to transact surety business in the State of California, as defined in Code of Civil Procedure section 995.120, and listed in the United States Department of the Treasury circular entitled "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies," authorized to do business in the State of California conditioned upon the faithful performance by the ESCO of all requirements of the Contract Documents. Each of the bonds shall be in a sum no less than one hundred percent (100%) of the Guaranteed Maximum Price.

### **2.3 Evidence of Insurance.**

- A. ESCO shall obtain, at its sole cost and expense, all insurance required by Article 6. Certificates of such insurance and endorsements shall be delivered to City within fifteen (15) Days after receipt of the Notice of Award and before execution of the agreement for construction by City

### **2.4 Execution of Contract.**

- A. Upon receipt of the required Contract Documents, City will execute the Contract, establishing the Effective Date of the Contract.

### **2.5 Commencement of Contract Times; Notice to Proceed with Construction.**

- A. Work shall commence within fifteen (15) Days of the date stated in City's Notice to Proceed with Construction. No Work shall be done at the Site prior to the date on which the Contract Time commence to run. Nothing herein shall affect the Project Completion Date.

### **2.6 Preconstruction Conference; Designation of Authorized Representatives.**

- A. Before any Work at the Project site is started, a conference attended by City, ESCO, City's Representative, and others as appropriate will be held to establish a working understanding among the parties as to the Work and to discuss the schedules referred to herein, procedures

for handling Shop Drawings and other submittals, processing Applications for Payment, and maintaining required records.

- B. At this conference City and ESCO each shall designate, in writing, a specific individual to act as its authorized representative with respect to the services and responsibilities under the Contract. Such individuals shall have the authority to transmit instructions, receive information, render decisions relative to the Contract, and otherwise act on behalf of each respective party.

#### 2.7 Initial Acceptance of Schedules.

- A. At least ten (10) Days before submission of the first Application for Payment, a conference attended by ESCO, City's Representative, and others as appropriate will be held to review for acceptability to City's Representative the schedules submitted, as required by the Contract Documents. ESCO shall have an additional ten (10) Days to make corrections and adjustments and to complete and resubmit the schedules. No progress payment shall be made to ESCO until acceptable schedules are submitted to City's Representative.
- B. Acceptance of the schedules by City's Representative will not impose on responsibility for accuracy, for sequencing, scheduling, or progress of the Work, or compliance with the Contract Documents. Acceptance will not interfere with or relieve ESCO from ESCO's full responsibility therefor.

#### 2.8 Subcontractor Mobilization Meeting.

- A. Prior to the start of each major Subcontractor's site work, the ESCO, the involved Subcontractor, and City's Representative shall attend a pre-start meeting to discuss the schedule, coordination, procedures, and other administrative issues.

#### 2.9 Project Signage.

- A. City will permit a single project sign, which shall be subject to City's prior and sole discretion and approval, as to all matters including, without limitation, size, location, material, colors, style and size of printing, logos and trademarks (if any), text, and selection of names to be displayed.

### **ARTICLE 3: CONTRACT DOCUMENTS: INTENT, AMENDING, REUSE**

#### 3.1 Intent.

- A. The Contract Documents are complementary; what is required by one is as binding as if required by all. It is the intent of the Contract Documents to describe a functionally complete Project (or part thereof) to be designed and constructed in accordance with the Contract Documents. Any labor, documentation, services, materials, or equipment that reasonably may be inferred from the Contract Documents or from prevailing custom or trade usage as being required to produce the indicated result will be provided whether or not specifically called for, at no additional cost to City. Clarifications and interpretations of the Contract Documents shall be issued by City's Representative as provided in these General Conditions.

- B. If utilities to equipment/fixtures are not shown but are necessary to operate the equipment/fixtures, the utilities service installation is considered to be part of the Work.
- C. Organization of the Contract Documents into divisions, sections, and articles, and arrangement of drawings shall not control the ESCO in dividing Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

### 3.2 Reference Standards.

#### A. Standards, Specifications, Codes, Laws, and Regulations.

1. Reference to federal specifications, federal standards, other standards, specifications, manuals, or codes of any technical society, organization, or association, or to Applicable Laws, whether such reference be specific or by implication, shall mean the standard, specification, manual, code, or Applicable Laws in effect at the time of opening of proposals (or on the Effective Date of the Contract if there were no proposals), except as may be otherwise specifically stated in the Contract Documents.
2. No provision of any such standard, specification, manual, or code, or any instruction of a supplier, shall be effective to change the duties or responsibilities of City, ESCO, or City's Representative, or any of their Subcontractors, consultants, agents, or employees, from those set forth in the Contract Documents. No such provision or instruction shall be effective to assign to City or City's Representative, or any of their officers, directors, members, partners, employees, agents, consultants, or subcontractors, any duty or authority to supervise or direct the performance of the Work or any duty or authority to undertake responsibility inconsistent with the provisions of the Contract Documents.

### 3.3 Order of Precedence.

- A. The intent of the Contract Documents is to include all necessary criteria to establish the scope and quality for completion of the Work on the Project by the ESCO. The Contract Documents are complementary and what is required by one shall be as binding as if required by all. Performance by the ESCO shall be required to the extent consistent with, and reasonably inferable from, the Contract Documents.
  1. Except as may be otherwise specifically stated in the Contract Documents, the provisions of the Contract Documents shall take precedence in resolving any conflict, error, ambiguity, or discrepancy between the provisions of the Contract Documents and:
    - a. the provisions of any standard, specification, manual, or code, or the instruction of any Supplier (whether or not specifically incorporated by reference in the Contract Documents); or
    - b. the provisions of any Applicable Laws (unless such an interpretation of the provisions of the Contract Documents would result in violation of such Applicable Law).
- B. In resolving conflicts among any of the Contract Documents, the order of precedence shall be as follows:

1. Permits from other agencies as may be required by law;
  2. Amendments, Change Orders or Pending Change Orders, most recent first;
  3. Design-Build Contract;
  4. General Conditions;
  5. RFP and all addenda, attachments and appendices;
  6. Construction Documents prepared by ESCO ; and
  7. Drawings prepared by ESCO ;
- C. With reference to the Drawings the order of precedence shall be as follows:
8. Figures govern over scaled dimensions;
  9. Detail drawings govern over general drawings;
  10. Amendment or Change Order drawings govern over Drawings;
  11. Drawings govern over standard drawings.
- D. Notwithstanding the orders of precedence established above, in the event of conflicts, the parties shall meet and confer and reach a mutually acceptable understanding of the applicable standard.

3.4 Amending and Supplementing Contract Documents.

- A. The Contract Documents may be amended to provide for additions, deletions, and revisions in the Work or to modify the terms and conditions thereof only by a formal Contract Amendment or Change Order.

3.5 Interpretation and Use of Contract Documents.

- A. Prior to the commencement of construction on the Project, the parties shall confirm, in writing, the final form of the Contract Documents that are to be utilized. Specifically, once approved by City, the Construction Documents become a part of the Contract Documents and define the entire scope of work. The ESCO shall certify that the Construction Documents are in full compliance with the Contract Documents, except as noted.
- B. Organization of the Performance Specifications into various subdivisions and the arrangement of the Drawings shall not control the ESCO in dividing portions of the Work necessary for the Project among Subcontractors or in establishing the extent of Work to be performed by any trade.
- C. Unless otherwise stated in the Contract Documents, technical words and abbreviations contained in the Contract Documents are used in accordance with commonly understood design professional and construction industry meanings; nontechnical words and abbreviations are used in accordance with their commonly understood meanings.

- D. The Contract Documents may omit modifying words such as “all” and “any,” and articles such as “the” and “an,” but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement. The use of the word “including,” when following any general statement, shall not be construed to limit such statement to specific items or matters set forth immediately following such word or to similar items or matters, whether or not non limiting language (such as “without limitation,” “but not limited to,” or words of similar import) is used with reference thereto, but rather shall be deemed to refer to all other items or matters that could reasonably fall within the broadest possible scope of such general statement.
- E. Whenever the context so requires, the use of the singular number shall be deemed to include the plural and vice versa. Each gender shall be deemed to include any other gender, and each shall include a corporation, partnership, trust, or other legal entity, whenever the context so requires. The captions and headings of the various subdivisions of the Contract Documents are intended only for reference and convenience and in no way define, limit, or prescribe the scope or intent of the Contract Documents or any subdivision thereof.
- F. Each and every provision of law required by law to be inserted in the Contract Documents shall be deemed to be inserted herein, and the Contract Documents shall be read and enforced as though it were included herein, and if through mistake or otherwise any such provision is not inserted, or is not correctly inserted, then upon application of either party the Contract shall be amended in writing to make such insertion or correction.
- G. Before commencing any Work on the Project, the ESCO shall check and review the Contract Documents, including the Construction Documents, for conformance and compliance with all laws, ordinances, codes, rules and regulations of all governmental authorities and public utilities affecting the construction and operation of the physical plant of the Project, all quasi-governmental and other regulations affecting the construction and operation of the physical plant of the Project, and other special requirements, if any, designated in the Contract. In the event the ESCO observes any violation of any law, ordinance, code, rule or regulation, or inconsistency with any such restrictions or special requirements of the Contract, the ESCO shall immediately notify City’s Representative in writing of the same and shall cause to be corrected any such violation or inconsistency in the manner provided hereunder. The ESCO shall be solely liable for any such violation, inconsistency or special requirement, if ESCO fails to conduct such review or notification to City.
- H. Before commencing any Work on the Project, the ESCO shall carefully examine all Performance Specifications, the Contract, the Contract Documents and other information given to the ESCO as to Project requirements. The ESCO shall immediately notify City’s Representative of any perceived or alleged error, inconsistency, ambiguity, or lack of detail or explanation in such documents in writing. Neither the ESCO nor any Subcontractor shall take advantage of any apparent error or omission which may be found in the Performance Specifications, the Contract, the Contract Documents or other information given to ESCO. If the ESCO or its Subcontractors, material or equipment suppliers, or any of their officers, agents, and employees performs, permits, or causes the performance of any Work under the Contract, which it knows or should have known to be in error, inconsistent, or ambiguous, or not sufficiently detailed or explained, the ESCO shall bear any and all costs arising therefrom including, without limitation, the cost of correction thereof without increase or adjustment to the Guaranteed Maximum Price or the Project Completion Date. In no case shall any

Subcontractor proceed with Work if uncertain without the ESCO's written direction and/or approval.

3.6 Reuse of Documents.

- A. ESCO and any Subcontractor shall not: have or acquire any title to or Ownership rights in any of the Construction Documents or other documents (or copies of any thereof) prepared by or bearing the seal of the A/E or its consultants, including electronic media editions; or reuse of any such Construction Documents, other documents, or copies thereof on extensions of the Project or any other project without written consent of City and A/E and specific written verification or adaptation by the A/E.
- B. The prohibitions of this Article 3.6 will survive final payment, or termination of the Contract. Nothing herein shall preclude ESCO from retaining copies of the Contract Documents for record purposes.

3.7 Electronic Data.

- A. The data furnished by City or City's Representative to ESCO, or by ESCO to City or City's Representative, that may be relied upon are limited to the printed copies (also known as hard copies). Files in electronic media format of text, data, graphics, or other types are furnished only for the convenience of the receiving party. Any conclusion or information obtained or derived from such electronic files will be at the user's sole risk. If there is a discrepancy between the electronic files and the hard copies, the hard copies govern.
- B. Because data stored in electronic media format can deteriorate or be modified inadvertently or otherwise without authorization of the data's creator, the party receiving electronic files agrees that it will perform acceptance tests or procedures within sixty (60) Days, after which the receiving party shall be deemed to have accepted the data thus transferred. Any errors detected within the 60-Day acceptance period will be corrected by the transferring party.
- C. When transferring documents in electronic media format, the transferring party makes no representations as to long term compatibility, usability, or readability of documents resulting from the use of software application packages, operating systems, or computer hardware differing from those used by the data's creator.

3.8 Ownership and Use of Construction Documents.

- A. The Construction Documents, and all copies thereof, furnished to, or provided by, the ESCO are the property of City, provided the ESCO has been appropriately compensated in accordance with the terms of the Contract. City and the ESCO explicitly agree that all materials and documents developed in the performance of this Contract are the property of City pursuant to the requirements of City, provided the ESCO has been appropriately compensated under this Contract. The ESCO agrees to, and hereby does, grant to City a royalty free license to all such data developed in the performance of this Contract for the Project and that the ESCO may cover by copyright and to all designs as to which the ESCO may assert any right or establish any claim to under the patent or copyright laws. The ESCO, for a period up to five (5) years from the date of Completion of the Project, agrees to furnish and to provide access to the originals or copies of all such materials immediately upon the written request of City. Any use or reuse by City of the Construction Documents on any project without employing the services of the

ESCO shall be at City's own risk. If City uses or re-uses the Construction Documents without employing the services of the Design Build Entity, it shall remove the A/E's seal from the Construction Documents and hold harmless ESCO, A/E, and their officers, directors, agents and employees from claims arising out of the use or re-use of the Construction Documents on such other project. ESCO shall not be responsible or liable for any revisions to the Construction Documents made by any party other than the ESCO, a party for which the ESCO is legally responsible or liable, or anyone approved by the ESCO .

3.9 Administration of the Contract by City's Representative.

- A. During the term of this Design-Build Contract, City's Representative shall have the right to review the ESCO's Work at such intervals as deemed appropriate by City's Representative. However, no actions taken during such review or site visit by City's Representative shall relieve the ESCO of any of its obligations of single point responsibility for the design and construction of this Project nor form the basis for a Claim if such actions extend beyond the Project Completion Date.
- B. City's Representative will not have control over, will not be in charge of, and will not be responsible for design or construction means, methods, techniques, sequences, or procedures, or for safety precautions and programs in connection with the Work on the Project, since these are solely the ESCO's responsibility.
- C. Except as otherwise provided in the Contract Documents or when direct communications have been specifically authorized, City and the ESCO shall communicate through City's Representative. Communications by the ESCO with City's consultants and City's Representative's consultants shall be through City's Representative. Communications by City and City's Representative with Subcontractors will be through the ESCO. Communications by the ESCO and Subcontractors with Separate Contractors shall be through City's Representative. The ESCO shall not rely on oral or other non-written communications.
- D. Based on City's Representative's Project site visits, review of the Work, and evaluations of the ESCO's Applications for Payment, City's Representative will recommend amounts, if any, due the ESCO and will issue Certificates for Payment in such amounts.
- E. City's Representative will have the authority to reject Work on the Project, or any portion thereof, which does not conform to the Contract Documents. City's Representative will have the authority to stop Work on the Project, or any portion thereof. Whenever City's Representative considers it reasonably necessary, or advisable, for implementation of the intent of the Contract Documents, City's Representative will have the authority to require additional inspection or testing of the Work on the Project, at the City's expense and in accordance with the Contract Documents, whether or not such Work is fabricated, installed, or completed. However, no authority of City's Representative conferred by the Contract Documents nor any decision made in good faith either to exercise, or to not exercise such authority, will give rise to a duty or responsibility of City or City's Representative to the ESCO, or any person or entity claiming under, or through, the ESCO .
- F. City's Representative will have the authority to conduct inspections in connection with beneficial occupancy and to determine the dates of Completion, such determination shall not be unreasonably delayed; will receive for review and approval any records, written warranties, and related documents required by the Contract Documents and assembled by the ESCO; and



will issue a final Certificate for Payment upon the ESCO's compliance with the requirements of the Contract Documents.

- G. City's Representative will be, in the first instance, the interpreter of the requirements of the Contract Documents. Should the ESCO discover any conflicts, omissions, or errors in the Construction Documents or the Contract Documents; have any questions about the interpretation or clarification of the Contract Documents; question whether Work is within the scope of the Contract Documents; then, before proceeding with the Work affected, the ESCO shall notify City's Representative in writing and request interpretation, or clarification. City's Representative's response to questions and requests for interpretations, clarifications, instructions, or decisions will be made with reasonable promptness. Should the ESCO proceed with the Work affected before receipt of a response from City's Representative, any portion of the Work on the Project which is not done in accordance with City's Representative's interpretations, clarifications, instructions, or decisions shall be removed or replaced and the ESCO shall be responsible for all resultant losses.
- H. City may at any time and from time to time, without prior notice to or approval of the ESCO, replace City's Representative with a new City Representative. Upon receipt of notice from City informing the ESCO of such replacement and identifying the new City's Representative, the ESCO shall recognize such person or firm as City's Representative for all purposes under the Contract Documents.

#### **ARTICLE 4: AVAILABILITY AND OWNERSHIP OF LANDS AND MATERIALS; HAZARDOUS ENVIRONMENTAL CONDITIONS; REFERENCE POINTS**

##### **4.1 Availability of Lands.**

- A. City shall furnish the Project site. City shall notify ESCO of any encumbrances or restrictions not of general application but specifically related to use of the Project site with which ESCO must comply in performing the Work. City will obtain in a timely manner and pay for easements for permanent structures or permanent changes in existing facilities. ESCO shall provide for all additional lands and access thereto that may be required for temporary construction facilities or storage of materials and equipment at no additional cost to City.

##### **4.2 Ownership of Site Materials Found.**

- A. The title to water, soil, rock, gravel, sand, minerals, timber and any other materials developed or obtained in the excavation or other operations of ESCO or any of its Subcontractors in the performance of the Contract, and the right to use said items in carrying out the Contract, or to dispose of same, is hereby expressly reserved by City. Neither ESCO nor any of its Subcontractors nor any of their representatives or employees shall have any right, title, or interest in said materials, nor shall they assert or make any claim thereto. ESCO will, as determined by City's Representative, be permitted to use in the Work without charge, any such materials which meet the requirements of the Contract Documents, provided City shall have the right to use or consume these materials without payment to a third party.

##### **4.3 Hazardous Material at Site.**

- A. The ESCO shall have no responsibility for detection, abatement, remediation, removal or disposal of any Hazardous Material, except Hazardous Materials introduced onto the Project

Site by the ESCO, its employees, subcontractors, agents, or other parties acting on behalf of the ESCO. In the event that the ESCO becomes aware of the presence of, or exposure of persons to, any Hazardous Material at the Project Site, the ESCO shall stop work in the affected area and inform City by notice immediately. Notwithstanding anything to the contrary herein, the ESCO shall not be responsible for, and the City shall bear full responsibility and remediation costs relating to any Hazardous Materials uncovered, removed or disturbed by the ESCO on the Project Site resulting from the ESCO's performance of the work hereunder, except Hazardous Materials introduced onto the Project Site by the ESCO, its employees, subcontractors, agents, or other parties acting on behalf of the ESCO. The City shall not be responsible for, and the ESCO shall bear full responsibility and remediation costs relating to any Hazardous Materials introduced onto the Project Site by the ESCO, its employees, subcontractors, agents, or other parties acting on behalf of the ESCO.

- B. The ESCO hereby specifically agrees to indemnify, defend and hold the City, its present and future directors, officers, employees, agents, representatives, successors and assigns harmless from and against any and all losses, liabilities, claims, demands, damages, causes of action, fines, penalties, costs and expenses (including, but not limited to, all reasonable consulting, engineering, attorneys' or other professional fees), that they may incur or suffer by reason of: (a) the existence, uncovering or unveiling, or any release by the ESCO of, a Hazardous Material introduced onto the Project Site by the ESCO, its employees, subcontractors, agents, or other parties acting on behalf of the ESCO; (b) any enforcement or compliance proceeding commenced by or in the name of any governmental authority because of the presence on the Project Site of Hazardous Materials introduced onto the Project Site by the ESCO, its employees, subcontractors, agents, or other parties acting on behalf of the ESCO; and (c) any action reasonably necessary to abate, remediate or prevent a violation or threatened violation of any Hazardous Material laws by the ESCO except where the violation relates to Hazardous Materials not introduced onto the Project Site by ESCO.

#### 4.4 Protection and Restoration of Existing Improvements and Reference Points.

- A. ESCO shall be responsible for confirming whether any historical stamps/impressions or survey monuments are located on existing sidewalks or curbs, which may be affected by the Work or construction activities. ESCO shall be solely responsible for ensuring that the design provides for the protection of existing improvements.
- B. ESCO shall be responsible for laying out the Work, shall protect and preserve the established reference points and property monuments, and shall make no changes or relocations without the prior written approval of City. ESCO shall report to City's Representative whenever any reference point or property monument is lost or destroyed or requires relocation because of necessary changes in grades or locations, and shall be responsible for the accurate replacement or relocation of such reference points or property monuments by professionally qualified personnel.

### **ARTICLE 5: BONDS AND INSURANCE**

- 5.1 Time for Compliance. ESCO shall not commence Work under this Contract until it has provided evidence to City that it has secured all insurance required under this Article. ESCO shall require and verify that all subconsultants and subcontractors maintain insurance meeting all the requirements stated herein. ESCO shall not allow any subconsultant or subcontractor to

commence work on any subcontract until it has provided evidence to City that the subconsultant or subcontractor has secured all insurance required under this Article.

5.2 Insurance Requirements. ESCO shall, at its expense, procure and maintain for the duration of the Contract the following policies of insurance (each a “Policy”, and collectively the “Policies”):

A. Commercial General Liability Insurance. A policy of commercial general liability insurance, written on an “occurrence” basis, with a liability limit of ten million dollars (\$10,000,000) per occurrence and fifteen million dollars (\$15,000,000) in the aggregate (“General Liability Policy”).

B. Automobile Liability Insurance. A policy of automobile liability insurance, written on an “occurrence” basis, with a combined single limit of ten million dollars (\$10,000,000) per accident for bodily injury and property damage (“Auto Liability Policy”). The Auto Liability Policy must include coverage for owned, hired and non-owned automobiles.

C. Workers' Compensation and Employer's Liability Insurance. Workers' compensation insurance as required by State law, and employer's liability insurance, written on an “occurrence” basis, with a liability limit of five million dollars (\$5,000,000).

D. Professional Liability Insurance. Professional liability insurance, written on a claims-made (and reported) basis, with a liability limit of five million dollars (\$5,000,000) per claim and aggregate (“Professional Liability Policy”).

E. Contractor's Pollution Liability, written on an occurrence basis with liability limit of \$5,000,000 per loss and aggregate.

5.3 Duration of Insurance. The Policies shall be procured by ESCO prior to ESCO's commencement of the Project and, except for the Professional Liability Policy, shall be maintained in effect for at least one year following the earlier of the Project Completion Date or termination of this Contract. ESCO shall maintain the Professional Liability Policy in effect for at least three years following the earlier of the Project Completion Date or termination of this Contract.

5.4 Insurer Rating Standards. The insurance policies required pursuant to this Article must be issued by one or more insurers that are (i) licensed to do business in the State and (ii) have an A.M. Best Company rating of not less than “A-” and a financial size category of not less than “VII.”

5.5 Additional Insureds. ESCO shall include the City and the City's directors, officers, employees, and agents as additional insureds on ESCO's General Liability Policy, Auto Liability Policy and Contractor's Pollution Liability. The additional insured endorsements will be on ESCO's most current versions of ISO Form CG 2010 and ISO Form CG 2037 or their substantial equivalents.

5.6 Waiver of Subrogation. Each of the General Liability Policy, the Auto Liability Policy and the Contractor's Pollution Liability Policy shall provide a waiver of transfer of rights of recovery in favor of the City.

5.7 ESCO Insurance is Primary. The General Liability Policy, the Auto Liability Policy and Contractor's Pollution Liability Policy shall be endorsed to provide that they are primary and non-contributory.

- 5.8 Premiums, Deductibles and Self-Insured Retentions. ESCO shall be solely responsible for paying deductibles and self-insured retentions applicable to the Policies.
- 5.9 Evidence of Coverage. ESCO shall provide to the City a duly authorized and executed certificate of insurance evidencing that the required Policies and endorsements are in effect (each a “Certificate of Insurance”).
- 5.10 Notice of Change in Policies. ESCO shall notify the City within thirty (30) days of its receipt of written notice from an applicable insurer that a Policy will expire without renewal or will be canceled or terminated.
- 5.11 Review of Coverage. The City’s failure to identify any non-compliance with the requirements of this Article shall not be deemed as a waiver of such requirements.
- 5.12 Subcontractor and Subconsultant Insurance. ESCO shall require each Subcontractor and Subconsultant to maintain such levels and types of insurance coverage as are appropriate for the Work to be performed by such Subcontractor or Subconsultant
- 5.13 Builder’s Risk [“All Risk”]
- A. It is the ESCO’s responsibility to maintain or cause to be maintained Builder’s Risk [“All Risk”] extended coverage insurance on all work, material, equipment, appliances, tools, and structures that are or will become part of the Work and subject to loss or damage by fire, and vandalism and malicious mischief, in an amount to cover 100% of the replacement cost. The City accepts no responsibility for the Work until the Work, such acceptance not to be unreasonably withheld, is formally accepted by the City. The ESCO shall provide a certificate evidencing this coverage before commencing performance of the Work.
  - B. The named insured shall be ESCO. The City, its elected officials, officers, employees, agents and authorized volunteers shall be included as Additional Insureds. ESCO shall not be required to maintain Builder’s Risk insurance for any portion of the Work following acceptance by City.
  - C. Policy shall be provided for replacement value on an “all risk” basis. There shall be no coinsurance penalty provision in any such policy. Policy must include: (1) coverage for any ensuing loss from faulty workmanship, defective work, omission or deficiency in design or specifications; (2) coverage against machinery accidents and operational testing; (3) coverage for removal of debris, and insuring the buildings, structures, machinery, equipment, materials, facilities, fixtures and all other properties constituting a part of the Project; and (4) coverage to insure the full replacement value of any property or equipment stored either on or off the Site.
  - D. In addition, the policy shall meet the following requirements:
    - 1. Insurance policies shall be so conditioned as to cover the performance of any extra work performed under the Contract.
    - 2. Coverage shall include all materials stored on site and in transit.
    - 3. Coverage shall include ESCO’s tools and equipment.

4. Insurance shall include boiler, machinery and material hoist coverage.

5.14 Performance Bond and Payment Bond.

- A. The ESCO shall submit performance and payment bonds on the forms provided with the Contract Documents, duly executed by a responsible corporate surety admitted to transact surety business in the State of California, as defined in Code of Civil Procedure Section 995.120, and listed in the United States Department of the Treasury circular entitled "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies," authorized to do business in the State of California and reasonably acceptable to City conditioned upon the faithful performance by the ESCO of the Construction Phase of the Project and the requirements of the Contract Documents applicable to the Construction Phase of the Project. Each of the bonds shall be in a sum no less than one hundred percent (100%) of the Guaranteed Maximum Price. The ESCO shall furnish bonds covering the faithful performance of the Contract (Performance Bond) and payment of obligations arising thereunder (Payment Bond) on the forms contained in the Contract. The obligations of the performance bond surety shall continue so long as any construction/installation obligation of ESCO remains. Nothing herein shall limit the City's rights or the ESCO's or surety's obligations under the Contract, law or equity, including, but not limited to, California Code of Civil Procedure section 337.15.
- B. Subject to the limitations in Article 4 of the Design Build Contract, the Payment Bond and Performance Bond shall be in effect on the date the ESCO commences performance of the Construction Phase of the Project. The premiums for the Payment Bond and Performance Bond shall be paid by the ESCO. The ESCO maintains and agrees that it will execute Payment and Performance Bonds in the amounts and manner required by the Contract Documents. No payment for performance of the Construction Phase of the Project will be made to the ESCO until the ESCO's Payment Bond and Performance Bond have been approved by City, such approval not to be unreasonably withheld.
- C. Should, in City's reasonable opinion, any bond become insufficient or surety found to no longer comply with requirements contained herein, the ESCO shall renew or replace the effected bond within 10 Days of receiving notice from City.
- D. In the event the surety or the ESCO intends to reduce or cancel any required bonds, at least thirty (30) Days prior written notice shall be given to City, and the ESCO shall post acceptable replacement bonds at least ten (10) Days prior to expiration of the original bonds. No further payments shall be deemed due or will be made under this Contract until any replacement bonds required by this Article are accepted by City.
- E. To the extent, if any, that the Guaranteed Maximum Price is increased in accordance with the Contract, the ESCO shall, upon request of City, cause the amount of the bonds to be increased accordingly and shall promptly deliver satisfactory evidence of such increase to City. The bonds shall further provide that no change or alteration of the Contract (including, without limitation, an increase in the Guaranteed Maximum Price, as referred to above), extensions of time, or modifications of the time, terms, or conditions of payment to the ESCO will release the surety. If the ESCO fails to furnish any required bond, City may terminate the Contract for cause.

**ARTICLE 6 - INDEMNITY / DUTY TO DEFEND**

- 6.1 Indemnity. Except as to the sole negligence, active negligence or willful misconduct of the City, ESCO assumes liability for and agrees, at the ESCO's sole cost and expense, to promptly and fully indemnify, and hold the City, its City Council, and all of its respective officials, officers, directors, employees, managers, commission members, representatives, agents, council members, ("Indemnitees"), harmless from and against any and all loss, damage, claims, allegations, actions, suits, arbitrations, administrative proceedings, regulatory proceedings, or other legal proceedings, causes of action, demands, costs, judgements, liens, stop notices, penalties, damages, losses, anticipates losses of revenue, expenses (including, but not limited to, any fees of accountants, attorneys, experts or other professionals, or investigation expenses), costs, including attorneys' fees, or losses of any kind or nature whatsoever, whether actual, threatened or alleged, arising out of, resulting from or is in any way (either directly or indirectly) related to, or is in many manner connected with the performance of the Work or this Contract, including claims made by Subcontractors for nonpayment and claims of bodily injury or damage to tangible personal property made by third parties, to the extent any of the foregoing arise out of the negligent acts or omissions or willful misconduct, whether active or passive, of ESCO, its officials, officers, employees, consultants, contractors, Subcontractors or by anyone working under ESCO for services rendered to ESCO in the performance of this Agreement ("Indemnity Claims), notwithstanding that the City may have benefitted from their services. This indemnification provision shall apply to all liability, as provided for above, regardless of whether any insurance policies are applicable. Insurance policy limits do not act as a limitation upon the amount of the indemnification to be provided by ESCO.
- 6.2 Duty to Defend. Design -ESCO agrees, at its sole cost and expense, to promptly defend the Indemnitees from all Indemnity Claims. The duty of ESCO to indemnify and hold harmless the Indemnitees includes the separate and independent duty to defend the Indemnitees, which duty arises immediately upon receipt by ESCO of the tender of any Indemnity Claim from an Indemnatee. ESCO's obligation to defend the Indemnitees shall be at ESCO's sole expense, and not be excused because of ESCO's inability to evaluate liability or because ESCO evaluates liability and determines that ESCO is not liable. This duty to defend shall apply whether or not an Indemnity Claim has merit or is meritless, or which involves claims or allegations that any or all of the Indemnitees were actively, passively or concurrently negligent, or which otherwise assert that the Indemnitees are responsible, in whole or in part, for any Indemnity Claim. ESCO agrees to provide this defense immediately upon written notice from the City, and with well qualified, adequately insured and experienced legal counsel reasonably acceptable to the City. ESCO will reimburse City for reasonable defense costs for claims arising out of ESCO's professional negligence based on the percentage of ESCO's liability.
- 6.3 Subcontractor Requirements. In addition to the requirements set forth hereinabove, ESCO shall ensure, by written subcontract agreement, that each of ESCO's Subcontractors of every tier shall protect, defend, indemnify and hold harmless the Indemnitees with respect to Indemnity Claims arising out of, in connection with, or in any way related to each such Subcontractors' Work on the Project in the same manner in which ESCO is required to protect, defend, indemnify and hold the Indemnitees harmless. In the event ESCO fails to obtain such defense and indemnity obligations from others as required herein, ESCO agrees to be fully responsible to the Indemnitees according to the terms of this Article.
- 6.4 No Limitation or Waiver of Rights. ESCO's obligations under this Article are in addition to any other rights or remedies which the Indemnitees may have under the law or under the Contract Documents. ESCO's indemnification and defense obligations set forth in this Article are separate and independent from the insurance provisions set forth in the Agreement and do not limit, in any

way, the applicability, scope, or obligations set forth in such insurance provisions. The purchase of insurance by ESCO with respect to the obligations required herein shall in no event be construed as fulfillment or discharge of such obligations. In any and all claims against the Indemnitees by any employee of ESCO, any Subcontractor, any supplier of ESCO or Subcontractors, anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable, the obligations under this Article shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for ESCO or any Subcontractor or any supplier of either of them, under workers' or workmen' s compensation acts, disability benefit acts or other employee benefit acts. Failure of the City to monitor compliance with these requirements imposes no additional obligations on the City and will in no way act as a waiver of any rights hereunder.

- 6.5 Withholding to Secure Obligations. In the event an Indemnity Claim arises prior to final payment to ESCO, the City may, in its sole discretion, reserve, retain or apply any monies due ESCO for the purpose of resolving such Indemnity Claims; provided, however, the City may release such funds if ESCO provides the City with reasonable assurances of protection of the Indemnitees' interests. The City shall, in its sole and reasonable discretion, determine whether such assurances are reasonable.
- 6.6 Survival of Indemnity Obligations. Design -ESCO's obligations under this Article are binding on ESCO's and its Subcontractors' successors, heirs and assigns and shall survive the completion of the Work or termination of ESCO's performance of the Work.
- 6.7 Independent Contractor. ESCO shall at all times during its performance of the Work retain its status as an independent contractor. ESCO's employees and agents shall under no circumstances be considered or held to be employees or agents of City and City shall have no obligation to pay or withhold state or federal taxes or provide workers' compensation or unemployment insurance for or on behalf of ESCO or its employees and agents.
- 6.8 If the ESCO's obligation to defend, indemnify, and/or hold harmless arises out of the ESCO's performance as a "design professional" (as that term is defined under Civil Code Section 2782.8), then, and only to the extent required under Civil Code Section 2782.8, which is fully incorporated herein, the ESCO's indemnification obligation shall be limited to claims that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the ESCO, and, upon ESCO obtaining a final adjudication by a court of competent jurisdiction, ESCO's liability for such claim, including the cost to defend, shall not exceed the ESCO's proportionate percentage of fault.
- 6.9 Joint and Several Liability. In the event the ESCO and one or more than one other party is connected with an accident or occurrence covered by this indemnification, then all such parties shall be jointly and severally responsible to each of the Indemnitees for indemnification, and the ultimate responsibility among such indemnifying parties for the loss and expense of any such indemnification shall be resolved without jeopardy to any indemnitee listed in this Article 6.

## ARTICLE 7: ESCO'S RESPONSIBILITIES

### 7.1 Review of Contract Documents and Field Conditions by The ESCO; Single Point Responsibility of The ESCO.

- A. In addition to the examination and reviews performed, and obligations assumed, incident to making the representations set forth in the Contract, the ESCO shall carefully study and compare each of the Contract Documents provided by City with the others and with information furnished by City, and shall promptly report in writing to City's Representative any errors, inconsistencies, or omissions in the Contract Documents provided by City or inconsistencies with Applicable Law observed by the ESCO. The ESCO shall be solely responsible for any errors, inconsistencies or omissions in the Contract Documents if the ESCO fails to perform such review and examination or fails to report such errors, inconsistencies or omissions to City in writing.
- B. The ESCO is responsible for the design and construction of the Project and shall use design and engineering standards of care applicable to projects, buildings or work of similar size, complexity, quality and scope in performing Work on the Project. The ESCO shall be solely responsible for any and all design errors including, but without limitation, errors, inconsistencies or omissions in the Construction Documents. The ESCO shall take field measurements, verify field conditions, and carefully compare with the Contract Documents such field measurements, conditions, and other information known to the ESCO before commencing Work on the Project. Errors, inconsistencies, or omissions discovered at any time shall be promptly reported in writing to City's Representative.
- C. If the ESCO performs any design and/or construction activity which it knows, or should know, involves an error, inconsistency, or omission referred to in this Article, without notifying and obtaining the written consent of City's Representative, the ESCO shall be responsible for the resultant losses, including, without limitation, the costs of correcting Defective Work.
- D. City does not assume any obligation to employ the ESCO's services or pay the ESCO royalties of any type as to future programs that may result from Work performed under this Contract.
- E. The ESCO shall be responsible for all plotting, printing, copying and distribution costs of any and all documents required in connection with Work on the Project.
- F. The ESCO agrees that it has single point responsibility for the design and construction of this Project, and agrees to utilize no less than the industry standard of design, engineering and construction practices. The ESCO has the duty to act in City's best interests at all times throughout the course and performance of this Contract.

### 7.2 Design, Supervision and Construction Procedures.

- A. The ESCO shall supervise, coordinate, and direct all Work on the Project using the ESCO's best skill and attention and applying such skills and expertise as may be necessary to perform the Work in accordance with the Contract Documents. The ESCO shall be solely responsible for, and have control over, the entire design effort, construction means, methods, techniques, sequences, procedures, and the coordination of all portions of Work on the Project.



- B. The ESCO shall be responsible to City for acts and omissions of the ESCO, its agents, employees, and Subcontractors, and their respective agents and employees.
- C. The ESCO shall not be relieved of its obligation to perform all Work on the Project in accordance with the Contract Documents either by acts or omissions of City or City's Representative in the administration of the Contract, or by tests, inspections, or approvals required, or performed, by persons or firms other than the ESCO. Unless otherwise provided in the Contract Documents, the ESCO shall be entitled to any necessary adjustments in the Contract Time or Contract Price where ESCO is unable to perform all Work in accordance with the Contract Document because of the acts or omissions of City or City's Representative in the administration of the Contract, or by tests, inspections, or approvals required, or performed, by persons or firms other than the ESCO.
- D. The ESCO shall be responsible for inspection of all portions of Work on the Project to determine that such portions conform to the requirements of the Contract Documents and are ready to receive subsequent Work.
- E. Unless otherwise provided in the Contract Documents, the ESCO shall provide and pay for all professional design/engineering services, services, labor, materials, equipment, tools, construction equipment and machinery, necessary for proper execution and completion of the Work on the Project, whether temporary or permanent and whether or not incorporated or to be incorporated in Work on the Project. The ESCO shall furnish architectural and engineering services for the preparation of Construction Documents necessary to complete the Project in accordance with the requirements of the Contract Documents. From the City-approved Construction Documents, which are developed from the City-accepted Proposal, the ESCO shall furnish all labor, materials, equipment, services, and transportation necessary to complete construction of the Project, including site work, structures and utilities.
- F. The ESCO is required to deliver to City, if requested, any and all Design Materials including, but not limited to, calculations, preliminary drawings, construction drawings, shop drawings, electronic media data, tenant improvement documents, sketches, illustrations, specifications, descriptions, models, mock ups, and other information developed, prepared, furnished, or delivered in the prosecution of the Design Work.
- G. The ESCO is responsible for preparation of the Construction Documents for the entire Project. The ESCO is responsible for construction of the entire Project as required by the Contract Documents.
- H. The ESCO shall at all times maintain good discipline and order among its employees and Subcontractors. The ESCO shall provide competent, fully qualified personnel to perform all Work on the Project.

### 7.3 Labor; Working Hours.

- B. The ESCO shall provide competent, suitably qualified personnel to survey and lay out the Work and perform construction as required by the Contract Documents. The ESCO shall at all times maintain good discipline and order at the Site. The ESCO will provide all labor needed to complete the Work within the Contract Times.

- A. Except as otherwise required for the safety or protection of persons or the Work or property at the Site or adjacent thereto, and except as otherwise stated in the Contract Documents, all Work at the Site shall be performed during regular working hours, which are defined as hours between 6:30 a.m. and 4:30 p.m. any day Monday through Friday of any week except on Holidays and/or during Schedule Constraints defined in the Contract Documents. The ESCO will not permit the performance of Work on a Saturday, Sunday, any Holiday or during identified Schedule Constraints without City's written consent given after prior written notice to City's Representative. The ESCO shall be responsible for and shall reimburse City for, all inspection costs outside regular working hours, including overtime, unless requested by the City.

#### 7.4 Progress Meetings.

- A. The ESCO shall schedule and hold regular progress meetings at least weekly and at other times as requested by the City or as required by progress of the Work. The ESCO, City's Representative, and all Subcontractors active on the Site shall attend each meeting. The ESCO may at its discretion request attendance by representatives of its Suppliers, manufacturers, and other Subcontractors.
- B. City's Representative will preside at the progress meetings and will arrange for keeping and distributing the minutes. The purpose of the meetings is to review the progress of the Work, maintain coordination of efforts, discuss changes in scheduling, and resolve other problems which may develop. During each meeting, the ESCO shall present any issues which may impact its progress with a view to resolve these issues expeditiously.

#### 7.5 Cost-Loaded CPM Progress Schedule and Recovery Schedule.

- A. ESCO shall adhere to the Project Schedule, which shall be a cost-loaded CPM progress schedule established in accordance with the Contract Documents as it may be adjusted from time to time as provided below:
  - 1. ESCO shall submit to City's Representative for acceptance proposed adjustments in the Project Schedule that will not result in changing the Project Completion Date.
  - 2. Proposed adjustments in the Project Schedule that will change the Project Completion Date shall be submitted in accordance with the requirements of the Contract Documents. Adjustments in the Project Completion Date may only be made by a Contract Amendment or Change Order.
  - 3. Should any of the following conditions exist, City may require ESCO to prepare, at no extra cost to City, a plan of action and a recovery schedule for completing the Work and achieving all contractual milestones within the Project Completion Date:
    - a. The ESCO's monthly progress report indicates delays that are, in the opinion of City, of sufficient magnitude that City questions the ESCO's ability to complete the Work;
    - b. The Project Schedule shows the ESCO to be thirty (30) or more Days behind the critical path at any time during construction;

- c. The ESCO desires to make changes in the logic or the planned duration of future activities of the Project Schedule which, in the opinion of City, are major in nature.
  - d. The recovery schedule shall include proposed revisions to the Project Schedule, demonstrating how ESCO intends to achieve all contractual milestones including contract completion within the Project Completion Date. The submittal shall include a narrative describing the actions planned by the ESCO to recover the schedule.
  - e. ESCO shall submit the recovery schedule within seven (7) Days of City's request:
    - (i) If ESCO asserts that City is responsible for the delay, failure to submit the recovery schedule within seven (7) Days of City's request will be considered a concurrent delay event attributable to ESCO, and ESCO shall only be entitled to non-compensable adjustments to the Project Completion Date.
    - (ii) If ESCO is responsible for the delay, this provision will not limit or affect ESCO's liability and failure to submit the recovery schedule with seven (7) Days of City's request may result in City withholding progress payments or other amounts due under the Contract Documents.
  - f. ESCO is responsible for all costs associated with the preparation and execution of the recovery schedule, including any necessary recovery actions, which may include, but are not limited to, assignment of additional labor, and/or equipment, shift or overtime work, expediting of submittals or deliveries, overlapping of activities or sequencing changes to increase activity concurrence.
  - g. Regardless of whether City directs ESCO to prepare a recovery schedule pursuant to this Article 7.6, ESCO shall promptly undertake appropriate action at no additional cost to City to recover the schedule whenever the current Project Schedule shows that the ESCO will not achieve a milestone and/or complete the Work within the Project Completion Date.
- B. Unless otherwise specified in the Contract Documents, ESCO shall provide and assume full responsibility for all services, materials, equipment, labor, transportation, construction equipment and machinery, tools, appliances, fuel, power, light, heat, telephone, water, sanitary facilities, temporary facilities, and all other facilities and incidentals necessary for the performance, testing, start up, and completion of the Work within the Project Completion Date.
- C. Failure of City's Representative to discover errors or omissions in schedules that it has reviewed, or to inform the ESCO that the ESCO, Subcontractors, or others are behind schedule, or to direct or enforce procedures for complying with the Project Schedule shall not relieve the ESCO from its sole responsibility to perform and complete all Work on the Project within the Project Completion Date and shall not be a cause for an adjustment of the Project Completion Date or the Guaranteed Maximum Price.
- D. The ESCO shall perform all Work on the Project in accordance with the current accepted Project Schedule.

7.6 Materials.

- A. All materials and equipment incorporated into the Work shall be as specified or, if not specified, shall be of good quality and new, except as otherwise provided in the Contract Documents. All materials furnished by the ESCO shall be of the most suitable grade for the purpose intended considering strength, ductility, durability, and best industry practice.
- B. All special warranties and guarantees required by the Contract Documents shall expressly run to the benefit of City. If required by City's Representative, ESCO shall furnish satisfactory evidence (including reports of required tests) as to the source, kind, and quality of materials and equipment.
- C. All materials and equipment shall be stored, applied, installed, connected, erected, protected, used, cleaned, and conditioned in accordance with instructions of the applicable supplier, except as otherwise may be provided in the Contract Documents.
- D. Materials shall be furnished in ample quantities and at such times as to ensure uninterrupted progress of the Work and shall be stored properly and protected as required by the Contract Documents. ESCO shall be entirely responsible for damage or loss by weather or other causes to materials or Work until City has accepted the Work.
- E. No materials, supplies, or equipment for Work under this Contract shall be purchased subject to any chattel mortgage or under a conditional sale or other agreement by which an interest therein or in any part thereof is retained by the seller or supplier. ESCO warrants good title to all material, supplies, and equipment installed or incorporated in the work and agrees upon completion to deliver the Work to City free from any claims, liens, or encumbrances.
- F. Materials shall be stored on the Project site in such manner so as not to interfere with any operations of City or any independent contractor.
- G. Inspection of Materials.
  - 1. Materials furnished by the ESCO which will become a part of the Project shall be subject to inspection at the site of the Work. To allow sufficient time to provide for inspection, the ESCO shall submit to City's Representative, at the time of issuance, copies of purchase orders or other written instrument confirming procurement of the materials, including drawings and other pertinent information, covering materials on which inspection will be made. ESCO shall provide written notice as to when Materials will be delivered at the Site of Work and City shall inspect upon arrival.
  - 2. The inspection of materials specified above or the waiving of the inspection thereof shall not impact whether the materials and equipment conform to the Contract Documents. ESCO will not be relieved from furnishing materials meeting the requirements of the Contract Documents due to City's inspection or lack of inspection of the equipment or materials. Acceptance of any materials will be made only after materials are installed in the Project.

7.7 Submittals.

- A. Industry Standard Submittals.

ESCO will identify in the Construction Documents all industry standard submittals for all materials, systems, and equipment incorporated into the Work.

B. Schedule of Submittals.

ESCO will prepare and deliver a Schedule of Submittals to City's Representative that has been fully integrated with the Cost-Loaded CPM Progress Schedule and identifies each Submittal required by the Construction Documents as well as the date on which ESCO will deliver each Submittal to City's Representative. Each Submittal must be delivered to City's Representative at least thirty (30) Days prior to the date the material or equipment is scheduled to be incorporated into the Work. ESCO is responsible for any schedule delays resulting from the Submittal process.

C. Submittal Procedures.

1. The ESCO will follow the following procedures for each Submittal, Shop Drawing and Sample required by the Contract Documents:
  - a. Transmit one ( 1) electronic (PDF) copy of each with a Submittal Transmittal.
  - b. Transmittals will be sequentially numbered. The ESCO to mark revised Submittals with original number and sequential alphabetic suffix.
  - c. Each Submittal will identify the Project, the ESCO, Subcontractor and supplier, pertinent Construction Document and detail number, and specification section number appropriate to the Submittal.
  - d. The ESCO must sign each Submittal, certifying that it has reviewed and approved the Submittal, verified products required, field dimensions, adjacent construction work, and that coordination of information is according to requirements of the Project and Contract Documents.
  - e. Identify variations in Contract Documents and product or system limitations that may differ and/or be detrimental to successful performance of completed Work.
  - f. When a Submittal is revised for resubmission, the ESCO shall promptly address City comments and resubmit. The ESCO shall identify changes made since previous submission.
  - g. City's review of Submittals shall not relieve the ESCO from responsibility for deviations from the Contract Documents unless the ESCO has, in writing, called City's attention to such deviations at time of submission and City's has taken no exception to the deviation. City's review of Submittals shall not relieve the ESCO from responsibility for errors in the Submittals.
  - h. Submittals not required by the Construction Documents or requested by City's Representative will not be acknowledged or processed.
  - i. Incomplete Submittals will not be reviewed by City's Representative, unless approved in writing and required for timely ordering of equipment. Delays

resulting from incomplete submittals are not the responsibility of City's Representative.

- j. The ESCO shall not be entitled to any extension of the Project Completion Date as a result of the Submittal process, unless the City is responsible for unreasonable delays in its review and approval.
2. Where a Submittal, Shop Drawing or Sample is required by the Construction Documents, any related Work performed prior to City's Representative's review and approval of the pertinent Submittal will be at the sole expense and responsibility of the ESCO.
3. Schedule Milestones for Submittals. ESCO must submit all submittals required by the Construction Documents in accordance with the Schedule of Submittals. If ESCO fails to submit the submittals in accordance with the Schedule of Submittals, ESCO will be solely liable for any delays or impacts caused by the delayed submittal, whether direct or indirect. ESCO will be liable for the time calculated from the date the submittal is due until the date a compliant submittal is made. A compliant submittal will be one that is complete and satisfies the requirements of the Contract Documents.

#### 7.8 Shop Drawing and Sample Submittal Procedures.

##### A. Before submitting each Shop Drawing or Sample, ESCO shall have:

1. reviewed and coordinated each Shop Drawing or Sample with other Shop Drawings and Samples and with the requirements of the Work and the Contract Documents;
2. determined and verified all field measurements, quantities, dimensions, specified performance and design criteria, installation requirements, materials, catalog numbers, and similar information with respect thereto;
3. determined and verified the suitability of all materials offered with respect to the indicated application, fabrication, shipping, handling, storage, assembly, and installation pertaining to the performance of the Work; and
4. determined and verified all information relative to the ESCO's responsibilities for means, methods, techniques, sequences, and procedures of construction, and safety precautions and programs incident thereto.

##### B. With each Submittal, the ESCO shall give City's Representative specific written notice of any variations that the Shop Drawing or Sample may have from the requirements of the Contract Documents. This notice shall be both a written communication separate from the Shop Drawings or Sample submittal and, in addition, a specific notation made on each Shop Drawing or Sample submitted to City's Representative for review and approval of each such variation.

##### C. Shop Drawings.

1. Data shown on the Shop Drawings will be complete with respect to quantities, dimensions, specified performance and design criteria, materials, and similar data to show City's Representative the services, materials, and equipment ESCO proposes to provide and to

enable City's Representative to review the information Representative for assessing conformance with information given and design concept expressed in Contract Documents.

2. When required by individual Specification Sections, provide Shop Drawings signed and sealed by a professional engineer responsible for designing components shown on Shop Drawings. Shop Drawings must include signed and sealed calculations to support design in a form suitable for submission to and approval by authorities having jurisdiction.
3. ESCO shall make revisions and provide additional information when required by authorities having jurisdiction.

D. Samples.

1. Clearly identify each Sample as to material, Supplier, pertinent data such as catalog numbers, the use for which intended and other data as required to enable City's Representative to review the submittal for assessing conformance with information given and design concept expressed in Contract Documents.
2. Samples should be of appropriate size and detail to assess functional, aesthetic, color, texture, patterns and finish selection.

E. City's Representative's Review.

1. City's Representative will review Shop Drawings and Samples in accordance with the Schedule of Submittals and within 10 days of receipt of submittals. City's Representative's review and acceptance will be only to determine if the items covered by the Submittals will, after installation or incorporation in the Project, conform to the information given in the Contract Documents and be compatible with the design concept of the completed Project as a functioning whole as indicated by the Contract Documents.
2. City's Representative's review and approval will not extend to means, methods, techniques, sequences, or procedures of construction (except where a particular means, method, technique, sequence, or procedure of design or construction is specifically and expressly called for by the Contract Documents) or to safety precautions or programs incident thereto. The review and approval of a separate item as such will not indicate approval of the assembly in which the item functions.
3. City's Representative's review and acceptance shall not relieve the ESCO from responsibility for any variation from the requirements of the Contract Documents unless City's Representative has given written approval of each such variation by specific written notation thereof incorporated in or accompanying the Submittal.

- D. The ESCO shall make corrections required by City's Representative and shall return three (3) corrected copies of Shop Drawings and Product Data, and submit, as required, new Samples for review and approval. The ESCO shall direct specific attention in writing to revisions other than the corrections called for by City's Representative on previous Submittals.

- E. City will review the first resubmittal of Shop Drawings at its cost. City reserves the right to reduce the Guaranteed Maximum Price by Change Order for its cost for any subsequent reviews of Shop Drawing resubmittals.

## 7.9 Construction Documents.

### A. Construction Documents.

1. The A/E shall prepare the Construction Documents. The Construction Documents shall provide information customarily necessary in documents for projects of similar size, complexity, and quality. The Construction Documents shall include all information required by the building trades to complete the construction of the Project, other than such details customarily developed by others during construction. City's review of the Construction Documents shall be conducted in accordance with the approved Project Schedule with procedures set forth in this Article. Such review shall not relieve the ESCO from its responsibilities under the Contract. Such review shall not be deemed an approval or waiver by City of any deviation from, or of the ESCO's failure to comply with, any provision or requirement of the Contract Documents, unless such deviation or failure has been identified as such in writing in the Document submitted by the ESCO and approved by City.
2. However, it is acknowledged by the parties hereto that inherent in a Design-Build concept, the production and review of Construction Documents may be a continuing process with portions thereof completed at different times. The ESCO will submit the Construction Document packages to City for review in accordance with the agreed upon schedule, unless otherwise approved in writing by City. The Project Schedule shall indicate the times for City to review the completion of each such portion of the Construction Documents and a reasonable time for review of same.
3. The ESCO shall submit completed packages of the Construction Documents for review by City at the times indicated on the Project Schedule and as defined in the Scheduling Specification. Meetings between the ESCO and City to review the Construction Document packages, shall be scheduled at least every two weeks, or as otherwise agreed to by the parties, and held so as not to delay Work on the Project. The ESCO will conduct these design meetings with City in accordance with the schedule approved by City. The ESCO will be responsible for preparing and circulating for the parties review, design meeting minutes from all such meetings.
4. The Construction Documents for hazardous and/or toxic abatement efforts and demolition activity shall be of sufficient clarity and shall be fully detailed when submitted to City for review.

### B. Shop Drawings, Product Data, Samples, Materials, and Equipment.

1. Shop drawings means drawings, submitted to the ESCO by Subcontractors, manufacturers, supplier or distributors, showing in detail the proposed fabrication and assembly of building elements and the installation (e.g., form, fit, and attachment details) of materials or equipment.
2. The ESCO shall coordinate all submittals and review them for accuracy, completeness, and compliance with the requirements of the Contract Documents and the ESCO's Construction Documents and shall indicate its approval thereon as evidence of such coordination and review.



3. Materials and equipment incorporated in the Work on the Project shall match the approved samples within tolerances appropriate to the items, and as may be described in the Contract Documents.
4. The ESCO shall submit shop drawings approved by the A/E and samples of submittals that relate to finish materials and products.
5. Wherever the name or brand of manufacturer or an article is listed in the Contract Documents, it is to be used in Work on the Project as the standard. Any variation in quality must be approved by City .

C. Field Engineering.

1. The ESCO shall retain and pay expenses of a civil engineer or land surveyor to establish on the Project site the required reference points and benchmarks, establish building lines and elevations, check for building framing, plumbness, and establish on building frame the required basic grid lines. The engineer or land surveyor shall be properly licensed in the State of California.
2. The ESCO shall locate and protect control points prior to starting Work on the Project site and preserve permanent reference points during construction, and shall require the engineer or surveyor to replace control points which become lost or destroyed.

D. Geotechnical and Survey.

1. City may provide a geotechnical report to ESCO that shall not be considered a part of the Contract Documents and shall be informational only and may not be relied upon by ESCO to form its basis of design. ESCO shall be responsible for obtaining its own geotechnical report which includes supporting data, findings and recommendations; and also with a legal description and a project survey, as necessary, which shall become a part of the Contract Documents. The Design Work shall be consistent with both the findings and recommendations of the ESCO's geotechnical report and legal description and Project survey, or such other geotechnical recommendations obtained by ESCO at its sole cost and expense.
2. The ESCO shall verify the location and depth (elevation) of all existing utilities and services before performing any excavation work.
3. Any additional tests, borings, etc. necessary to support the Construction Documents shall be the responsibility of the ESCO.

7.10 Dust Control.

- A. ESCO, at its expense, shall maintain all excavations, embankments, haul roads, permanent access roads, plant sites, waste disposal areas, borrow areas, and all other work areas free from dust. Industry accepted methods of dust control suitable for the area involved, such as sprinkling, chemical treatment, light bituminous treatment or similar methods, will be permitted.

7.11 Air Pollution.

- A. To the extent applicable, ESCO must fully comply with all applicable laws, rules and regulations in furnishing or using equipment and/or providing services, including, but not limited to, emissions limits and permitting requirements imposed by the Amador County Air Pollution Control District (APCD) and/or California Air Resources Board (CARB). Although the APCD and CARB limits and requirements are more broad, ESCO shall specifically be aware of their application to "portable equipment", which definition is considered by APCD and CARB to include any item of equipment with a fuel-powered engine. ESCO shall indemnify City against any fines or penalties imposed by APCD, CARB, or any other governmental or regulatory agency for violations of applicable laws, rules and/or regulations by ESCO, its sub-consultants, or others for whom ESCO is responsible under its indemnity obligations provided for in this Agreement.
- B. The ESCO shall comply with all air pollution control rules, regulations, ordinances and statutes. All containers of paint, thinner, curing compound, solvent or liquid asphalt shall be labeled to indicate that the contents fully comply with the applicable material requirements. ESCO shall not discharge into the atmosphere from any source whatever smoke, dust, or other air contaminants in violation of the laws, rules, and regulations of the governmental entities having jurisdiction.

7.12 Patent Fees and Royalties.

- A. Except as otherwise indicated in the Contract Documents, ESCO shall pay all license fees and royalties and assume all costs incident to the use in the performance of the Work or the incorporation in the Work of any invention, design, process, product, or device which is the subject of patent rights or copyrights held by others.
- B. To the fullest extent permitted by Applicable Laws, ESCO shall indemnify, defend, and hold harmless City and City's Representative, and the officers, directors, members, partners, employees, agents, consultants and subcontractors of each and any of them, from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to any infringement of patent rights or copyrights incident to the use in the performance of the Work or resulting from the incorporation in the Work of any invention, design, process, product, or device not specified in the Contract Documents or specified in the Contract Documents and identified as being subject to payment of any license fee or royalty to others required by patent rights or copyrights.

7.13 Permits and Licenses.

Permits and licenses necessary for prosecution of the Work shall be secured and paid for by ESCO, unless otherwise specified in the Contract Documents.

- A. ESCO shall obtain and pay for all other permits and licenses required for the Work, including excavation permit and permits for plumbing, mechanical and electrical work and for operations in or over public streets or right of way under jurisdiction of public agencies other than City

- B. The ESCO shall arrange and pay for all off-site inspection of the Work related to permits and licenses, including certification, required by the Performance Specifications, drawings, or by governing authorities, except for such off-site inspections identified as City's responsibility in the Contract Documents.
- C. Before acceptance of the Work, the ESCO shall submit all licenses, permits, certificates of inspection and required approvals to City.

7.14 ESCO Standard of Care.

- A. The ESCO warrants to City that all Design Work will be performed in accordance with the professional standards and degree of care applicable to those design professionals who specialize in designing and providing services for projects of the type, scope, quality and complexity of the Project utilizing the Design-Build contracting mode. The ESCO warrants to City that all labor, materials, equipment and furnishings used in, or incorporated into, the Construction Work will be of good quality, new (unless otherwise required or permitted by the Contract Documents), and all Work will be free of liens, claims and security interests of third parties; that the Work will be of the highest quality and free from defects and that all Work will conform with the requirements of the Contract Documents. If required by City's Representative, the ESCO shall furnish satisfactory evidence of compliance with this Article 7.15. Further, the type, quality and quantity of such evidence shall be within the sole discretion of City's Representative.
- B. The ESCO shall supervise, inspect, and direct the Project competently and efficiently, devoting such attention thereto and applying such skills and expertise as may be necessary to perform the Project in accordance with the Contract Documents. The ESCO shall be solely responsible for the means, methods, techniques, sequences, and procedures of design and construction of the Project.

7.15 Applicable Laws.

- A. ESCO shall give all notices required by and shall comply with all Applicable Laws applicable to the performance of the Work. Except where otherwise expressly required by Applicable Laws, neither City nor City's Representative shall be responsible for monitoring ESCO's compliance with any Applicable Laws.
- B. If ESCO performs any Work knowing or having reason to know that it is contrary to Applicable Laws, ESCO shall bear all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to such Work.

7.16 Labor Laws and ESCO's Obligations.

A. Hours of Work.

- 1. The ESCO and Subcontractors shall furnish sufficient forces to ensure the prosecution of the Work on the Project in accordance with the Construction Schedule and in such a manner to allow for the full and adequate completion of the Project within the Project Completion Date.

2. Work on the Project shall be performed during regular working hours, except that in the event of an emergency or when required to complete the Work on the Project in accordance with job progress, Work may be performed outside of regular working hours with advance written notice to City. Permissible working hours shall be between 7:00 a.m. to 8:00 p.m. and shall not be changed except with consent of City .
3. Eight (8) hours of work shall constitute a legal day's work. The ESCO and each Subcontractor shall forfeit, as penalty to City, twenty-five dollars (\$25) for each worker employed in the execution of Work on the Project by the ESCO or any Subcontractor for each day during which such worker is required or permitted to work more than eight (8) hours in any one day and forty (40) hours in any week in violation of the provisions of the Labor Code, and in particular, Section 1810 to Section 1815, except as provided in Labor Code Section 1815.
4. If the work done after hours is required by the Contract to be done outside the ESCO's regular working hours, the costs of any inspections, if required to be done outside normal working hours, shall be borne by City. If City allows the ESCO to do Work outside regular working hours for the ESCO's own convenience, the costs of any inspections required outside regular working hours shall be invoiced to the ESCO by City and deducted from the next progress payment. If the ESCO elects to perform Work outside the Inspector's regular working hours, costs of any inspections required outside regular working hours shall be invoiced to the ESCO by City and deducted from the next progress payment.
5. No Work on the Project or other activities by or on behalf of the ESCO which presents a hazard or unreasonable disruption to City staff shall be allowed during normal working hours. The determination as to whether Work on the Project or some other activity presents a hazard or constitutes an unreasonable disruption to City staff shall be made by and pursuant to the sole discretion of a representative of City. All Work on the Project or other activities which could present a hazard or unreasonable disruption to City staff shall be performed before or after normal working hours, on weekends, or on a City recognized holiday. Neither the ESCO nor its Subcontractors or anyone working on behalf of the ESCO or Subcontractors shall be entitled to additional compensation or an extension of the Project Completion Date for having to arrange their Work schedule so as not to violate the provisions of this Article 6.17A. The ESCO, Subcontractors and persons working on behalf of the ESCO shall be expected to arrange such Work and other activities in advance so as to avoid creating monetary or time impacts.

B. Wage Rates, Travel, and Subsistence.

1. The ESCO is aware of the requirements of Labor Code Sections 1720 et seq. and 1770 et seq., as well as California Code of Regulations, Title 8, Section 16000 et seq. ("Prevailing Wage Laws"), which require the payment of prevailing wage rates and the performance of other requirements on certain "public works" and "maintenance" projects. Since the Work on the Project involves an applicable "public works" or "maintenance" project, as defined by the Prevailing Wage Laws, and since the total compensation is \$1,000 or more, the ESCO agrees to fully comply with such Prevailing Wage Laws. City has obtained the prevailing wage rates from the Director of the Department of Industrial Relations, State of California. Copies of the prevailing wage rates are on file at City's office and shall be made available to any interested party on request. the ESCO shall make copies of the prevailing rates of per diem wages for each craft, classification or type of worker needed

to perform the Project available to interested parties upon request, and shall post copies at the ESCO's principal place of business and at the Project site. The ESCO shall defend, indemnify and hold City, its elected officials, officers, employees and agents free and harmless from any claims, liabilities, costs, penalties or interest arising out of any failure or allege failure to comply with the Prevailing Wage Laws.

2. Pursuant to Labor Code Section 1775, the ESCO is hereby advised that in the event that the ESCO fails to pay prevailing wages, the ESCO will be held liable for penalties and for shortfalls in wages and such amounts may be withheld from progress payments, the ESCO and each Subcontractor shall forfeit as a penalty to City not more than two hundred dollars (\$200) for each Day, or portion thereof, for each worker paid less than the stipulated prevailing wage rate for any work done by him, or by any subcontract under him, in violation of the provisions of the Labor Code. The difference between such stipulated prevailing wage rate and the amount paid to each worker for each Day or portion thereof for which each worker was paid less than the stipulated prevailing wage rate shall be paid to each worker by the ESCO .
3. The ESCO shall post, at appropriate conspicuous points on the Project site, a schedule showing all determined general prevailing wage rates and all authorized deductions, if any, from unpaid wages actually earned.

C. Labor Compliance/Payroll Records.

1. Pursuant to Labor Code Section 1776, the ESCO and each Subcontractor shall maintain weekly certified payroll records showing the name, address, social security number, work classification, straight time and overtime hours paid each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker or other employee employed in connection with the Project. The ESCO shall certify under penalty of perjury that records maintained and submitted by the ESCO are true and accurate. The ESCO shall also require Subcontractor(s) to certify weekly payroll records under penalty of perjury.
2. In accordance with Labor Code section 1771.4, the ESCO and each Subcontractor shall furnish the certified payroll records directly to the Department of Industrial Relations ("DIR") on a weekly basis and in the format prescribed by the DIR. This may include electronic submission. ESCO shall ensure full compliance with all requirements and regulations from the DIR relating to labor compliance monitoring and enforcement and all other applicable labor law.
3. Any stop orders issued by the DIR against ESCO or any Subcontractor that affect ESCO's performance of Work, including any delay, shall be ESCO's sole responsibility. Any delay arising out of or resulting from such stop orders shall be considered ESCO caused delay subject to any applicable liquidated damages and shall not be compensable by the City. ESCO shall defend, indemnify and hold the City, its officials, officers, employees and agents free and harmless from any claim or liability arising out of stop orders issued by the DIR against ESCO or any Subcontractor.
4. The payroll records described herein shall be certified and submitted by the ESCO at a time designated by the City. The ESCO shall also provide the following:

- a. A certified copy of the employee's payroll records shall be made available for inspection or furnished to such employee or his or her authorized representative on request.
  - b. A certified copy of all payroll records described herein shall be made available for inspection or furnished upon request of the DIR.
- 5. Unless submitted electronically, the certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement ("DLSE") of the DIR or shall contain the same information as the forms provided by the DLSE.
- 6. Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency, the City, the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement shall be marked or obliterated in such a manner as to prevent disclosure of an individual's name, address and social security number. The name and address of the ESCO awarded the Contract or performing the contract shall not be marked or obliterated.
- 7. In the event of noncompliance with the requirements of this Article 6.17C, the ESCO shall have ten (10) Days in which to comply subsequent to receipt of written notice specifying any item or actions necessary to ensure compliance with this Article 6.17C. Should noncompliance still be evident after such ten (10) day period, the ESCO shall, as a penalty to the City, forfeit One Hundred Dollars (\$100.00) for each day, or portion thereof, for each worker until strict compliance is effectuated. Upon the request of DIR, such penalties shall be withheld from contract payments.
- 8. In submitting the Proposal on this Project, it shall be the ESCO's sole responsibility to evaluate and include the cost of complying with all labor compliance requirements under this Contract and Applicable Law in its Proposal.
- 9. The ESCO shall include provisions of this Article 6.17C in all Subcontracts and require Subcontractors to comply with these provisions at no additional cost to City .

D. Apprentices.

- 1. The ESCO's attention is directed to the provisions of Sections 1777.5, 1777.6, and 1777.7 of the Labor Code concerning employment of apprentices by the ESCO or any Subcontractor. The ESCO shall obtain a certificate of apprenticeship before employing any apprentice pursuant to Sections 1777.5, 1777.6, and 1777.7 of the Labor Code. Information relative to apprenticeship standards, wage schedules, and other requirements may be obtained from DIR, the Administrator of Apprenticeships, San Francisco, California, or from the Division of Apprenticeship Standards and its branch offices. Knowing violations of Labor Code section 1777.5 will result in forfeiture not to exceed one hundred dollars (\$100.00) for each calendar day of non-compliance pursuant to Labor Code section 1777.7.

E. Nondiscrimination.

- 1. Pursuant to Labor Code section 1735 and other applicable provisions of law, the ESCO and its Subcontractors shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, age, political affiliation,

marital status, or handicap on this Work. The ESCO will take affirmative action to insure that employees are treated during employment or training without regard to their race, color, religion, sex, national origin, age, political affiliation, marital status, or handicap.

F. Workers' Compensation.

1. Pursuant to Labor Code section 1860, ESCO shall secure the payment of workers' compensation to its employees in accordance with the provisions of Labor Code section 3700. Prior to commencement of work, ESCO shall sign and file with City the following certification:

"I am aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this contract."

G. Public Works Registration.

1. Pursuant to Labor Code sections 1725.5 and 1771.1, the ESCO and its Subcontractors must be registered with the Department of Industrial Relations prior to the execution of a contract to perform public works. By entering into this Contract, ESCO represents that it is aware of the registration requirement and is currently registered with the DIR. ESCO shall maintain a current registration for the duration of the Project. ESCO shall further include the requirements of Labor Code sections 1725.5 and 1771.1 in any Subcontract and ensure that all Subcontractors are registered at the time this Contract is entered into and maintain registration for the duration of the Project.

7.17 Debarment

- A. Contractors or subcontractors may not perform work on a public works project with a subcontractor who is ineligible to perform work on a public project pursuant to Labor Code section 1777.1 or 1777.7. Any contract on a public works project entered into between a contractor and a debarred subcontractor is void as a matter of law. A debarred subcontractor may not receive any public money for performing work as a subcontractor on a public works contract. Any public money that is paid, or may have been paid to a debarred subcontractor by a contractor on the project shall be returned to the City. The ESCO shall be responsible for the payment of wages to workers of a debarred subcontractor who has been allowed to work on the Project.

7.18 Taxes.

- A. The ESCO shall pay all sales, consumer, use, and other similar taxes required to be paid in accordance with the Applicable Law of the place of the Project which are applicable during the performance of the Project. All such costs shall be included in the Contract Price. In accordance with Revenue and Taxation Code Section 107.6, the Contract Documents may create a possessory interest subject to personal property taxation for which the ESCO will be responsible.

7.19 Use of Site and Other Areas.

A. Limitation on Use of Site and Other Areas.

1. The ESCO shall confine construction equipment, the storage of materials and equipment, and the operations of workers to the Site and other areas permitted by Applicable Laws, and shall not unreasonably encumber the Site and other areas with construction equipment or other materials or equipment. ESCO shall assume full responsibility for any damage to any such land or area, or to the City or occupant thereof, or of any adjacent land or areas resulting from the performance of the Work.
2. Should any claim be made by any such City or occupant because of the performance of the Work, ESCO shall promptly settle with such other party by negotiation or otherwise resolve the claim by arbitration or other dispute resolution proceeding or at law.

B. Removal of Debris. During the progress of the Work ESCO shall keep the Site and other areas free from accumulations of waste materials, rubbish, and other debris. Removal and disposal of such waste materials, rubbish, and other debris shall conform to Applicable Laws.

C. Cleaning. Prior to Completion of the Work, ESCO shall clean the Site and the Work and make it ready for utilization by City. At the completion of the Work ESCO shall remove from the Site all tools, appliances, construction equipment and machinery, and surplus materials and shall restore to original condition all property not designated for alteration by the Contract Documents.

D. Loading Structures. ESCO shall not load nor permit any part of any structure to be loaded in any manner that will endanger the structure, nor shall ESCO subject any part of the Work or adjacent property to stresses or pressures that will endanger it.

7.20 Utility Usage.

A. Unless otherwise agreed to be provided by the City in writing and defined in the Scope of Work, all temporary utilities, including but not limited to electricity, water, gas, and telephone, used on the Work shall be furnished and paid for by ESCO. ESCO shall provide necessary temporary distribution systems, including meters, if necessary, from distribution points to points on the Work where the utility is needed. Upon completion of the Work, ESCO shall remove all temporary distribution systems.

B. ESCO shall provide necessary and adequate utilities and pay all costs for water, electricity, gas, oil, and sewer charges required for completion of the Work, including but not limited to startup and testing required in the Contract Documents. As Work is to be performed in existing City's facilities, ESCO may, to the extent authorized by City in writing, use City's existing utilities.

C. All permanent meters installed shall be listed in the ESCO's name until the Work is accepted.

7.21 Record Drawings.

A. ESCO shall maintain in a safe place at the Site one record copy of the Contract Documents and written interpretations and clarifications in good order and annotated to show changes made during construction. On these, it shall mark all Project conditions, locations, configurations,



and any other changes or deviations which may vary from the information represented in the original Contract Documents, including buried or concealed construction and utility features which are revealed during the course of construction. Said record drawings shall be supplemented by any detailed sketches as necessary or directed to fully indicate the Work as actually constructed. These master record drawings of the as-built conditions, including all revisions made necessary by Addenda and Change Orders shall be maintained up-to-date during the progress of the Project. Red ink shall be used for alterations and notes. Notes shall identify relevant Change Orders by number and date.

- B. Record drawings shall be accessible to City's Representative at all times during the construction period. Upon Completion of the Project and as a condition of final acceptance, the ESCO shall finalize and deliver a complete set of record drawings to City's Representative. The information submitted by the ESCO will be assumed to be correct, and the ESCO shall be responsible for, and liable to City, for the accuracy of such information, and for any errors or omissions which may or may not appear on the record drawings.

#### 7.22 Safety and Protection.

- A. ESCO shall be solely responsible for all safety precautions and programs in connection with the Work. Such responsibility does not relieve Subcontractors of their responsibility for the safety of persons or property in the performance of their work, nor for compliance with applicable safety laws. ESCO shall take all necessary precautions for the safety of, and shall provide the necessary protection to prevent damage, injury or loss to:
1. all persons on the Site or who may be affected by the Work;
  2. all the Work and materials and equipment to be incorporated therein, whether in storage on or off the Site; and
  3. other property at the Site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures, utilities, and Underground Facilities not designated for removal, relocation, or replacement in the course of construction.
- B. ESCO shall comply with all Applicable Laws relating to the safety of persons or property, or to the protection of persons or property from damage, injury, or loss; and shall erect and maintain all necessary safeguards for such safety and protection. ESCO shall notify owners of adjacent property and of Underground Facilities and other utility owners when prosecution of the Work may affect them, and shall cooperate with them in the protection, removal, relocation, and replacement of their property.
- C. ESCO shall comply with the applicable requirements of City's safety programs, if any. The Special Conditions identify any City's safety programs that are applicable to the Work.
- D. ESCO shall inform City and City's Representative of the specific requirements of ESCO's safety program with which City's and City's Representative's employees and representatives must comply while at the Site.
- E. All damage, injury, or loss to any property caused, directly or indirectly, in whole or in part, by ESCO, any Subcontractor, Supplier, or any other individual or entity directly or indirectly employed by any of them to perform any of the Work, or anyone for whose acts any of them may be liable, shall be remedied by ESCO.

F. ESCO's duties and responsibilities for safety and for protection of the Work shall continue until City files the Notice of Completion in accordance with Contract Documents.

7.23 Safety Representative.

A. ESCO shall designate an OSHA-certified and experienced safety representative at the Project site whose duties and responsibilities shall be the prevention of accidents and the maintaining and supervising of safety precautions and programs. ESCO shall provide City's Representative the name and contract information of the safety representative in writing. ESCO shall provide City's Representative the name and contact information of the safety representative in writing.

7.24 Hazard Communication Programs.

A. ESCO shall be responsible for coordinating any exchange of material safety data sheets or other hazard communication information required to be made available to or exchanged between or among employers at the Project site in accordance with Applicable Laws.

7.25 Emergencies.

A. In an emergency affecting safety of life or of Work or of adjoining property, ESCO, without special instruction or authorization from City, shall act to prevent such threatened loss or injury; and ESCO shall so act, without appeal, if directed or instructed by City. Any compensation claimed by ESCO on account of emergency work shall be determined in accordance with the Contract Documents.

7.26 Continuing The Work.

A. ESCO shall carry on the Work during negotiation of all Change Orders and all disputes or disagreements with City. No Work shall be delayed or postponed pending resolution of any Change Orders, disputes or disagreements, unless City and ESCO otherwise agree in writing.

7.27 Warranty.

A. The ESCO warrants that any and all materials, equipment and furnishings incorporated in the Project will be of good quality and new unless otherwise required or permitted by the Contract Documents and that all Work on the Project will be completed in accordance with the requirements of the Contract Documents, and will remain free of defects in workmanship and materials for a period of one (1) year from the date set forth on the certificates of Substantial Completion (the "Warranty Period"). Multiple certificates of Substantial Completion will be issued for segments of Work as set forth in the Scope of Work and the respective Warranty Periods for such segments of Work will be set forth in the certificates of Substantial Completion. The ESCO shall repair or replace any and all Work, together with any adjacent work that may have been damaged or displaced, which was not in accordance with the requirements of the Contract Documents, or that may be defective in its workmanship or material within the guarantee period specified in the Contract Documents, without any expense whatsoever to City; ordinary wear and tear and abuse excepted.

B. The foregoing warranty excludes acts of god, improper operation, or normal wear and tear under normal usage under the control of City. Such warranty shall exclude warranties relating to design, warranty of fitness, and any other express or implied warranties other than as set

forth herein or in the Contract Documents; provided, however, that the foregoing shall not impair the rights of City to maintain an action for breach of contract against the ESCO. Nothing contained in these Contract Documents pertaining to warranty shall be construed as limiting any other rights City may have at law, including rights for latent defects under Code of Civil Procedure Section 337.15.

- C. The ESCO further agrees, within thirty (30) Days, or as such shorter period as may be designated for emergency repairs, after being notified in writing by City, of any Work not in accordance with the requirements of the Contract Documents or any defects in the Work on the Project, that the ESCO shall commence and execute, with due diligence, all Work necessary to fulfill the terms of the guarantee. If City finds that the ESCO fails to cure or diligently commence to cure the identified defects in the Work, City may elect to have the Work completed at the ESCO's expense and the ESCO will pay costs of the Work upon demand. City will be entitled to all costs, including reasonable attorneys' fees and consultants' expenses necessarily incurred upon the ESCO's refusal to pay the above costs.
- D. Where Defective Work (or damage to other Work resulting therefrom) has been corrected or removed and replaced, the Warranty period hereunder with respect to such Work shall be extended for an additional period of one (1) year after such correction or removal and replacement has been satisfactorily completed.
- E. ESCO's obligations under this Article are in addition to any other obligation or warranty and do not limit City's rights and remedies pursuant to California Code of Civil Procedure sections 337.10 and 337.15. or any other Applicable Law.
- F. Notwithstanding the foregoing provisions, in the event of an emergency constituting an immediate hazard to health or safety of City employees, property, or licensees, City may undertake, at the ESCO's expense and without prior notice, all Work necessary to correct such condition(s) when it is caused by Work of the ESCO not being in accordance with the requirements of the Contract Documents.

#### 7.28 Superintendent.

- A. The ESCO shall employ a competent Superintendent satisfactory to City who shall be in attendance at the Project site at all times during the performance of the Construction Work. Superintendent shall represent the ESCO and communications given to, and received from, Superintendent shall be binding on the ESCO. Superintendent must be able to proficiently speak, read and write in English. Failure to maintain a Superintendent on the Project site at all times Work on the Project is in progress shall be considered a material breach of this Contract, entitling City to terminate the Contract or, alternatively, issue a Suspension Order until the Superintendent is on the Project site. If, by virtue of issuance of said Suspension Order, the ESCO fails to complete the Contract by the Project Completion Date, the ESCO will be assessed Liquidated Damages in accordance with the Contract.
- B. Any changes to the assignment of the Superintendent shall receive prior written approval from City. The Superintendent may not perform the work of any trade, pick up materials, or perform any work not directly related to the supervision and coordination of the Construction Work at the Project site when work is in progress. In addition, the ESCO will provide all key personnel identified in the Contract for the time periods stipulated.

7.29 Project Staffing.

- A. The ESCO and each Subcontractor shall: furnish a competent and adequate staff as necessary for the proper administration, coordination, supervision, and superintendence of its portion of the Work on the Project; organize the procurement of all materials and equipment so that the materials and equipment will be available at the time they are needed for the Work; and keep an adequate force of skilled and fit workers on the job to complete all Work on the Project in accordance with all requirements of the Contract.

City shall have the right, but not the obligation, to require the removal from the Project of the ESCO's Representative, or any other superintendent, staff member, agent, or employee of any contractor, Subcontractor, material or equipment supplier, or any other entity working on the Project. Removal may be required for any reason designated by City, including but not limited to, failure or refusal to perform Work on the Project in a manner acceptable to City, uncooperative or incompetent performance on the Project, threatening the adequate or timely completion of the Project, or threatening the safety of persons or property.

7.30 Compliance With State Storm Water Permit for Construction.

- A. Storm, surface, ground, nuisance, or other waters may be encountered at various times during the Work. ESCO hereby acknowledges that it has investigated the risk arising from such waters, has prepared its Proposal accordingly, and assumes any and all risks and liabilities arising therefrom.
- B. ESCO shall keep itself and all subcontractors, staff, and employees fully informed of and in compliance with all local, state and federal laws, rules and regulations that may impact, or be implicated by the performance of the Work including, without limitation, all applicable provisions of the City's ordinances regulating discharges of storm water; the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.); the California Porter-Cologne Water Quality Control Act (Water Code § 13000 et seq.); and any and all regulations, policies, or permits issued pursuant to any such authority. These include, but are not limited to California Regional Water Quality Control Boards (Santa Ana and San Diego Regions) Order No. R8-2009-0030 (NPDES Permit No. CAS 618030), Order No. R9-2009-0002, Order No. R8-2009-0045, Order No. R9-2013-0001 as amended by Order Nos. R9-2015-0001 and R9-2015-0100, and State Water Resources Control Board Order No. 2010-0014-DWQ, Order No. 2009-0009-DWQ, and Order No. 2012-0006-DWQ, and any amendment or renewal thereof.
- C. The ESCO shall be required to comply with all conditions of the State Water Resources Control Board National Pollutant Discharge Elimination System General Permit for Waste Discharge Requirements for Discharges of Stormwater Runoff Associated with Construction Activity ("Permit") for all construction activity which results in the disturbance of in excess of one acre of total land area or which is part of a larger common area of development or sale. The ESCO shall be responsible for filing the Notice of Intent and for obtaining the Permit. If applicable, the ESCO shall be solely responsible for preparing and implementing a Stormwater Pollution Prevention Plan ("SWPPP") prior to initiating work on the Project. It shall be the ESCO's responsibility to evaluate the cost of procuring the Permit and preparing the SWPPP as well as complying with the SWPPP and any necessary revision to the SWPPP to address storm water impacts. The ESCO shall comply with all requirements of the State Water Resources Control Board. The ESCO shall include all costs of compliance with specified requirements in the Price. For those Sites where construction activity results in the disturbance of less than one

acre of total land area and/or do not need coverage under the Permit, the ESCO shall be responsible for preparing and implementing an Erosion and Sediment Control Plan in accordance with California Regional Water Quality Control Board Order No. R8-2009-0030, Order No. R9-2013-0001 as amended by Order Nos. R9-2015-0001 and R9-2015-0100 and any amendment or renewal thereof.

- D. The ESCO shall be responsible for procuring, implementing and complying with the provisions of the Permit and the SWPPP, including the standard provisions, monitoring and reporting requirements as required by the Permit. The ESCO shall provide copies of all reports and monitoring information to the City's Representative. The ESCO shall comply with the lawful requirements of any applicable municipality, the County, drainage authority, and other local agencies regarding discharges of storm water to separate storm drain system or other watercourses under their jurisdiction, including applicable requirements in municipal storm water management programs.
- E. Failure to comply with laws, regulations, and ordinances listed in this Article is a violation of federal and state law. Notwithstanding any other indemnity contained in this Contract, ESCO agrees to indemnify and hold harmless the City, its officials, officers, agents, employees and authorized volunteers from and against any and all claims, demands, losses or liabilities of any kind or nature which the City, its officials, officers, agents, employees and authorized volunteers may sustain or incur for noncompliance with the laws, regulations, and ordinances listed above, arising out of or in connection with the Project, except for liability resulting from the sole established negligence, willful misconduct or active negligence of the City, its officials, officers, agents, employees or authorized volunteers. City reserves the right to defend any enforcement action or civil action brought against the City for ESCO's failure to comply with any applicable water quality law, regulation, or policy. ESCO hereby agrees to be bound by, and to reimburse the City for the costs associated with, any enforcement action and/or settlement reached between the City and any relevant enforcement entity.

The ESCO shall prepare and submit to City, during both the Construction Documents Phase and the Construction Phase, monthly reports on the Work accomplished during the prior monthly period. Such reports shall be prepared in a manner and in a format approved by City. Reports shall be furnished at the time of submission of each monthly application for payment. The monthly report shall also set forth the ESCO's projected progress for the forthcoming month.

The ESCO will cooperate with City in preparing, or causing to be prepared, all or part of, periodic project reports required by state or federal agencies.

- A. If the ESCO has knowledge that any actual or potential labor dispute is delaying, or threatens to delay, the timely performance of Work on the Project, the ESCO shall immediately give written notice including all relevant information to City.
- B. The ESCO agrees to insert the substance of this Article 7.36 in any subcontract to which a labor dispute may delay the timely performance of Work on the Project, except that each subcontract shall provide that in the event its timely performance is delayed or threatened by delay by any actual or potential labor dispute, the Subcontractor shall immediately notify the next higher tier Subcontractor or the ESCO, as the case may be, of all relevant information concerning the dispute.

7.34 Documents and Samples At Project Site.

A. The ESCO shall maintain the following at the Project site:

1. One current copy of the Contract Documents (including Construction Documents), in good order and marked to record current changes and selections made during construction.
2. One copy of the prevailing wage rates applicable to the Project.
3. The current accepted Project Schedule.
4. Shop Drawings, Product Data, and Samples.
5. All other required submittals.

7.35 Cutting, Fitting, and Patching.

A. The ESCO shall do all cutting, fitting, or patching work required to make all parts of the Project come together properly and to allow the Project to receive or be received by the work of Separate Contractors shown upon, or reasonably implied by, the Contract Documents. The ESCO shall not endanger the Project, or adjacent property by cutting, digging, or otherwise. The ESCO shall not cut or alter the work of any Separate Contractor without the prior written consent of City's Representative.

7.36 Access to Work.

A. City, City's Representative, their consultants, and other persons authorized by City will at all times have access to the Work on the Project wherever it is in preparation or progress. The ESCO shall provide safe and proper facilities for such access and for inspection.

7.37 Concealed Or Unknown Conditions.

A. If conditions are encountered at the Project Site which are (i) concealed physical conditions which differ materially from facts or information of which ESCO has actual knowledge or which are reasonably foreseen or inferable from such knowledge or (ii) unknown physical conditions, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, hereinafter ("Concealed Conditions"), then, ESCO shall give the City notice of such Concealed Conditions within three (3) Days in writing and City shall investigate the site conditions promptly after receiving the notice. If the conditions do materially differ and if they do actually cause an increase or decrease in Contractor's cost or the time required for performing any part of the Work, the parties shall negotiate a Change Order modifying Contract Terms to provide for the change in design details and to provide for an adjustment in the Guaranteed Maximum Price and/or Project Completion Date pursuant to Articles 10 and 11.

7.38 Liability for and Repair of Damaged Work.

A. Multiple certificates of Substantial Completion will be issued for segments of Work as set forth in the Scope of Work. ESCO shall be liable for any and all damages and losses to the Work (whether by fire, theft, vandalism, earthquake, flood or otherwise) prior to City's issuance of a

Certificate of Substantial Completion. Upon issuance of a Certificate of Substantial completion, Design-Builder shall be released from any damage and losses to that segment of Work identified in the Certificate of Substantial Completion.

7.39 Permits, Fees, and Notices.

- A. Except for the permits and approvals which are to be obtained on behalf of City or the requirements with respect to which City is not subject, the ESCO shall secure, and pay for, all other permits, approvals, government fees, licenses, and inspections necessary for the proper execution and performance of Work on the Project. The ESCO shall deliver to City all original licenses, permits, and approvals obtained by the ESCO in connection with Work on the Project prior to the final payment or upon termination of the Contract, whichever is earlier.

7.40 Environmental Quality Protection

A. Landscape and Vegetation Preservation

1. General. The ESCO shall exercise care to preserve the natural landscape and vegetation, and shall conduct operations so as to prevent unnecessary destruction, scarring, or defacing of the natural surroundings in the vicinity of the Work.
2. Damage and Restoration. Movement of crews and equipment within the rights-of-way and over routes provided for access to the Work shall be performed in a manner to prevent damage to property. When no longer required, construction roads shall be restored to original contours.
3. Upon completion of the Work, and following removal of construction facilities and required cleanup, land used for construction purposes and not required for the completed installation shall be scarified and regraded, as required, so that all surfaces are left in a condition that will facilitate natural revegetation, provide for proper drainage, and prevent erosion.

B. Protected Species

1. General. If, in the performance of the Work, evidence of the possible occurrence of any Federally listed threatened or endangered plant or animal is discovered, the ESCO shall notify the City Representative immediately, giving the location and nature of the findings. Written confirmation of the evidence, location and nature of the findings shall be forwarded to City within 2 Days.
2. Procedures. The ESCO shall immediately cease all construction activities in the immediate area of the discovery to the extent necessary to protect the endangered plant or animal.
3. If directed by the City Representative, ESCO will refrain from working in the immediate area, suspend the Work in its entirety, or alter its performance to ensure full compliance

with all applicable permits, laws and regulations. Any City directed changes to the Work as a result of a siting will be pursuant to the Contract Documents.

4. False Siting. Any costs or delays incurred by City or the ESCO due to unreasonable or false notification of an endangered plant or animal will be borne by the ESCO.

#### C. Preservation of Historical and Archeological Resources

1. General. If, in the performance of the Work, ESCO should unearth cultural resources (for example, human remains, animal bones, stone tools, artifacts and/or midden deposits) through excavation, grading, watering or other means, the ESCO notify the Construction/Archeological Monitor and/or the City Representative immediately, giving the location and nature of the findings. Written confirmation of the evidence, location and nature of the findings shall be forwarded to the Construction/Archeological Monitor and/or City within 2 Days.
2. Procedures. The ESCO shall immediately cease all construction activities in the immediate area of the discovery to the extent necessary to protect the cultural resource.
3. If directed by the City Representative, ESCO will refrain from working in the immediate area, suspend the Work in its entirety, or re-sequence and/or alter its performance to ensure full compliance with all applicable permits, laws and regulations. Should the presence of cultural resources be confirmed, the ESCO will assist the City Representative and the Construction/Archeological Monitor in the preparation and implementation of a data recovery plan. The ESCO shall provide such cooperation and assistance as may be necessary to preserve the cultural resources for removal or other disposition. Any City directed changes to the Work as a result of the cultural resource will be pursuant to the Contract Documents.
4. ESCO's Liability. Should ESCO, without permission, injure, destroy, excavate, appropriate, or remove any cultural resource on or adjacent to the Site, it will be subject to disciplinary action, arrest and penalty under applicable law. The ESCO shall be principally responsible for all costs of mitigation and/or restoration of cultural resources related to the unauthorized actions identified above. ESCO shall be required to pay for unauthorized damage and mitigation costs to cultural resources (historical and archeological resources) as a result of unauthorized activities that damage cultural resources and shall indemnify City pursuant to the Contract Documents.

#### 7.41 Cybersecurity

- A. For the avoidance of doubt, ESCO is not responsible for implementing or maintaining a security program to safeguard and protect the City's computer network, systems, machines, and/or data (collectively, "Systems"), including those Systems on which it runs the Deliverables provided by ESCO, against Cyber Threats ("Security Program"). "Cyber Threat" means any circumstance or event with the potential to adversely impact, compromise, damage, or disrupt the City's or the end user's Systems or that may result in any unauthorized access, acquisition, loss, misuse, destruction, disclosure, and/or modification of the City's Systems, including through malware, hacking, or similar attacks. Failure by the City to maintain an appropriate Security Program in accordance with industry standards may result in the Deliverables or Systems becoming vulnerable to certain Cyber Threats or result in



impaired functionality, and ESCO shall not be liable or responsible for any losses or damages that may result.

7.42 Technical Manuals; Spare Parts.

- A. The ESCO shall submit technical operation and maintenance information for each item of mechanical, electrical and instrumentation equipment in an organized manner in the Technical Manual. It shall be written so that it can be used and understood by City's operation and maintenance staff. The ESCO shall furnish to City six (6) identical Technical Manuals. Each set shall consist of one or more volumes, each of which shall be bound in a standard binder.
- B. The ESCO shall furnish to City six (6) identical sets of spare parts information for all mechanical, electrical, and instrumentation equipment. The spare parts list shall include the current list price of each spare part. The spare parts list shall include those spare parts which each manufacturer recommends be maintained by City in inventory. Each manufacturer or supplier shall indicate the name, address, and telephone number of its nearest outlet of spare parts to assist City in ordering. The ESCO shall cross-reference all spare parts lists to the equipment numbers designated in the Contract Documents. The spare parts lists shall be bound in standard size, 3-ring binder.

**ARTICLE 8: OTHER WORK AT THE PROJECT SITE**

8.1 Related Work At Project Site.

- A. Nothing contained in the Contract Documents shall be interpreted as granting to ESCO exclusive occupancy at the Project site. City reserves the right to award separate contracts for, or to perform with its own forces, construction or operations related to the Work or other construction or operations at or affecting the Project site, including portions of Work on the Project which have been deleted by Change Order. The ESCO shall cooperate with City's employees or through other direct contracts, or have other work performed by utility owners (collectively, "Other Contractors"). If such other work is not noted in the Contract Documents, then written notice thereof will be given to the ESCO prior to starting any such other work. The ESCO shall participate with City and Separate Contractors in joint review of construction schedules and Project requirements when directed to do so. The ESCO shall make necessary revisions to the Project Schedule after such joint review.
- B. ESCO shall be solely responsible for all costs associated with coordinating its Work with Separate Contractors. ESCO shall not be entitled to additional compensation from City for damages resulting from such simultaneous, collateral, and essential Work. If necessary to avoid or minimize such damage or delay, ESCO shall redeploy its work forces to other parts of the Work, or adjust its Work schedule including reasonable acceleration of the Work. If a portion of the Work on the Project is dependent upon the proper execution or results of other construction or operations by City or Separate Contractors, the ESCO shall inspect such other design or construction or operations before proceeding with that portion of the Work on the Project. The ESCO shall promptly report to City's Representative apparent discrepancies or defects which render the other design, construction or operations unsuitable to receive the Work on the Project. Unless otherwise directed by City's Representative, the ESCO shall not proceed with the portion of the Work on the Project affected until apparent discrepancies or defects have been corrected. Failure of the ESCO to so report within a reasonable time after discovering

such discrepancies or defects shall constitute an acknowledgment that the other construction or operations by City or Separate Contractors is suitable to receive the Work on the Project, except as to defects not then reasonably discoverable.

- C. ESCO shall afford each Separate Contractor proper and safe access to the Project site, provide a reasonable opportunity for the introduction and storage of materials and equipment and the execution of such other work, and properly coordinate the Work with theirs. ESCO shall do all cutting, fitting, and patching of the Work that may be required to properly connect or otherwise make its several parts come together and properly integrate with such other work. ESCO shall not endanger any work of others by cutting, excavating, or otherwise altering such work; provided, however, that ESCO may cut or alter others' work with the written consent of City's Representative and the others whose work will be affected.
- D. If the proper execution or results of any part of ESCO's Work depends upon work performed by Separate Contractors, ESCO shall inspect such other work and promptly report to City's Representative in writing any delays, defects, or deficiencies in such other work that render it unavailable or unsuitable for the proper execution and results of ESCO's Work. ESCO's failure to so report will constitute an acceptance of such other work as fit and proper for integration with ESCO's Work except for latent defects and deficiencies in such other work.
- E. If any claims are made by Separate Contractors arising out of ESCO's performance of the Work, ESCO shall be responsible to immediately resolve the dispute and indemnify City pursuant to the Contract Documents.
- F. City's Representative shall arrange meetings with Separate Contractors performing work to plan coordination of construction activities but will not be responsible to direct coordination efforts. Any difference or conflict arising between ESCO and any Separate Contractor shall be submitted to City's Representative for a decision in the matter. ESCO shall comply with direction from City's Representative whose decision on coordination matters will be final.

## 8.2 For Delays by Others.

- A. By entering into this Contract, ESCO acknowledges that there may be Separate Contractors on the Project site whose work will be coordinated with that of ESCO. ESCO expressly warrants and agrees that ESCO will cooperate with Separate Contractors and will do nothing to delay, hinder, or interfere with the work of Separate Contractors, City, or City's Representative. ESCO also expressly agrees that, in the event its Work is hindered, delayed, interfered with, or otherwise affected by a Separate Contractor, its sole remedy will be a direct action against the Separate Contractor. ESCO will have no remedy, and hereby expressly waives any remedy, against City or City's Representative on account of delay, hindrance, interference, or other event caused by Separate Contractor.

## 8.3 ESCO's Delay Or Damage.

- A. ESCO shall be liable to City and any Separate Contractor for the direct delay and disruption costs or damages incurred by such Separate Contractor as a result of ESCO's wrongful action or inactions.

## **ARTICLE 9: SUBCONTRACTORS**

### **9.1 Award of Subcontracts and Other Contracts for Portions of The Work.**

- A. The ESCO shall not, without the consent of City: substitute any person or entity as a Subcontractor in place of the Subcontractor designated in the Proposal; or permit any such Subcontractor to be assigned or transferred, or allow it to be performed by any person or entity other than the original Subcontractor listed in the Proposal, without written notification to City. Any assignment or substitution made without the prior written consent of the awarding authority or not in compliance with the Subletting and Subcontracting Fair Practices Act shall be void, and the assignees shall acquire no rights in the Contract. Any consent, if given, shall not relieve the ESCO or its Subcontractors from their obligations under the terms of the Contract. All requests by the ESCO for substitution will be handled through City's Representative.
- B. The ESCO shall submit to City's Representative after selecting Subcontractors, an updated expanded list of Subcontractors, along with their respective addresses, telephone numbers, e-mail addresses and contractor's license numbers. The expanded list of Subcontractors shall be provided and/or updated no later than ten (10) Days after the date which the ESCO awards a contract for any portion of the Work to a Subcontractor not originally listed in the ESCO's Proposal.
- C. Any increase in the cost of the Work on the Project resulting from the replacement or substitution of a Subcontractor pursuant to this Article, shall be borne solely by the ESCO. The ESCO shall not be entitled to any increase in Guaranteed Maximum Price or an extension of Project Completion Date due to such replacement or substitution, unless such a substitution is required by City. In that case, ESCO may be entitled to increases in the Contract Price and/or extension of time.
- D. Any part of the Work on the Project performed for the ESCO by a Subcontractor shall be pursuant to a written subcontract. Each such subcontract shall require the Subcontractor, to the extent of the work to be performed by the Subcontractor, to be bound to the ESCO by the terms of the Contract Documents, to assume toward the ESCO all the obligations and responsibilities which the ESCO assumes towards the City by the Contract Documents, and to perform such portion of the work on the Project in accordance with the Contract Documents. Each such subcontract shall preserve and protect the rights of the City under the Contract Documents, with respect to the work to be performed by Subcontractor, so that subcontracting thereof will not prejudice such rights. The ESCO is responsible for reviewing and coordinating the Work of and among his Subcontractors and Design Professionals. This review and coordination includes, but is not limited to, resolution of any inconsistencies, errors or omissions.

## **ARTICLE 10: CHANGE IN GUARANTEED MAXIMUM PRICE; CHANGE IN CONTRACT TIMES**

### **10.1 Contract Change Orders.**

- A. City, without invalidating the Contract, may order changes in the work consisting of additions, deletions or other revisions, and the Guaranteed Maximum Price and/or Contract Time shall be adjusted accordingly. All such changes in the Work shall be authorized by written Change Order and shall be performed under the applicable conditions of the Contract Documents. A

Change Order signed by the ESCO indicates the ESCO's agreement therewith, including any adjustment in the Guaranteed Maximum Price and/or Contract Time, and the full and final settlement of all costs (direct, indirect and overhead) related to the work authorized by the Change Order. No changes in the Work covered by this Contract shall exonerate any surety or any bond given in connection with this Contract. Both Parties agree to act in good faith and promptly when considering a Change Order requested by the other party but neither party is obligated to execute a Change Order. No dispute, disagreement or failure of the Parties to reach agreement on the terms of a Change Order shall relieve the ESCO from the obligation to proceed with performance of the changed work promptly and expeditiously. Whenever any change is made as provided for herein, such change shall be considered and treated as though originally included in the Contract Documents, and shall be subject to all terms, conditions and provisions of the original Contract Documents.

- B. ESCO shall promptly execute changes in the Work as directed in writing by City even when the parties have not reached agreement on whether the change increases the scope of Work or affects the Guaranteed Maximum Price or Contract Time, if any. All claims for additional compensation to the ESCO shall be presented in writing. In the event the parties cannot reach agreement on the terms of a Change Order then the parties can submit the claim for dispute resolution. No claim will be considered after the work in question has been done unless a written Change Order has been issued or a timely written notice of claim has been made by ESCO. ESCO shall not be entitled to claim or bring suit for damages, whether for loss of profits or otherwise, on account of any decrease or omission of any item or portion of Work to be done.

## 10.2 Contract Change Order Procedures.

### A. City Directive

1. The City may direct changes in the Work, including deletion of Work, by delivering a written work directive. To the extent the work directive results in a change to the Guaranteed Maximum Price and/or Contract Time, ESCO must timely submit a Change Order Request and comply with all Change Order procedures in accordance with this Article. ESCO's failure to timely submit a Change Order Request shall constitute a waiver by ESCO of any adjustment to the Guaranteed Maximum Price and/or Contract Time for work performed under the directive. The City shall not be liable to ESCO for work performed or omitted by ESCO in reliance on verbal orders.
2. The City shall have the right to order changes in the Work by a unilateral Change Order setting forth the City's determination of the reasonable additions or savings in the Guaranteed Maximum Price and/or Contract Time.

### B. ESCO Change Order Requests

1. The ESCO agrees that one of the purposes of the Contract is to minimize the risk for Change Orders and reduce the likelihood of Change Orders. Change Order Requests shall be kept to a minimum.
2. The ESCO may request changes to the Guaranteed Maximum Price and/or Contract Time for City directed changes in the Work or for Additional Work or Excusable Delays to completion of the Project caused by the acts, errors, or omissions of the City, or caused by

unforeseen or Concealed Conditions if, and only if, the ESCO follows the procedures specified in this Article . Any Work necessary to achieve the agreed upon energy savings and that the ESCO should have reasonably foreseen and included in the Construction Documents, and/or any Work resulting from ambiguities in the Design and Construction Documents shall not be considered Additional Work and the City will not issue a Change Order for said work.

3. If ESCO intends to initiate a Change Order Request, then ESCO shall provide the City with written notice of the underlying facts and circumstances that give rise to the proposed change. ESCO shall submit the notice of change/delay prior to performance of the work and no later than five (5) business Days after the City's work directive or ESCO discovers the circumstances causing the need for the Change Order. A Change Order Request will only be deemed timely submitted if it is submitted prior to incurring any expense and within fourteen (14) Days from ESCO's notice of change/delay.
4. A Change Order Request must state that it is a Change Order Request, state and justify the reason for the request, and specify the amount of any requested adjustment to the Guaranteed Maximum Price and/or Contract Time, if any. The Change Order Request shall include all of the following information (unless inapplicable to the change): A detailed description of the circumstances giving rise to the request; A complete itemized cost proposal, including itemized pricing for Reimbursable Costs; Supporting documentation for all costs; A time impact analysis showing the impact of the delay to the critical path to completion; If any added costs or information cannot be determined at the time of the Change Order Request, the reason the costs or information cannot be determined at the time; and Certification to the accuracy of the Change Order Request under penalty of perjury. The time impact analysis shall be in the critical path method format and shall show the sequencing of all critical and non-critical new activities and/or activity revisions affected by the delay, with logic ties to all affected existing activities noted on the schedule. The City may demand, and ESCO shall provide, any additional information supporting the Change Order Request, including but not limited to native electronic format version of schedules and time impact analyses. ESCO shall provide the requested additional information within five (5) Days of the request.
5. If the City denies the Change Order Request or disagrees with the proposal submitted by ESCO, it will notify the ESCO, and the City will provide its opinion of the appropriate change to the Guaranteed Maximum Price and/or Contract Time. If no agreement can be reached, the City shall have the right to order the work by a unilateral Change Order setting forth the City's determination of the reasonable additions or savings in the Guaranteed Maximum Price and/or Contract Time, if any. The City's determination shall become final and binding if the ESCO fails to submit a Claim in writing to the City within fourteen (14) Days of the issuance of the unilateral Change Order, disputing the terms of the unilateral Change Order and providing such supporting documentation for its position as the City may reasonably require. If the Change Order includes additions to the Work to be performed, the City shall continue to pay ESCO in accordance with the City's determination of the addition to the GMP, subject to resolution of the Dispute pursuant to Article 15.

C. Change Order Format

1. The City may designate the forms to be used for notices, Change Order Requests, and Change Orders. If so designated, ESCO may only use such forms. ESCO shall not reserve a right to assert impact costs, extended job site costs, extended overhead, constructive acceleration and/or actual acceleration beyond what is stated in the Change Order. No Claims shall be allowed for impact, extended overhead costs, constructive acceleration and/or actual acceleration due to a multiplicity of changes and/or clarifications. The ESCO may not change or modify the City's Change Order form in an attempt to reserve additional rights.

10.3 Determining Adjustments to Compensation.

- A. Limitation on Costs. ESCO shall not be entitled to any compensation for Work subject to a Change Order except as expressly set forth in this Article. The mark-up added in instances of Additional Work shall be mutually acceptable, negotiated in good faith between the City and ESCO, and shall constitute the entire amount of profit, any mark-ups, any field or home office overhead costs, including personnel, equipment or office space, any materials, or any costs of equipment idle time for such Work.
- B. Lump Sum Change Orders. Whenever possible, any changes affecting compensation shall be in a lump sum mutually agreed by the ESCO and the Agency.
- C. Time and Materials Change Orders. The Agency may direct the ESCO to proceed with the Additional Work with payment to be made on the basis of actual cost of the labor and materials required to complete the Additional Work. If the Project is federally funded, a time and materials Change Order shall only be issued after a determination that no other Change Order is suitable and the Change Order shall include a ceiling price that the ESCO exceeds at its own risk.
- D. Allowed Costs. Estimates for lump sum quotations and accounting for time-and-material work shall be limited to direct expenditures necessitated specifically by the change and shall be segregated as follows
  1. Labor. The costs of labor will be the actual cost for wages prevailing locally for each craft or type of worker at the time the Additional Work is done, plus employer payments of payroll taxes and insurance, health and welfare, pension, vacation, apprenticeship funds, and other direct costs resulting from federal, state or local laws, as well as assessment or benefits required by lawful collective bargaining agreements. The use of a labor classification which would increase the Additional Work cost will not be permitted unless the ESCO establishes the necessity for such additional costs. Labor costs for equipment operators and helpers shall be reported only when such costs are not included in the invoice for equipment rental.
  2. Materials. The cost of materials reported shall be at the lowest current price at which such materials are locally available in the quantities involved, plus sales tax, freight and delivery. Materials costs shall be based upon supplier or manufacturer's invoice.
  3. Tool and Equipment Use. Regardless of ownership, the rates to be used in determining equipment use shall not exceed listed rates prevailing locally at equipment rental agencies,

or distributors, at the time the work is performed. The ESCO shall furnish cost data supporting the establishment of the rental rate. The rental rate to be applied for use of each item of equipment shall be the rate resulting in the least total cost to the Agency for the total period of use. The Agency shall make the final determination as to an equitable rental rate for the equipment. No payment will be made for the use of small tools, which have a replacement value of \$1,000 or less.

- a. The rental time to be paid for equipment shall be the time the equipment is in productive operation on the Additional Work being performed. Rental time will not be allowed while equipment is inoperative due to breakdowns.
  - b. All equipment shall, in the opinion of the Agency, be in good working condition and suitable for the purpose for which the equipment is to be used. Equipment with no direct power unit shall be powered by a unit of at least the minimum rating recommended by the manufacturer.
  - c. Before construction equipment is used on any Additional Work, the ESCO shall plainly stencil or stamp an identifying number thereon at a conspicuous location, and shall furnish to the Agency, in duplicate, a description of the equipment and its identifying number.
  - d. When hourly rates are listed, any part of an hour less than 30 minutes of operation shall be considered to be 1/2-hour of operation, and any part of an hour greater than 30 minutes will be considered one hour of operation. When daily rates are listed, any part of a day less than 4 hours operation shall be considered to be 1/2-day of operation.
4. Allowed Mark-up. The allowed mark-up for any and all overhead (including supervision and home and field office costs) and profit on work added to the Contract shall be determined in accordance with the following provisions:
- a. "Net Cost" is defined as the actual costs of labor, materials and tools and equipment only, excluding overhead and profit. The costs of applicable insurance and bond premium will be reimbursed to the ESCO and Subcontractors at cost only, without mark-up. ESCO shall provide the Agency with documentation of the costs, including but not limited to payroll records, invoices, and such other information as the Agency may reasonably request.
  - b. For Work performed by the ESCO's forces the allowed mark-up for overhead and profit combined shall not exceed twenty-five (25%) percent of labor costs, twenty-five percent (25%) of material costs, and twenty-five percent (25%) of the cost of tools and equipment use.
  - c. For Work performed by a Subcontractor, the added cost for overhead and profit shall not exceed ten percent (10%) of the Subcontractor's Net Cost of the Work to which the ESCO may add up to fifteen percent (15%) of the Subcontractor's Net Cost.
  - d. For Work performed by a sub-subcontractor, the added cost for overhead and profit shall not exceed five percent (5%) of the sub-subcontractor's Net Cost for Work to which the Subcontractor may add up to an additional five percent (5%) and ESCO

may add up to an additional fifteen percent (15%) of the Net Cost of the lower tier subcontractor.

- e. No additional mark-up will be allowed for lower tier subcontractors, and in no case shall the added cost for overhead and profit payable by the Agency exceed twenty-five percent (25%) of the Net Cost as defined herein, of the party that performs the Work.

5. Documentation of Time-and-Material Costs.

- a. T&M Daily Sheets. ESCO must submit timesheets, materials invoices, records of equipment hours, and records of rental equipment hours to the Agency's for an approval signature each day that Work is performed on a time-and-material basis. The Engineer's signature on time sheets only serves as verification that the Work was performed and is not indicative of the Agency's agreement to ESCO's entitlement to the cost.
- b. T&M Summary Sheet. ESCO shall submit a T&M Summary Sheet, which shall include total actual costs, within five (5) Days following completion of Additional Work on a time-and-material basis. ESCO's total actual cost shall be presented in a summary table in an electronic spreadsheet file by labor, material, equipment, and any other costs, along with documentation supporting the costs. ESCO's failure to submit the T&M Summary Sheet within five (5) Days of completion of the Additional Work will result in ESCO's waiver for any reimbursement of any costs associated with the Additional Work.
- c. Excluded Costs. The following costs or any other home or field office overhead costs, all of which are to be considered administrative costs covered by the ESCO's mark-up, shall not be allowed costs and shall not be included in any lump sum proposals or time-and-materials invoices:
  - d. Overhead Cost. Payroll costs and other compensation of ESCO's officers, executives, principals, general managers, engineers, architects, estimators, attorneys, auditors, accountants, purchasing and contracting agents, timekeepers, clerks, and other personnel employed by ESCO whether at the Site or in ESCO's principal office or any branch office, material yard, or shop for general administration of the Work;
- e. Office Expenses. Expenses of ESCO's principal and branch offices;
- f. Capital Expenses. Any part of ESCO's capital expenses, including interest on ESCO's capital employed for the Additional Work and charges against ESCO for delinquent payments;
- g. Negligence. Costs due to the negligence of ESCO or any Subcontractor or Supplier, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable, including without limitation the correction of Defective Work, disposal of materials or equipment wrongly supplied, and making good any damage to property;
- h. Small Tools. Cost of small tools valued at less than \$1,000 and that remain the property of ESCO;



- i. Administrative Costs. Costs associated with the preparation of Change Orders (whether or not ultimately authorized), cost estimates, or the preparation or filing of Claims;
- j. Anticipated Lost Profits. Expenses of ESCO associated with anticipated lost profits or lost revenues, lost income or earnings, lost interest on earnings, or unpaid retention;
- k. Home Office Overhead. Costs derived from the computation of a “home office overhead” rate by application of the Eichleay, Allegheny, burden fluctuation, or other similar methods;
- l. Special Consultants and Attorneys. Costs of special consultants or attorneys, whether or not in the direct employ of ESCO, employed for services specifically related to the resolution of a Claim, dispute, or other matter arising out of or relating to the performance of the Additional Work.
- m. Other. Other overhead or general expense costs of any kind and the cost of any item not specifically and expressly included in the Contract Documents; including but not limited to: submittals, drawings, field drawings, shop drawings, including submissions of drawings; field inspection; general superintendence; computer services; reproduction services; salaries of project engineer, superintendent, timekeeper, storekeeper, and secretaries; janitorial services; small tools, incidentals and consumables; temporary on-site facilities (offices, telephones, high speed internet access, plumbing, electrical power, lighting; platforms, fencing, water); surveying; estimating; protection of work; handling and disposal fees; final cleanup; other incidental work; related warranties; insurance and bond premiums.

#### 10.4 ESCO’s Waiver of Further Relief.

- A. **ESCO’S FAILURE TO PROVIDE A COMPLETE AND TIMELY NOTICE OF A CHANGE ORDER REQUEST OR TO COMPLY WITH ANY OTHER REQUIREMENT OF THIS ARTICLE, SHALL CONSTITUTE A WAIVER BY ESCO OF THE RIGHT TO AN ADJUSTMENT OF THE GUARANTEED MAXIMUM PRICE AND/OR PROJECT COMPLETION DATE ON ACCOUNT OF SUCH CIRCUMSTANCES AND A WAIVER OF ANY RIGHT TO FURTHER RECOURSE OR RECOVERY BY REASON OF OR RELATED TO SUCH CHANGE BY MEANS OF THE CLAIMS DISPUTE RESOLUTION PROCESS OR BY ANY OTHER LEGAL PROCESS OTHERWISE PROVIDED FOR UNDER APPLICABLE LAWS.**
- B. ESCO recognizes and acknowledges that timely submission of a formal written notice of change/delay and Change Order Request, whether or not the circumstances of the change may be known to the City or available to the City through other means, is not a mere formality but is of crucial importance to the ability of the City to promptly identify, prioritize, evaluate and mitigate the potential effects of changes. Any form of informal notice, whether verbal or written (including, without limitation, statements in requests for information, statements in Submittals, statements at any job meeting or entries on monthly reports, daily logs or job meeting minutes), that does not strictly comply with the formal requirements of this Article, shall accordingly be insufficient.

#### 10.5 Materials and Equipment.

- A. Notwithstanding anything to the contrary contained herein, where the cost for materials or equipment from an Equipment Manufacturer or Supplier increases or decreases greater than five percent (5%) from the NTP Date by no fault of the ESCO, ESCO shall submit a Change Order request to City for an adjustment to the Contract Price for (i) costs that it incurs directly arising out of or relate to said increase in pricing by the Equipment Manufacturer or Supplier or (ii) a deduction in the Contract price to reflect said decrease in costs. In the case that the cost of materials or equipment increases greater than five percent (5%) from the NTP Date, ESCO agrees that overhead and profit will not be applied to that portion of the cost of materials or equipment that exceeds the original cost set forth at the time the NTP is issued. .. City, at its sole option, may reject the Change Order and terminate the Contract for convenience.
- B. In the event of a delay in acquiring said equipment or materials from an Equipment Manufacturer or Supplier and the ESCO can demonstrate conditions 1 through 9 of Section 11.3(A) in the General Conditions, it shall be considered as an Excusable Delay and the Project Completion Date will be extended. Design Build Entity shall not be held to contractual sanctions (including without limitation delay penalties, liquidated damages or other damages) or termination for default for such a Excusable Delay. In the case of the foregoing, the Parties shall negotiate in good faith to execute a Change Order. ESCO shall exercise all reasonable diligence, and the City shall cooperate with ESCO, to ensure said equipment and materials are ordered in a timely manner to prevent an increase to the Contract Price or extend the Project Completion Date.

#### 10.6 City Reservation of Rights.

- A. By signing the Contract, the parties agree that City has the right to do any or all of the following, which are reasonable and within the contemplation of the parties:
  1. To order changes in the Work, including without limitation: Changes to correct errors or omissions caused by City, if any, in the Contract Documents; Changes resulting from City's decision to change the Work subsequent to execution of the Contract; and Changes due to unforeseen conditions.
  2. To suspend Work on the Project or any part thereof.
  3. To delay Work on the Project, including without limitation, delays resulting from the failure of City or City's Representative to timely perform any Contract obligation and delays for City's convenience.
- B. If the City exercises any or all of the rights contained herein then ESCO shall be entitled to an equitable adjustment in the Guaranteed Maximum Price and Contract Time.
- C.. If the City suspends Work for a period of time in excess of 180 days then ESCO shall have the right to terminate the contract and City shall compensate ESCO for all work performed up to the time of termination plus reasonable termination and demobilization costs.

## ARTICLE 11: PROJECT COMPLETION DATE

### 11.1 Progress and Completion.

#### A. By signing the Contract:

1. The ESCO represents to City that the Project Completion Date is reasonable for performing the Work and that the ESCO is able to perform and complete the Work within the Project Completion Date.
2. The ESCO agrees that City is purchasing the right to have the ESCO present on the Project for the full duration of the time period necessary to complete the Work.

#### B. The ESCO shall not, except by agreement or instruction of City in writing, commence operations on the Project site or elsewhere prior to the effective date of insurance required by to be furnished by the ESCO. The date of commencement and the Project Completion Date shall not be changed by the effective date of such insurance.

#### C. The ESCO shall proceed expeditiously with adequate forces and shall achieve full completion of the Work by the Project Completion Date. If City's Representative determines and notifies the ESCO that the ESCO's progress is such that the ESCO will not achieve full completion of the Work by the Project Completion Date, the ESCO shall immediately and at no additional cost to City, take all measures necessary, including working such overtime, additional shifts, Sundays, or holidays as may be required to ensure that the entire Project is completed within the Project Completion Date. Upon receipt of such notice from City's representative, the ESCO shall immediately notify City's Representative of all measures to be taken to ensure full completion of the Work within the Project Completion Date.

### 11.2 Delay.

#### A. There are two kinds of delay, Excusable Delay (which may be compensable or non-compensable) and Unexcusable Delay. Only Excusable Delay, that meets the requirements specified herein may result in the adjustment of the Project Completion Date, and/or the Guaranteed Maximum Price. All other delay(s) are Unexcusable, and except and only to the extent provided otherwise in Articles 10 and 11, by signing the Contract, the ESCO agrees: to bear the risk of non-compensable and Unexcusable Delays to completion of the Work on the Project and that the Proposal was made with full knowledge of this risk.

#### B. In agreeing to bear the risk of Unexcusable Delays to completion of the Work on the Project, the ESCO understands that, except and only to the extent provided otherwise in Articles 10 and 11, the occurrence of events that result in any delay in completion of the Work on the Project shall not excuse the ESCO from its obligation to achieve full completion of the Work on the Project within the Project Completion Date, and shall not entitle the ESCO to an adjustment of the Guaranteed Maximum Price.

### 11.3 Adjustment of The Project Completion Date for Excusable Delay.

#### A. The Project Completion Date will be extended for an Excusable Delay, if and only if, the ESCO demonstrates that all of the following conditions are met:

1. When the event causing the delay commences, the ESCO has complied with all Contract requirements for maintaining, submitting, and updating Project Schedules.
2. The delay is critical. A delay is critical if and only to the extent it delays a Work activity that cannot be delayed without delaying completion of the entire Project beyond the Project Completion Date. Additionally:
3. If the Project Schedule shows completion of the Project before the Project Completion Date, a delay is critical if and only to the extent the delay pushes completion of the entire project to a date that is beyond the Project Completion Date.
4. When two or more delays occur concurrently, and each such concurrent delay by itself without consideration of the other delays would be critical, then all such concurrent delays shall be considered critical. For the purpose of determining whether and to what extent the Project Completion Date should be adjusted pursuant to Article 10.4B, such concurrent critical delays shall be treated as a single delay which commences at the start of the delay that begins first and terminates at the cessation of the delay that ends last.
5. The delay is supported by the Project Schedule (or, if appropriate, the Preliminary Schedule), current at the commencement of the event giving rise to the delay. A delay is supported only to the extent the Project Schedule (or, if appropriate, the Preliminary Schedule) corroborates that it causes a delay to completion of the entire Project beyond the Project Completion Date because of its effect on the operation referred to in Article 11.4A(2).
6. Within fourteen (14) Days of the date the ESCO discovers or reasonably should discover an act, error, omission or unforeseen condition causing the delay, (even if the ESCO has not been delayed when the ESCO discovers or reasonably should discover the act, error, omission or unforeseen condition giving rise to the delay) the ESCO submits a timely Change Order Request that meets the requirements of Article 10.
7. The delay is not caused by:
  - a. The financial inability, negligence or fault of the ESCO, a Subcontractor or supplier; or
  - b. An error or omission in the Contract Documents caused by the ESCO or the ESCO's design consultants.
8. The delay arises from causes beyond the control of ESCO. Examples of these causes are: : Fire; Strikes, boycotts, or like obstructive actions by employees or labor organizations; Acts of God, including earthquakes in excess of a magnitude of 3.5 on the Richter Scale, tidal waves, floods, unusually severe weather, pandemic, quarantine restrictions, epidemic, or other severe natural disaster; A man made (not naturally occurring) unforeseen site condition such as buried utility lines, pipes, and the like; An error or omission in the Contract Documents caused by City; City's decision to change the Work, where such decision is not the result of any default or misconduct of the ESCO; City's decision to suspend the Work on the Project, where such decision is not the result of any default or misconduct of the ESCO; or The failure of City, City's representative or a Separate

Contractor to timely perform any Contract obligation unless such failure is due to the ESCO's default or misconduct.

- B. If and only if a delay meets all conditions prescribed in this Article, then the Project Completion Date will be extended by the number of days completion of the entire Project is delayed beyond the Project Completion Date for full completion of the Work on the Project.
- C. If for any reason one or more of the conditions prescribed in this Article held legally unenforceable, then all remaining conditions must be met as a condition to obtaining an extension of the Project Completion Date.

#### 11.4 Compensation for Excusable Delay

- A. City's liability to ESCO for delays for which the City is responsible shall be limited to only an extension of time unless such delays were unreasonable under the circumstances. In no case shall the City be liable for any costs which are borne by the ESCO in the regular course of business, including, but not limited to, home office overhead and other ongoing costs. The Contract Price shall be equitably adjusted to cover damages caused by unreasonable City delay that impacts the critical path, including delays caused by items that are the responsibility of City pursuant to Government Code section 4215..
- B. ESCO shall be deemed to waive any right to delay damages unless: ESCO complies with all requirements of the Contract for providing timely notice to the City and timely requests for adjustments to the Price and/or Guaranteed Completion Date and ESCO meets all conditions of an Excusable Delay and is granted an extension of the Guaranteed Completion Date.

#### 11.5 Waiver

- A. A waiver of, or failure by, the City or the City's Representative to enforce any requirement in this Article, including without limitation the requirements of an Excusable Delay, in connection with any or all past delays shall not constitute a waiver of, and shall not preclude the City from enforcing, such requirements in connection with any present or future delays. The ESCO agrees and understands that no oral approval, either express or implied, of any time extension by the City or its agents shall be binding upon the City unless and until such approval is ratified by execution of a written Change Order.
- B. City and City's Representative, and the officers, directors, members, partners, employees, agents, consultants, or subcontractors of each of them, shall not be liable to ESCO for any claims, costs, losses, or damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) sustained by ESCO on or in connection with any other project or anticipated project.

**ARTICLE 12: TEST AND INSPECTIONS; CORRECTION, REMOVAL, OR ACCEPTANCE OF DEFECTIVE WORK; NOTICE OF DEFECTS**

12.1 Notice of Defective Work.

- A. Prompt notice of all Defective Work of which City or City's Representative has actual knowledge will be given to ESCO. Defective Work may be rejected, corrected, or accepted as provided in the Contract Documents.

12.2 Access to Work.

- A. City, City's Representative, their consultants and other representatives and personnel, independent testing laboratories, and governmental agencies with jurisdictional interests will have access to the Project site and the Work at reasonable times for their observation, inspection, and testing. ESCO shall provide them proper and safe conditions for such access and advise them of ESCO's safety procedures and programs.

12.3 Tests and Inspections.

- A. ESCO shall give City's Representative timely notice of readiness of the Work for all required inspections, tests, or approvals and shall cooperate with inspection and testing personnel to facilitate required inspections or tests.
- B. Except as provided by the Contract Documents, City shall employ and pay for the services of an independent testing laboratory to perform all inspections, tests, or approvals required by the Contract Documents.
- C. If Applicable Laws of any public body having jurisdiction require any Work (or part thereof) specifically to be inspected, tested, or approved by an employee or other representative of such public body, ESCO shall assume full responsibility for arranging and obtaining such inspections, tests, or approvals, pay all costs in connection therewith, and furnish City's Representative the required certificates of inspection or approval.
- D. ESCO shall be responsible for arranging and obtaining and shall pay all costs in connection with any inspections, tests, or approvals required for City and City's Representative's acceptance of materials or equipment to be incorporated in the Work; or acceptance of materials, mix designs, or equipment submitted for approval prior to ESCO's purchase thereof for incorporation in the Work. Such inspections, tests, or approvals shall be performed by organizations acceptable to City .
- E. City will provide inspection during normal working hours from 7:00 a.m. to 3:30 p.m. Monday through Friday. Inspection before or after this time will be charged to the contractor as reimbursable inspection time. Inspections on weekends requires two days' notice for review and approval. Upon written request and approval, the 8.5 hour working day may be changed to other limits subject to City ordinance.

#### 12.4 Uncovering Work.

- A. If any Work (or the work of others) that is to be inspected, tested, or approved is covered by ESCO without written concurrence of City's Representative, ESCO shall, if requested by City's Representative, uncover such Work for observation.
- B. Uncovering Work shall be at ESCO's expense unless ESCO has given City's Representative timely notice of ESCO's intention to cover the same and City's Representative has not acted with reasonable promptness in response to such notice.
- C. If ESCO has given City's Representative timely notice of ESCO's intention to cover the work and City's Representative has not acted with reasonable promptness in response to such notice, and City's Representative later considers it necessary or advisable that covered Work be observed by City's Representative or inspected or tested by others, ESCO, at City's Representative's request, shall uncover, expose, or otherwise make available for observation, inspection, or testing as City's Representative may require, that portion of the Work in question, furnishing all necessary labor, material, and equipment.
  - 1. If it is found that the uncovered Work is defective, ESCO shall pay all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to such uncovering, exposure, observation, inspection, and testing, and of satisfactory replacement or reconstruction (including but not limited to all costs of repair or replacement of work of others); and City shall be entitled to an appropriate decrease in the GMP.
  - 2. If the uncovered Work is not found to be defective, ESCO shall be allowed an increase in the GMP and/or an extension of the Contract Times, directly attributable to such uncovering, exposure, observation, inspection, testing, replacement, and reconstruction.

#### 12.5 City May Stop The Work.

- A. If the Work is defective, City may in its sole discretion order ESCO to stop the Work, or any portion thereof, until the cause for such order has been eliminated. All delays associated with the stop Work order will be the responsibility of the ESCO.

#### 12.6 Correction of Defective Work and Warranty Period.

- A. Promptly after receipt of written notice, ESCO shall correct all Defective Work, whether or not fabricated, installed, or completed, or, if the Work has been rejected by City or City's Representative, remove it from the Project and replace it with Work that is not defective.
- B. When correcting Defective, ESCO shall take no action that would void or otherwise impair City's special warranty and guarantee, if any, on said Work.
- C. The ESCO shall (1) correct Defective Work that becomes apparent during the progress of the Work on the Project or during the Warranty Period and (2) replace, repair, or restore to City's satisfaction any other parts of the Work on the Project and any other real or personal property which is damaged or destroyed as a result of Defective Work or the correction of Defective Work. The ESCO shall promptly commence such correction, replacement, repair, or

restoration upon notice from City's Representative or City, but in no case later than fourteen (14) Days after receipt of such notice; and the ESCO shall diligently and continuously prosecute such correction to completion. The ESCO shall correct, replace, repair, or restore, such Defective Work, and perform any necessary additional testing, and inspection. The ESCO shall perform corrective Work on the Project at such times and in such a manner as to avoid, to the extent practicable, disruption to City's activities.

- D. If immediate correction of Defective Work is required for life safety or the protection of property and is performed by City or Separate Contractors, the ESCO shall pay to City all reasonable costs of correcting such Defective Work. The ESCO shall replace, repair, or restore to City's satisfaction any other parts of the Construction Work and any other real or personal property which is damaged or destroyed as a result of such Defective Work or the correction of such Defective Work.
- E. The ESCO shall remove from the Project site portions of the Construction Work and materials which are not in accordance with the Contract Documents and which are neither corrected by the ESCO nor accepted by City.
- F. The ESCO's obligations under this Article are in addition to and not in limitation of its standard of care owed on the Project to City under Article 67 or any other obligation of the ESCO under the Contract Documents. Enforcement of the ESCO's express warranties and guarantees to repair contained in the Contract Documents shall be in addition to and not in limitation of any other rights or remedies City may have under the Contract Documents or at law or in equity for Defective Work. Establishment of the Warranty Period relates only to the specific obligation of the ESCO to correct the Work on the Project and in no way limits either the ESCO's liability for Defective Work or the time within which proceedings may be commenced to enforce the ESCO's obligations under the Contract Documents.
- G. If the ESCO fails to carry out the Work in accordance with the Contract Documents, fails to provide sufficient labor, materials, equipment, tools, and services, with respect to either the Schematic Design or Construction phases, to maintain the Contract Schedule, or otherwise fails to comply with any material term of the Contract Documents, and fails within ten (10) business days after receipt of notice from City to promptly commence and thereafter diligently continue to completion the correction of such failure, City may, without prejudice to other remedies City may have, correct such failure at the ESCO's sole expense. In such case, City will be entitled to deduct from payments then or thereafter due the ESCO the cost of correcting such failure, including compensation for the additional services and expenses of City's Representative and City's consultants made necessary thereby. If payments then or thereafter due the ESCO are not sufficient to cover such amounts, the ESCO shall pay the additional amount to City.

#### 12.7 Acceptance of Defective Work.

- A. If, after ESCO attempts to repair and/or replace the Defective Work, the City prefers to accept it, City may do so. If the City chooses to accept the Defective Work, then City shall accept the Work as-is, and releases the ESCO from any and all guarantee or warranty obligations related to the Work and the parties shall agree upon a reduction in the Guaranteed Maximum Price to address costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) attributable to City's evaluation of and determination to accept such Defective Work and for the diminished value of the Work.



#### 12.8 City May Correct Defective Work.

- A. If ESCO fails within a reasonable time after written notice from City's Representative to correct or diligently commence to correct Defective Work, or to remove and replace rejected Work as required by City, City may, after seven (7) business days written notice to ESCO, correct, or remedy any such deficiency.
- B. In connection with such corrective or remedial action, City may exclude ESCO from all or part of the Site, take possession of all or part of the Work and suspend ESCO's services related thereto, and incorporate in the Work all materials and equipment stored at the Site for which City has paid ESCO but which are stored elsewhere. ESCO shall allow City and City's Representative, and the agents, employees, other contractors, and consultants of each of them, access to the Site to enable City to exercise the rights and remedies to correct the defective work.
- C. All claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) incurred or sustained by City correcting the defective work will be charged against ESCO, and a Change Order will be issued incorporating the necessary revisions in the Contract Documents with respect to the Work; and City shall be entitled to an appropriate decrease in the GMP.
- D. Such claims, costs, losses and damages will include but not be limited to all costs of repair, or replacement of work of others destroyed or damaged by correction, removal, or replacement of defective Work.
- E. If the Change Order is executed after all payments under the Contract have been paid by City, then an appropriate amount will be paid by ESCO to City.
- F. ESCO shall not be allowed an extension of the Contract Times because of any delay in the performance of the Work attributable to City correcting defective work.

### ARTICLE 13: PAYMENTS TO ESCO AND COMPLETION

#### 13.1 Progress Payments.

The Cost-Loaded CPM Progress Schedule will serve as the basis for progress payments and will be incorporated into a form of Application for Payment agreed upon by the parties as a schedule of values, for purposes of payment and tracking progress of the Work only. The schedule of values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, except that the ESCO's Design and Construction Fee shall be shown as a single separate item.

##### A. Applications for Payments.

- 1. Within ten (10) days of the Date of Commencement, Customer shall make payment to ESCO for project mobilization expenses, including but not limited to any design or engineering fees not already invoiced, project start-up and mobilization, equipment and material procurement, bonds and other expenses incurred to date ("Project Mobilization Payment") in the amount of not to exceed 15% of the implementation contract payment total of the Contract Price.

2. By the twenty-fifth (25th) day of each month ESCO shall submit to City's Representative for review an Application for Payment filled out and signed by ESCO covering the Work completed as of the date of the Application for Payment and accompanied by such supporting documentation as is required by the Contract Documents. If payment is requested on the basis of materials and equipment not incorporated in the Work but delivered and suitably stored at the Site or at another location agreed to in writing, the Application for Payment shall also be accompanied by a bill of sale, invoice, or other documentation warranting that City has received the materials and equipment free and clear of all Liens and evidence that the materials and equipment are covered by appropriate property insurance or other arrangements to protect City's interest therein, all of which must be satisfactory to City.
3. Applications for Payment shall show the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage of completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed; or (2) the percentage obtained by dividing (a) the expense that has actually been incurred by the ESCO on account of that portion of the Work for which the ESCO has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the GMP allocated to that portion of the Work in the schedule of values.
4. To compute the amount of each progress payment, the amount of each progress payment shall first include: That portion of the GMP properly allocable to completed Work as determined by multiplying the percentage of completion of each portion of Work by the share of the GMP allocated to that portion of the Work in the most recent schedule of values; That portion of the GMP properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work, or if approved in advance by the City, suitably stored off the site at a location agreed upon in writing; That portion of Change Orders reasonably justified; and The ESCO's Design and Construction Fee.
5. The amount of each progress payment shall then be reduced by: The aggregate of previous payments made by the City; The amount for failure of the ESCO to make payments properly to Subcontractors or for material or labor (unless a labor and material payment bond has been furnished by the ESCO); The shortfall, if any, indicated by the ESCO in the documentation required to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the City's auditors in such documentation; and Retention.
6. Beginning with the second Application for Payment, each Application shall include an affidavit executed by the ESCO stating that it has paid all amounts due on account of the Work paid by City in the prior Applications for Payment.

**B. Review of Applications.**

1. Within seven (7) days of receipt of a Payment Application, City's Representative will either indicate in writing a recommendation of payment to City or return the Application for Payment to ESCO indicating in writing City's Representative's reasons for refusing to recommend payment. In the latter case, ESCO may make the necessary corrections and resubmit the Application for Payment.

2. In taking action on the ESCO's Applications for Payment, the City shall be entitled to rely on the accuracy and completeness of the information furnished by the ESCO and shall not be deemed to represent that the City has made a detailed examination, audit or arithmetic verification of the documentation submitted in support of the Application for Payment or other supporting data; that the City has made exhaustive or continuous on-site inspections; or that the City has made examinations to ascertain how or for what purposes the ESCO has used amounts previously paid on account of the Contract. Such examinations, audits and verifications, if required by the City, will be performed by the City's auditors acting in the sole interest of the City.
3. By recommending any such payment City's Representative will not thereby be deemed to have represented that:
  - a. inspections made to check the quality or the quantity of the Work as it has been performed have been exhaustive, extended to every aspect of the Work in progress, or involved detailed inspections of the Work beyond the responsibilities specifically assigned to City's Representative in the Contract Documents; or
  - b. there may not be other matters or issues between the parties that might entitle ESCO to be paid additionally by City or entitle City to withhold payment to ESCO.
4. Neither City's Representative's review of ESCO's Work for the purposes of recommending payments nor City's Representative's recommendation of any payment, including final payment, will impose responsibility on City's Representative:
  - a. to supervise, direct, or control the Work;
  - b. for the means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto;
  - c. for ESCO's failure to comply with Applicable Laws applicable to ESCO's performance of the Work;
  - d. to make any examination to ascertain how or for what purposes ESCO has used the moneys paid on account of the GMP; or
  - e. to determine that title to any of the Work, materials, or equipment has passed to City free and clear of any Liens.
5. City's Representative may refuse to recommend the whole or any part of any payment due to subsequently discovered evidence or the results of subsequent inspections or tests. City retains the right to revise or revoke any such payment recommendation previously made, to such extent as may be necessary in City's opinion to protect City from loss.

C. Payment Becomes Due.

1. Thirty (30) Days after presentation of an undisputed and properly submitted Application for Payment to City's Representative, and subject to City's Representative's recommendation, subject to the modifications above, the amount recommended will become due, and when due will be paid by City to ESCO.

D. Retention and Securities in Lieu of Retention.

1. Unless Project has been deemed substantially complex as noted in the Contract Documents, City will retain five percent (5%) of the amount invoiced in accordance with Applicable Laws. Multiple certificates of Substantial Completion will be issued for segments of Work as set forth in the Scope of Work and ESCO shall be entitled to payment of the retainage amount corresponding to the value of any segment of Work that receives a certificate of Substantial Completion. Payment shall be released upon issuance of said certificate of Substantial Completion.
2. Pursuant to Public Contract Code section 22300, ESCO may substitute securities for any moneys withheld as a retention by City to ensure performance under the Contract. At the request and expense of ESCO, securities equivalent to the amount withheld shall be deposited with City, or with a state or federally chartered bank in this state as the escrow agent, who shall then pay those moneys to ESCO. Upon satisfactory completion of the Contract, the securities shall be returned to ESCO .
3. Alternatively, ESCO may request, and City shall make payment of retentions earned directly to the escrow agent selected by the ESCO. At the expense of ESCO, ESCO may direct the investment of the payments into securities and ESCO shall receive the interest earned on the investments upon the same terms provided for in Public Contract Code section 22300 for securities deposited by ESCO. Upon satisfactory completion of the Contract, ESCO shall receive from the escrow agent all securities, interest, and payments received by the escrow agent when City authorizes the escrow agent to release these funds to the ESCO, pursuant to the terms of Public Contract Code section 22300.
4. Securities eligible for investment shall include those listed in Government Code section 16430, bank or savings and loan certificates of deposit, interest-bearing demand deposit accounts, standby letters of credit, or any other security mutually agreed to by ESCO and City.
5. ESCO shall be the beneficial City of any securities substituted for moneys withheld and shall receive any interest thereon.
6. The escrow agreement shall be in the form of the Escrow Agreement provided as part of the Contract Documents.

E. City's Reduction in Recommended Payment.

1. In addition to reductions recommended by City's Representative, City may refuse to make payment of the full amount recommended by City's Representative because:
  - a. Claims have been made against City on account of ESCO's performance or furnishing of the Work.
  - b. Stop Payment Notices or Liens have been filed in connection with the Work.
  - c. Defective Work not remedied.
  - d. Failure of ESCO to make proper payments to its subcontractors or suppliers.

- e. Completion of the Contract if there exists a reasonable doubt that the Work can be completed for the unpaid Contract balance.
- f. Damage to another contractor or third party.
- g. Amounts which may be due the City for claims against ESCO .
- h. Failure of ESCO to keep the record ("as-built") drawings up to date.
- i. Failure to provide updates on the construction schedule.
- j. Site cleanup.
- k. Failure of the ESCO to comply with requirements of the Contract Documents.
- l. Liquidated Damages.

Upon completion of the Contract, City will reduce the final Contract Price to reflect costs charged to the ESCO, back charges or payments withheld pursuant to the Contract Documents.

#### 13.2 ESCO's Warranty of Title.

- A. ESCO warrants and guarantees that title to all Work, materials, and equipment covered by any Application for Payment, whether incorporated in the Project or not, will pass to City no later than the time of payment free and clear of all Liens.

#### 13.3 Partial Utilization.

- A. City reserves the right to occupy or utilize any portion of the Work at any time before completion, and such occupancy or use shall not constitute acceptance of any part of Work covered by this Contract. This use shall not relieve the ESCO of its responsibilities under the Contract.

#### 13.4 Final Inspection.

- A. Upon written notice from ESCO that the entire Work is complete, City's Representative will promptly make a final inspection with City and ESCO and will notify ESCO in writing of all particulars in which this inspection reveals that the Work is incomplete or defective. ESCO shall immediately take such measures as are necessary to complete such Work or remedy such deficiencies.

#### 13.5 Final Acceptance.

- A. After ESCO has, in the opinion of City's Representative, satisfactorily completed all corrections identified during the final inspection and has delivered, in accordance with the Contract Documents, all maintenance and operating instructions, schedules, guarantees, bonds, certificates or other evidence of insurance, certificates of inspection, marked-up record documents, and other documents required by the Contract Documents, City shall execute and

file with the County in which the Project is located a Notice of Completion, constituting final acceptance and completion of the Project, except as may be expressly noted.

13.6 Final Payment.

A. Application for Payment.

1. Upon execution of the Notice of Completion, ESCO may submit a final accounting for the cost of the Work and a final Application for Payment. Final payment, constituting the entire unpaid balance of the Contract Price.
2. Prior to Final Payment, the City may conduct an audit of the Work or notify the ESCO that it will not conduct an audit and issue a final Certificate for Payment. If the City conducts an audit of the Work, the City will either issue to the ESCO a final Certificate for Payment, or notify the ESCO in writing of the City's reasons for withholding a certificate. If the City's auditors report the cost of the Work as substantiated by the ESCO's final accounting to be less than claimed by the ESCO, the ESCO shall be entitled to make a claim. Pending a final resolution of the disputed amount, the City shall pay the ESCO the amount certified in the City's final Certificate for Payment.
3. The final Application for Payment shall be accompanied (except as previously delivered) by:
  - a. all documentation called for in the Contract Documents, including but not limited to the evidence of insurance;
  - b. consent of the surety to final payment;
  - c. a fully completed Conditional Waiver and Release on Final Payment.

B. City's Representative's Review of Application and Acceptance.

1. If, on the basis of City's Representative's observation of the Work during construction and final inspection, and City's Representative's review of the final Application for Payment and accompanying documentation as required by the Contract Documents, City's Representative is satisfied that the Work has been completed and ESCO has satisfied all other requirements for final payment, City's Representative will indicate in writing City's Representative's recommendation of payment and present the Application for Payment to City for payment. Otherwise, City's Representative will return the Application for Payment to ESCO, indicating in writing the reasons for refusing to recommend final payment, in which case ESCO shall make the necessary corrections and resubmit the Application for Payment.

C. Payment Becomes Due.

1. Within sixty (60) Days after the presentation to City's Representative of the proper and complete final Application for Payment and accompanying documentation, the amount recommended by City's Representative, less any sum City is entitled to set off pursuant to the Contract Documents, will become due and will be paid by City to ESCO.

13.7 Waiver of Claims.

- A. The making and acceptance of final payment will constitute a waiver of all Claims by ESCO against City other than those previously made in accordance with the requirements herein and expressly acknowledged by City in writing as still unsettled.

**ARTICLE 14: SUSPENSION OF WORK AND COMPLETION**

14.1 City May Suspend Work.

- A. City may, at its sole option, decide to suspend at any time the performance of all or any portion of the Work by notice in writing to ESCO. Such notice of suspension of Work will designate the amount and type of plant, labor, and equipment to be committed to the Project during the period of suspension. ESCO shall use its best efforts to utilize its plant, labor, and equipment in such a manner as to minimize costs associated with suspension.
- B. Upon receipt of any such notice, ESCO shall, unless the notice requires otherwise:
1. Immediately discontinue Work on the date and to the extent specified in the notice;
  2. Place no further orders or subcontracts for material, services, or facilities with respect to suspended Work other than to the extent required in the notice;
  3. Promptly make every reasonable effort to obtain suspension upon terms satisfactory to City's Representative of all orders, subcontracts, and rental agreements to the extent they relate to performance of Work suspended; and
  4. Continue to protect and maintain the Work including those portions on which Work has been suspended.
- C. Except as provided by this article, as full and complete compensation for such suspension, ESCO shall be granted an adjustment in the GMP for ESCO's actual costs associated with the demobilized condition of the and an extension of the Contract Times equal to the number of days performance of Work is suspended; provided, however, that no adjustment of GMP or extension of Contract Times shall be granted if the suspension results from ESCO's non-compliance with the requirements of the Contract. Further, in the event said suspension continues in excess of 180 days, then ESCO may elect to terminate for convenience.

14.2 City May Terminate for Cause.

- A. City may, without prejudice to any other right or remedy, serve written notice upon ESCO of its intention to terminate this Contract in whole or in part if the ESCO: (i) refuses or fails to prosecute the Work or any part thereof with such diligence as will ensure its completion within the Project Completion Date; (ii) fails to complete the Work within the required time; (iii) files a bankruptcy petition or is adjudged a bankruptcy; (iv) makes a general assignment for the benefit of its creditors; (v) has a receiver appointed; (vi) refuses or fails to supply enough properly skilled workers or proper materials to complete the Work; (vii) fails to make prompt payment to subcontractors or for material or labor; (viii) disregards Applicable Laws, other requirements or instructions of City; or (ix) violates any of the provisions of the Contract Documents.

B. The Notice of Default and Intent to Terminate shall state the reasons for termination. Unless within thirty (30) Days after the service of such notice, ESCO resolves the circumstances giving rise to the Notice of Default to City's reasonable satisfaction, or makes arrangements reasonably acceptable to City for the required corrective action, City may terminate this Contract. In such case, ESCO shall not be entitled to receive any further payment until the Work has been finished. City may take over and complete the Work by any method it may deem appropriate, including enforcement of the Project Performance Bond. ESCO and its surety shall be liable to City for any excess costs or other damages incurred by City to complete the Work. If City takes over the Work, City may, without liability for so doing, take possession of and utilize in completing the Work such materials, appliances, plant, and other property belonging to the ESCO as may be on the Site.

14.3 Design Builder May Suspend or Terminate for Cause.

- A. ESCO may terminate the Contract or suspend the performance of the Work by providing written Notice to the City if: (i) the City repeatedly or materially fails, refuses or neglects to fulfill its obligations under the Contract or fails to make any undisputed payment(s) to ESCO as and when due hereunder, (ii) ESCO has provided written Notice of default to the City detailing the alleged failure, refusal, neglect, or payment default, and (iii) within thirty (30) days of the City's receipt of such written Notice, the City has neither cured nor commenced and diligently continued efforts to cure such default.

14.4 City May Terminate for Convenience.

- A. In addition to its right to terminate this Contract for default, City may terminate the Contract, in whole or in part, at any time upon seven (7) Days written notice to ESCO. The Notice of Termination shall specify that the termination is for the convenience of City, the extent of termination, and the effective date of such termination ("Effective Date of Termination").
- B. After receipt of Notice of Termination, and except as directed by City, the ESCO shall, regardless of any delay in determining or adjusting any amounts due under this Termination for Convenience clause, immediately proceed with the following obligations:
1. Stop Work as specified in the Notice.
  2. Complete any Work specified in the Notice of Termination in accordance with the Contract Documents.
  3. Leave the Site and any other property upon which the ESCO was working in a safe and sanitary manner such that it does not pose any threat to the public health or safety. ESCO shall be relieved of this requirement in the event that Work necessary to ensure safety is not specified and authorized in the Notice of Termination.
  4. Terminate all subcontracts and purchase orders to the extent that they relate to the portions of the Work terminated.
  5. Place no further subcontracts or orders, except as necessary to complete the remaining portion of the Work.



6. Submit to City, within thirty (30) Days from the Notice of Termination, all of the documentation called for by the Contract Documents to substantiate all costs incurred by the ESCO for labor, materials and equipment through the Notice of Termination. Any documentation substantiating costs incurred by the ESCO solely as a result of City's exercise of its right to terminate this Contract pursuant to this clause, which costs the ESCO is authorized under the Contract Documents to incur, shall: (i) be submitted to and received by City no later than thirty (30) Days after the Effective Date of the Notice of Termination; (ii) describe the costs incurred with particularity; and (iii) be conspicuously identified as "Termination Costs Occasioned by City's Termination for Convenience."
7. City's total liability to ESCO by reason of the termination shall be limited to the total (without duplication of any items) of:
  - a. The actual cost to the ESCO for all Work performed prior to the Effective Date of Termination, including the Work done to secure the Project for termination. Deductions shall be made for cost of materials to be retained by the ESCO (provided the materials may be reused for other projects or returned to the supplier), cost of Work defectively performed, amounts realized by sale of materials, and for other appropriate credits or offsets against cost of Work as allowed by the Contract Documents.
  - b. When, in City's opinion, the cost of any item of Work is excessively high due to costs incurred to remedy or replace defective or rejected Work, reasonable cost to be allowed will be the estimated reasonable cost of performing the Work in compliance with requirements of the Contract Documents and excessive actual cost shall be disallowed.
  - c. Any Work required by the Termination for Convenience that is not included in Contract Documents will be negotiated pursuant to the Contract Change Order provisions.
  - d. Reasonable costs to the ESCO of handling material returned to vendors, delivered to City or otherwise disposed of as directed by City.
  - e. A reasonable allowance for the ESCO's internal administrative costs in preparing termination claim.
  - f. Reasonable demobilization costs, and reasonable payments made to Subcontractors or suppliers on account of termination.
8. In no event shall City be liable for unreasonable costs incurred by the ESCO or subcontractors after receipt of a Notice of Termination. Such non-recoverable costs include, but are not limited to, the cost of or anticipated profits on Work not performed as of the date of termination, post-termination employee salaries, unreasonable post-termination administrative expenses, post-termination overhead or unabsorbed overhead, surety costs of any type, costs of preparing and submitting the ESCO's termination claim, attorney fees of any type, and all other costs relating to prosecution of a claim or lawsuit.
9. City shall have no obligation to pay the ESCO under this Article unless and until the ESCO provides City with updated and acceptable as-builts and Record Documents for Work completed prior to termination as required by the Contract Documents.

10. In arriving at the amount due the ESCO under this clause there shall be deducted in whole, or in the appropriate part(s) if the termination is partial:

- a. All unliquidated advances or other payments on account previously made to the ESCO, including without limitation all payments which are applicable to the terminated portion of the Contract Documents,
- b. Any claim City may have against the ESCO in connection with the Work or any amounts that may be withheld in accordance with the Contract Documents, and
- c. The agreed price for, or proceeds of sale of, any materials, supplies, or other things kept by the ESCO and not otherwise recovered by or credited to City.

ESCO shall not be paid on account of loss of anticipated profits or revenue or other economic loss or consequential damages arising out of or resulting from such termination.

11. Notwithstanding any other provision of this Article, when immediate action is necessary to protect life and safety or to reduce significant exposure or liability, City may immediately order ESCO to cease Work until such safety or liability issues are addressed to the satisfaction of City or the Contract is terminated.

12. If City terminates ESCO for cause, and if it is later determined that the termination was wrongful, such default termination shall automatically be converted to and treated as a termination for convenience. In such event, ESCO shall be entitled to receive only the amounts payable under this section, and ESCO specifically waives any claim for any other amounts or damages, including, but not limited to, any claim for consequential damages or lost profits.

## **ARTICLE 15: CLAIMS, DISPUTE AVOIDANCE AND RESOLUTION**

### **15.1 Procedure for Resolving Claims**

- A. ESCO shall timely comply with any and all requirement of the Contract Documents pertaining to notices and requests for changes to the GMP and/or the Project Completion Date, including but not limited to all requirements of Article 10 and Article 15.1, as a prerequisite to filing any Claim governed by this Article. The failure to timely submit a notice of delay or notice of change, or to timely submit a Change Order Request, or to timely provide any other notice or request required herein shall constitute a waiver of the right to further pursue the Claim under the Contract or at law.
- B. Intent. Effective January 1, 1991, Section 20104 et seq., of the California Public Contract Code prescribes a process utilizing informal conferences, non-binding judicial supervised mediation, and judicial arbitration to resolve disputes on construction claims of \$375,000 or less. Effective January 1, 2017, Section 9204 of the Public Contract Code prescribes a process for negotiation and mediation to resolve disputes on construction claims. The intent of this Article is to implement Sections 20104 et seq. and Section 9204 of the California Public Contract Code. This Article shall be construed to be consistent with all applicable law, including but not limited to these statutes.

- C. Claims. For purposes of this Article, "Claim" means a separate demand by the ESCO for (1) a time extension, including without limitation relief from damages or penalties for delay assessed by City, (2) payment of money or damages arising from Work done by or on behalf of the ESCO and payment of which is not otherwise expressly provided for or the ESCO is not otherwise entitled, or (3) payment of an amount which is disputed by City. A "Claim" does not include any demand for payment for which the ESCO has failed to provide notice, submit a Change Order Request, or otherwise failed to follow any procedures contained in the Contract Documents.
- D. Filing Claims. Claims governed by this Article may not be filed unless and until the ESCO completes any and all requirements of the Contract Documents pertaining to notices and requests for changes to the GMP and/or the Project Completion Date, and ESCO's request for a change has been denied in whole or in part. Claims governed by this Article must be filed no later than thirty (30) Days after a request for change has been denied in whole or in part or after any other event giving rise to the Claim. The Claim shall be submitted in writing to the City and shall include on its first page the following words in 16-point capital font: "THIS IS A CLAIM." The Claim shall include the all information and documents necessary to substantiate the Claim, including but not limited to those identified below. Nothing in this Article is intended to extend the time limit or supersede notice requirements otherwise provided by Contract Documents. Failure to follow such contractual requirements shall bar any Claims or subsequent proceedings for compensation or payment thereon.
- E. Documentation. The ESCO will submit the claim justification in the following format:
1. Summary description of Claim including basis of entitlement, merit and amount of time or money requested, with specific reference to the Contract Document provisions pursuant to which the Claim is made
  2. List of documents relating to the Claim
    - a. Specifications
    - b. Drawings
    - c. Clarifications (Requests for Information)
    - d. Schedules
    - e. Other
  3. Chronology of events and correspondence
  4. Narrative analysis of Claim merit
  5. Analysis of Claim cost, including calculations and supporting documents
  6. Time impact analysis in the form required by the Contract Documents or, if the Contract Documents do not require a particular format, CPM format, if an adjustment of the Contract Time is requested
  7. Cover letter and certification of validity of the Claim

- F. City Response to Claim. Upon receipt of a Claim pursuant to this Article, City shall conduct a reasonable review of the Claim and, within a period not to exceed 45 days of receipt of the Claim, or as extended by mutual agreement, shall provide a written statement identifying what portion of the Claim is disputed and what portion is undisputed. Any payment due on an undisputed portion of the Claim will be processed and made within 60 days after City issues its written response.
1. If City needs approval from its governing body to provide ESCO a written statement as set forth above, and the governing body does not meet within the 45 days or within the mutually agreed to extension of time following receipt of a Claim, City shall have up to three (3) days following the next publicly noticed meeting of the governing body after the 45-day period, or extension, expires to provide ESCO a written statement identifying the disputed portion and the undisputed portion of the Claim.
  2. City may request, in writing, within 30 days of receipt of the claim, any additional documentation supporting the Claim or relating to defenses or Claims City may have. If additional information is needed thereafter, it shall be provided upon mutual agreement of the City and the ESCO. City's written response shall be submitted 30 days (15 days if the Claim is less than \$50,000) after receiving the additional documentation, or within the same period of time taken by the ESCO to produce the additional information, whichever is greater.
- G. Meet and Confer Conference. If the ESCO disputes City's response, or if City fails to respond within the statutory time period(s), the ESCO may so notify City, in writing, within 15 days of the receipt of the response or the failure to respond, and demand an informal conference to meet and confer for settlement of those portions of the Claim that remain in dispute. Upon such demand, City shall schedule a meet and confer conference within 30 Days.
- H. Mediation. Within 10 business days following the conclusion of the meet and confer conference, if the Claim or any portion of the Claim remains in dispute, the City shall provide the ESCO a written statement identifying the portion of the Claim that remains in dispute and the portion that is undisputed. Any payment due on an undisputed portion of the Claim shall be processed and made within 60 Days after the City issues its written statement. Any disputed portion of the Claim, as identified by the ESCO in writing, shall be submitted to nonbinding mediation, with the City and the ESCO sharing the associated costs equally. The public entity and ESCO shall mutually agree to a mediator within 10 business days after the disputed portion of the Claim has been identified in writing, unless the parties agree to select a mediator at a later time.
1. If the parties cannot agree upon a mediator, each party shall select a mediator and those mediators shall select a qualified neutral third party to mediate with regard to the disputed portion of the Claim. Each party shall bear the fees and costs charged by its respective mediator in connection with the selection of the neutral mediator.
  2. For purposes of this Article, mediation includes any nonbinding process, including, but not limited to, neutral evaluation or a dispute review board, in which an independent third party or board assists the parties in dispute resolution through negotiation or by issuance of an evaluation. Any mediation utilized shall conform to the timeframes in this Article.

3. Unless otherwise agreed to by the City and the ESCO in writing, the mediation conducted pursuant to this section shall excuse any further obligation under Section 20104.4 to mediate after litigation has been commenced.
  4. The mediation shall be held no earlier than the date the ESCO completes the Work or the date that the ESCO last performs Work, whichever is earlier. All unresolved Claims shall be considered jointly in a single mediation, unless a new unrelated Claim arises after mediation is completed.
- I. Procedures After Mediation. If following the mediation, the Claim or any portion remains in dispute, the ESCO must file a Claim pursuant to Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of Division 3.6 of Title 1 of the Government Code prior to initiating litigation. For purposes of those provisions, the running of the period of time within which a Claim must be filed shall be tolled from the time the ESCO submits his or her written Claim pursuant to subdivision (a) until the time the Claim is denied, including any period of time utilized by the meet and confer conference.
- J. Civil Actions. The following procedures are established for all civil actions filed to resolve Claims of \$375,000 or less:
1. Within 60 Days, but no earlier than 30 Days, following the filing or responsive pleadings, the court shall submit the matter to non-binding mediation unless waived by mutual stipulation of both parties or unless mediation was held prior to commencement of the action in accordance with Public Contract Code section 9204 and the terms of this Contract. The mediation process shall provide for the selection within 15 Days by both parties of a disinterested third person as mediator, shall be commenced within 30 Days of the submittal, and shall be concluded within 15 Days from the commencement of the mediation unless a time requirement is extended upon a good cause showing to the court.
  2. If the matter remains in dispute, the case shall be submitted to judicial arbitration pursuant to Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil Procedure, notwithstanding Section 1114.11 of that code. The Civil Discovery Act of 1986 (Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4 of the Code of Civil Procedure) shall apply to any proceeding brought under this subdivision consistent with the rules pertaining to judicial arbitration. In addition to Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil Procedure, (A) arbitrators shall, when possible, be experienced in construction law, and (B) any party appealing an arbitration award who does not obtain a more favorable judgment shall, in addition to payment of costs and fees under that chapter, also pay the attorney's fees on appeal of the other party.
- K. Government Code Claim Procedures.
1. This Article does not apply to tort claims and nothing in this Article is intended nor shall be construed to change the time periods for filing tort claims or actions specified by Chapter

1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of Division 3.5 of Title 1 of the Government Code.

2. In addition to any and all requirements of the Contract Documents pertaining to notices of and requests for adjustment to the Contract Time, Contract Price, or compensation or payment for Additional Work, disputed Work, construction claims and/or changed conditions, the ESCO must comply with the claim procedures set forth in Government Code Section 900, et seq. prior to filing any lawsuit against the City.
3. Such Government Code claims and any subsequent lawsuit based upon the Government Code claims shall be limited to those matters that remain unresolved after all procedures pertaining to adjustment of the Contract Time or Contract Price for Additional Work, disputed Work, construction claims, and/or changed conditions have been followed by ESCO. If ESCO does not comply with the Government Code claim procedure or the prerequisite contractual requirements, ESCO may not file any action against the City .
4. **A Government Code claim must be filed no earlier than the date the Work is completed or the date the ESCO last performs Work on the Project, whichever occurs first. A Government Code claim shall be inclusive of all unresolved Claims known to ESCO or that should reasonably be known to ESCO excepting only new unrelated Claims that arise after the Government Code claim is submitted.**

L. Non-Waiver. The City's failure to respond to a Claim from the ESCO within the time periods described in this Article or to otherwise meet the time requirements of this Article shall result in the Claim being deemed rejected in its entirety, and shall not constitute a waiver of any rights under this Article.

#### 15.2 Litigation.

A. Any claims, disputes, or controversies between the parties arising out of or related to the Contract, which have not been resolved in accordance with the procedures set forth herein shall be resolved in a court of competent jurisdiction.

#### 15.3. Duty to Continue Performance.

A. Unless provided to the contrary in the Contract Documents, ESCO shall continue to perform the Work and City shall continue to satisfy its payment obligations to ESCO, pending the final resolution of any dispute or disagreement between ESCO and City .

### **ARTICLE 16: MISCELLANEOUS PROVISIONS**

#### 16.1 Limitations On City's Responsibilities.

A. City shall not supervise, direct, or have control or authority over, nor be responsible for, the ESCO's means, methods, techniques, sequences, or procedures of design or construction, or the safety precautions and programs incident thereto, or for any failure of the ESCO to comply with Applicable Laws applicable to the performance of the Work. City will not be responsible for the ESCO's failure to perform the Project in accordance with the Contract Documents.

## 16.2 Successors

- A. The parties do for themselves, their heirs, executors, administrators, successors, and assigns agree to the full performance of all of the provisions contained in this Contract. The ESCO may not either voluntarily or by action of law, assign any obligation assumed by the ESCO hereunder without the prior written consent of the City.

## 16.3 Cumulative Remedies.

- A. Except where explicitly stated otherwise, the duties and obligations imposed by these General Conditions and the rights and remedies available hereunder to the parties hereto are in addition to, and are not to be construed in any way as a limitation of, any rights and remedies available to any or all of them which are otherwise imposed or available by Applicable Laws, by special warranty or guarantee, or by other provisions of the Contract Documents. The provisions of this Article will be as effective as if repeated specifically in the Contract Documents in connection with each particular duty, obligation, right, and remedy to which they apply.

## 16.4 Survival of Obligations.

- A. All representations, indemnifications, warranties, and guarantees made in, required by, or given in accordance with the Contract Documents, as well as all continuing obligations indicated in the Contract Documents, will survive final payment, completion, and acceptance of the Project or termination or completion of the Contract or termination of the services of the ESCO.

## 16.5 Controlling Law.

- A. Notwithstanding any subcontract or other contract with any Subcontractor, Supplier, or other person or organization performing any part of the Project, this Contract shall be governed by the law of the State of California excluding any choice of law provisions.

## 16.6 Jurisdiction; Venue.

- ~~A.~~ A. The ESCO and any Subcontractor, supplier, or other person or organization performing any part of the Project agree that any action or suits at law or in equity arising out of or related to the proposal process, award, or performance of the Project shall be maintained in the Superior Court of Riverside County, California, and expressly consent to the jurisdiction of said court, regardless of residence or domicile, and agree that said court shall be a proper venue for any such action.

- ~~16.7~~ 16.7 No Estoppel or Waiver by City. No action or failure to act by the City shall constitute a waiver of any right or duty afforded City under this Agreement, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically provided in this Agreement or as may be otherwise agreed in writing. The waiver by the City of any breach or violation of any term, covenant or condition of this Agreement or of any provision, ordinance, or law shall not be deemed to be a waiver of any other term, covenant, condition, ordinance, or law or of any subsequent breach or violation of the same or of any other term, covenant, condition, ordinance, or law. The subsequent payment of any monies or fee by the City which may

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become due hereunder shall not be deemed to be a waiver of any preceding breach or violation by ESCO or any term, covenant, condition of this Agreement or of any applicable law or ordinance.

16.8 Headings.

- A. Article and paragraph headings are inserted for convenience only and do not constitute parts of these General Conditions.

16.9 City's Right to Audit.

- A. The ESCO shall make available to City for auditing, all relevant accounting records and documents, and other financial data, and upon request, shall submit true copies of requested records to City. If the ESCO submits a Change Order Request or a Claim to City, City shall have the right to audit the ESCO's books, records, documents, and other evidence to the extent they are relevant.
- B. In accordance with Government Code Section 8546.7, records of both City and the ESCO shall be subject to examination and audit by the State Auditor General for a period of three (3) years after final payment.

16.10 Assignment.

- A. ESCO shall not assign, transfer, convey, sublet, or otherwise dispose of this Contract or any part thereof including any claims, without prior written consent of City, such prior written consent shall not be unreasonably withheld. Any assignment without the written consent of City shall be void. Any assignment of money due or to become due under this Contract shall be subject to a prior lien for services rendered or Material supplied for performance of Work called for under the Contract Documents in favor of all persons, firms, or corporations rendering such services or supplying such Materials to the extent that claims are filed pursuant to the Civil Code, the Code of Civil Procedure or the Government Code.
- B. As set forth in Public Contract Code section 7103.5, in entering into a public works contract or a subcontract to supply goods, services, or materials pursuant to a public works contract, the contractor or subcontractor offers and agrees to assign to the awarding body all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. § 15) or under the Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code), arising from purchases of goods, services, or materials pursuant to the public works contract or the subcontract. This assignment shall be made and become effective at the time the awarding body tenders final payment to the contractor, without further acknowledgment by the parties.

16.11 All Legal Provisions Included.

- A. ESCO shall give all notices and comply with all federal, state and local laws, ordinances, rules and regulations bearing on conduct of work as indicated and specified by their terms. References to specific laws, rules or regulations in this Contract are for reference purposes only, and shall not limit or affect the applicability of provisions not specifically mentioned. If ESCO observes that drawings and specifications are at variance therewith, he shall promptly



notify City in writing and any necessary changes shall be adjusted as provided for in this Contract for changes in Work. If ESCO performs any Work knowing it to be contrary to such laws, ordinances, rules and regulations, and without such notice to City, he shall bear all costs arising therefrom.

- B. ESCO shall be responsible for familiarity with the Americans with Disabilities Act (“ADA”) (42 U.S.C. § 12101 et seq.). The Work will be performed in compliance with ADA laws, rules and regulations. ESCO shall comply with the Historic Building Code, including, but not limited to, as it relates to the ADA, whenever applicable.
- C. ESCO acknowledges and understands that, pursuant to Public Contract Code section 20676, sellers of "mined material" must be on an approved list of sellers published pursuant to Public Resources Code section 2717(b) in order to supply mined material for this Contract.
- D. No City official or representative who is authorized in such capacity and on behalf of City to negotiate, supervise, make, accept, or approve, or to take part in negotiating, supervising, making, accepting or approving any engineering, inspection, construction or material supply contract or any subcontract in connection with construction of the Work, shall be or become directly or indirectly interested financially in the Contract.
- E. All provisions of law required to be inserted in the Contract or Contract Documents pursuant to any Applicable Laws shall be and are inserted herein. If through mistake, neglect, oversight, or otherwise, any such provision is not herein inserted or inserted in improper form, upon the application of either party, the Contract or Contract Documents shall be changed by City, at no increase in the Guaranteed Maximum Price or Contract Time, so as to strictly comply with the Applicable Laws and without prejudice to the rights of either party hereunder. In the event an Applicable Law takes effect after execution of this Contract, and is inserted herein, and impacts the schedule or costs of the Project then either party may request changes to the GMP or Contract Time resulting from such new Applicable Law.
- F. Ethics. Each Party shall comply in all respects with all Applicable Laws governing the duties, obligations, and business practices of that Party. Neither Party shall take any action in violation of any Applicable Laws that could result in liability being imposed on the other Party. In the event the City has concerns related to ethics, compliance or ESCO’s Principles of Responsibility, and/or any potential violations of these policies, the City is welcome to make use of ESCO’s GreenLine. The GreenLine is ESCO’s global helpline for external stakeholders. It is a confidential channel through which public agencies can ask questions and raise concerns. Reports can be made using the following link:  
<https://secure.ethicspoint.eu/domain/media/en/gui/104677/index.html>.
- G. Export Control. The products, software, services, information, other deliverables and/or the technologies embedded therein (hereinafter referred to as “Deliverables”) provided by ESCO under this Contract contain or may contain components and/or technologies from the United States of America (“US”), the European Union (“EU”) and/or other nations. The City acknowledges and agrees that the assignment and/or usage of Deliverables under this Contract shall fully comply with applicable US, EU and other national and international export control laws and/or regulations. Unless any applicable export licenses have been obtained from the relevant authority and the ESCO has approved, the Deliverables shall not (i) be exported and/or re-exported to any destination or party (including without limitation to any individual, group

and/or legal entity) restricted by the applicable export control laws and/or regulations; or (ii) be used for those purposes and fields restricted by the applicable export control laws and/or regulations. the City also agrees that the Deliverables will not be used either directly or indirectly in any rocket systems, unmanned air vehicles, and/or nuclear weapons delivery systems, nor will they be used in any design, development, production or use for any weapons (which may include, without limitation, chemical, biological or nuclear weapons). If any necessary or advisable licenses, authorizations or approvals are not obtained, whether arising from inaction by any relevant government authority or otherwise, or if any such licenses, authorizations or approvals are denied or revoked, or if the applicable export control laws and/or regulations would prohibit ESCO from fulfilling any order, or would in ESCO's judgment otherwise expose ESCO to a risk of liability under the applicable export control laws and/or regulations if it fulfilled the order, ESCO shall be excused from all obligations under such order and/or this Contract.

16.12 State License Board Notice.

- A. Contractors are required by law to be licensed and regulated by the ESCO's State License Board which has jurisdiction to investigate complaints against contractors if a complaint regarding a patent act or omission is filed within four (4) years of the date of the alleged violation. A complaint regarding a latent act or omission pertaining to structural defects must be filed within ten (10) years of the date of the alleged violation. Any questions concerning a contractor may be referred to the Registrar, the Contractors' State License Board, P.O. Box 26000, Sacramento, California 95826.

16.13 Noise.

- A. The ESCO shall use only such equipment on the Project and in such state of repair so that the emission of sound therefrom is within the noise tolerance level of that equipment as established by CAL-OSHA.
- B. The ESCO shall comply with the most restrictive of the following: (1) local sound control and noise level rules, regulations and ordinances and (2) the requirements contained in these Contract Documents, including hours of operation requirements. No internal combustion engine shall be operated on the Project without a muffler of the type recommended by the manufacturer. Should any muffler or other control device sustain damage or be determined to be ineffective or defective, the ESCO shall promptly remove the equipment and shall not return that equipment to the Project site until the device is repaired or replaced. Noise and vibration level requirements shall apply to all equipment on the jobsite or related to the Project, including but not limited to, trucks, transit mixers or transit equipment that may or may not be owned by the ESCO.

16.14 Change In Name Or Nature of ESCO's Legal Entity.

- A. Should a change be contemplated in the name or nature of the ESCO's legal entity, the ESCO shall first notify City in order that proper steps may be taken to have the change reflected in the Contract Documents and all related documents. No change of the ESCO's name or nature

will affect City's rights under the Contract Documents, including but not limited to the bonds and insurance.

16.15 Complete Contract.

- A. The Contract Documents constitute the full and complete understanding of the parties and supersede any previous agreements or understandings, oral or written, with respect to the subject matter hereof. The Contract may be modified only by a written instrument signed by both parties or as otherwise provided in the Contract Documents.

16.16 Notice of Third-Party Claims.

- A. Pursuant to Public Contract Code section 9201, City shall provide ESCO with timely notification of the receipt of any third-party claim relating to the Contract.

16.17 Signature Authority. The individuals executing this Contract and the instruments referenced herein on behalf of ESCO each represent and warrant that they have the legal power, right and actual authority to bind ESCO to the terms and conditions hereof and thereof.

16.18 Severability of Provisions.

- A. If any one or more of the provisions contained in the Contract Documents should be invalid, illegal, or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

16.19 Correction of Errors and Omissions.

- A. The ESCO agrees to correct any error or omission in the Construction Documents or Contract Documents at no additional cost to City .

16.20 Interpretation.

- A. The Contract Documents shall not be construed in favor of or against any party, but shall be construed as if all parties prepared the Contract Documents.

**END OF GENERAL CONDITIONS**

**ATTACHMENT 3  
PERFORMANCE BOND**

WHEREAS the CITY OF SUTTER CREEK (also herein "City") have awarded to \_\_\_\_\_ (hereinafter the "ESCO"), a contract for work consisting of but not limited to, furnishing all labor, materials, tools, equipment, services, and incidentals for the construction of the \_\_\_\_\_ Project and all other required structures and facilities within the rights-of-way, easements and permits;

WHEREAS, the Work to be performed by the ESCO is more particularly set forth in the Contract Documents for the Project dated \_\_\_\_\_, (hereinafter referred to as "Contract Documents"), the terms and conditions of which are expressly incorporated herein by reference; and

WHEREAS, the ESCO is required by said Contract Documents to perform the terms thereof and to furnish a bond for the faithful performance of said Contract Documents.

NOW, THEREFORE, we, \_\_\_\_\_, the undersigned ESCO and \_\_\_\_\_ as Surety, a corporation organized and duly authorized to transact business under the laws of the State of California, are held and firmly bound unto the City in the sum of \_\_\_\_\_ DOLLARS, (\$ \_\_\_\_\_), said sum being not less than one hundred percent (100%) of the total amount of the Contract, for which amount well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH, that, if the ESCO, his or its heirs, executors, administrators, successors or assigns, shall in all things stand to and abide by, and well and truly keep and perform the covenants, conditions and agreements in the Contract Documents and any alteration thereof made as therein provided, on its part, to be kept and performed at the time and in the manner therein specified, and in all respects according to their intent and meaning; and shall faithfully fulfill all obligations including the one-year guarantee of all materials and workmanship; and shall indemnify and save harmless the City, its officers and agents, as stipulated in said Contract Documents, then this obligation shall become null and void; otherwise it shall be and remain in full force and effect.

As a condition precedent to the satisfactory completion of the Contract Documents, unless otherwise provided for in the Contract Documents, the above guarantee obligation shall hold good for a period of one (1) year after the acceptance of the work by City, during which time if the Design Build Entity shall fail to make full, complete, and satisfactory repair and replacements, and totally protect the City from loss or damage resulting from or caused by defective materials or faulty workmanship, the above obligation in penal sum thereof shall remain in full force and effect. The obligations of Surety hereunder shall continue so long as any obligation of ESCO remains. Nothing herein shall limit the City's rights or the ESCO or Surety's obligations under the Contract, law or equity, including, but not limited to, California Code of Civil Procedure section 337.15.

As a part of the obligation secured hereby, there shall be included costs and reasonable expenses and fees including reasonable attorney's fees, incurred by City in enforcing such obligation.

Whenever ESCO shall be, and is declared by the City to be, in default under the Contract Documents, the Surety shall remedy the default pursuant to the Contract Documents, or shall promptly, at the City's option:

- (1) Take over and complete the Project in accordance with all terms and conditions in the Contract Documents; or
- (2) Obtain a bid or bids for completing the Project in accordance with all terms and conditions in the Contract Documents and upon determination by Surety of the lowest responsive and responsible bidder, arrange for a Contract between such bidder, the Surety and the City, and make available as work progresses sufficient funds to pay the cost of completion of the Project, less the balance of the contract price, including other costs and damages for which Surety may be liable. The term "balance of the contract price" as used in this paragraph shall mean the total amount payable to ESCO by the City under the Contract and any modification thereto, less any amount previously paid by the City to the ESCO and any other set offs pursuant to the Contract Documents.
- (3) Permit the City to complete the Project in any manner consistent with California law and make available as work progresses sufficient funds to pay the cost of completion of the Project, less the balance of the contract price, including other costs and damages for which Surety may be liable. The term "balance of the contract price" as used in this paragraph shall mean the total amount payable to ESCO by the City under the Contract and any modification thereto, less any amount previously paid by the City to the ESCO and any other set offs pursuant to the Contract Documents.

Surety expressly agrees that the City shall be entitled to approve any contractor or subcontractor which may be proposed by Surety in fulfillment of its obligations in the event of default by the ESCO, such approval shall not be unreasonably withheld by City .

Where ESCO has been terminated for default by the City, the Surety shall not utilize ESCO in completing the Project nor shall Surety accept a bid from ESCO for completion of the Project unless the City, when declaring the ESCO in default, notifies Surety of the City's written agreement to have ESCO's further participation in the completion of the Project.

The Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the Contract Documents or to the Project to be performed thereunder shall in any way affect its obligations on this bond, and it does hereby waive notice of any such change, extension of time, alteration or addition to the terms of the Contract Documents or to the Project, including, but not limited to, the provisions of sections 2819 and 2845 of the California Civil Code.

Notwithstanding any provision to the contrary herein, this Performance Bond shall guarantee only the performance of the installation portion of the Contract, and shall not be construed to guarantee the performance of: (1) any efficiency or energy savings guarantees, or (2) any support or maintenance service agreement.

**[Remainder of Page Left Intentionally Blank.]**

IN WITNESS WHEREOF, we have hereunto set our hands and seals this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
ESCO/PRINCIPAL

\_\_\_\_\_  
Name

By \_\_\_\_\_

SURETY:

By: \_\_\_\_\_  
Attorney-In-Fact

The rate of premium on this bond is \_\_\_\_\_ per thousand. The total amount of premium charges, \$ \_\_\_\_\_.  
(The above must be filled in by corporate attorney.)

**THIS IS A REQUIRED FORM**

Any claims under this bond may be addressed to:

(Name and Address of Surety) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Name and Address of Agent or Representative for service of process in California, if different from above) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Telephone number of Surety and Agent or Representative for service of process in California) \_\_\_\_\_

**NOTE: A copy of the power of attorney to local representatives of the bonding company may be attached hereto.**

**ATTACHMENT 4**  
**PAYMENT BOND (LABOR AND MATERIALS)**

WHEREAS the **CITY OF SUTTER CREEK** (hereinafter "Obligee") have awarded to \_\_\_\_\_ (hereinafter the "ESCO"), a contract for work consisting of but not limited to, furnishing all labor, materials, tools, equipment, services, and incidentals for the construction of the \_\_\_\_\_ Project and all other required structures and facilities within the rights-of-way, easements and permits;

WHEREAS, the Work to be performed by the ESCO is more particularly set forth in that certain contract for the said Public Work dated \_\_\_\_\_, (hereinafter the "Public Work Contract"); and

WHEREAS, the ESCO is required to furnish a bond in connection with said Public Work Contract providing that if the ESCO or any of his or its subcontractors shall fail to pay for any materials, provisions, or other supplies, or terms used in, upon, for or about the performance of the Work contracted to be done, or for any work or labor done thereon of any kind, or for amounts due under the provisions of 3248 of the California Civil Code, with respect to such work or labor, that the Surety on this bond will pay the same together with a reasonable attorney's fee in case suit is brought on the bond.

NOW, THEREFORE, we \_\_\_\_\_, the undersigned ESCO (s), as Principal and \_\_\_\_\_, a corporation organized and existing under the laws of the State of \_\_\_\_\_ and duly authorized to transact business under the laws of the State of California, as Surety, are held and firmly bound unto the Obligee and to any and all material men, persons, companies or corporations furnishing materials, provisions, and other supplies used in, upon, for or about the performance of the said Public Work, and all persons, companies or corporations renting or hiring teams, or implements or machinery, for or contributing to said Public Work to be done, and all persons performing work or labor upon the same and all persons supplying both work and materials as aforesaid excepting the ESCO, the sum of \_\_\_\_\_ Dollars, \$ \_\_\_\_\_, said sum being not less than 100% of the total amount payable by said Obligee under the terms of the said Public Work Contract, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH that if the Principal, his or its subcontractors, heirs, executors, administrators, successors, or assigns, shall fail to pay for any materials, provisions, or other supplies or machinery used in, upon, for or about the performance of the Work contracted to be done, or for work or labor thereon of any kind, or fail to pay any of the persons named in California Civil Code Section 9100, or amounts due under the Unemployment Insurance Code with respect to work or labor performed by any such claimant, or for any amounts required to be deducted, withheld, and paid over to the Employment Development Department from the wages of employees of the contractor and his subcontractors pursuant to Section 13020 of the Unemployment Insurance Code with respect to such work and labor, and all



other applicable laws of the State of California and rules and regulations of its agencies, then said Surety will pay the same in or to an amount not exceeding the sum specified herein.

In case legal action is required to enforce the provisions of this bond, the prevailing party shall be entitled to recover reasonable attorneys' fees in addition to court costs, and necessary disbursements. In addition to the provisions hereinabove, it is agreed that this bond will inure to the benefit of any and all persons, companies and corporations entitled to make claims under Section 9100 of the California Civil Code, so as to give a right of action to them or their assigns in any suit brought upon this bond.

The said Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration or additions to the terms of the said Public Work Contract or to the Work to be performed thereunder or the specification accompanying the same shall in any way affect its obligations on this bond, and it does hereby waive notice of any such change, extension of time, alteration or addition to the terms of the Contract or to the Work or to the Specifications, including but not limited to the provisions of sections 2819 and 2845 of the California Civil Code.

IN WITNESS WHEREOF, we have hereto set our hands and seals this \_\_\_\_ day  
on \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
ESCO

By:\_\_\_\_\_  
President

\_\_\_\_\_  
Surety

By:\_\_\_\_\_

Attorney-in-Fact

STATE OF CALIFORNIA   )  
  )  
COUNTY OF \_\_\_\_\_)       ss.

On this \_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, before me, \_\_\_\_\_, a Notary Public in and for said state, personally appeared \_\_\_\_\_, known to me (or proved to be on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact of the \_\_\_\_\_ (surety) and acknowledged to me that he subscribed the name of the \_\_\_\_\_ (surety) thereto and his own name as Attorney-in-Fact.

\_\_\_\_\_  
Notary Public in and for said State

(SEAL)

My Commission Expires \_\_\_\_\_

CERTIFICATE AS TO CORPORATE PRINCIPAL

I, \_\_\_\_\_, certify that I am the \_\_\_\_\_ Secretary of the corporation named as principal in the attached bond, that \_\_\_\_\_ who signed the said bond on behalf of the principal was then \_\_\_\_\_ of said corporation; that I know his signature, and his signature thereto is genuine; and that said bond was duly signed, sealed and attested for and in behalf of said corporation by authority of its governing Board.

(Corporate Seal)

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

**NOTE: A copy of the power of attorney to local representatives of the bonding company may be attached hereto.**

STATE OF CALIFORNIA   )  
  )  
COUNTY OF \_\_\_\_\_)       ss.

On this \_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, before me, \_\_\_\_\_, a Notary Public in and for said state, personally appeared \_\_\_\_\_, known to me (or proved to be on the basis of satisfactory evidence) to be the person whose name is subscribed to

the within instrument as the Attorney-in-Fact of the \_\_\_\_\_  
(surety) and acknowledged to me that he subscribed the name of the  
\_\_\_\_\_ (surety) thereto and his own name as Attorney-in-Fact.

\_\_\_\_\_  
Notary Public in and for said State

(SEAL)

My Commission Expires \_\_\_\_\_

CERTIFICATE AS TO CORPORATE PRINCIPAL

I, \_\_\_\_\_, certify that I am the \_\_\_\_\_  
Secretary of the corporation named as principal in the attached bond, that  
\_\_\_\_\_ who signed the said bond on behalf of the principal was  
then \_\_\_\_\_ of said corporation; that I know his signature,  
and his signature thereto is genuine; and that said bond was duly signed, sealed and attested for  
and in behalf of said corporation by authority of its governing Board.

(Corporate Seal)

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

**NOTE: A copy of the power of attorney to local representatives of the bonding company  
may be attached hereto.**

**ATTACHMENT 5  
HOURLY RATE SCHEDULE**

Attachment 5 to this Contract – Hourly Rate Schedule	
Schneider Electric Billing Classification	Hourly Rate
Vice President	\$ 350.00
Program Manager	\$ 250.00
Senior Project Manager	\$ 250.00
Senior Principal	\$ 270.00
Wastewater Technical Project Manager	\$ 250.00
Mechanical Engineer	\$ 215.00
Senior Electrical Engineer	\$ 225.00
Senior Energy Engineer	\$ 225.00
SCADA Integration Manager	\$ 215.00
Structural Engineer	\$ 225.00
Pre-Construction Manager	\$ 250.00
Senior Cost Estimator	\$ 195.00
Solar & Microgrid Technical Project Manager	\$ 250.00
Solar Solutions Manager	\$ 220.00
Senior Microgrid Solutions Architect	\$ 215.00
National Solar Developer	\$ 175.00
Regional Energy Engineering Manager	\$ 205.00
MEP Design Engineering Manager	\$ 195.00
Construction Project Manager	\$ 225.00
Project Superintendent	\$ 180.00
Commissioning & Quality Control Manager	\$ 250.00
Scheduler	\$ 165.00
Client Services/ M&V Manager	\$ 150.00
Finance Director	\$ 145.00
Rebates and Grant Writing/ Manager	\$ 140.00
Marketing Specialist	\$ 120.00

**ATTACHMENT 6**  
**WORKERS' COMPENSATION CERTIFICATION**

Labor Code section 3700 in relevant part provides:

Every employer except the State shall secure the payment of compensation in one or more of the following ways:

- a. By being insured against liability to pay compensation by one or more insurers duly authorized to write compensation insurance in this state.
- b. By securing from the Director of Industrial Relations a certificate of consent to self-insure, which may be given upon furnishing proof satisfactory to the Director of Industrial Relations of ability to self-insure and to pay any compensation that may become due to his employees.

I am aware of the provisions of section 3700 of the Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the Work of this Contract.

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

Name of ESCO: \_\_\_\_\_

Signature: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

(In accordance with Article 6 - commencing at section 1860, chapter 1, part 7, division 2 of the Labor Code, the above certificate must be signed and filed with the awarding body prior to performing any Work under this Contract.)

## ATTACHMENT 7

### ASBESTOS & OTHER HAZARDOUS MATERIALS CERTIFICATION

ESCO hereby certifies that no Asbestos, or Asbestos-Containing Materials, polychlorinated biphenyl (PCB), or any material listed by the federal or state Environmental Protection Agency or federal or state health agencies as a hazardous material, or any other material defined as being hazardous under federal or state laws, rules, or regulations “New Material Hazardous”, shall be furnished, installed, or incorporated in any way into the Project or in any tools, devices, clothing, or equipment used to affect any portion of ESCO's work on the Project for City.

ESCO further certifies that it has instructed its employees with respect to the above-mentioned standards, hazards, risks, and liabilities.

Asbestos and/or asbestos-containing material shall be defined as all items containing but not limited to chrysotile, crocidolite, amosite, anthophyllite, tremolite, and actinolite. Any or all material containing greater than one-tenth of one percent (.1%) asbestos shall be defined as asbestos-containing material.

Any disputes involving the question of whether or not material is New Hazardous Material shall be settled by electron microscopy or other appropriate and recognized testing procedure, at the City's determination. The costs of any such tests shall be paid by ESCO if the material is found to be New Hazardous Material.

All Work or materials found to be New Hazardous Material or Work or material installed with “New Hazardous Material” containing equipment will be immediately rejected and this Work will be removed at ESCO's expense at no additional cost to the City.

ESCO has read and understood the document Hazardous Materials Procedures & Requirements, and shall comply with all the provisions outlined therein.

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

Name of ESCO Design-Build Entity: \_\_\_\_\_

Signature: \_\_\_\_\_

Print Name: \_\_\_\_\_

**Title:** \_\_\_\_\_

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## **Attachment 8 Wastewater Treatment Performance Guarantee**

### **1. General**

ESCO warrants that the Project, once completed and placed into operation, will be capable of treating wastewater and producing effluent meeting the applicable effluent limitations established under the Facility's NPDES and recycled water discharge permits, as such limits may be confirmed during the Design Phase and incorporated into the final design basis.

### **2. Basis of Guarantee**

The performance guarantee is based on the influent flow and loading design criteria used in ESCO's final design (to be documented in the approved Basis of Design Report). The guarantee applies under Average and Peak Flow conditions and corresponding design loadings under both dry and wet weather conditions. The guarantee applies to the entire wastewater treatment process including pretreatment/screening, biological treatment, membrane filtration, effluent disinfection, and sludge dewatering.

### **3. Demonstration of Compliance**

#### **3.1 Performance Test Plan.**

At least thirty (30) days prior to testing, ESCO shall prepare and submit a Performance Test Plan for review and approval by the Owner. The Plan shall include:

- a. Test schedule and operating conditions
- b. Sampling and monitoring locations and frequency
- c. Analytical methods and QA/QC procedures
- d. Data reporting format
- e. Pass/fail criteria tied to effluent limits
- f. Staffing and monitoring plan

Owner/Engineer approval is a condition precedent to starting the Performance Test.

The following shall be deemed complete prior to initiating Performance Testing:

- a. Substantial completion of construction
- b. Successful completion of all facility acceptance testing
- c. All Operations and Maintenance manuals submitted and accepted
- d. Comprehensive training of City operations staff completed
- e. All spare parts and special tools required for routine operation and maintenance delivered
- f. All required temporary or final permits for operation, including NPDES coverage and Title 22 approval, are in place or conditionally authorized to allow testing under regulatory oversight
- g. Permanent power, water supply, chemical systems, and other supporting utilities are fully installed, tested, and available for use

- h. City operations staff are available and scheduled to operate alongside ESCO personnel during the Performance Test to gain hands-on training and experience

### **3.2 Performance Testing Protocol.**

Within thirty (30) days after Substantial Completion, ESCO shall initiate a Performance Test of the completed wastewater treatment facilities. The Performance Test shall:

- a. Be conducted over a minimum continuous thirty (30) day operating period,
- b. Be performed under average dry weather flow conditions at or near design loadings, as documented in the approved Basis of Design Report,
- c. Include influent and effluent sampling and analysis sufficient to demonstrate compliance with all applicable permit effluent limits, including but not limited to BOD, TSS, turbidity, coliform, pH, and disinfection criteria,
- d. Be performed in accordance with industry-recognized quality assurance/quality control practices and permit requirements.

### **3.3 Sampling and Monitoring.**

- a. Sampling frequency, analytical methods, and reporting protocols shall be consistent with the Facility's discharge permit monitoring and reporting requirements.
- b. At a minimum, daily monitoring of critical parameters (BOD, TSS, turbidity, and coliform) shall be performed during the Performance Test.
- c. All samples shall be analyzed by a California ELAP-certified laboratory, unless otherwise agreed in writing.

### **3.4 Reporting.**

At the conclusion of the Performance Test, ESCO shall prepare and submit a Performance Test Report including:

- a. Summary of operating conditions during the test period,
- b. Tabulation of all influent and effluent monitoring data,
- c. Comparison of results to guaranteed effluent limits,
- d. Identification of any exceedances and corrective actions taken,
- e. Certification by ESCO's design engineer of record that the test demonstrates the facility's capability to reliably meet the guaranteed performance.

### **3.5 Failure and Retest.**

- a. If the Performance Test demonstrates non-compliance with any guaranteed effluent limit, ESCO shall, at its sole cost, promptly implement such modifications, adjustments, or additions to the treatment process as necessary to achieve compliance.
- b. Following completion of such modifications, ESCO shall repeat the Performance Test for a full thirty (30) day period, under the same terms as above.
- c. This process shall be repeated as necessary until the facility demonstrates compliance.

### **3.6 Warranty Terms.**

The Performance Guarantee Warranty Period shall commence upon successful completion and City acceptance of the Performance Test. The following warranty requirements shall be proposed

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by the ESCO for consideration by the City, and negotiated in good faith, at the completion of Phase 2:

- a. Duration of the Warranty Period.
- b. Corrective actions required to achieve compliance, in the event of noncompliance.
- c. Criteria for extension of the Warranty Period if repeated failures are encountered.
- d. Exclusions.

## ATTACHMENT 9

### GRANT/LOAN COMPLIANCE RIDER

This Rider is attached to and made part of the Design-Build Energy Services Contract between the City of Sutter Creek ("City") and Schneider Electric Buildings Americas, Inc. ("ESCO").

1. **Purpose.** This Rider is intended to incorporate and flow down the terms of any state or federal grant, loan, or funding assistance secured by the City for the Project.
2. **Incorporated Provisions.** ESCO shall comply with the following, as applicable to the funding source:
  - **Federal Cross-Cutting Requirements** (2 CFR Part 200, Subpart D, Appendix II, and related guidance).
  - **Labor Standards** (Davis-Bacon Act, Copeland Act, Contract Work Hours and Safety Standards Act, or California Labor Code prevailing wage provisions).
  - **Domestic Preference** (Build America, Buy America Act, 49 U.S.C. § 5323(j), or equivalent).
  - **Civil Rights / Equal Opportunity** (Title VI, ADA, Section 504 of the Rehabilitation Act, Executive Order 11246, etc.).
  - **Environmental and Permitting Compliance** (CEQA, NEPA, EPA SRF cross-cutters, etc.).
  - **Debarment and Suspension Certification** (2 CFR Part 180).
  - **Audit and Record Retention** (2 CFR §§ 200.334–200.338, minimum three years after final payment).
  - **Other Agency Specific Provisions** as may be required by the funding agreement (examples: USDA RD Guide 27, EPA SRF loan conditions, CDBG contract provisions).
3. **Supersession.** Where this Rider conflicts with the base Agreement, the provisions of this Rider shall govern, but only to the extent necessary to comply with funding agency requirements.
4. **Amendments.** The City may replace this Rider with the funding agency's standard form at the time of award. ESCO shall execute such replacement Rider as a condition of proceeding with the Work.

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