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# **MODIFIED STANDARD FORM OF GENERAL CONDITIONS OF CONTRACT BETWEEN OWNER AND DESIGN-BUILDER**

The author of this document has revised the text of the original DBIA standard form.

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## **Document No. 535**

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# Article 1

## General

### 1.1 Mutual Obligations

1.1.1 *Owner and Design-Builder* commit at all times to cooperate fully with each other, and proceed on the basis of trust and good faith, to permit each party to realize the benefits afforded under the Contract Documents.

### 1.2 Basic Definitions

1.2.1 *Agreement* refers to the executed contract between Owner and Design-Builder under DBIA Document No. 530, *Standard Form of Agreement Between Owner and Design-Builder - Cost Plus Fee with an Option for a Guaranteed Maximum Price* (2010 Edition), as modified.

1.2.3 *Basis of Design Documents* are as follows: For DBIA Document No. 530, *Standard Form of Agreement Between Owner and Design-Builder - Cost Plus Fee With an Option for a Guaranteed Maximum Price*, the Basis of Design Documents are those documents specifically listed in, as applicable, the GMP Proposal as being the "Basis of Design Documents."

1.2.4 *Construction Documents* are the documents, consisting of Drawings and Specifications, to be prepared or assembled by the Design-Builder in consultation with and subject to the approval of the Owner and consistent with the Basis of Design Documents unless a deviation from the Basis of Design Documents is specifically set forth in a Change Order executed by both the Owner and Design-Builder, as part of the design review process contemplated by Section 2.4 of these General Conditions of Contract.

1.2.5 *Day or Days* shall mean calendar days unless otherwise specifically noted in the Contract Documents.

1.2.6 *Design-Build Team* is comprised of the Design-Builder, the Design Consultant, and key Subcontractors identified by the Design-Builder subject to the approval of the Owner.

1.2.7 *Design Consultant* is a qualified, licensed design professional who is not an employee of Design-Builder, but is retained by Design-Builder, or employed or retained by anyone under contract with Design-Builder, to furnish design services required under the Contract Documents. A Design Sub-Consultant is a qualified, licensed design professional who is not an employee of the Design Consultant, but is retained by the Design Consultant or employed or retained by anyone under contract to Design Consultant, to furnish design services required under the Contract Documents. The Design-Builder warrants and represents that it, its Design Consultants, its Design Sub-Consultants, its Subcontractors, its Sub-Subcontractors and all of its other consultants presently have, and will at all times during the term of this Agreement maintain: (i) all skills, experience, knowledge, staffing and resources necessary to perform the services set forth herein, and (ii) all required licenses, accreditations, certifications and registrations necessary to perform the services set forth herein.

1.2.8 *Final Completion* shall mean that the Work is complete in accordance with the Contract Documents and the Design-Builder has submitted to the Owner all documents required to be submitted to the Owner for Final Completion.

1.2.9 *Force Majeure Events* are those events that are beyond the control of both Design-Builder and Owner, including the events of war, floods, labor disputes, earthquakes, epidemics, adverse weather conditions not reasonably anticipated, and other acts of God.

1.2.10 *General Conditions of Contract* refer to this DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (2010 Edition), as modified.

**1.2.11** [not used].

**1.2.12** *GMP Proposal* means the guaranteed maximum price proposal for the Project provided by the Design-Builder to the Owner as part of the Design-Builder's response to the Owner's request for proposals for the Project.

**1.2.13** *Hazardous Conditions* are any materials, wastes, substances and chemicals deemed to be hazardous under applicable Legal Requirements, or the handling, storage, remediation, or disposal of which are regulated by applicable Legal Requirements.

**1.2.14** *Legal Requirements* are all applicable federal, state and local laws, codes, ordinances, rules, regulations, orders and decrees of any government or quasi-government entity having jurisdiction over the Project or Site, the practices involved in the Project or Site, or any Work.

**1.2.15** *Notice of Delays* shall be provided by Design-Builder for all delays in accordance with Section 2.1.3.3.1 herein.

**1.2.16** *Owner's Project Criteria* are developed by or for Owner to describe Owner's program requirements and objectives for the Project, including use, space, price, time, site and expandability requirements, as well as submittal requirements and other requirements governing Design-Builder's performance of the Work. Owner's Project Criteria may include conceptual documents, design criteria, design performance specifications, design specifications, and LEED® or other sustainable design criteria and other Project-specific technical materials and requirements.

**1.2.17** *Site* is the land or premises on which the Project is located.

**1.2.18** *Subcontractor* is any person or entity retained by Design-Builder as an independent contractor to perform a portion of the Work and shall include materialmen and suppliers and is prequalified in accordance with all Legal Requirements and the requirements of the Contract Documents.

**1.2.19** *Sub-Subcontractor* is any person or entity retained by a Subcontractor as an independent contractor to perform any portion of a Subcontractor's Work and shall include materialmen and suppliers.

**1.2.20** *Substantial Completion* or *Substantially Complete* shall mean that the Work is complete and ready for full occupancy with only a very limited number of minor defects and/or items of incomplete or non-conforming Work that have no adverse impact on the use or occupancy of the Project. All finishes must be complete, all systems fully functional, including permanent power, and a Certificate of Occupancy (if applicable) issued by the authority having jurisdiction. If a Certificate of Occupancy is not required, the Criteria Architect will determine if the building is ready for occupancy and will issue a letter stating the building is ready for occupancy.

**1.2.21** *Work* is comprised of all Design-Builder's design, construction and other services required by the Contract Documents, including procuring and furnishing all materials, equipment, services and labor reasonably inferable from the Contract Documents.

**1.2.22** *Claim* is defined in Section 10.1 of the General Conditions of Contract.

**1.2.23** *Statement of Claim Form* means the Statement of Claim Form described in Section 10.1 of the General Conditions of Contract and contained in the Contract Documents.

## Article 2

### **Design-Builder's Services and Responsibilities**

#### **2.1 General Services.**

**2.1.1** Design-Builder's Representative shall be reasonably available to Owner's Representative and shall have the necessary expertise and experience required to supervise the Work. Design-Builder's Representative shall communicate regularly with Owner's Representative and shall be vested with the authority to act on behalf of Design-Builder. Design-Builder's Representative may be replaced only with the written approval of the Owner's Representative.

**2.1.2** Design-Builder shall provide Owner's Representative with a monthly status report detailing the progress of the Work, including (1) executive summary, (2) design reviews, issues and sign-off status, (3) status of all contracts, subcontracts, purchase orders and consultant agreements, (4) budget status and forecast, (5) buyout status, (6) change order status, (7) contingency status, (8) schedule status, (9) remedial action plan for any critical area behind schedule, (10) issues log and critical issues list, (11) items requiring Owner action, (12) outlook of scheduled activities for the next 30 days, (13) drawings and photos, (14) identification of discrepancies, conflicts, or ambiguities existing in the Contract Documents that require resolution, (15) identification of health and safety issues existing in connection with the Work; (16) identification of any items that require resolution so as not to jeopardize Design-Builder's ability to complete the Work for the Contract Price and within the Contract Time, and (17) any other information Design-Builder finds relevant to bring to the attention of the Owner.

**2.1.3** Unless a schedule for the execution of the Work has been attached to the Agreement as an exhibit at the time the Agreement is executed, Design-Builder shall prepare and submit, at least three (3) days prior to the meeting contemplated by Section 2.1.4 hereof, a schedule for the execution of the Work for Owner's review and response ("Progress Schedule"). The Progress Schedule shall indicate the dates for the start and completion of the various stages of Work, including reasonable dates when Owner information and approvals are required to enable Design-Builder to achieve the Contract Time(s), punch list, project close-out requirements, contract completion, and occupancy requirements. The Progress Schedule shall be revised as required by conditions and progress of the Work, but such revisions shall not relieve Design-Builder of its obligations to complete the Work within the Contract Time(s), as such dates may only be adjusted in accordance with the Contract Documents. Owner's review of, and response to, the schedule shall not be construed as relieving Design-Builder of its complete and exclusive control over the means, methods, sequences and techniques for executing the Work. The Progress Schedule shall be manpower loaded and utilize a critical path method network analysis and shall be accompanied by a bar chart schedule based thereon. The Progress Schedule shall be updated on a monthly basis or at any time that the Progress Schedule has been significantly impacted by any cause. A copy of the current revised Progress Schedule shall be submitted by the Design-Builder to the Owner each month with a report.

**2.1.3.1** The Progress Schedule is for the purpose of coordinating the timing, phasing and sequence of the Work and shall not change or modify the Date for Substantial Completion. **The Date for Substantial Completion shall only be changed or modified by Change Order, other Modification or a Claim that is Finally Resolved, regardless of the date in any proposed schedule.**

**2.1.3.2.** The Design Builder's obligation to furnish requested scheduling information is a material term of its Contract. If the Design-Builder fails to furnish requested scheduling information in writing within five (5) days of a request for such information from the Owner, the Owner may withhold processing all current and future Applications for Payment until the Design-Builder furnishes the requested information.

**2.1.3.3. THE PERIODS OF TIME IN THE PROGRESS SCHEDULE ARE OF THE ESSENCE TO THIS CONTRACT. THE DESIGN-BUILDER SHALL PROSECUTE ITS WORK IN ACCORDANCE WITH THE CURRENT PROGRESS SCHEDULE.**

**2.1.3.3.1. Notice of Delays.** As a condition precedent to any increase in the Contract Price, use of Contingency, use of Shared Savings, increase in Contract Times and/or increase in the GMP, the Design-Builder shall give the Owner's Representative verbal notice of any delay affecting its Work within two (2) business days of the commencement of the delay. In addition and also as a condition precedent to any increase in the Contract Price, use of Contingency, use of Shared Savings, increase in Contract Times and/or increase in the GMP, the Design-Builder shall give the Owner's Representative written notice of the delay within ten (10) business days of the commencement of the delay with specific recommendations about how to minimize the effect of the delay. The written notice of the delay shall conspicuously state that it is a "**NOTICE OF DELAY.**" A notice of a delay shall not constitute the submission of a Claim. Contract Times shall only be changed as provided in the Agreement. The Design-Builder acknowledges and agrees that these notice provisions are material terms of the Contract Documents and give the Owner the opportunity to take action to minimize the cost and/or effect of delays.

**2.1.4** The parties will meet within seven (7) days after execution of the Agreement to discuss issues affecting the administration of the Work and to implement the necessary procedures, including those relating to submittals and payment, to facilitate the ability of the parties to perform their obligations under the Contract Documents.

**2.1.5** If the Owner, through the Owner's Representative, determines that the performance of the Work has not progressed adequately and it is likely that the Design-Builder will not substantially complete its Work by its Date for Substantial Completion based upon the Design-Builder's failure to achieve specific milestone dates contained within the original construction schedule as adjusted by Excusable Delays, the Owner's Representative shall have the right to order the Design-Builder to take Corrective Measures necessary to expedite the Work, including, without limitation: (i) working additional shifts or overtime; (ii) supplying additional manpower, equipment, and facilities; and (iii) other similar measures (collectively referred to as "Corrective Measures"). If the Owner orders the Design-Builder to take such Corrective Measures, and regardless of any claims, disputes or objections, the Design-Builder shall take and continue such Corrective Measures until the Owner is satisfied that the Design-Builder is likely to substantially complete its Work by its Date for Substantial Completion. The Design-Builder shall not be entitled to adjustment in the Guaranteed Maximum Price in connection with the Corrective Measures required pursuant to this Section 2.1.5, unless the Design-Builder is able to establish that it is otherwise entitled to additional compensation under the terms of the Contract Documents.

**2.1.6** Unless otherwise expressly provided in the Contract Documents, the Design-Builder shall provide typed or printed instructions covering the operation and maintenance of each item of equipment furnished in a notebook submitted to the Owner. The instructions, as applicable, shall include the following:

- .1 Any schematic piping and wiring diagrams;
- .2 Any valve charts and schedules;
- .3 Any lubrication charts and schedules;
- .4 Guides for troubleshooting;
- .5 Pertinent diagrams and maintenance instructions for all equipment;
- .6 Manufacturer's data on all equipment;
- .7 Operating and maintenance instructions for all equipment;
- .8 Manufacturer's parts list;
- .9 Any testing procedures for operating tests; and
- .10 Other instructions and materials as required by the Contract Documents.

The Design-Builder shall provide two (2) hard copies and two (2) additional copies in any electronic format requested by Owner of the above instruction books within 30 days after the Substantial Completion of the Work. The books shall describe the information to be covered clearly and in detail and shall be in form and content satisfactory to the Owner.

**2.1.7** Unless otherwise provided in the Contract Documents, the Design-Builder will participate in training sessions for the Owner's maintenance personnel. These training sessions will cover the operation and maintenance of the Project's systems. The training will be of sufficient time and detail to train the Owner's maintenance personnel in how to maintain and operate these systems. Additionally, unless otherwise provided in the Contract Documents, during the first twelve (12) months following Final Completion of the Project, the Design-Builder (without additional compensation) will participate in tests on all systems as reasonably requested by the Owner. The Owner will be advised when the testing will be conducted and may observe the testing. It is intended that the testing be a comprehensive series of operation tests designed to determine whether the systems are fully operational in accordance with appropriate design standards, the Owner's Design Criteria, and the requirements of the Contract Documents. If it appears that any of the systems, including equipment and software, do not conform to appropriate design standards, the Owner's Design Criteria, and the requirements of the Contract Documents, the Design-Builder will remedy the defective and/or non-conforming work as provided in Contract Documents.

**2.1.8** The Design-Builder shall confine operations at the site to areas permitted by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders and all other requirements of public authorities and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

**2.1.9** The Design-Builder shall conduct the Work in a manner that minimizes disruption to the adjacent property owners' operations and minimizes disruption to the owners, tenants and sub-tenants of existing structures. Unless expressly permitted by the Contract Documents or by the Owner in writing, the Design-Builder shall not materially interfere with the operations of any businesses or buildings adjacent or near the site, shall not permit any of its employees or its Design Consultant's, Design Sub-Consultant's, Subcontractor's or Sub-Subcontractor's employees to use any existing facilities on the Project site, including, without limitation, lavatories, toilets, entrances, and parking areas, and shall not permit its employees or its Design Consultant's, Design Sub-Consultant's, Subcontractor's or Sub-Subcontractor's employees to bring any tobacco products, alcoholic beverages, controlled substances, or firearms onto the Project site or any other property owned or controlled by the Owner. Additionally, the Design-Builder shall not permit its employees or its Design Consultant's, Design Sub-Consultant's, Subcontractor's or Sub-Subcontractor's employees to use any radios, tape or compact disc players, or sound amplification equipment that is audible outside of the immediate area where the Work is being performed.

**2.1.10** The Design-Builder shall conspicuously post notice of the prohibitions listed in the preceding subparagraphs at the Project site in the same locations as OSHA notices are required to be posted, and shall verbally inform all of the Design-Builder's employees, and the employees of the Design-Builder's Design Consultants, Design Sub-Consultants, Subcontractors and Sub-Subcontractors, regardless of tier, of such prohibitions.

**2.1.11 SIGNAGE.** The Design-Builder and any entity for whom the Design-Builder is responsible shall not erect any sign on the Project site without the prior written consent of the Owner, which may be withheld in the sole discretion of the Owner.

**2.1.12 CUTTING AND PATCHING.** The Design-Builder shall be responsible for cutting, fitting or patching as required to complete the Work or to make its parts fit together properly. The Design-Builder shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or separate contractors by cutting, patching or otherwise altering such

construction or by excavation. The Design-Builder shall not cut or otherwise alter such construction by the Owner or a separate contractor except with written consent of the Owner's Representative and of such separate contractor; such consent shall not be unreasonably withheld. The Design-Builder shall not unreasonably withhold from the Owner or a separate contractor the Design-Builder's consent to cutting or otherwise altering the Work.

**2.1.13 PRIVILEGED COMMUNICATIONS.** The Design-Builder acknowledges and agrees that the Owner's legal counsel may from time to time provide legal services to the Project and that in doing so may communicate with the Owner's Representative and Criteria Architect. The Design-Builder agrees that such communications will be privileged communications and, if there is a Claim contemplated or pending, any written communications will be confidential work product.

**2.1.14** As part of its General Services, Design-Builder shall attend all public meetings to solicit public input regarding the Project as requested by the Owner.

## **2.2 Design Professional Services.**

2.2.1 Design-Builder shall, consistent with applicable state licensing laws, provide through qualified, licensed design professionals employed by Design-Builder, or procured from qualified, independent licensed Design Consultants, the necessary design services, including architectural, engineering and other design professional services, for the preparation of the required drawings, specifications and other design submittals to permit Design-Builder to complete the Work consistent with the Contract Documents. Nothing in the Contract Documents is intended or deemed to create any legal or contractual relationship between Owner and any Design Consultant or any Design Sub-Consultant except as set forth in Paragraph 2.7.3 herein.

## **2.3 Standard of Care for Design Professional Services.**

**2.3.1** The standard of care for all design professional services performed to execute the Work shall be the care and skill ordinarily used by members of the design profession for similar projects taking into account any unique requirements of the Owner and the location of the Project.

**2.3.2** The Design-Builder shall review laws, codes, and regulations applicable to the Design-Builder's services. The Design-Builder shall respond in the design of the Project to requirements imposed by governmental authorities having jurisdiction over the Project, and shall perform Design-Builder's services and design the Project in conformance with all such laws, codes, and regulations in effect at the time of design completion. In the event of conflicting requirements, the Design-Builder shall comply with the more stringent requirements.

## **2.4 Design Development Services.**

**2.4.1** Design-Builder and the Owner's Representative shall, consistent with any applicable provision of the Contract Documents, agree upon any interim design submissions that Owner may wish to review, which interim design submissions may include design criteria, drawings, diagrams and specifications setting forth the Project requirements. Interim design submissions shall be consistent with the Basis of Design Documents identified in the GMP Proposal, as the Basis of Design Documents may have been changed through the design process set forth in this Section 2.4.1. On or about the time of the scheduled submissions, Design-Builder and Owner's Representative shall meet and confer about the submissions, with Design-Builder identifying during such meetings, among other things, the evolution of the design and any changes to the Basis of Design Documents, or, if applicable, previously submitted design submissions. Changes to the Basis of Design Documents, including those that are deemed minor changes under Section 9.3.1, shall be processed in accordance with Article 9. Minutes of the meetings, including a full listing of all changes, will be maintained by Design-Builder and provided to all attendees for review. Following the design review meeting, Owner's Representative shall review and approve the interim design submissions and meeting minutes in a time that is consistent with any

reasonable turnaround times set forth in Design-Builder's schedule.

**2.4.2** Design-Builder shall submit to Owner's Representative Construction Documents setting forth in detail drawings and specifications describing the requirements for construction of the Work. The Construction Documents shall be consistent with the latest set of interim design submissions, as such submissions may have been modified in a design review meeting and recorded in the meetings minutes. The parties shall have a design review meeting to discuss, and Owner's Representative shall review and approve, the Construction Documents in accordance with the procedures set forth in Section 2.4.1 above. Design-Builder shall proceed with construction in accordance with the approved Construction Documents and shall submit one set of approved Construction Documents to Owner's Representative prior to commencement of construction.

**2.4.3** Owner's or Owner's Representative's review and approval of interim design submissions, meeting minutes, and the Construction Documents is for the purpose of mutually establishing a conformed set of Contract Documents compatible with the requirements of the Work. Neither Owner's Representative's review nor approval of any interim design submissions, meeting minutes, and Construction Documents shall be deemed to transfer any design liability from Design-Builder to Owner or Owner's Representative.

**2.4.4** To the extent not prohibited by the Contract Documents or Legal Requirements, Design-Builder may prepare interim design submissions and Construction Documents for a portion of the Work to permit construction to proceed on that portion of the Work prior to completion of the Construction Documents for the entire Work.

## **2.5 Legal Requirements.**

**2.5.1** Design-Builder shall perform the Work in accordance with all Legal Requirements and shall provide all notices applicable to the Work as required by the Legal Requirements.

**2.5.2** Except as set forth in Section 2.3.2, the Contract Price and/or Contract Time(s) shall be adjusted to compensate Design-Builder for the effects of any changes in the Legal Requirements enacted after the date of the GMP Proposal to the extent that they result in revisions Design-Builder is required to make to the Construction Documents that affect the cost of the Work or the schedule.

## **2.6 Government Approvals and Permits.**

**2.6.1** Design-Builder shall obtain and pay for all necessary permits, approvals, licenses, government charges and inspection fees required for the prosecution of the Work by any government or quasi-government entity having jurisdiction over the Project. Owner shall waive all permit fees that are within its jurisdiction and may obtain waivers of certain other fees.

**2.6.2** Design-Builder shall provide reasonable assistance to Owner in obtaining those permits, approvals and licenses that are Owner's responsibility.

## **2.7 Design-Builder's Construction Phase Services.**

**2.7.1** Unless otherwise provided in the Contract Documents to be the responsibility of Owner or a separate contractor, Design-Builder shall provide through itself, Design Consultants, Design Sub-Subconsultants, Subcontractors or Sub-Subcontractors the necessary supervision, labor, inspection, testing, start-up, material, equipment, machinery, temporary utilities and other temporary facilities to permit Design-Builder to complete construction of the Project consistent with the Contract Documents.

**2.7.2** Design-Builder shall perform all construction activities efficiently and with the requisite

expertise, skill and competence of a Design-Builder familiar with the construction of similar court house facilities in Ohio in order to satisfy the requirements of the Contract Documents. Design-Builder shall at all times exercise complete and exclusive control over the means, methods, sequences and techniques of construction.

### **2.7.3 Subcontractors.**

**2.7.3.1** Design-Builder shall employ only Subcontractors who are duly licensed and qualified to perform the Work consistent with the Contract Documents. Owner may reasonably object to Design-Builder's selection of any Subcontractor, Supplier, or other individual or entity. If the Design-Builder is in default because of the Subcontractor's performance, then the Design-Builder shall not be entitled to any adjustment in the Contract Price, Contract Time and/or GMP and shall remain liable to the Owner for any actual and direct damages or losses caused by such default. The objection or failure to object to any Subcontractor by the Owner shall not relieve the Design-Builder of its responsibility for performance of the Work, nor shall the approval of any particular Subcontractor be construed as approval of any particular process, equipment, or material.

**2.7.3.2** The Design-Builder shall be responsible to the Owner for acts and omissions of the Design-Builder's employees, Design Consultants, Design Sub-Consultants, Subcontractors, Sub-Subcontractors and their agents and employees, and other persons or entities performing any portion of the Design-Builder's obligations under the Design-Build Documents.

**2.7.3.2** Design-Builder shall prequalify Subcontractors in accordance with all Legal Requirements, including the latest version of the Ohio Administrative Code 153:1-7-01. Design-Builder shall establish criteria for the prequalification of prospective bidders on subcontracts that shall:

**2.7.3.2.1** include the experience of the bidder, the bidder's financial condition, conduct and performance on previous contracts, facilities, management skills, and the ability to execute the contract properly;

**2.7.3.2.2** require prospective bidders to affirmatively state that they have not violated any affirmative action or equal opportunity program during the last five years preceding the date of the prequalification application;

**2.7.3.2.3** require a prospective bidder to submit proof of current licenses held by Design-Builder, its Design Consultants, or Design Sub-Consultants to perform the work as required by the Owner or by applicable law.

**2.7.3.3** The prequalification criteria established pursuant to Paragraph 2.7.3.2 by the Design-Builder are subject to the approval of the Owner. The Owner may approve or reject the criteria in whole or in part. In addition to any other remedies under the Contract Documents, the Owner shall have the right to stop payment or withhold monies due the Design-Builder until an acceptable Subcontractor is approved by the Owner.

### **2.7.3.4 Requirements for the award of Subcontracts.**

**2.7.3.4.1** All Subcontracts shall be awarded in accordance with all applicable Legal Requirements.

**2.7.3.4.2** For each Subcontract to be awarded, the Design-Builder shall identify at least three prospective bidders that are prequalified to bid on each Subcontract, except that the Design-Builder shall identify fewer than three if the Design-Builder establishes to the satisfaction of the Owner's Representative that fewer than three prequalified bidders are available.

**2.7.3.4.3** Once the prospective bidders are prequalified and found acceptable by the Owner's Representative, the Design-Builder shall solicit proposals from each of those bidders.

**2.7.3.4.4** The solicitation and selection of a Subcontractor shall be conducted under an open-book pricing method consistent with Paragraph 7.5 of the Agreement.

**2.7.3.4.5** Subject to the consent of the Owner's Representative, the Design-Builder is not required to award a Subcontract to a low bidder.

**2.7.3.4.6** If the Design-Builder intends and is permitted by the Owner's Representative, in writing, to self-perform a portion of the Work on the Project, the Design-Builder shall submit a sealed bid for the portion of the Work prior to accepting any bids from Subcontractors for the same Work. The Design-Builder may only self-perform work to the extent that the Design-Builder's bid for the particular scope of work is lower than the bid of a prequalified subcontractor.

**2.7.3.5** For all Subcontractors on the Project, the Design-Builder shall use the form of subcontract included in Ohio Administrative Code Section 153:1-3-02. All subcontracts on the Project shall include the following terms and conditions:

**2.7.3.5.1** Mutual rights and responsibilities: The subcontract form shall contain a provision requiring:

- a. the Design-Builder and the Subcontractor to be mutually bound to the terms of the Contract Documents;
- b. the Design-Builder to assume toward the Subcontractor the rights, remedies, obligations, and responsibilities that the Owner has and assumes toward the Design-Builder;
- c. the Subcontractor to assume toward the Design-Builder the rights, remedies, obligations, and responsibilities that the Design-Builder assumes towards the Owner; and,
- d. the Subcontractor to perform its portion of the work on the Project in accordance with the Contract Documents.

**2.7.3.5.2** Contingent assignment: The subcontract form shall contain a provision providing for the assignment of the subcontract to the Owner, at the Owner's option, upon the termination of the Design-Builder's contract and written notice to the Subcontractor.

**2.7.3.5.3** Intended third party beneficiary: The subcontract form used for the contract with Subcontractors, Sub-Subcontractors, Design Consultants, and Design Sub-Consultants shall contain a provision indicating that the Owner is an intended third party beneficiary of the subcontract, entitled to enforce any rights thereunder for its benefit.

**2.7.3.5.4** Insurance: The subcontract form shall contain a provision requiring the Subcontractor to maintain insurance in accordance with the Contract Documents.

**2.7.3.5.5** Right to audit: The subcontract form shall contain a provision entitling the Owner and any agents designated by the Owner to have access to and the right to audit and copy, at the Owner's reasonable cost, all of the Subcontractor's and Sub-Subcontractor's books, records, contracts, correspondence, instructions, drawings, receipts, vouchers, purchase orders and memorandum relating to the Work for not less

than ten (10) years following completion of the Work consistent with section 149.43 of the Revised Code.

**2.7.3.5.6** Indemnification: The subcontract form shall contain a provision requiring the Subcontractor and its Sub-Subcontractors to indemnify, defend and hold harmless, to the fullest extent permitted by law, the Owner, its consultants, and employees from all claims and expenses for bodily injury and property damage other than to the work itself that may arise from the performance of the subcontract work, but only to the extent caused by the negligence of the Subcontractor, its Sub-Subcontractors or a person or entity for whom the Subcontractor or Sub-Subcontractor may be liable. The subcontract form shall not require a Subcontractor to waive its immunity under the workers' compensation laws of this state from claims brought against the Subcontractor by the Subcontractor's employees. The indemnification required by this provision is in addition to, and not a limitation of, the other indemnification requirements in the Contract Documents.

**2.7.3.5.7** Prompt payment: The subcontract form shall contain a provision requiring the Design-Builder, notwithstanding a contingent payment clause, to make payments to the Subcontractor in accordance with applicable law, including section 4113.61 of the Ohio Revised Code, and that progress payments to the Subcontractor for satisfactory performance of the subcontract work shall be made no later than ten days after receipt by the Design-Builder of payment from the Owner for that subcontract work.

**2.7.3.4.8** Retainage: The subcontract form shall contain a provision requiring that retainage shall be at a rate equal to or less than the percentage retained from the Design-Builder's payment by the Owner for subcontract work.

**2.7.3.5.9** Warranty: The subcontract form shall contain a provision requiring that the Subcontractor fully warrant, for the benefit of the Owner, that all materials and equipment shall be new unless otherwise specified, of good quality, in conformance with the Contract Documents and free from defective workmanship or materials.

**2.7.3.5.10** Non-waiver of lien or payment bond rights: The subcontract form and any supplemental terms to the contract between the Design-Builder and the Subcontractor shall not include any terms or conditions that seek to prohibit a Subcontractor from exercising its rights under chapter 1311 of the Revised Code or under any payment bond provided by the Design-Builder.

**2.7.3.5.11** Nondiscrimination: The subcontract form shall contain a provision specifically requiring the Subcontractor to comply with applicable law regarding equal employment opportunity, including section 153.59 of the Revised Code and, to the extent applicable, all executive orders issued by the Governor of the state of Ohio.

**2.7.3.5.12** Dispute resolution: The subcontract form shall require the contract between the Design-Builder and Subcontractor to contain a dispute resolution provision that is comparable to the dispute resolution provision in the contract between the Design-Builder and the Owner.

**2.7.4** Design-Builder has a duty to inspect the Work of its Subcontractors, Sub-Subcontractors, Design Consultants and Design Sub-Consultants for appropriate design and conformance with the Contract Documents and assumes responsibility to Owner for the proper performance of the Work of Subcontractors, Sub-Subcontractors, Design Consultants, and Design Sub-Consultants and any acts and omissions in connection with such performance. Nothing in the Contract Documents is intended or deemed to create any legal or contractual relationship between Owner and any Subcontractor or Sub-Subcontractor, including but not limited to any third-party beneficiary rights except that the Owner is an intended third-party beneficiary of Design-Builder's

agreements with its Design Consultants, Design Sub-Consultants, Subcontractors, Sub-Subcontractors and suppliers.

**2.7.5** Design-Builder shall coordinate the activities of all Subcontractors. If Owner performs other work on the Project or at the Site with separate contractors under Owner's control, Design-Builder shall reasonably cooperate and coordinate its activities with those of such separate contractors so that the Project can be completed in an orderly and coordinated manner without disruption.

**2.7.6** Design-Builder shall keep the Site free from debris, trash and construction wastes to permit Design-Builder to perform its construction services efficiently, safely and without interfering with the use of adjacent land areas. Upon Substantial Completion of the Work, or a portion of the Work, Design-Builder shall remove all debris, trash, construction wastes, materials, equipment, machinery and tools arising from the Work or applicable portions thereof to permit Owner to occupy the Project or a portion of the Project for its intended use.

**2.7.7** Design-Builder shall maintain at the Project site or other location approved by Owner's Representative and accessible for review and copying by the Owner or its designee, the following items:

- .1 A set of Drawings and Specifications as approved by the Authority having Jurisdiction;
- .2 A copy of the Drawings and Specifications upon which the Design-Builder shall record changes made during the course of its Work;
- .3 The Design-Builder shall keep an accurate record of all changes made to the Drawings to show actual installation where installation varies from Work as originally shown, including the exact location and depth of underground utility lines. Any such changes shall be noted by Change Order Number, if a Change Order was issued, and drawn neatly in a contrasting color on the drawings;
- .4 The Design-Builder shall keep record of all changes to the Specifications;
- .5 When Shop Drawings are used, the Design-Builder shall cross-reference the corresponding sheet numbers on the drawings and sections of the specifications;
- .6 A daily log at the Project site in which it has recorded Project-related information, including, but not limited to, the weather, number of workers on site, identification of equipment, Work accomplished, problems encountered, and other similar relevant Project data;
- .7 As applicable to its Work, all Bulletins, Addenda, approved Shop Drawings, Product Data, Samples, manufacturers' installation, operating and/or maintenance instructions or requirements, certificates, warranties, Change Orders, Change Directives, other Modifications and complete back up data for all Change Orders, Change Directives and other Modifications; and
- .8 All the Design-Builder's communications, including but not limited to letters, memoranda, e-mail, invoices and bills of lading, arising out of or related to the Project with the Owner, Owner's Representative, other contractors, and/or its Design Consultant, Design Subconsultant, Subcontractor or Sub-Subcontractor.

**2.7.8** The Design-Builder will, at the Design-Builder's expense, fully comply with all statutes and regulations regarding notification and disposal of construction and demolition debris, including, without limitation, Ohio Revised Code Chapter 3714 and the regulations enacted thereunder.

**2.7.9** The Design-Builder, at least five (5) working days prior to commencing construction in an area that may involve underground utility facilities, concealed conditions, or may impact on life safety matters, shall comply with the obligations imposed upon excavators in Ohio Revised Code Sections 3781.25 to 3781.32 including but not limited to giving notice to the Owner and where underground utility facilities are involved also to the registered underground utility protection services and the owners of underground utility facilities.

**2.7.10** The Design-Builder shall notify immediately the occupants of any premises near the Work and the Owner's Representative as to any emergency that it may create or discover. The Design-Builder shall notify immediately the operator of any underground utilities and the Owner's Representative of any break or leak in the lines of such operator or any dent, gouge, groove, or other damage to such lines or to their rating or cathodic protection, made or discovered in the course of excavation.

**2.7.11** The Design-Builder shall perform its Work during normal business hours unless otherwise provided in the Contract Documents or approved in writing by the Owner's Representative. Any Work at other than normal business hours will be at the Design-Builder's expense without reimbursement, unless authorized by Change Order or Change Directive.

**2.7.12** The Design-Builder shall enforce strict discipline and good order among the Design-Builder's employees and other persons carrying out the Design-Build Contract. The Design-Builder shall not permit employment of unfit persons or persons not skilled in tasks assigned to them. The Design-Builder's employees and other persons carrying out the Design-Build Contract shall comply with all security and safety requirements of the Owner. The Design-Builder shall only assign competent supervisors and workers to the Project, each of whom is fully qualified to perform the tasks assigned. If the Owner or the Owner's Representative deems any employee of the Design-Builder or of a Subcontractor, a Sub-Subcontractor, a Design Consultant, or a Design Sub-Consultant of any tier unsatisfactory, the Design-Builder will transfer or require its Subcontractor, Sub-Subcontractor, Design Consultant, or Design Sub-Consultant to transfer such employee from the Project immediately and replace or require the prompt replacement of such employee with a competent employee. The Owner, however, shall be under no obligation to do so.

## **2.8 Design-Builder's Responsibility for Project Safety.**

**2.8.1** Design-Builder shall take reasonable precautions for safety so as to prevent damage, injury or loss to (i) all individuals at the Site, whether working or visiting, (ii) the Work, including materials and equipment incorporated into the Work or stored on-Site or off-Site, and (iii) all other property at the Site or adjacent thereto. The Design-Builder shall be responsible, at the Design-Builder's sole cost and expense, for all measures necessary to protect any property adjacent to the Project and improvements therein with respect to the Design-Builder's Work. The Design-Builder shall promptly repair any damage to such property or improvements at its sole cost and expense. Design-Builder assumes responsibility for implementing and monitoring all safety precautions and programs related to the performance of the Work. Design-Builder shall, prior to commencing construction, designate a Safety Representative with the necessary qualifications and experience to supervise the implementation and monitoring of all safety precautions and programs related to the Work. Unless otherwise required by the Contract Documents, Design-Builder's Safety Representative shall be an individual stationed at the Site who may have responsibilities on the Project in addition to safety. The Safety Representative shall make routine daily inspections of the Site and shall hold weekly safety meetings with Design-Builder's personnel, Design Consultant, Design Sub-Consultant, Subcontractor, Sub-Subcontractor and others as applicable.

**2.8.2** Design-Builder, Subcontractors and its Sub-Subcontractors shall comply with all Legal Requirements relating to safety, as well as any Owner-specific safety requirements set forth in the Contract Documents, provided that such Owner-specific safety requirements do not violate

any applicable Legal Requirement. Design-Builder will immediately report in writing any safety-related injury, loss, damage or accident arising from the Work to Owner's Representative and, to the extent mandated by Legal Requirements, to all government or quasi-government authorities having jurisdiction over safety-related matters involving the Project or the Work.

**2.8.3** Design-Builder's responsibility for safety under this Section 2.8 is not intended in any way to relieve Subcontractors and Sub-Subcontractors of their own contractual and legal obligations and responsibility for (i) complying with all Legal Requirements, including those related to health and safety matters, and (ii) taking all necessary measures to implement and monitor all safety precautions and programs to guard against injuries, losses, damages or accidents resulting from their performance of the Work.

**2.8.4** When trenching, excavating or performing any other activities where the presence of a competent person is required, Design-Builder shall keep a competent person at the Site to comply with OSHA requirements. The competent person shall be one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions that are unsanitary, hazardous or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

**2.8.5** The Design-Builder shall provide the Owner's Representative with a list of names and contact information of the designated employees for the Design-Builder and for each Subcontractor to be contacted in case of emergency during non-working hours. A copy of the list will also be displayed at the jobsite by Design-Builder.

## **2.9 Design-Builder's Warranty.**

**2.9.1** Design-Builder warrants to Owner that the construction, including all materials and equipment furnished as part of the construction, shall be new unless otherwise specified in the Contract Documents, of good quality, suitable and fit for their intended use, in conformance with the Contract Documents and free of defects in materials, design and workmanship. Design-Builder's warranty obligation excludes defects caused by abuse, alterations, or failure to maintain the Work in a commercially reasonable manner. Nothing in this warranty is intended to limit any manufacturer's warranty which provides Owner with greater warranty rights than set forth in this Section 2.9 or the Contract Documents. Design-Builder will provide Owner with all manufacturers' warranties upon Substantial Completion.

**2.9.2** Design-Builder's warranty period starts at the successful startup and testing in accordance with the Contract Documents or beneficial occupancy of the Project by the Owner, whichever comes later.

**2.9.3** If the Design-Builder breaches any of its warranties under Section 2.9, the Design-Builder will pay the Owner for its damages and expenses, including but not limited to attorneys' and consultants' fees and expenses, arising out of or related to such breach.

**2.9.4 ADDITIONAL WARRANTIES** The Design-Builder gives the Owner the following additional warranties:

- .1 The Design-Builder warrants that the roofing system will be weather tight; and,
- .2 The Design-Builder warrants that the wall and window systems will be weather tight.

Weather tight shall mean the roofing, wall and window systems are designed and constructed to prevent water infiltration, moisture infiltration, and condensation that might cause damage to the Work or the Owner's property.

**2.9.5** Design-Builder's warranty provided under Section 2.9 is in addition to and not limited by

any other warranties provided by the Design-Builder under the Contract Documents.

**2.9.6** The Design-Builder further warrants that the Project shall be designed so that it (1) is fit for its intended purpose and (2) complies with all security and safety standards and requirements for similar buildings. Additionally, the Design-Builder warrants and represents that it and/or its Design Consultants, Design Sub-Consultants, Subcontractors and Sub-Subcontractors presently have, and will at all times during the term of this Agreement maintain: (i) all skills, experience, knowledge, staffing and resources necessary to perform the services set forth herein, and (ii) all required licenses, accreditations, certifications and registrations necessary to perform the services set forth herein.

## **2.10 Correction of Defective Work.**

**2.10.1** Design-Builder shall correct any Work that is found to be improperly designed, defective or to not be in conformance with the Contract Documents within the applicable statute of limitations period, including that part of the Work subject to Section 2.9 hereof, or within such longer period to the extent required by any specific warranty included in the Contract Documents.

**2.10.2** If Design-Builder fails within two (2) business days of a written notice from the Owner or the Owner's Representative, or such longer time as may be stated in such notice, to correct, or take reasonable steps to commence to correct defective or nonconforming Work, or to remove and replace, or take reasonable steps to remove and replace, the Work, or if Design-Builder fails to perform the Work in accordance with the Contract Documents, or if Design-Builder fails to comply with any other provision of the Contract Documents, the Owner may correct or remedy any such deficiency. In such case an appropriate unilateral Change Order shall be issued deducting from payments then or thereafter due the Design-Builder all the 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 the Owner in exercising the rights and remedies under this Section 2.10.2. If payments then or thereafter due the Design-Builder are not sufficient to cover such amounts, the Design-Builder and its surety shall pay the difference to the Owner. If such defective and non-conforming work results in a threat to the safety of any person or property including but not limited to the Work itself, the Design-Builder shall immediately commence to correct such defective and non-conforming work upon receipt of written or oral notice thereof.

## **2.11 Underground Facilities**

**2.11.1** The cost of all of the following will be included in the Contract Price and the GMP, and the Design-Builder shall have full responsibility for:

- a. protecting all Underground Facilities in a manner at least as cautious and protective of safety and underground facilities as those methods identified in Ohio Revised Code Sections 3781.25 and 3781.
- b. coordination of the Work with the owners of such Underground Facilities during construction; and
- c. the safety and protection of all such Underground Facilities and repairing any damage thereto resulting from the Work.

## **Article 3**

### **Owner's Services and Responsibilities**

#### **3.1 Duty to Cooperate.**

**3.1.1** Owner shall, throughout the performance of the Work, cooperate with Design-Builder and perform its responsibilities, obligations and services in a reasonably timely manner to facilitate Design-Builder's timely and efficient performance of the Work and so as not to delay or interfere with Design-Builder's performance of its obligations under the Contract Documents.

**3.1.2** Owner, through the Owner's Representative, shall provide timely reviews and approvals of interim design submissions and Construction Documents consistent with any reasonable turnaround times set forth in Design-Builder's schedule.

**3.1.3** Owner shall give Design-Builder notice of any Work that Owner notices to be defective or not in compliance with the Contract Documents. The failure of the Owner to provide said notice shall not relieve the Design-Builder of its obligation to correct all defective and non-conforming Work on the Project, or limit the Owner's rights under the Contract Documents.

#### **3.2 Furnishing of Services and Information.**

**3.2.1** Unless expressly stated to the contrary in the Contract Documents, Owner shall provide, at its own cost and expense, for Design-Builder's information and use the following, all of which Design-Builder is entitled to rely upon in performing the Work:

**3.2.1.1** Surveys describing the property, boundaries, topography and reference points for use during construction, including existing service and utility lines;

**3.2.1.2** Temporary and permanent easements;

**3.2.1.3** A legal description of the Site;

**3.2.1.4** To the extent available, record drawings of any existing structures at the Site; and

**3.2.1.5** To the extent available, environmental studies, reports and impact statements describing the environmental conditions, including Hazardous Conditions, in existence at the Site.

**3.2.2** Owner is responsible for securing and executing all necessary agreements with adjacent land or property owners that are necessary to enable Design-Builder to perform the Work; except that the Design-Builder shall provide for all additional lands and access thereto that may be required for temporary construction facilities or storage of materials and equipment. Design-Builder shall provide the Owner with a copy of the agreement for use of additional land and a copy of the release confirming that restoration of the additional land has been completed to the satisfaction of the owner of the adjacent land or property.

#### **3.3 Financial Information.**

**3.3.1** The Owner shall provide certification of available funds upon execution of the Agreement.

**3.3.2** Design-Builder shall cooperate with the reasonable requirements of Owner's lenders or other financial sources. Notwithstanding the preceding sentence, after execution of the Agreement Design-Builder shall have no obligation to execute for Owner or Owner's lenders or other financial sources any documents or agreements that require Design-Builder to assume

obligations or responsibilities greater than those existing obligations Design-Builder has under the Contract Documents.

### **3.4 Owner-supplied Information.**

**3.4.1** Owner shall be responsible for providing Owner-supplied information and approvals in a reasonably timely manner to permit Design-Builder to fulfill its obligations under the Contract Documents.

### **3.5 Government Approvals and Permits.**

**3.5.1** Design-Builder shall obtain and pay for all necessary permits, approvals, licenses, government charges and inspection fees. However, Owner shall waive all permit fees that are within its jurisdiction and may obtain waivers of certain other fees as set forth in Section 2.6 herein.

**3.5.2** Owner shall provide reasonable assistance to Design-Builder in obtaining those permits, approvals and licenses that are Design-Builder's responsibility.

### **3.6 Owner's Separate Contractors.**

**3.6.1** Owner is responsible for all work performed on the Project or at the Site by separate contractors under Owner's control. Owner shall contractually require its separate contractors to cooperate with, and coordinate their activities so as not to interfere with, Design-Builder in order to enable Design-Builder to timely complete the Work consistent with the Contract Documents.

## **Article 4**

### **Hazardous Conditions and Differing Site Conditions**

#### **4.1 Hazardous Conditions.**

**4.1.1** Unless otherwise expressly provided in the Contract Documents to be part of the Work, Design-Builder is not responsible for any Hazardous Conditions encountered at the Site, which were not known or could not have been reasonably anticipated by Design-Builder prior to commencement of the Work. Upon encountering any Hazardous Conditions, Design-Builder will stop Work immediately in the affected area and duly notify Owner and, if required by Legal Requirements, all government or quasi-government entities with jurisdiction over the Project or Site.

**4.1.2** Upon receiving notice of the presence of suspected Hazardous Conditions, Owner shall take the necessary measures required to ensure that the Hazardous Conditions are remediated or rendered harmless. Such necessary measures shall include Owner retaining qualified independent experts to (i) ascertain whether Hazardous Conditions have actually been encountered, and, if they have been encountered, (ii) prescribe the remedial measures that Owner must take either to remove the Hazardous Conditions or render the Hazardous Conditions harmless.

**4.1.3** Design-Builder shall be obligated to resume Work at the affected area of the Project only after Owner's expert provides it with written certification that (i) the Hazardous Conditions have been removed or rendered harmless and (ii) all necessary approvals have been obtained from all government and quasi-government entities having jurisdiction over the Project or Site.

**4.1.4** If the Owner and the Design-Builder cannot agree as to entitlement to or on the amount

or extent, if any, of any adjustment in Contract Price, Contract Times and/or the GMP, or all three, as a result of such Work stoppage or any special conditions under which Work is to be resumed by the Design-Builder, either party may make a Claim therefor as provided in the Contract Documents.

**4.1.5** Not used.

**4.1.6** Notwithstanding the preceding provisions of this Section 4.1, Owner is not responsible for Hazardous Conditions introduced to the Site by Design-Builder, Subcontractors, Sub-Subcontractors or anyone for whose acts they may be liable. To the fullest extent permitted by law, Design-Builder shall indemnify, defend and hold harmless Owner and Owner's officers, directors, employees and agents from and against all claims, losses, damages, liabilities and expenses, including attorneys' fees and expenses, arising out of or resulting from those Hazardous Conditions introduced to the Site by Design-Builder, Subcontractors, Sub-Subcontractors or anyone for whose acts they may be liable.

## **4.2 Differing Site Conditions.**

**4.2.1** Concealed or latent physical conditions or subsurface conditions at the Site that could not have been known to the Design-Builder given the exercise of reasonable diligence, taking into account the fact that the Design-Builder is responsible for all site investigations and testing, are collectively referred to herein as "Differing Site Conditions." If Design-Builder encounters a Differing Site Condition, Design-Builder will be entitled to an adjustment in the Contract Price and/or Contract Time(s) to the extent Design-Builder's cost and/or time of performance are adversely impacted by the Differing Site Condition and provided Design-Builder provides a timely notice of claim in accordance with Article 10 of the General Conditions.

**4.2.2** Upon encountering a Differing Site Condition, as a condition precedent to any increase in the Contract Price and/or an extension of the Contract Time(s), Design-Builder shall provide immediate written notice to Owner of such condition. Design-Builder shall, to the extent reasonably possible, provide such notice before the Differing Site Condition has been substantially disturbed or altered. Design-Builder shall not further disturb such condition or perform any Work in connection therewith until receipt of written order to do so. Failure to provide such notice as required herein or disturbing the differing site condition shall be an irrevocable waiver of the Design-Builder's right to additional time or money arising out of the differing subsurface or physical condition.

## **Article 5**

### **Insurance and Bonds**

#### **5.1 Design-Builder's Insurance Requirements.**

**5.1.1** Design-Builder shall purchase and maintain such liability and other insurance as is appropriate for the Work being performed and as will provide protection from claims set forth below which may arise out of or result from Design-Builder's performance of the Work and Design-Builder's other obligations under the Contract Documents, whether it is to be performed by Design-Builder, any Subcontractor or Sub-Contractors, or by anyone directly or indirectly employed by any of them to perform any of the Work, or by anyone for whose acts any of them may be liable:

.1 claims under workers' compensation, disability benefits, and other similar employee benefit acts;

.2 claims for damages because of bodily injury, occupational sickness or disease, or death of Design-Builder's employees;

.3 claims for damages because of bodily injury, sickness or disease, or death of any person other than Design-Builder's employees;

.4 claims for damages insured by reasonably available personal injury liability coverage which are sustained:

a. by any person as a result of an offense directly or indirectly related to the employment of such person by Design-Builder, or

b. by any other person for any other reason;

.5 claims for damages, other than to the Work itself, because of injury to or destruction of tangible property wherever located, including loss of use resulting therefrom; and

.6 claims for damages because of bodily injury or death of any person or property damage arising out of the ownership, maintenance or use of any motor vehicle.

**5.1.2** The policies of insurance required by Section 5.1 shall include at least the specific coverages and be written for not less than the limits of liability provided below\_or required by Laws or Regulations, whichever is greater;

**5.1.2.1** Commercial General Liability ("CGL"): Bodily injury (including death and personal injury) and property damage with limits of \$2,000,000 each occurrence and \$4,000,000 aggregate. CGL shall include (i) Premises-Operations, (ii) Explosion and Collapse Hazard, (iii) Underground Hazard, (iv) Broad Form Property Damage, including Completed Operations, (v) Contractual Liability, (vi) Products and Completed Operations, (vii) Personal/Advertising Injury with Employment Exclusion deleted, (viii) Stopgap liability endorsement for \$1,000,000 limit, and (ix) per project aggregate endorsement.

**5.1.2.2** Automobile Liability, covering all owned, non-owned, and hired vehicles used in connection with the Work: Bodily injury (including death and personal injury) and property damage with a combined single limit of \$2,000,000 per person and \$2,000,000 each accident.

**5.1.2.3** Such policies shall be supplemented by an umbrella policy, also written on an occurrence basis, to provide additional protection to provide coverage in the total amount of \$2,000,000 for each occurrence and \$4,000,000 aggregate for contracts with a Contract Price of \$250,000 or less; \$2,000,000 each occurrence and \$4,000,000 aggregate for contracts with a Contract Price greater than \$250,000 but less than or equal to \$500,000; \$4,000,000 each occurrence and \$6,000,000 aggregate for contracts with a Contract Price greater than \$500,000 but less than or equal to \$1,000,000; and \$6,000,000 each occurrence and \$10,000,000 aggregate for contracts with a Contract Price greater than \$1,000,000.

**5.1.2.4** Professional Liability Insurance. Professional liability insurance coverage in the amount of not less than \$5,000,000 each claim, covering claims for negligent errors, acts, and omissions by the Design-Builder arising out of the performance or failure to perform professional services under the Contract Documents.

**5.1.3** Design-Builder's insurance shall specifically delete any design-build or similar exclusions that could compromise coverages because of the design-build delivery of the Project.

**5.1.4** Prior to commencing any construction services hereunder, Design-Builder shall provide Owner and each additional insured with Owner-approved certificates, endorsements, and other documentation evidencing that (i) all insurance obligations required by the Contract Documents are in full force and in effect and will remain in effect for the duration required by the Contract Documents and (ii) no insurance coverage will be canceled, renewal refused, or materially changed unless at least thirty (30) days prior written notice is given to Owner. If any of the foregoing insurance coverages are required to remain in force after final payment are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the Final Application for Payment. If any information concerning reduction of coverage is not furnished by the insurer, it shall be furnished by the Design-Builder with reasonable promptness according to the Design-Builder's information and belief.

**5.1.4.1** Failure of the Owner to demand such certificates or other evidence of full compliance with these insurance requirements or failure of the Owner to identify a deficiency from evidence provided shall not be construed as a waiver of Design-Builder's obligation to maintain such insurance.

**5.1.4.2** By requiring such insurance and insurance limits herein, the Owner does not represent that coverage and limits will necessarily be adequate to protect Design-Builder, and such coverage and limits shall not be deemed as a limitation on Design-Builder's liability under the indemnities granted to the Owner in the Contract Documents.

**5.1.4.3** All proof of insurance submitted to the Owner shall clearly set forth all exclusions and deductible clauses. The Design-Builder is responsible for the deductible limit of the policy and all exclusions consistent with the risks the Design-Builder assumes under the Contract Documents and as imposed by law.

**5.1.5** With respect to Design-Builder's insurance requirements under the Contract Documents, Design-Builder shall include as additional insured the Owner and any other individuals or entities identified in the Contract Documents, all of whom shall be listed as additional insureds, and include coverage for the respective officers, directors, partners, employees, agents, consultants and subcontractors of each and any of all such additional insureds, and the insurance afforded to these additional insureds shall provide primary coverage for all claims covered thereby. The insurance policies provided by the Design-Builder under the Contract Documents shall not contain an exemption from coverage for claims between insureds.

**5.1.6** The following provisions shall also apply to the insurance provided by the Design-Builder:

**5.1.6.1** Design-Builder's insurance shall be primary and non-contributory.

**5.1.6.2** Insurance policies shall be written on an occurrence basis only.

**5.1.6.3** The Design-Builder shall require all Subcontractors and Design Consultants to provide Workers' Compensation, CGL, and Automobile Liability Insurance with the same minimum limits specified herein, unless the Owner agrees to a lesser amount.

**5.1.6.4** The Owner shall be named as a certificate holder on the policies of insurance maintained by Design-Builder. The Design-Builder shall provide each additional insured with two copies of the certificates of insurance.

**5.1.6.5** The additional insured endorsement shall be ISO 20 10 11 85 or its equivalent so that Completed Operations liability extends to the additional insureds after the completion of the Project.

**5.1.7.** Design-Builder shall pay all deductible provisions applicable to claims related to the Project made under and paid by insurance. The maximum deductible shall be \$5,000.

**5.2 Owner's Liability Insurance. [Not used.]**

**5.3 Property Insurance.**

**5.3.1.** Design-Builder shall purchase and maintain property insurance upon the Work at the Site in the amount of full replacement cost thereof.

(1) This insurance shall:

- (a) include the interests of the Owner, Design-Builder, Subcontractors, Design Consultants, Sub-Subcontractors, Design Sub-Consultants and any other individuals or entities identified herein, and the officers, directors, partners, employees, agents, and other consultants and subcontractors of any of them, each of whom is deemed to have an insurable interest and shall be listed as an insured or additional insured (Insurance certificates shall specifically indicate by name the additional insureds, which are to include the Owner as well as other individuals or entities so identified.);
- (b) be written on a Builder's Risk "all-risk" form that shall at least include insurance for physical loss and damage to the Work, temporary buildings, falsework, and materials and equipment in transit and shall insure against at least the following perils or causes of loss: fire, lightning, extended coverage, theft, vandalism, malicious mischief, earthquake, collapse, wind, hail, tornadoes, debris removal, demolition occasioned by enforcement of Laws and Regulations, water damage (including that caused by flood or hydrostatic pressure), and such other perils or causes of loss as may be specifically required by these General Conditions;
- (c) include expenses incurred in the repair or replacement of any insured property (including but not limited to fees and charges of engineers and architects);
- (d) cover the total value of materials and equipment supplied under the Contract from the time Design-Builder takes possession of them until they are installed and tested by Contractor and the Project is accepted as complete by the Owner under an endorsement to this policy or in the form of Installation Floater Insurance of the "all risk" type;
- (e) allow for partial utilization of the Work by the Owner;
- (f) shall not contain any exemption from coverage for claims between insureds.
- (g) include testing and startup; and
- (h) be maintained in effect until final payment is made unless otherwise agreed to in writing by the Owner, and Design-Builder with 30 days written notice to each other additional insured to whom a certificate of insurance has been issued.

(2) Design-Builder shall be responsible for any deductible or self-insured retention.

(3) The policies of insurance required to be purchased and maintained by Design-Builder in accordance with this Paragraph 5.3.1 shall comply with the requirements of Paragraph 5.1.3 of these General Conditions.

**5.3.2** Unless the Contract Documents provide otherwise, Owner shall procure and maintain boiler and machinery insurance that will include the interests of Owner, Design-Builder, Design Consultants, and Subcontractors of any tier. The Owner is responsible for the payment of any deductibles under the insurance required by this Section 5.3.2.

**5.3.3** Prior to Design-Builder commencing any Work, Owner shall provide Design-Builder with certificates evidencing that (i) all Owner's insurance obligations required by the Contract Documents are in full force and in effect and will remain in effect until Design-Builder has completed all of the Work and has received final payment from Owner and (ii) no insurance coverage will be canceled, renewal refused, or materially changed unless at least thirty (30) days prior written notice is given to Design-Builder. Owner's property insurance shall not lapse or be canceled if Owner occupies a portion of the Work pursuant to Section 6.6.3 hereof. Owner shall provide Design-Builder with the necessary endorsements from the insurance company prior to occupying a portion of the Work.

**5.3.4** Any loss covered under Owner's property insurance shall be adjusted with Owner and Design-Builder and made payable to both of them as trustees for the insureds as their interests may appear, subject to any applicable mortgage clause. All insurance proceeds received as a result of any loss will be placed in a separate account and distributed in accordance with such agreement as the interested parties may reach. Any disagreement concerning the distribution of any proceeds will be resolved in accordance with Article 10 hereof.

**5.3.5** Owner and Design-Builder waive against each other and Owner's separate contractors, Design Consultants, Subcontractors, agents and employees of each and all of them, all damages covered by property insurance provided herein, except such rights as they may have to the proceeds of such insurance. Design-Builder and Owner shall, where appropriate, require similar waivers of subrogation from Owner's separate contractors, Design Consultants and Subcontractors and shall require each of them to include similar waivers in their contracts. These waivers of subrogation shall not contain any restriction or limitation that will impair the full and complete extent of its applicability to any person or entity unless agreed to in writing prior to the execution of this Agreement.

## **5.4 Bonds and Other Performance Security.**

**5.4.1** Design-Builder shall furnish a separate Performance Bond and a Payment Bond in the amount of the GMP in Paragraph 6.6.1 of the Agreement less the Design Services Fee in Paragraph 6.2.1.1 of the Agreement as security for the faithful performance and payment of all of Design-Builder's obligations under the Contract Documents. Such bonds shall be in the form that meets the requirements of the Ohio revised Code. Design-Builder shall also furnish any other bonds as are required by the Contract Documents. If the Cost of the Work is increased at any time after the Design-Builder provides the bonds, the Design-Builder shall cause the penal sum of each bond to be increased as necessary to equal one hundred percent of the Cost of the Work as revised. The delivery of written consent from the affected surety or sureties to the Owner by the Design-Builder confirming the increased penal sums is a condition precedent to the Owner's obligation to pay the Design-Builder for any portion of the Work associated with the increase in the Cost of the Work.

**5.4.2** All bonds furnished by Design-Builder shall be in a form satisfactory to Owner. The surety shall be a company qualified and registered to conduct business in the state in which the Project is located.

**5.4.3 Material Default or Termination.** If the Owner or the Owner's Representative notifies the Design-Builder's surety that the Design-Builder is in material default, the surety will complete an investigation of the claimed material default within 21 days. The surety is advised to start looking for a replacement contractor upon notice of material default. As part of its investigation, the surety shall promptly visit the offices of the Design-Builder, and the Owner to inspect and copy the available Project records. The Owner and Design-Builder, upon written request by the surety, shall make such records available during regular business hours for such inspection and copying. The Owner's making such records available as provided herein shall satisfy the Owner's obligation to the surety to furnish documents for the investigation. The surety will provide the Owner with the results of its investigation, including any written report or documents, prepared during the investigation.

If the Owner terminates the Design-Builder and the surety proposes to take-over the Work, the surety shall do so no later than the expiration of the 21-day investigation period or 10 days after the date the Owner terminates the Contract, whichever is later. If the Owner terminates the Contract, and the surety proposes to provide a replacement contractor, the replacement contractor shall be fully capable of performing the Work in accordance with the Contract Documents. If the Design-Builder is terminated for cause, the replacement design-builder shall not be the Design-Builder or its employees, unless the Owner agrees in writing. In the event the Surety takes over the Project, the surety's obligation shall not be limited to the penal sum of the Bond.

If the surety does not propose an acceptable contractor as required by this Paragraph 5.4.3, the Owner may complete the Work by such means as it deems appropriate. In the event the Owner agrees to accept a replacement design-builder, the replacement design-builder shall furnish its own bond for the replacement design-builder's scope of work, and neither the Design-Builder nor the surety shall be relieved of their obligations under the Contract Documents.

This Paragraph 5.4.3 is in addition to any other rights of the Owner under the Contract Documents and is not intended to create any rights of the surety, including but not limited to the right to take over the Design-Builder's obligations.

In the event of the Design-Builder's termination and if the surety does not takeover the Work as provided in this Paragraph 5.4.3, the Owner may take possession of and use all materials, facilities and equipment at the Project Site or stored off-site for which the Owner has paid in whole or in part.

**5.4.4** If at any time prior to Final Payment, any surety providing a surety bond for the Project (1) is adjudged bankrupt or has made a general assignment for the benefit of its creditors; (2) has liquidated all assets or has made a general assignment for the benefit of its creditors; (3) is placed in receivership; (4) otherwise petitions a state or federal court for protection from its creditors; or (5) allows its license to do business in Ohio to lapse or to be revoked, then the Design-Builder shall, within twenty-one days of any such action listed above, provide the Owner with new surety bonds in the form and amount described in the Contract Documents. The delivery to the Owner by the Design-Builder of replacement bonds is a condition precedent to the Owner's obligation to make any payment to the Design-Builder.

## **Article 6**

### **Payment**

#### **6.1 Schedule of Values.**

**6.1.1** Unless required by the Owner upon execution of this Agreement, within ten (10) days of execution of the Agreement, Design-Builder shall submit for Owner's review and approval a schedule of values for all of the Work. The Schedule of Values will (i) subdivide the Work into its respective parts, (ii) include values for all items comprising the Work and (iii) serve as the basis for monthly progress payments made to Design-Builder throughout the Work.

**6.1.2** The Owner's Representative will timely review and approve the schedule of values so as not to delay the submission of the Design-Builder's first application for payment. The Owner and Design-Builder shall timely resolve any differences so as not to delay the Design-Builder's submission of its first application for payment. By submitting such schedule of values, the Design-Builder represents for the reliance of the Owner that the allocation of the values to the portions of the Work is a fair and reasonable estimate of such allocation.

**6.1.3** Once approved by the Owner's Representative, the Design-Builder will not change the allocation of the Contract Price to the component parts of the Work without the Owner's

Representative's written approval. The Owner's Representative thereafter may from time to time require the Design-Builder to adjust such schedule if the Owner's Representative determines it to be in any way unreasonable or inaccurate. The Design-Builder then shall adjust the schedule of values as required by the Owner's Representative within ten (10) days.

**6.1.4** The Schedule of Values established as provided in Section 6.1 will serve as the basis for progress payments and will be incorporated into the form of Application for Payment attached to the Agreement as Exhibit 14. The Owner-approved version of the Application for Payment form, which includes information on completed Schedule of Values items, is to be used by the Design-Builder when making an Application for Progress Payment. Progress payments on account of Unit Price Work will be based on the number of units completed.

## **6.2 Monthly Progress Payments.**

**6.2.1** At least by the 20<sup>th</sup> day of the month (but not more often than once a month), Design-Builder shall submit to the Owner's Representative for review an Application for Payment on the Owner's Application and Certificate for Payment Summary Sheet and a Schedule of Values, described in Section 6.1 of these General Conditions, filled out and signed by Design-Builder covering the Work completed as of the date of the Application, and accompanied by a properly completed Design-Builder's Payment Application Checklist, all the documentation required to be submitted with such Checklist, and any other supporting documentation required by the Contract Documents or by the Owner's Representative. The Application for Payment will be in the form and submitted with the number of copies of it and all related documents as required by the Contract Documents.

**6.2.1.1** Beginning with the second Application for Payment, each Application shall include a) a Waiver and Release Agreement for itself and a Subcontractor's – Supplier's Waiver and Release Agreement for each of its subcontractors, and b) a Design-Builder's Affidavit with List of Subcontractors and Suppliers with Amounts Withheld.

**6.2.2** The Application for Payment may request payment for equipment and materials not yet incorporated into the Project, provided that (i) Owner is satisfied that the equipment and materials are suitably stored at either the Site or another acceptable location, (ii) the equipment and materials are protected by suitable insurance and (iii) upon payment, Owner will receive the equipment and materials free and clear of all liens and encumbrances. Such materials and equipment not incorporated in the Work must be delivered and suitably stored at the Site or at another location agreed to in writing.

**6.2.3** All discounts offered by Subcontractor, Sub-Subcontractors and suppliers to Design-Builder for early payment shall accrue one hundred percent to Design-Builder to the extent Design-Builder advances payment. Unless Owner advances payment to Design-Builder specifically to receive the discount, Design-Builder may include in its Application for Payment the full undiscounted cost of the item for which payment is sought.

**6.2.4** The Application for Payment shall constitute Design-Builder's representation that the Work described herein has been performed consistent with the Contract Documents, has progressed to the point indicated in the Application for Payment, and that title to all Work will pass to Owner free and clear of all claims, liens, encumbrances, and security interests upon the incorporation of the Work into the Project, or upon Design-Builder's receipt of payment, whichever occurs earlier.

**6.2.5** By processing an Application for Payment, neither the Owner nor the Owner's Representative will thereby be deemed to have: (1) accepted the Work performed by the Design-Builder; or (2) waived any claims that the Owner may have related to the Project, including any claims related to the Work performed by the Design-Builder.

### **6.3 Withholding of Payments.**

**6.3.1** Upon receipt of each Application for Payment, the Owner will proceed with processing the Application for Payment or the Owner will, within thirty (30) calendar days after receipt of each Application for Payment, return the Application to Design-Builder indicating in writing the Owner's reasons for refusing to proceed with processing the Application for Payment. In the latter case, Design-Builder may make the necessary corrections and resubmit the Application.

**6.3.1.1** By proceeding with processing of an Application for Payment, neither the Owner nor the Owner's Representative will 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; or
- b.** that there may not be other matters or issues between the parties that might entitle the Owner to withhold payment to Design-Builder.

**6.3.1.2** The Owner's or Owner's Representative's review of Design-Builder's Work for the purposes of determining whether to proceed with processing an Application for Payment, including final payment, will not impose responsibility on the Owner or Owner's Representative:

- a.** to supervise, direct, design, or control the Work, or
- b.** for the means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, or
- c.** for Design-Builder's failure to comply with Laws and Regulations applicable to Design-Builder's performance of the Work, or
- d.** to make any examination to ascertain how or for what purposes Design-Builder has used the moneys paid on account of the Contract Price, or
- e.** to determine that title to any of the Work, materials, or equipment has passed to the Owner free and clear of any Liens.

**6.3.1.3** When determining whether to proceed with processing an Application for Payment, the Owner may refuse to issue payment of the whole or any part of any Application for Payment, to such extent as may be necessary in the Owner's opinion to protect the Owner from loss because:

- a.** the Work is defective, or completed Work has been damaged, requiring correction or replacement;
- b.** the Contract Price has been reduced by Change Orders;
- c.** the Owner has been required to correct defective Work or complete Work in accordance with Section 2.10;
- d.** of the occurrence of any of the events enumerated in Section 11.2; or
- e.** the Design-Builder is in default of any other Agreement it has with the Owner.

**6.3.1.4** Unless the Owner refuses to proceed with processing an Application for Payment under the Contract Documents, including Section 6.3.1 of the General Conditions, the amount approved by the Owner's Representative, subject to the provisions of Section 6.3.1.5, will become due thirty (30) calendar days after approval of the Application for Payment by the Owner and after the approval of any agencies and/or lenders, whichever comes later.

**6.3.1.5** The Owner may also refuse to make payment of the full amount requested by Design-Builder in an Application for Payment because:

- a.** claims have been made against the Owner on account of Design-Builder's performance or furnishing of the Work;
- b.** Liens have been filed in connection with the Work, except where Design-Builder has delivered a specific bond satisfactory to the Owner to secure the satisfaction and discharge of such Liens;
- c.** there are other items entitling the Owner to a set-off against the amount recommended; or
- d.** the Owner has actual knowledge of the occurrence of any of the events enumerated in Section 6.3.1.3.a through 6.3.1.3.c or the failure of the Design-Builder to comply with Section 6.2.

**6.3.2** If the Design-Builder disputes any determination by the Owner with regard to any progress payment application, the Design-Builder shall nevertheless continue to prosecute the Work without delay or disruption. Notwithstanding the foregoing, the Owner shall pay all undisputed amounts to the Design-Builder, retaining only amounts reasonably believed necessary to protect the Owner from defective or non-conforming Work.

#### **6.4 Right to Stop Work and Interest.**

**6.4.1** Subject to the Owner's right to withhold payment pursuant to Section 6.3, if Owner fails to pay timely Design-Builder any amount that becomes due, Design-Builder, in addition to all other remedies provided in the Contract Documents, may stop Work pursuant to Section 11.3 hereof. All payments due and unpaid shall bear interest at the rate set forth in the Agreement.

#### **6.5 Design-Builder's Payment Obligations.**

**6.5.1** Design-Builder will pay Design Consultants and Subcontractors, in accordance with its contractual obligations to such parties, all the amounts Design-Builder has received from Owner on account of their work. Design-Builder will impose similar requirements on Design Consultants and Subcontractors to pay those parties with whom they have contracted. Design-Builder will indemnify and defend Owner against any claims for payment and mechanic's liens as set forth in Section 7.3 hereof.

#### **6.6 Substantial Completion.**

**6.6.1** Design-Builder shall notify Owner's Representative when it believes the Work, or to the extent permitted in the Contract Documents, a portion of the Work, is Substantially Complete. Within five (5) days of Owner's receipt of Design-Builder's notice, Owner's Representative and Design-Builder will jointly inspect such Work to verify that it is Substantially Complete in accordance with the requirements of the Contract Documents. If such Work is Substantially Complete, Owner shall prepare and issue a Certificate of Substantial Completion that will set forth (i) the date of Substantial Completion of the Work or portion thereof, (ii) the remaining items of

Work that have to be completed before final payment, (iii) provisions (to the extent not already provided in the Contract Documents) establishing Owner's and Design-Builder's responsibility for the Project's security, maintenance, utilities and insurance pending final payment, and (iv) an acknowledgment that warranties commence to run on the date of Substantial Completion, except as may otherwise be noted in the Certificate of Substantial Completion.

**6.6.2** Upon Substantial Completion of the entire Work or, if applicable, any portion of the Work, Owner shall release to Design-Builder all retained amounts relating, as applicable, to the entire Work or completed portion of the Work, less an amount equal to the reasonable value of all remaining or incomplete items of Work as noted in the Certificate of Substantial Completion.

**6.6.3** Owner, at its option, may use a portion of the Work which has been determined to be Substantially Complete, provided, however, that (i) a Certificate of Substantial Completion has been issued for the portion of Work addressing the items set forth in Section 6.6.1 above, (ii) Design-Builder and Owner have obtained the consent of their sureties and insurers, and to the extent applicable, the appropriate government authorities having jurisdiction over the Project, and (iii) Owner and Design-Builder agree that Owner's use or occupancy will not interfere with Design-Builder's completion of the remaining Work.

## **6.7 Final Payment.**

**6.7.1** If, on the basis of the Owner's Representative's observation of the Work during construction and final inspection, and the Owner's Representative's review of the final Application for Payment and accompanying documentation as required by the Contract Documents, the Owner's Representative is satisfied that the Project has reached Final Completion, the Owner's Representative will, within ten days after receipt of the final Application for Payment, give written notice to Design-Builder that the Work is acceptable and has reached Final Completion subject to the provisions of Sections 6.7.3 and 6.7.3.1. Otherwise, the Owner's Representative will return the Application for Payment to Design-Builder, indicating in writing the reasons for refusing to recommend final payment, in which case Design-Builder shall make the necessary corrections and resubmit the Application for Payment.

**6.7.1.1** Thirty (30) calendar days after the Owner provides written notice required under Section 6.7.1 of the General Conditions, the amount requested by Design-Builder, less any sum the Owner is entitled to set off against the amount requested by Design-Builder, including but not limited to liquidated damages, will become due and will be paid by the Owner to Design-Builder.

**6.7.2** At the time of submission of its Final Application for Payment, Design-Builder shall provide the following information:

**6.7.2.1** A list of all Claims against the Owner that Design-Builder believes are unsettled;

**6.7.2.2** A Design-Builder's Waiver and Release Agreement for itself as of the date of the Final Application for Payment and Subcontractor's – Supplier's Waiver and Release Agreements for each of its Subcontractors and Suppliers as of the date of the Final Application for Payment;

**6.7.2.3** Consent of Design-Builder's surety to final payment;

**6.7.2.4** All operating manuals, warranties and other deliverables required by the Contract Documents; and

**6.7.2.5** All documentation called for in the Contract Documents, including but not limited to certificates of insurance confirming that required coverages will remain in effect consistent with the requirements of the Contract Documents and copies of all documents,

records, and CAD (.dwg) drawings for the Project.

**6.7.3** Upon making final payment, Owner waives all Claims against Design-Builder except Claims relating to (i) Unsettled Liens or Design-Builder's failure to satisfy its payment obligations, (ii) Design-Builder's failure to complete the Work consistent with the Contract Documents, including defects appearing after Substantial Completion, (iii) Design-Builder's failure to comply with the Contract Documents or the terms of any warranties or special guarantees specified therein, (iv) Design-Builder's continuing obligations under the Contract Documents, (v) design defects, and (vi) the terms of any special warranties required by the Contract Documents.

**6.7.3.1** Upon receipt of final payment, Design-Builder waives all Claims by Design-Builder against the Owner other than those previously made in accordance with the requirements herein and expressly acknowledged by the Owner in writing as still unsettled.

**6.7.4** Deficiencies in the Work discovered after Substantial Completion, whether or not such deficiencies would have been included on the Punch List if discovered earlier, shall be deemed warranty Work. Such deficiencies shall be corrected by Design-Builder under the Contract Documents, including Sections 2.9 and 2.10 herein, and shall not be a reason to withhold final payment from Design-Builder, provided, however, that Owner shall be entitled to withhold from the Final Payment the reasonable value of completion of such deficient work until such work is completed.

## **Article 7**

### **Indemnification**

#### **7.1 Patent and Copyright Infringement.**

**7.1.1** Design-Builder shall defend any action or proceeding brought against Owner based on any claim that the Work, or any part thereof, or the operation or use of the Work or any part thereof, constitutes infringement of any United States patent or copyright, now or hereafter issued. Owner shall give prompt written notice to Design-Builder of any such action or proceeding and will reasonably provide authority, information and assistance in the defense of same. Design-Builder shall indemnify and hold harmless Owner from and against all damages and costs, including but not limited to attorneys' fees and expenses awarded against Owner or Design-Builder in any such action or proceeding. Design-Builder agrees to keep Owner informed of all developments in the defense of such actions.

**7.1.2** If Owner is enjoined from the operation or use of the Work, or any part thereof, as the result of any patent or copyright suit, claim, or proceeding, Design-Builder shall at its sole expense take reasonable steps to procure the right to operate or use the Work. If Design-Builder cannot so procure such right within a reasonable time, Design-Builder shall promptly, at Design-Builder's option and at Design-Builder's expense, (i) modify the Work so as to avoid infringement of any such patent or copyright or (ii) replace said Work with Work that does not infringe or violate any such patent or copyright.

**7.1.3** Sections 7.1.1 and 7.1.2 above shall not be applicable to any suit, claim or proceeding based on infringement or violation of a patent or copyright (i) relating solely to a particular process or product of a particular manufacturer specified by Owner and not offered or recommended by Design-Builder to Owner or (ii) arising from modifications to the Work by Owner or its agents after acceptance of the Work.

**7.1.4** The obligations set forth in this Section 7.1 shall constitute the sole agreement between the parties relating to liability for infringement or violation of any patent or copyright.

## **7.2 Taxes.**

**7.2.1** Design-Builder shall pay all sales, consumer, use, commercial activity and other similar taxes required to be paid by Design-Builder in accordance with the Laws and Regulations of the place of the Project which are applicable during the performance of the Work.

**7.2.1.1** Materials purchased for use or consumption in connection with the proposed Work will be exempt from the State of Ohio Sales Tax, as provided in Section 5739.02 of the Ohio Revised Code, and also from the State of Ohio Use Tax, as provided in Section 5741.01 of the Ohio Revised Code. The Owner will provide the Design-Builder with a Construction Tax Exempt Certificate upon request, made in writing to the Owner.

**7.2.1.2** Purchases by the Design-Builder of expendable items, such as form lumber, tools, oil, greases, fuel, or equipment rentals, are subject to the application of Ohio Sales or Use Taxes.

**7.2.1.3** In addition to any other taxes required to be withheld by the Design-Builder, the Design-Builder shall withhold any income taxes due to the Owner for wages, salaries and commissions paid to its employees for work done under this Agreement and further agrees that any of its Subcontractors shall, by the terms of its subcontract, be required to withhold any such income taxes due for work performed under this Agreement.

## **7.3 Payment Claim Indemnification.**

**7.3.1** Provided that Owner is not in breach of its contractual obligation to make payments to Design-Builder for the Work, Design-Builder shall indemnify, defend and hold harmless Owner from any claims or mechanic's liens brought against Owner or against the Project as a result of the failure of Design-Builder, or those for whose acts it is responsible, to pay for any services, materials, labor, equipment, taxes or other items or obligations furnished or incurred for or in connection with the Work. Within three (3) days of receiving written notice from Owner that such a claim or mechanic's lien has been filed, Design-Builder shall commence to take the steps necessary to discharge said claim or lien, including the furnishing of a mechanic's lien bond in the form specified by the Ohio Revised Code. If Design-Builder fails to do so, Owner will have the right to discharge the claim or lien and hold Design-Builder liable for costs and expenses incurred, including attorneys' fees.

## **7.4 Design-Builder's General Indemnification.**

**7.4.1** Design-Builder, to the fullest extent permitted by laws and regulations, shall indemnify, hold harmless and defend the Owner, its officers, directors, partners, employees, agents, consultants, and subcontractors from and against all claims (whether alleged or proven), demands, costs, losses, damages, and liabilities, 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 the Work or any breach of Design-Builder's obligations under the Contract Documents, including but not limited to the breach of warranty provided in the Contract Documents.

**7.4.2** If an employee of Design-Builder, Design Consultants, Subcontractors, Design Sub-Consultants, Sub-Subcontractors, or anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable has a claim against Owner, its officers, directors, employees, or agents, Design-Builder's indemnity obligation set forth in Section 7.4.1 above shall not be limited by any limitation on the amount of damages, compensation or benefits payable by or for Design-Builder, Design Consultants, Subcontractors, Design Sub-Consultants, Sub-Subcontractors, or other entity under any employee benefit acts, including workers' compensation or disability acts.

## Article 8

### Time

#### 8.1 Obligation to Achieve the Contract Times.

**8.1.1** Design-Builder agrees that it will commence performance of the Work and achieve the Contract Time(s) in accordance with Article 5 of the Agreement. Design-Builder is required to provide forty-eight (48) hours advance written notice to the Owner prior to starting any work on the Project.

#### 8.2 Delays to the Work.

**8.2.1** If Design-Builder is delayed in the performance of the Work due to acts, omissions, conditions, events, or circumstances beyond its control and due to no fault of its own or those for whom Design-Builder is responsible, the Contract Time(s) for performance shall be reasonably extended by Change Order, if a Claim is made therefor as provided in Section 10.1. Events that will entitle Design-Builder to an extension of the Contract Time(s) include acts or omissions of Owner or anyone under Owner's control (including separate contractors), changes in the Work, Differing Site Conditions, Hazardous Conditions, and Force Majeure Events.

**8.2.2** In addition to Design-Builder's right to a time extension for those events set forth in Section 8.2.1 above, Design-Builder shall also be entitled to an appropriate adjustment of the Contract Price provided, however, that the Contract Price shall not be adjusted for Force Majeure Events unless otherwise provided in the Agreement and provided Design-Builder provides timely notice of a claim pursuant to Article 10 of the General Conditions.

**8.2.3 Weather Delays.** When the Design-Builder is prevented from completing any part of the Work on the critical path within the Contract Time due to weather conditions, and if a Claim is made therefor as provided in Section 10.1, the Contract Times will be extended by one (1) day for each work day lost due to weather that delays Work on the critical path in excess of those in the following table:

<u>Month</u>	<u>Number of Workdays Lost Due To Weather</u>
<u>January</u>	<u>8</u>
<u>February</u>	<u>8</u>
<u>March</u>	<u>7</u>
<u>April</u>	<u>6</u>
<u>May</u>	<u>5</u>
<u>June</u>	<u>4</u>
<u>July</u>	<u>4</u>
<u>August</u>	<u>4</u>
<u>September</u>	<u>5</u>
<u>October</u>	<u>6</u>
<u>November</u>	<u>6</u>
<u>December</u>	<u>6</u>

A work day will be lost due to weather only when weather conditions reduce production by more than 50 percent on Work on the critical path. Production shall be measured by hours worked. The Design-Builder shall have the burden of establishing that weather conditions reduced production by more than 50 percent on Work on the critical path.

## **Article 9**

### **Changes to the Contract Price and Time**

#### **9.1 Change Orders.**

**9.1.1** A Change Order is a written instrument issued after execution of the Agreement signed by Owner and Design-Builder, stating their agreement upon all of the following:

**9.1.1.1** The scope of the change in the Work;

**9.1.1.2** The amount of the adjustment to the Contract Price; and

**9.1.1.3** The extent of the adjustment to the Contract Time(s).

**9.1.2** All changes in the Work authorized by applicable Change Order shall be performed under the applicable conditions of the Contract Documents. Owner and Design-Builder shall negotiate in good faith and as expeditiously as possible the appropriate adjustments for such changes.

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

**9.1.4** The agreement on any Change Order shall constitute a final settlement of all matters relating to the change in the Work that is the subject of the Change Order and/or Work Directive Change, including, but not limited to, all direct, indirect and cumulative costs associated with such change and any and all adjustments to the Contract Price, Contract Time and/or the GMP.

**9.1.5** If the Owner and Design-Builder are unable to agree on entitlement to, or on the amount or extent, if any, of an adjustment in the Contract Price or Contract Times, or both, that should be allowed as a result of a Work Directive Change within twenty-one (21) calendar days after the Owner issued the Work Directive Change, the Owner may unilaterally issue to Design-Builder a fully executed Change Order that includes an equitable adjustment in the Contract Price, Contract Time and/or GMP as determined by the Owner. If Design-Builder disputes the adjustment in the Contract Price, Contract Time and/or the GMP pursuant to a unilateral Change Order issued by the Owner under this Section, and if Design-Builder gives timely notice pursuant to Section 10.1 of this Agreement of the original event giving rise to the entitlement or adjustment, Design-Builder may pursue a Claim therefor as provided in the Contract Documents.

#### **9.2 Work Change Directives.**

**9.2.1** A Work Change Directive is a written order prepared and signed by Owner's Representative directing a change in the Work prior to agreement on an adjustment in the Contract Price and/or the Contract Time(s).

**9.2.2** Owner's Representative and Design-Builder shall negotiate in good faith and as expeditiously as possible the appropriate adjustments for the Work Change Directive. Upon reaching an agreement, the parties shall prepare and execute an appropriate Change Order reflecting the terms of the agreement.

#### **9.3 Minor Changes in the Work.**

**9.3.1** Minor changes in the Work do not involve an adjustment in the Contract Price and/or Contract Time(s) and do not materially and adversely affect the Work, including the design, quality, performance and workmanship required by the Contract Documents. Design-Builder may

make minor changes in the Work consistent with the intent of the Contract Documents, provided, however, that Design-Builder shall promptly inform Owner, in writing, of any such changes and record such changes on the documents maintained by Design-Builder.

#### **9.4 Contract Price Adjustments.**

**9.4.1** The increase or decrease in Contract Price resulting from a change in the Work shall be determined by one or more of the following methods:

**9.4.1.1** Unit prices set forth in the Agreement or as subsequently agreed to between the parties;

**9.4.1.2** A mutually accepted lump sum, properly itemized and supported by sufficient substantiating data to permit evaluation by Owner;

**9.4.1.3** Costs, fees and any other markups set forth in the Agreement; or

**9.4.1.4** If an increase or decrease cannot be agreed to as set forth in items 9.4.1.1 through 9.4.1.3 the Design-Builder shall perform the Work shall submit to the Owner, on a daily basis, invoices, daily job logs and work tickets reflecting the labor, material and equipment used to complete the Work.

**9.4.2** [Not used]

**9.4.3** If Owner and Design-Builder disagree upon whether Design-Builder is entitled to be paid for any services required by Owner, or if there are any other disagreements over the scope of Work or proposed changes to the Work, Owner and Design-Builder shall resolve the disagreement pursuant to Article 10 hereof. As part of the negotiation process, Design-Builder shall furnish Owner with a good faith estimate of the costs to perform the disputed services in accordance with Owner's interpretations. If the parties are unable to agree and Owner expects Design-Builder to perform the services in accordance with Owner's interpretations, Design-Builder shall proceed to perform the disputed services, conditioned upon Owner's Representative issuing a written order to Design-Builder (i) directing Design-Builder to proceed and (ii) specifying Owner's interpretation of the services that are to be performed.

#### **9.5 Emergencies.**

**9.5.1** In any emergency affecting the safety of persons and/or property, Design-Builder shall act, at its discretion, to prevent threatened damage, injury or loss. Any change in the Contract Price and/or Contract Time(s) on account of emergency work shall be determined as provided in this Article 9.

## **Article 10**

### **Contract Adjustments and Disputes**

#### **10.1 Requests for Contract Adjustments and Relief.**

**10.1.1** All Claims, except those waived pursuant to Sections 6.7.3 and 6.7.3.1, shall be submitted in accordance with Section 10.1 as a condition precedent to any exercise by the Owner or Design-Builder of any rights or remedies either may otherwise have under the Contract Documents or by Laws and Regulations in respect of such Claims.

#### **10.1.2 Claim Submittal Procedure**

**10.1.2.1 Notice of Claim by Design-Builder.** As a condition precedent to a change in the Contract Price, Contract Times, the GMP or a recovery of damages against the Owner, the Design-Builder shall give the Owner written notice of a Claim ("Notice of Claim"). The Design-Builder shall be responsible to provide Notice of Claim within a reasonable time, but not exceeding seven (7) calendar days of the start of the event giving rise to the Claim. The Design-Builder shall be responsible for substantiating its Claim. The Notice of Claim must be delivered to the Owner's Representative, and shall provide sufficient detail to enable the Owner to investigate the matter and shall conspicuously state that it is a **"NOTICE OF CLAIM."** Failure to give Notice of Claim within the time period required shall be an irrevocable waiver of the Design-Builder's right to seek a change in the Contract Price, the Contract Times, the GMP, and/or a recovery of damages against the Owner.

**10.1.2.2 Statement of Claim.** As a condition precedent to a change in the Contract Price, Contract Times, the GMP, or a recovery of damages against the Owner, for each Claim the Design-Builder shall deliver a fully completed Statement of Claim Form, a copy of which form is a Contract Document. The Statement of Claim Form shall be submitted to the Owner within fifteen (15) calendar days from the date the Design-Builder submitted the Notice of Claim or within thirty (30) days of the start of the event giving rise to the Claim, whichever occurs first. The Design-Builder's obligation to deliver a fully completed Statement of Claim Form within such time period is a material term of the Contract Documents and provides the Owner with the opportunity to mitigate its damages. Included in this Statement of Claim is the requirement for the Design-Builder to certify that the Claim is not false or fraudulent, as further discussed in Section 10.1.7.

**10.1.3 The Owner's Action.** The Owner's Representative will review each Claim and will, within forty-five (45) calendar days after receipt of the Statement of Claim Form from the Design-Builder, take one of the following actions in writing:

1. deny the Claim in whole or in part,
2. approve the Claim,
3. request additional documentation of the Claim pursuant to Section 10.1.8 of this Agreement.

**10.1.4** In the event that the Owner's Representative does not take action on a Claim within said forty-five (45) calendar days, the Claim shall be deemed denied.

**10.1.5** The Owner's Representative's written action under Section 10.1.3 or denial pursuant to Sections 10.1.3 or 10.1.4 will be final and binding upon Design-Builder, unless Design-Builder commences an action in a court of exclusive jurisdiction as set forth in Section 10.2.3 within thirty (30) calendar days of the Date of Substantial Completion.

**10.1.6.** No Claim for a change in the Contract Price, a change in the Contract Times, a change in the GMP or a recovery of damages against the Owner will be valid if not submitted in accordance with this Section 10.1.

**10.1.7. False or Fraudulent Claim.** The Design-Builder shall not knowingly present or cause to be presented to the Owner a false or fraudulent Claim. Knowingly shall have the same meaning as in Section 3729(b) USC of the Federal False Claims Act. If the Design-Builder knowingly presents or causes to be presented a false or fraudulent Claim, then the Design-Builder shall be liable to the Owner for the same civil penalty and damages as the United States Government would be entitled to recover under such Section 3729(a) USC and shall also indemnify and hold the Owner harmless from all costs and expenses, including the Owner's attorneys' and

consultants' fees and expenses incurred in investigating and defending against such Claim and in pursuing the collection of such penalty, damages and fees and expenses.

**10.1.8. Claim Documentation.** Within ten (10) calendar days of written request from the Owner's Representative, Design-Builder shall make available to the Owner, for review and copying by the Owner's Representative, any and all documentation requested by the Owner, including all books, records, or other documents in its possession or to which it has access, including but not limited to Design-Builder's daily logs/reports, original estimates of Work and applicable agreements, correspondence with Design Consultants, Design Subconsultants, Subcontractors and Sub-Subcontractors, internal correspondence (including e-mail), accounting records, and other information from which the Design-Builder's costs may be derived. To the extent permitted by law, the Owner shall keep the Project accounting records and estimate for the Project confidential. As requested by the Owner, the Design-Builder shall provide such documents and information in paper copies and/or computer format (including the format of the Design-Builder's accounting software and/or ASCII format). The Design-Builder's provision of the requested documents and information shall be a condition precedent to any further proceeding under the Contract Documents or to payment of an Application for Payment.

Failure to provide the requested documents shall be a material breach of the Contract, and Design-Builder shall indemnify the Owner for all of the Owner's 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 Design-Builder's failure to comply with this provision. If the Design-Builder fails to provide the requested documents, the Design-Builder shall be precluded from presenting such documents in any subsequent dispute resolution proceedings, if the data was reasonably available at the time of the request.

## **10.2 Dispute Avoidance and Resolution.**

**10.2.1** The parties are fully committed to working with each other throughout the Project and agree to communicate regularly with each other at all times so as to avoid or minimize disputes or disagreements. If disputes or disagreements do arise, Design-Builder and Owner each commit to resolving such disputes or disagreements in an amicable, professional and expeditious manner so as to avoid unnecessary losses, delays and disruptions to the Work.

**10.2.2** In the event that Design-Builder files a Claim or files an action against the Owner, the Owner shall be entitled to make an offer of settlement of the Claim to Design-Builder at any time up to the date of trial. Such offer of settlement shall not be admissible into evidence at the litigation except on the issue of entitlement to recovery of attorneys' fees, costs and expenses. If at any stage of the litigation, including any appeals, Design-Builder's claim is dismissed or found to be without merit, or if the damages awarded to Design-Builder on its claim do not exceed the Owner's offer of settlement, Design-Builder shall be liable to the Owner and shall reimburse the Owner for all attorney's fees, costs and expenses incurred by the Owner from the date of the offer of settlement until the date of the final adjudication and resolution of Design-Builder's claim.

**10.2.3** Any dispute, claim or other matter not settled by negotiation or other means as mutually agreed upon by the Owner, Design-Builder, and surety where applicable, shall be determined by the Court of Common Pleas where the Project is located which shall have exclusive venue and jurisdiction over such matters and claims. The parties hereby waive any rights that they may have to remove any action to Federal court.

## **10.3 [Not Used.]**

## **10.4 Duty to Continue Performance.**

**10.4.1** Unless provided to the contrary in the Contract Documents, Design-Builder shall continue to perform the Work and Owner shall continue to satisfy its payment obligations to Design-

Builder, pending the final resolution of any dispute or disagreement between Design-Builder and Owner. However, the Owner shall be under no obligation to make payments on or against any claim or amounts in dispute during the pendency of any mediation, arbitration or litigation proceeding to resolve those claims or amount in dispute.

## **10.5 Consequential Damages.**

**10.5.1** Notwithstanding anything herein to the contrary (except as set forth in Section 10.5.2 below), Owner shall not be liable to the Design-Builder for any consequential losses or damages, whether arising in contract, tort (including negligence), strict liability or otherwise, including but not limited to losses by the Design-Builder for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation and for loss of profit except anticipated profit arising directly from the Work.

**10.5.2** The consequential damages limitation set forth in Section 10.5.1 above is not intended to affect the payment of liquidated damages or direct damages, if any, set forth in Article 5 of the Agreement, which both parties recognize has been established, in part, to reimburse Owner for some damages that might otherwise be deemed to be consequential.

## **Article 11**

### **Stop Work and Termination for Cause**

#### **11.1 Owner's Right to Stop Work.**

**11.1.1** Owner's Representative may, without cause and for its convenience, order Design-Builder in writing to stop and suspend the Work. Such suspension shall not exceed ninety (90) consecutive days during the duration of the Project.

**11.1.2** Design-Builder is entitled to seek an adjustment of the Contract Price and/or Contract Time(s) if its cost or time to perform the Work has been adversely impacted by any suspension of stoppage of the Work by Owner and Design-Builder makes a Claim therefore as provided in Section 10.1.

#### **11.2 Owner's Right to Perform and Terminate for Cause.**

**11.2.1** If Design-Builder fails to (i) provide a sufficient number of skilled workers, (ii) supply the materials required by the Contract Documents, (iii) comply with applicable Legal Requirements, (iv) timely pay, without cause, Design Consultants or Subcontractors, (v) prosecute the Work with promptness and diligence to ensure that the Work is completed by the Contract Time(s), as such times may be adjusted, or (vi) perform obligations under the Contract Documents, then Owner, in addition to any other rights and remedies provided in the Contract Documents or by law, shall have the rights set forth in Sections 11.2.2 and 11.2.3 below.

**11.2.2** Upon the occurrence of an event set forth in Section 11.2.1 above, Owner may provide written notice to Design-Builder that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be cured, within three (3) business days of Design-Builder's receipt of such notice. If Design-Builder fails to cure, or reasonably commence to cure, such problem within such three (3) business day period, then Owner may declare the Agreement terminated for default by providing written notice to Design-Builder of such declaration.

**11.2.3** Upon declaring the Agreement terminated pursuant to Section 11.2.2 above, Owner may enter upon the premises and take possession, for the purpose of completing the Work, of all materials, equipment, scaffolds, tools, appliances and other items thereon, which have been purchased or provided for the performance of the Work, all of which Design-Builder hereby transfers, assigns and sets over to Owner for such purpose, and to employ any person or

persons to complete the Work and provide all of the required labor, services, materials, equipment and other items. In the event of such termination, Design-Builder shall not be entitled to receive any further payments under the Contract Documents until the Work shall be finally completed in accordance with the Contract Documents. At such time, if the unpaid balance of the Contract Price exceeds the cost and expense incurred by Owner in completing the Work, such excess shall be paid by Owner to Design-Builder. Notwithstanding the preceding sentence, if the Agreement establishes a Guaranteed Maximum Price, Design-Builder will only be entitled to be paid for Work performed prior to its default. If Owner's cost and expense of completing the Work exceeds the unpaid balance of the Contract Price, then Design-Builder shall be obligated to pay the difference to Owner. Such costs and expense shall include not only the cost of completing the Work, but also losses, damages, costs and expense, including attorneys', engineer, architect, other professional, court or arbitration or other dispute resolution fees and expenses, incurred by Owner in connection with the procurement and defense of claims arising from Design-Builder's default, subject to the waiver of consequential damages set forth in Section 10.5 hereof. Such termination shall be effective as of the date stated in the termination notice provided to Contractor.

**11.2.4** If Owner improperly terminates the Agreement for cause, the termination for cause will be converted to a termination for convenience in accordance with the provisions of Article 8 of the Agreement.

**11.2.5** As set forth in this section, the Owner's termination of the Design-Builder is without prejudice to any other rights and remedies of the Owner, including but not limited to the Owner's rights and remedies under the Contract Documents and at law, all of which shall survive termination.

### **11.3 Design-Builder's Right to Stop Work.**

**11.3.1** Design-Builder may, in addition to any other rights afforded under the Contract Documents or at law, stop the Work upon the Owner's failure to pay amounts properly due under Design-Builder's Application for Payment for thirty (30) days after such amounts were finally determined to be due, subject to the Owner's right to withhold payment pursuant to Section 6.3.

**11.3.2** Should the event set forth in Section 11.3.1 above occur, Design-Builder shall provide Owner with written notice that Design-Builder will stop the Work unless said event is cured within seven (7) days from Owner's receipt of Design-Builder's notice. If Owner does not cure the problem within such seven (7) day period, Design-Builder may stop the Work. In such case, Design-Builder shall be entitled to make a claim for adjustment to the Contract Price and Contract Time(s) to the extent it has been adversely impacted by such stoppage.

### **11.4 Design-Builder's Right to Terminate for Cause.**

**11.4.1** Design-Builder, in addition to any other rights and remedies provided in the Contract Documents or by law, may terminate the Agreement for cause for the following reasons:

**11.4.1.1** The Work has been stopped for ninety (90) consecutive days because of court order, any government authority having jurisdiction over the Work, or orders by Owner under Section 11.1.1 hereof, provided that such stoppages are not due to the acts or omissions of Design-Builder or anyone for whose acts Design-Builder may be responsible.

**11.4.1.2** Owner's failure to provide Design-Builder with any information, permits or approvals that are Owner's responsibility under the Contract Documents which result in the Work being stopped for ninety (90) consecutive days, even though Owner has not ordered Design-Builder in writing to stop and suspend the Work pursuant to Section 11.1.1 hereof.

**11.4.1.3** Owner's failure to cure the problems set forth in Section 11.3.1 above after Design-Builder has stopped the Work.

**11.4.2** Upon the occurrence of an event set forth in Section 11.4.1 above, Design-Builder may provide written notice to Owner that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be cured, within seven (7) days of Owner's receipt of such notice. If Owner fails to cure, or reasonably commence to cure, such problem, then Design-Builder may give a second written notice to Owner of its intent to terminate within an additional seven (7) day period. If Owner, within such second seven (7) day period, fails to cure, or reasonably commence to cure, such problem, then Design-Builder may declare the Agreement terminated for default by providing written notice to Owner of such declaration. In such case, Design-Builder shall be entitled to recover in the same manner as if Owner had terminated the Agreement for its convenience under Article 8 of the Agreement.

## **11.5 Bankruptcy of Design-Builder.**

**11.5.1** If Design-Builder institutes or has instituted against it a case under the United States Bankruptcy Code (such party being referred to as the "Bankrupt Party"), such event may impair or frustrate the Bankrupt Party's ability to perform its obligations under the Contract Documents. Accordingly, should such event occur:

**11.5.1.1** The Bankrupt Party, its trustee or other successor, shall furnish, upon request of the non-Bankrupt Party, adequate assurance of the ability of the Bankrupt Party to perform all future material obligations under the Contract Documents, which assurances shall be provided within ten (10) days after receiving notice of the request; and

**11.5.1.2** The Bankrupt Party shall file an appropriate action within the bankruptcy court to seek assumption or rejection of the Agreement within sixty (60) days of the institution of the bankruptcy filing and shall diligently prosecute such action.

If the Bankrupt Party fails to comply with its foregoing obligations, the non-Bankrupt Party shall be entitled to request the bankruptcy court to reject the Agreement, declare the Agreement terminated and pursue any other recourse available to the non-Bankrupt Party under this Article 11.

**11.5.2** The rights and remedies under Section 11.5.1 above shall not be deemed to limit the ability of the non-Bankrupt Party to seek any other rights and remedies provided by the Contract Documents or by law, including its ability to seek relief from any automatic stays under the United States Bankruptcy Code.

## **Article 12**

### **Electronic Data**

#### **12.1 Electronic Data.**

**12.1.1** The parties recognize that Contract Documents, including drawings, specifications and three-dimensional modeling (such as Building Information Models) and other Work Product may be transmitted among Owner, Design-Builder and others in electronic media as an alternative to paper hard copies (collectively "Electronic Data").

#### **12.2 Transmission of Electronic Data.**

**12.2.1** Design-Builder shall provide electronic data in CAD (.dwg) format or other format acceptable to the Owner. Each party shall be responsible for securing the legal rights to access the agreed-upon format, including, if necessary, obtaining appropriately licensed copies of the

applicable software or electronic program to display, interpret and/or generate the Electronic Data.

**12.2.2** Neither party makes any representations or warranties to the other with respect to the functionality of the software or computer program associated with the electronic transmission of Work Product. Unless specifically set forth in the Agreement, ownership of the Electronic Data does not include ownership of the software or computer program with which it is associated, transmitted, generated or interpreted.

**12.2.3** By transmitting Work Product in electronic form, the transmitting party does not transfer or assign its rights in the Work Product. The rights in the Electronic Data shall be as set forth in Article 4 of the Agreement. Under no circumstances shall the transfer of ownership of Electronic Data be deemed to be a sale by the transmitting party of tangible goods.

### **12.3 Electronic Data Protocol.**

**12.3.1** The parties acknowledge that Electronic Data may be altered or corrupted, intentionally or otherwise, due to occurrences beyond their reasonable control or knowledge, including but not limited to compatibility issues with user software, manipulation by the recipient, errors in transcription or transmission, machine error, environmental factors, and operator error. Consequently, the parties understand that there is some level of increased risk in the use of Electronic Data for the communication of design and construction information and, in consideration of this, agree, and shall require their independent contractors, Subcontractors and Design Consultants to agree, to the following protocols, terms and conditions set forth in this Section 12.3.

**12.3.2** Electronic Data will be transmitted in the format agreed upon in Section 12.2.1 above, including file conventions and document properties, unless prior arrangements are made in advance in writing.

**12.3.3** The Electronic Data represents the information at a particular point in time and is subject to change. Therefore, the parties shall agree upon protocols for notification by the author to the recipient of any changes which may thereafter be made to the Electronic Data, which protocol shall also address the duty, if any, to update such information, data or other information contained in the electronic media if such information changes prior to Final Completion of the Project.

## **Article 13**

### **Miscellaneous**

#### **13.1 Confidential Information.**

**13.1.1** The Design-Builder acknowledges that Owner is a public entity subject to Ohio's public records act. If the Design-Builder claims that any information submitted to the Owner is exempt from disclosure under Ohio's public records act, then the Design-Builder shall conspicuous mark on the record "NOT A PUBLIC RECORD" and include in a cover letter or transmittal an explanation, citing legal authority, of the basis of the claim. Owner reserves the right to reject Design-Builder's position and produce said documents. In the event of a dispute with any third party requesting such records, Design Builder shall undertake the defense of Owner at Design-Builder's own expense and hold harmless and indemnify the Owner for any damages, penalties, fees, or costs that the Owner may incur as a result of such a dispute.

#### **13.2 Assignment.**

**13.2.1** Neither Design-Builder nor Owner shall, without the written consent of the other assign,

transfer or sublet any portion or part of the Work or the obligations required by the Contract Documents.

### **13.3 Successorship.**

**13.3.1** Design-Builder and Owner intend that the provisions of the Contract Documents are binding upon the parties, their employees, agents, heirs, successors and assigns.

### **13.4 Governing Law.**

**13.4.1** The Agreement and all Contract Documents shall be governed by the laws of the place of the Project, without giving effect to its conflict of law principles.

### **13.5 Severability.**

**13.5.1** If any provision or any part of a provision of the Contract Documents shall be finally determined to be superseded, invalid, illegal, or otherwise unenforceable pursuant to any applicable Legal Requirements, such determination shall not impair or otherwise affect the validity, legality, or enforceability of the remaining provision or parts of the provision of the Contract Documents, which shall remain in full force and effect as if the unenforceable provision or part were deleted.

### **13.6 No Waiver.**

**13.6.1** The failure of either Design-Builder or Owner to insist, in any one or more instances, on the performance of any of the obligations required by the other under the Contract Documents shall not be construed as a waiver or relinquishment of such obligation or right with respect to future performance.

### **13.7 Headings.**

**13.7.1** The headings used in these General Conditions of Contract, or any other Contract Document, are for ease of reference only and shall not in any way be construed to limit or alter the meaning of any provision.

### **13.8 Notice.**

**13.8.1** Whenever the Contract Documents require that notice be provided to the other party, notice will be deemed to have been validly given (i) if delivered in person to the individual intended to receive such notice, (ii) four (4) days after being sent by registered or certified mail, postage prepaid to the address indicated in the Agreement, or (iii) if transmitted by facsimile, by the time stated in a machine generated confirmation that notice was received at the facsimile number of the intended recipient. All written notices required under the Contract Documents from the Design-Builder to the Owner shall be submitted to the Owner, c/o the Owner's Representative and the Criteria Architect.

### **13.9 Amendments.**

**13.9.1** The Contract Documents may not be changed, altered, or amended in any way except in writing signed by a duly authorized representative of each party.

### **13.10 Mutual Cooperation.**

**13.12.1** Each party hereto agrees to do all acts and things and to make, execute and deliver such written instruments, as shall from time to time be reasonably required to carry out the terms and provisions of the Contract Documents.