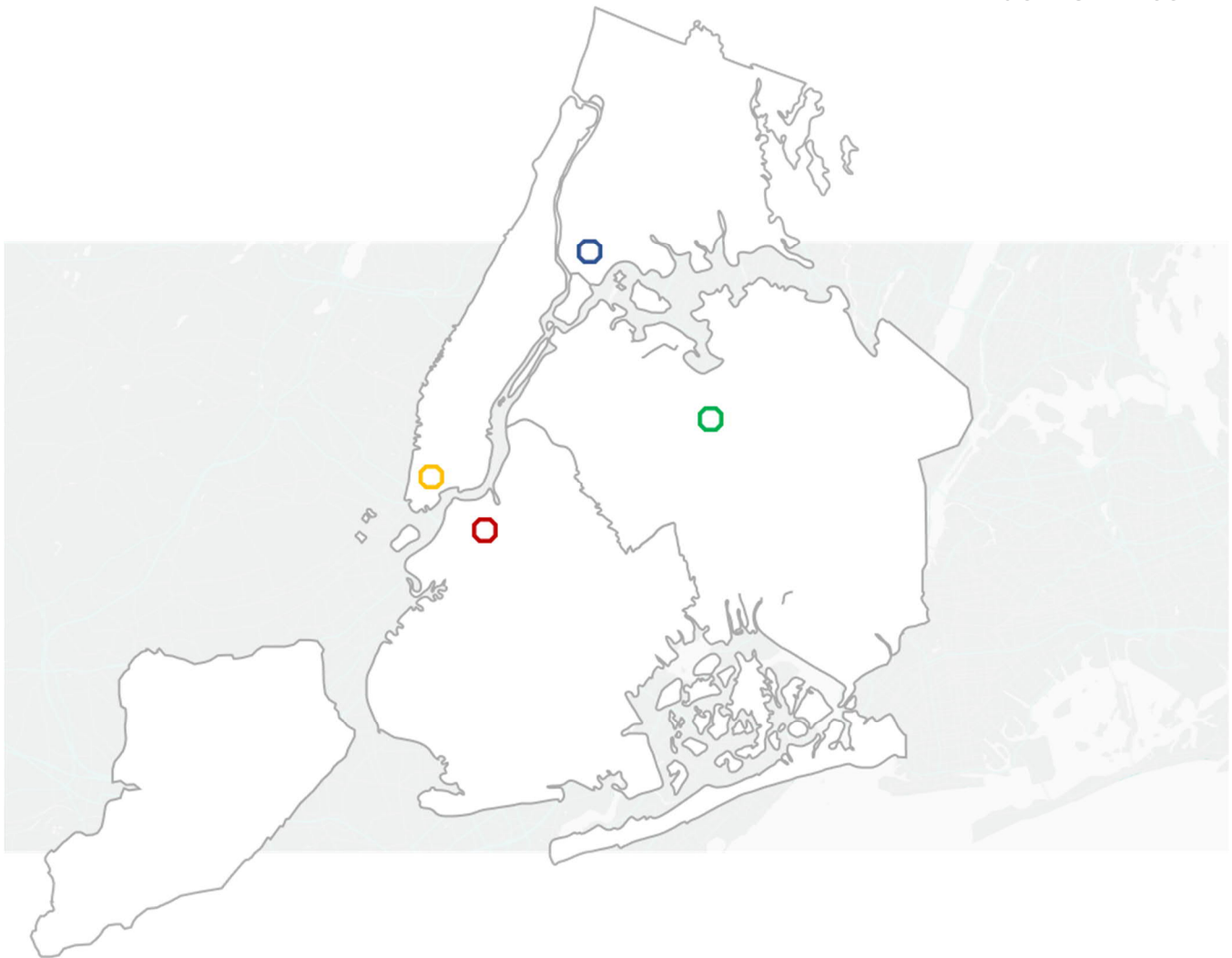


Request for Qualifications

Manhattan Site Dismantle and Swing Space

MN NYC BOROUGH-BASED JAILS PROGRAM

A DESIGN-BUILD PROGRAM



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PREAMBLE

This preamble is provided for informational purposes. In the event of discrepancies between the contents of this preamble and the main body or exhibits of this RFQ, the provisions within the main body or exhibits of the RFQ will prevail.

New York City is at a transformational moment, rethinking and redoing the way in which its justice system operates to ensure it is as small, safe and fair as possible. Uniquely in the nation, the City has achieved record reductions in both crime and incarceration, even as it has lightened the touch of enforcement. Today, the City has the lowest rates of crime and incarceration of any big city in the nation, relying less on police and jails than it once did and more on neighborhood-based and preventive efforts. In the midst of this transformation, the City is also closing its outdated jails, which for decades have been isolated on Rikers Island, which sits in the East River, and building instead facilities in four of the City's five boroughs, closer to communities, public transportation, services and courts.

The City is seeking to create buildings that are equal in ambition to the transformational changes that have taken place and continue to unfold in the City's criminal justice system. The City's new jails must be civic assets, valuable to the communities within which they will be located and to the people who are incarcerated, work, and visit them. These facilities must be beacons of high-quality civic architecture that integrate into the immediate neighborhood context and are assets to all New Yorkers. The buildings will offer an aspirational model of how to use detention—sparingly, with a focus on the specific characteristics of detained populations and their needs, and shaped by principles of procedural justice—to achieve a safer and fairer city.

The City will build four modern, humane facilities in the Bronx, Brooklyn, Manhattan and Queens that will house no more than 3,300 people in total—the lowest jail population since 1920. This is part of a once in many generations opportunity to build a smaller and more humane justice system that includes facilities grounded in dignity and respect, offering better connections to and space for families, attorneys, courts, medical and mental health care, education, therapeutic programming and service providers. The facilities must provide for effective and tailored programming, appropriate housing for those with medical, behavioral and mental health needs, and an opportunity for a more stable reentry into the community.

The new facilities must realize these values through innovative and high-quality design that will foster safety and wellbeing through normalized environments for all those who interact with the facilities. Such high-quality design practices must also provide for the new facilities to be built efficiently and cost-effectively to achieve the City's functional objectives and do so as expeditiously as possible in order to meet the City's goal of closing the Rikers Island Jail Complex as soon as possible.

This procurement is part of the Early Works packages to be completed prior to the construction of the new facilities. Specifically, this Early Works project is for the construction of a temporary sally port and the dismantling of the existing detention facilities in Manhattan, and other related activities.

The overarching goal for this procurement is to select a Design-Build (DB) Team to design and construct the Project in a manner that provides the best value to the City in support of its vision and mission. **Through best value selection, the City is looking for high-quality, innovative design to be completed on time and within budget. This procurement is not a low-bid procurement.** The City is seeking teams with the capability to work in dense, urban environments, to optimize energy-efficiency and sustainability, to provide robust minority and woman-owned business enterprise participation, to deliver project excellence in the community-specific urban realm, and to reduce construction and operations-related community impacts. DDC seeks an effective partnering relationship with the successful DB Team(s) to accomplish this goal.

DDC intends to award fixed price DB agreements with incentives and an award fee program. DDC will state its requirements in a performance-based contract, thus allowing and expecting the DB Team(s) to determine how to satisfy and exceed Project requirements. The DB Team is expected to work collaboratively with the City to seek out solutions to accelerate the schedule while managing cost and promoting quality and innovation.

The City understands that integrated Design-Build and design-bid-build are fundamentally different project procurement and delivery systems. As part of DDC's shift into a collaborative Design-Build approach, DDC will implement Design-Build Institute of America best practices to become an owner of choice for DB Teams, such as:

- A two-phase, best value selection that prioritizes design, quality, past performance, and qualifications over price. This RFQ is Phase I. A subsequent RFP will be Phase II.
- Offering stipends to unsuccessful responsive and responsible Proposers in Phase II.
- Implementation of a formal Alternative Dispute Resolution (ADR) partnering program.
- Allowing the DB Team flexibility to choose means and methods to satisfy contract requirements.
- An integrated City-DB Team approach to meet or exceed Project goals.
- Rewarding key performance criteria throughout the Project.
- Mitigating the risk to the Design-Builder by providing for appropriate allowances, potential economic price adjustment provisions, and mitigating unknown subsurface conditions.

DB agreement(s) will be awarded to the best value Proposer(s) with Design-Build quality, project excellence, experience, past performance, and other non-cost factors valued more than lowest price.

1. INTRODUCTION TO THE BOROUGH-BASED JAILS PROGRAM

1.1 Executive Summary

New York City (the “City”) is at a transformational moment, rethinking and redoing the way in which its justice system operates to ensure it is as small, safe and fair as possible. Uniquely in the nation, the City has achieved record reductions in both crime and incarceration, even as it has lightened the touch of enforcement. Today, the City has the lowest rates of crime and incarceration of any big city in the nation, relying less on police and jails than it once did and more on neighborhood-based and preventive efforts. In the midst of this transformation, we are also closing the City’s outdated jails, which for decades have been isolated on Rikers Island, which sits in the East River, and building instead facilities in four of the City’s five boroughs, closer to communities, services and courts.

The City will build four modern, humane facilities in the Bronx, Brooklyn, Manhattan and Queens that will house no more than 3,300 people in total—the lowest jail population since 1920. This Early Works Project is part of a once in many generations opportunity to build a smaller and more humane justice system that includes facilities grounded in dignity and respect, offering better connections to and space for families, attorneys, courts, medical and mental health care, education, therapeutic programming and service providers. The new facilities will realize these values through innovative and high-quality design that will foster safety and wellbeing through normalized environments for all those who interact with the facilities.

The overarching goal for this procurement is to select a DB Team to design and construct the Project in a manner that provides the best value to the City in support of its vision and mission. This Request for Qualifications (“RFQ”) is issued by the Department of Design and Construction (“DDC”) on behalf of the sponsor agencies, the Mayor’s Office of Criminal Justice (“MOCJ”) and the Department of Correction (“DOC”), and seeks submissions from the most highly qualified Proposers.

All capitalized terms and abbreviations used, but not otherwise defined herein, have the meaning given to such terms in Appendix A (*Abbreviations and Definitions*).

1.2 Purpose

The purpose of this RFQ is to commence procuring DB services from a Design-Builder for the Manhattan Site Dismantle and Swing Space Project, which is an Early Works package as part of this Borough-Based Jails Program (the “BBJ”) and as described in Appendix C (the “Project Description Appendix”). The Project Description Appendix provides a high-level overview for the Project, including (i) the Design-Builder’s responsibilities and (ii) the Project Goals.

Sections 2 and 3, respectively, provide a description of the procurement process and general instructions applicable to the RFQ procurement. An explanation of the evaluation criteria, including evaluation criteria weights, is provided in Section 4. Proposals will be evaluated based on the best value. Detailed submission instructions for Proposers submitting statements of qualifications (“Statements of Qualifications” or “SOQs”) are set forth in Section 5.

1.3 RFQ Approach

This RFQ is the first step in a two-step process to award a DB Agreement for this Project as part of the BBJ program. The first step, encompassed in this RFQ, is to short-list up to three (3) Design-Build teams who will be invited to submit Proposals in response to the subsequently issued RFP.

During Phase II, DDC intends to award one DB Agreement. The overall procurement process, restrictions and limitations is described in further detail in Section 2 (*Procurement Process*).

1.4 BBJ Program Goals

DDC's general goals and objectives for the BBJ are listed below (the "**Program Goals**"). Additional goals ("**Project Goals**") are listed in the Project Description Appendix.

- (a) design and construct new Detention Facilities that are grounded in dignity and respect; offering better connections to, and space for, families, attorneys, courts, medical and mental health care, education, therapeutic programming and service providers. They must provide for effective and tailored programming, appropriate housing for those with medical, behavioral and mental health needs, and opportunity for a more stable reentry into the community;
- (b) design and construct in a manner that provides a safe and efficient work environment for those who work within the facilities;
- (c) design and construct in a manner that seamlessly integrates its operations, design and landscaping into the applicable existing neighborhood as a civic asset;
- (d) select a DB Team that can provide exceptional design in a collaborative manner;
- (e) select a DB Team to design and construct in a manner that provides the best value to the City and in a manner in full compliance with all applicable legal and agency requirements;
- (f) select a DB Team that will proactively seek out innovative solutions to expedite the project schedule while controlling cost and achieving a high degree of quality and safety;
- (g) optimize overall operations and maintenance efficiency;
- (h) prioritize environmental sustainability and energy efficiency, with the expectation that each Detention Facility will achieve, at minimum, LEED Gold rating.
- (i) establish robust diversity practices and meet M/WBE participation goals set forth in Section 8.1 (*M/WBE Policy*); and
- (j) minimize construction and operations-related impacts to neighboring properties and facilities and the community at large.

1.5 Role of the DDC

For each Detention Facility, DDC, through its own forces or through the Consultant Support Team, intends to undertake the following:

- (a) overall project management for BBJ projects;
- (b) procurement and administration;
- (c) preparation of the RFQ and subsequent RFP, evaluation of SOQs and Proposals, determination of Short-lists and selection of the best value Proposal by a committee more fully described in Section 4.2 (*Selection Committee*);
- (d) identification of DDC's designated project manager as the point of contact for all communication during the design and construction phase;

- (e) quality oversight and audit of the Design-Builder's design and construction activities, including quality checks and verification sampling and testing;
- (f) providing reasonable assistance to the Design-Builder in securing agreements with utility companies, utility owners and other third parties, as necessary; and
- (g) M/WBE program oversight and compliance review.

1.6 Role of MOCJ, DOC and CHS

The Mayor's Office of Criminal Justice (“**MOCJ**”) serves as the primary advisor to the Mayor on public safety. MOCJ shapes and funds strategies to increase safety and fairness throughout the public safety system. The Department of Correction (“**DOC**”) provides for the care, custody and control of persons held in custody once accused of crimes, or who have been convicted and sentenced to one year or less. DOC will manage and operate the Borough-Based Jails. NYC Health + Hospitals/Correctional Health Services (“**CHS**”) provides medical and mental health care, substance use treatment, dental care, social work services, and reentry support services, to individuals in the City's custody. DOC will be the long-term operator of the Detention Facilities with CHS providing on-site health services.

DOC and MOCJ are the sponsor agencies of the BBJ – which is the basis of this RFQ. CHS is a key stakeholder in the BBJ.

1.7 Form of Design-Build Agreement

(a) Generally

The DB Agreement for the Project will be a fixed price, lump-sum and date-certain design and construction agreement prepared in accordance with design-build best practices and which may include incentives and award fees. The maximum budget for the Project is contained in the Project Description Appendix.

A draft form of DB Agreement is provided with this RFQ attached in Appendix H (*Form of DB Agreement*).

(b) Form of DB Agreement Subject to Change

The draft form of DB Agreement included with this RFQ may be revised by the DDC at any time. It is DDC's intention to discuss the DB Agreement with each Short-Listed Proposer through collaborative dialogue meetings and written requests for information throughout the in-market period. DDC may make appropriate revisions based on those collaborative discussions.

1.8 Project Information

A high-level project description is set forth in the Project Description Appendix.

This RFQ is being issued concurrently with the process of development and review of the final scope of Work for each Detention Facility. As a result of such process, or otherwise, any Work or project description included or described in this RFQ is subject to modification or adjustment, in DDC's sole discretion.

For more information about the City's plan to close the Rikers Island Jail Complex and replace it with a smaller network of Detention Facilities, please visit: <https://rikers.cityofnewyork.us/>

To view copies of BBJ's City Environmental Quality Review documents, including the Final Scope of Work and the Final Environmental Impact Statement, please visit: <https://a002->

ceqraaccess.nyc.gov/ceqr/Details?data=MThET0MwMDFZ0&signature=e330cd9c78430a8d28b580b159a7183c6bd2b3d8

A capital project scope development study ("CPSD") was also performed. A copy of the final draft CPSD is available upon request by emailing DDC's Designated Representative, identified in Section 3.2 (*Rules of Contact*).

1.9 Other BBJ DB Procurements

Prior to, or simultaneous with this RFQ, DDC has procured, or is procuring through separate solicitations and procurements, design-build services for the Detention Facilities and other Early Works. Proposers or Persons participating in the procurements for Detention Facilities projects or other Early Works projects under the BBJ are not precluded from participating in this solicitation.

2. PROCUREMENT PROCESS

2.1 Purpose & Overview

- (a) DDC seeks the most highly qualified Proposers who are prepared in all respects to undertake the complete design and construction work for this Project. As described further below, SOQs will only be accepted from Proposers intending to provide all required services for the Project.
- (b) A high-level procurement schedule is included in Appendix F (*Draft Request for Proposals (Phase II) Information*) and the procurement and preliminary project schedule for is set out in the Project Description Appendix C.

2.2 RFQ (Phase I)

(a) **SOQ Submission**

Qualified Proposers that wish to be Short-listed under this RFQ, must submit an SOQ by the SOQ Due Date.

(b) **Ranking Process**

DDC will rank all SOQs received. After ranking, DDC will identify up to three of the most highly qualified Proposers.

(c) **Shortlist**

- (i) DDC intends that the Short-list for the Project will not exceed three qualified Proposers.
- (ii) DDC intends to issue the Short-list in accordance with the procurement schedule described in Section 2.1(b) (*Purpose & Overview*).

2.3 RFP (Phase II)

(a) **RFP Participation**

DDC will only issue an RFP to the Short-listed Proposers. As a result, in order to be invited to proceed to Phase II of the procurement and respond to a subsequent RFP, a Proposer must provide a timely response to this RFQ and be Short-listed by DDC.

(b) **Collaborative Dialogue Meetings**

Short-listed Proposers will have the opportunity to engage in collaborative dialogue meetings with the City to discuss comments and innovations to the RFP and will be required to submit fixed-price Proposals in response to the final RFP.

(c) **Selected Proposer**

DDC will evaluate the Proposals received and enter into the DB Agreement with the DB Team whose Proposal is deemed by the City to provide the best value to the City, considering, among other things, a Proposal that best optimizes design, quality, innovation, schedule, efficiency, price, and performance.

(d) **Additional RFP Information**

Additional information pertaining to the RFP (Phase II) process is described in Appendix F (*Draft Request for Proposals (Phase II) Information*). All references or information in this RFQ regarding the subsequent RFP are for informational purposes only and may be changed by DDC at any time in its discretion.

2.4 RFP Proposal Stipend (Phase II Only)

A stipend amount of not more than \$200,000.00 (Two Hundred Thousand dollars) will be available to responsive and responsible Proposers that do not enter into the DB Agreement solely at the RFP (Phase II) stage. Submission of a fully responsive Proposal and execution of a stipend agreement attached in Appendix I (*Form of Stipend Agreement*) will be prerequisites to be eligible for the stipend.

2.5 Procurement Schedule

| | |
|--|-------------------|
| Pre-Submission Conference (via Webex) ¹ | February 22, 2021 |
| RFQ (Phase I) Questions and Comments Due | March 8, 2021 |
| Register w/ PASSPort No Later Than | March 8, 2021 |
| Final Response to Proposer Questions | March 15, 2021 |
| Statements of Qualification Due | March 22, 2021 |
| Shortlisted Teams Announced | April 2021 |
| Issue RFP | April 2021 |

¹

Please visit the following Webex Link to attend the Pre-submission Conference. RSVP is not required:

<https://nycddc.webex.com/nycddc/j.php?MTID=m070f23eb5a1235332b315e19bf702379>

Join by meeting number:

Meeting number (access code): 177 034 2572

Meeting password: rJnjyJp9A76

3. **RFQ GENERAL INSTRUCTIONS**

3.1 **Conflicts of Interest**

(a) **Conflicts of Interest**

Proposers are required to disclose all known or potential Conflicts of Interest in their SOQs in accordance with Section 5.5(a)(xiii) (*Conflicts of Interest*). Conflicts of Interest with DDC or among the DB Teams will not be permitted by any member of a DB Team, unless expressly authorized by DDC.

(b) **Conflicts Between DB Teams**

No Major Participant or Key Personnel may be a member of, or participant in, more than one DB Team for the *same* procurement at any one time, either during any Phase I or Phase II. Additionally, subject to complying with Section 3.1(c) (*Communication Between DB Teams*) below, Subcontractors that are not Major Participants may be on one or more DB Teams on the same procurements.

(c) **Communication Between DB Teams**

After the Short-list is announced, neither a Proposer nor any of its DB Team members may communicate with another Proposer or members of another DB Team with regard to this procurement. Notwithstanding such general prohibition, where a Proposer obtains and provides to DDC a written certification from either a Major Participant or a Subcontractor that is not a Major Participant, as applicable, which provides, among other things, that such Major Participant or Subcontractor (as applicable) will not act as a conduit between Proposers or share any information as it pertains to either Proposer, then:

- (i) any such Major Participant that is permitted under Section 3.1(b) (*Conflicts Between DB Teams*) to be on one or more DB Teams may communicate with multiple Proposers, solely on such separate procurements; or
- (ii) a Proposer's DB Team member may communicate with a Subcontractor (that is not a Major Participant) that is on both its DB Team and another Proposer's DB Team.

3.2 **Rules of Contact**

The following rules of contact shall apply during Phase I and Phase II, which began upon public issuance of this RFQ and will be completed with the execution of the DB Agreement. The rules are designed to promote a fair, unbiased, legally defensible procurement process for the BBJ. Contact includes face-to-face, telephone, e-mail or any other form of communication.

(a) **Designated DDC Representative**

Potential Proposers are advised that communication in connection with this procurement should be made to the designated DDC Representative, Lisa Rigatti, at:

NYCBBJ@DDC.NYC.gov

Questions must be submitted via the link below:

<https://app.smartsheet.com/b/form/1663a1bfae174d63abccb11b5a7b3b1c>

(b) **Proposer Designated Representative**

For purposes of communications with DDC, the Proposer must notify DDC's Designated Representative of the Proposer's sole designated point of contact during Phase I and Phase II (the "**Proposer's Designated Representative**").

(c) **Meetings Exception**

Communications between a Proposer or its DB Team and DDC's team or staff and the Consultant Support Team is allowed during any collaborative dialogue meeting, joint workshops and/or meetings organized by DDC during Phase I or Phase II.

(d) **No Contact or Lobbying Permitted**

Except as expressly provided in Section 3.1(b) (*Conflicts Between DB Teams*) and (c) (*Communications Between DB Teams*) above, neither a Proposer nor its DB Team members, or any of their authorized representatives, advisors or agents may contact (i) employees, authorized representatives, advisors of DDC or the Consultant Support Team, including staff members, members of any SOQ evaluation committee and any other person who will evaluate SOQs, regarding the BBJ or (ii) any public official regarding the BBJ.

Each Proposer, its DB Team members and their agents must refrain from any and all lobbying of any governmental official related to the BBJ during Phase I or Phase II.

(e) **Improper Communication**

Any contact by a Proposer or DB Team member determined by DDC in its discretion to be improper or in breach of this RFQ or the RFP may result in disqualification of the Proposer.

(f) **Non-Binding Effect Oral Communication**

Without prejudice to Section 7 (*DDC's Rights and Disclaimers*), any oral communication by DDC may not be relied upon for purposes of this RFQ, unless confirmed in writing by DDC's Designated Representative.

(g) **Website**

Information regarding the Phase I procurement will be posted on DDC's website:

<http://designbuild.ddcanywhere.nyc>

Proposers are advised to monitor the website regularly. DDC is not obligated to notify potential Proposers of posted information, including Addenda, to this RFQ and the subsequent RFP.

3.3 The City's Consultant Support Team

- (a) Entities that have been retained by the City to provide assistance to the City and the selection committee in preparing this RFQ and the subsequent RFPs and in evaluating SOQs and Proposals, including providing financial, legal, contractual, and technical advice (the "**Consultant Support Team**"), are listed in Appendix G (*List of Consultant Support Team*). The Consultant Support Team may also provide project oversight, including design reviews, construction monitoring, and environmental compliance oversight.

- (b) Except as otherwise provided in Appendix G (*List of Consultant Support Team*) members of the Consultant Support Team are not eligible to assist or participate as DB Team members with any Proposer for this procurement. SOQs and Proposals that include ineligible DB Team members may be deemed non-responsive.
- (c) Additional members may be added to the Consultant Support Team for the BBJ. DDC will notify Proposers of additional members by issuing an Addendum to this RFQ.

3.4 Proposer Questions

(a) Questions & Requests for Clarifications or Corrections

DDC will consider questions submitted in writing by Proposers regarding this RFQ, including requests for clarification and requests to correct errors. All such requests must be submitted via the link provided in Section 3.2(a). Questions must include the individual requestor's name, the potential Proposer's name, address, telephone number and e-mail address.

(b) Written Communication Only with Designated Representative

Only written requests by e-mail to DDC's Designated Representative will be considered. No oral requests will be accepted or responded to. No requests for additional information or clarification to any other DDC office, consultant, employee, or stakeholder (including any utilities or other governmental agency relevant this procurement) will be considered.

(c) Deadline

Only questions received by 12:00 P.M. (Noon) Eastern Time (ET) on the deadline for Proposer questions or clarifications specified in Appendix C (*Project Description, Design-Builder Responsibilities and Project Status*) are required to be addressed by DDC.

(d) Responses

Responses to Proposer questions in connection with this RFQ will be disseminated by posting on DDC's website listed above and (except for certain Proposer specific questions or clarifications – which are not broadly applicable) will not be e-mailed or mailed directly to any Person. Proposers will be solely responsible for independently searching DDC's website for information pertaining to this RFQ. Responses will not indicate which Proposer raised particular questions. DDC may consolidate or rewrite questions, and may post multiple sets of questions and answers. Final responses will be posted on DDC's website (listed below) no later than the date indicated in the procurement in Appendix C (*Project Description, Design-Builder Responsibilities and Project Status*).

3.5 RFQ Addenda

(a) Pre-SOQ Submission Addenda

If necessary, DDC will issue Addenda to modify conditions or requirements of this RFQ. Addenda will be disseminated by posting on DDC's website. If Addenda are posted, DDC will attempt to send e-mail notification to potential Proposers that have registered and downloaded documents directly from DDC's website. DDC is not responsible if potential Proposers fail to receive e-mail notification of posted Addenda. Proposers are advised to visit DDC's website regularly to check for Addenda. DDC will seek to ensure that the final Addendum will be posted on DDC's

website not later than seven Days prior to the SOQ Due Date. If an additional Addendum is required within seven Days of the SOQ Due Date, and such Addendum requires modifications to the SOQs, the SOQ Due Date may be revised such that there will be seven Days or greater from the final Addendum to the SOQ Due Date.

(b) **Post-SOQ Submission Addenda**

In the event that a material error is discovered in this RFQ during the SOQ evaluation process, DDC will issue an Addendum to this RFQ and provide all Proposers an opportunity to submit either a new or a revised SOQ based upon the corrected RFQ.

3.6 Notification of Firms on the Short-List

Each Proposer will be notified officially in writing whether it has been selected for a Short-list. The Short-list will be posted on DDC's website after all Short-listed Proposers have been notified. Short-list notifications may be expected no later than the date specified in Appendix C (*Project Description, Design-Builder Responsibilities and Project Status*).

A Proposer's Short-listing does not represent a finding of responsibility with respect to the Proposer or any member of its DB Team. Between the time of Short-listing and award of the DB Agreement, ACCO may determine that a Short-listed Proposer is not responsible, and as such, should be removed from the Short-list and therefore, among other things, be ineligible to either (i) receive an RFP, (ii) submit a Proposal in response to an RFP or (iii) be awarded, or enter into, a DB Agreement.

3.7 Costs

Proposers are solely responsible for all costs and expenses of any nature associated with responding to this RFQ, including preparing an SOQ, attending any briefing(s), workshop(s) or meeting(s), and/or providing supplemental information. Proposers will not be reimbursed for any costs associated with responding to this RFQ.

3.8 Changes in DB Team

(a) **DB Team to Remain Intact & Scoring Carry-Forward**

This RFQ requires Proposers to identify Major Participants and Key Personnel. Major Participants and Key Personnel, identified in the SOQs submitted by Proposers are required to remain intact for the duration of Phase I and Phase II of the procurement and the resulting DB Agreement. The scoring of these Major Participants and Key Personnel positions in the evaluation of an SOQ will likewise carry forward in the scoring of such Major Participants and Key Personnel in a Short-listed Proposer's Proposal submitted in response to the applicable RFP (Phase II).

(b) **Phase II DB Team Changes**

A Short-listed Proposer may propose substitutions to DDC for its approval for substitute DB Team members; however, such changes will require written approval by DDC, in its sole discretion. Proposers should carefully consider the make-up of its DB Team, prior to the submittal of the SOQ, to reduce the likelihood of occurrence of any such changes during the Proposal period and throughout the term of the DB Agreement.

During Phase II, requests for changes to the Proposer's DB Team must be made in writing no later than the date listed in the procurement schedule. Requests by Short-

listed Proposers for changes in any of the Major Participants and Key Personnel will be particularly scrutinized. Proposers with changes, whether such changes are approved or not, may have their scores increased or decreased due to such changes in Major Participants or Key Personnel.

(c) **Disqualification**

Proposers that make changes to the Major Participants or Key Personnel identified in an SOQ without DDC approval may be disqualified.

4. **SOQ EVALUATION PROCESS**

4.1 **Evaluation Objectives**

The objective of Phase I of this procurement is to create a Short-list of the most highly qualified Proposers with the general capability (quality of SOQ responses, financial and management), capacity and past performance necessary to successfully undertake and complete the Work for this Project. Only Proposers who demonstrate a capability to complete the Work in its entirety will be considered eligible to be included on a Short-list. The Design-Builder will have responsibility to perform all Work necessary to plan, design, construct, manage and control the Project and to complete the Work on, or ahead of, schedule and within the DB Agreement price.

4.2 **Selection Committee**

DDC has established a selection committee, which will be responsible for evaluating the SOQs, Short-listing Proposers and subsequently evaluating Proposals in Phase II and making a recommendation as to the Selected Proposer. Proposals may also be reviewed by DDC and other City agencies, including but not limited to MOCJ, and members of the City's Consultant Support Team.

4.3 **Review and Evaluation of the SOQ**

(a) **Eligibility**

In order to be eligible for evaluation, SOQs submitted in response to this RFQ must include information addressing each pass/fail evaluation factor identified in this RFQ.

(b) **Evaluation Generally**

Evaluation of the SOQs will be based on information submitted in the SOQs or otherwise available to DDC and will involve (i) first evaluating whether an SOQ has passed all the pass/fail evaluation factors in Section 4.4 (*Pass/Fail Evaluation Factors*) and (ii) subsequently evaluating an SOQ against the qualitative evaluation factors in Section 4.5 (*Qualitative Evaluation Factors*). The pass/fail evaluation factors in Section 4.4 (*Pass/Fail Evaluation Factors*) and the qualitative evaluation factors in Section 4.5 (*Qualitative Evaluation Factors*) are of importance to the City and in addition to providing a basis for evaluating the SOQs are provided to assist Proposers in organizing their DB Teams and preparing their SOQ to satisfy areas of importance to DDC and the City.

(c) **Self-Contained SOQ**

Proposers should note that the SOQ must be self-contained and therefore all the information necessary to allow the selection committee to make a complete and comprehensive evaluation must be contained within the Proposer's SOQ. Proposers should not assume that any SOQ reviewer will have previous knowledge of the DB Team, its Major Participants or its Key Personnel.

4.4 **Pass/Fail SOQ Evaluation Factors**

Only if a Proposer passes all the following pass/fail evaluations, will its SOQ be further evaluated using the qualitative evaluation factors detailed in Section 4.5 (*Qualitative Evaluation Factors*). If any item identified as pass/fail in this RFQ is scored as fail, the entire SOQ may be disqualified. Each SOQ's pass/fail rating will be based on the following criteria:

(a) **Legal**

Demonstration of the Proposer’s legal capability to enter into a contractual relationship with DDC and a declaration of willingness to do so;

(b) **Financial**

Demonstration of the Proposer’s and each Principal Participant’s capability to have a sufficient balance sheet to satisfy contingent liabilities under a market-standard DB Agreement and to provide required bonds, insurance and guarantees and to meet other financial requirements of undertaking and completing the Work;

(c) **Capacity**

Demonstration of workforce / resource capacity to timely and successfully complete the Work for the Project, considering current, committed and potential workload;

(d) **Compliance with RFQ & Satisfaction of Fundamental Requirements**

- (i) Proper identification of each Major Participant; and
- (ii) Proper submittal of all required submittals, forms and information in accordance with this RFQ, including satisfaction of the fundamental requirements in Section 5.5 (*Fundamental Qualifications (Tab 0 – Pass/Fail)*) and any “Required Experience” identified in Section 5 (*SOQ Submission Requirements*) of this RFQ;

(e) **Vendor Integrity**

Determination that the Principal Participants possess a satisfactory record of business integrity, it being understood that such a determination is not a determination of responsibility pursuant to PPB 2-08;

(f) **Legal Compliance Requirements**

A Proposer’s DB Team’s ability to comply with the provisions of articles 145, 147 and 148 of the New York State Education Law and past record of compliance with the New York State Labor Law. Material past non-compliance with any such requirements, may warrant the DDC’s disqualification of any Proposers.

4.5 Qualitative Evaluation Factors

The qualitative evaluation factors to be evaluated against each SOQ and their associated weightings are:

| RFQ (Phase I) Weighted Criteria | | |
|--|---|--------------------|
| Tab | Item Description | Weighting |
| 1 | Project Past Performance/Experience | 35 percent |
| 2 | DB Team Key Personnel Resumes | 35 percent |
| 3 | Project Excellence and DB Management Approach | 30 percent |
| | Total | 100 percent |

4.6 Requests for Clarification by DDC

(a) **Generally**

A Proposer must provide accurate and complete information to DDC. If information is not accurate and complete, the Proposer’s SOQ may be considered non-responsive. If the information provided requires clarification, DDC will notify the Proposer and request that the clarification be submitted within twenty-four hours or

another time period deemed appropriate by DDC. Proposers will not be allowed to participate further in the procurement unless and until all required information is provided. Any insufficient statements or incomplete affidavits may be returned directly to the Proposer by DDC with notations of the insufficiencies or omissions and may be accompanied by a request for clarifications and/or submittal of corrected documents. If a response is not provided within the time frame specified by DDC, the Proposer's SOQ may be declared non-responsive.

(b) **Responses to Requests for Clarifications**

Responses to DDC requests for clarification must be limited to answering the specific information requested by DDC and must be submitted to DDC's Designated Representative by e-mail no later than the deadline specified in DDC's request for clarification.

(c) **Interviews**

DDC does not anticipate conducting interviews during Phase I but reserves the right to do so. If DDC elects to conduct interviews, the Proposers will be notified by e-mail.

4.7 Minor Non-Compliance

- (a) DDC may waive technical irregularities in the form of a Proposer's SOQ that do not substantively alter the information provided; however, any other non-compliance may cause DDC to deem an SOQ and Proposer disqualified for purposes of the SOQ was submitted.
- (b) Additionally, a Proposer's compliance with the required SOQ format and organization in this RFQ may also be considered by DDC as part of any qualitative evaluation score rendered in accordance with this Section.

4.8 Short-List Protest

DDC's decision regarding which Proposers will be included on any Short-list will be final and will not be appealable, reviewable or reopened in any way, except as provided in Section 6 (*Protests*). Persons and entities participating in this RFQ will be deemed to have accepted this condition and other requirements of this RFQ.

5. SOQ SUBMISSION REQUIREMENTS

5.1 Submittal Requirements

(a) **Deadline**

All SOQs must be received at the location, set forth in Section **Error! Reference source not found.** (*Submission Portal*), no later than 12:00 p.m. Eastern Time on the applicable SOQ Due Date. SOQs received after 12:00 pm Eastern Time on the applicable SOQ Due Date will not be considered.

(b) **Cover Page**

The front cover of the SOQ must be clearly marked with the Project name, Proposer name, and date of submittal, as set forth below.

(c) **Contents of Proposal Submission**

Proposer submissions must consist of the following two files and must be labeled in accordance with Section 5.3.

- (i) **Statement of Qualifications (SOQ)**
- (ii) **Doing Business Data Form (DBDF)**

(d) **PASSport Requirement**

Interested Proposers must create an online account and submit an online disclosure application with the NYC Mayor's Office of Contract Services in the Procurement and Sourcing Solutions Portal (PASSPort). Those Proposers that have not submitted an online disclosure application with the NYC Mayor's Office of Contract Services, are required to do so at least seven Days prior to the applicable SOQ Due Date, by creating an account with the NYC Mayor's Office of Contract Services, PASSPort site. Additional information on how to submit an application or register for PASSPort are contained in following link:

<https://www1.nyc.gov/site/mocs/systems/about-go-to-passport.page>.

Questions about PASSPort registration should be directed to the NYC Mayor's Office of Contract Services.

Proposers that have not submitted an online disclosure application in PASSPort as a joint venture, but have done so as individual companies, may submit proof of such submission and are not required to submit the online disclosure application as a joint venture (or other type of Proposer legal entity) at this time. Joint ventures selected as Short-listed Proposers will be required to submit the online disclosure application as a joint venture.

5.2 Submission Portal

SOQs shall be submitted electronically at the link below.

Upload Link:

<https://ddcnyc.app.box.com/f/930f3181aa6047cdb338bbe0806c5547>

All documents should be addressed to DDC's Designated Representative as identified below:

DDC's Designated Representative

Nicholas Mendoza

NYCBBJ@ddc.nyc.gov

Only electronic SOQs, submitted at the link provided will be accepted. Oral, telephonic, e-mail or fax submissions will not be considered.

SOQs will not be publicly opened.

5.3 Page Limit and Format

(a) **Page Limit**

The page limit shall not exceed that shown in Appendix D (*Format and Organization for Statement of Qualifications*) (front and back covers, title page, table of contents, and tabs do not count as pages. Documents required as attachments in the RFQ shall not be counted against the Proposer's page limit.

(b) **Submission Format**

Proposers must submit one PDF containing the SOQ, and a separate PDF containing the Proposer's Doing Business Data Form (DBDF). The electronic files must 1) (i) be an Adobe Acrobat PDF file format, (ii) be readable and not corrupt and (iii) must be combined in one file and bookmarked, and 2) labeled as follows:

[Proposers Name] SOQ [MM.DD.YY of due date] for NYC BBJ Manhattan Dismantle & SS

[Proposers Name] DBDF [MM.DD.YY of due date] for NYC BBJ Manhattan Dismantle & SS

(c) **Format of Materials**

Provide 8 ½" x 11" format, using 10 point or larger font size, single space, with a cover sheet. Within the file, provide a title page identifying the Proposer's name, address, telephone number, e-mail and fax number if applicable. Provide consecutive page numbering throughout the file. Provide a full table of contents at the beginning of the file that follows RFQ – Response Table of Contents provided in Appendix D (*Format and Organization for Statement of Qualifications*). Provide tabbed sections. In the footer of each page within the document, provide the name and address of the Proposer, the volume number (if any), and date submitted.

5.4 Content of SOQ Generally

(a) **Outline of SOQ**

An outline of the required format for the SOQ is provided in Appendix D (*Format and Organization for Statement of Qualifications*). Required forms for the SOQ are contained in Appendix E (*SOQ Forms*). Any material modification to the forms may result in the SOQ being declared non-responsive. Proposers must submit all required information specified in this RFQ. Any information provided in the SOQ that the Proposer considers proprietary must be clearly marked as such and easily separated from the submission. Unmarked information will be considered in the public domain.

(b) **Brief & Concise Information**

Proposers should provide brief, concise information that addresses the objectives and the requirements of the RFQ and the BBJ consistent with the evaluation factors described herein. Lengthy narratives containing extraneous information are discouraged.

5.5 Fundamental Qualifications (Tab 0 – Pass/Fail)

The purpose of Tab 0 is to establish the fundamental qualifications of each Proposer, including team structure, level of commitment to the Program Goals and Project Goals, insurance and bonding capacity to meet the expected requirements, employment practices, and teaming agreements. Satisfaction of these fundamental qualifications are necessary to meet the pass/fail criteria described in Section 4.4 (*Pass/Fail SOQ Evaluation Factors*).

(a) Submission Requirements:

- (i) **Cover Letter.** The cover letter provided by the Proposer is required to contain the following information, but may also include additional information about the Proposer's DB Team:
 - Identification and full contact information for the person(s) authorized to contractually bind the Proposer;
 - E-mail addresses for up to three Proposer's points of contact (including the Proposer's Designated Representative). Correspondence related to the RFQ will be delivered to these e-mail addresses only.
 - Contact information through which potential subcontractors seeking business opportunities with the Proposer on this Project may contact the Proposer about such opportunities. DDC will include this contact information with the Short-List announcement on its website.
- (ii) **Acknowledgment of receipt of Addenda.** List the Addenda number and date issued and attach each Addenda cover page signed by the Proposer, using the form provided in Appendix E-13 (*Acknowledgement of Addenda Form*). The entire Addendum is not required to be included in the SOQ submission.
- (iii) **Equal Opportunity Employer Statement.** Provide the Proposer's Equal Opportunity Employer Statement or a summary of the corporate equal opportunity policy.
- (iv) **Construction Employment Report.** Complete the Employment Report Form and upload to the EEO Section of PASSPort by the SOQ Due Date. See Appendix E-1 (*Construction Employment Report*) for detailed instructions. PDF copies of the Construction Employment Report are not required and will not be accepted. A statement that this step has been completed must be included with the SOQ.
- (v) **Doing Business Data Form.** Complete the Doing Business Data Form and include one separate electronic file. Use the form provided in Appendix E-2 (*Doing Business Data Form*).
- (vi) **Iran Divestment Act Form.** Complete and sign the Iran Divestment Act Certification and include with the SOQ. Use the form provided in Appendix E-3 (*Iranian Divestment Act*).

- (vii) **Insurance Requirements.** Confirm that the DB Team carries or will carry coverage levels identified in Appendix E-4 (*Preliminary Insurance Information*).
- (viii) **Letter of Commitment from Surety.** Submit a letter of commitment from a surety, signed by an officer or agent authorized to bond, that identifies the Proposer's or each Principal Participant's available bonding capacity and limits and that states that the surety will bond the Proposer, as the successful awardee, taking into consideration the specific budget described in this RFQ. Surety requirements include:
- the surety company or companies providing the commitment letter must be (a) approved by the City; (b) authorized to do business in the State of New York; and (c) on the current list of certified surety bond companies provided by the Department of the Treasury of the United States; and
 - if the Proposer is or will be a joint venture, and only one party intends to provide the applicable surety indemnity for the bond, provide a complete explanation with confirmation from the surety.
- (ix) **Legal Structure.** Describe the Proposer's legal structure (e.g. joint venture, limited liability company, or other). If a joint venture, provide (1) a copy of the executed joint venture agreement (if available), or (2) a copy of the executed letter of intent to joint venture. If the Proposer's organization has not yet been formed, information regarding the future legal structure and organization must be provided in a manner that will allow the DDC to determine whether the future organization will be legally capable of entering into a DB Agreement and to meet applicable requirements once it is formed. Prior to award, the Selected Proposer, in the event that it is a foreign entity, i.e., not formed in New York State, must be authorized to do business in New York State. There is no role-requirement for the leadership of the DB Team; for example, DB Teams may be designer-led.
- (x) **Teaming Agreement.** A teaming agreement is an arrangement between two or more Persons to perform on a specific contract. (See also, e.g., AIA Form C102-2015, DBIA Form 580). Provide a description of the Proposer's teaming agreement or, at minimum, the Proposer's letter of intent to team. Provide information that is similar to that of the AIA-AGC Design-Build Teaming Checklist or the DBIA Teaming Checklist. A Proposer may use the teaming agreements or other agreements that are specifically developed for its DB Team. Include the Major Participants, key trade partners, and other key Subcontractors or key trade Subcontractors in the teaming agreement.
- (xi) **Safety Questionnaire.** Provide a completed Safety Questionnaire. Use the form provided in Appendix E-5 (*Safety Questionnaire*). Any Experience Modification Rate greater than 1.1 may be considered non-responsive.
- (xii) **Financial Questionnaire.** Provide a completed Financial Questionnaire. Use the form provided in Appendix E-6 (*Financial Questionnaire*).
- (xiii) **Conflicts of Interest.** Provide a description of any known or potential Conflicts of Interest.

5.6 Project Past Performance/Experience (Tab 1)

(a) Project Past Performance/Experience Evaluation Criteria

Each Proposer's SOQ Tab 1 will be evaluated based on:

(i) Recent and Relevant Project Experience

“**Relevant Projects**” are defined as those projects included in the SOQ Tab 1 which satisfy one or more of the “Required Experience” or “Desirable Experience” criteria established in Section 5.6(b) below and which help demonstrate the Proposer's and its DB Team member's capability of delivering the Program Goals and the Project Goals.

(ii) A Proposer's and its Major Participant's past performance in delivering successful Relevant Projects. Relevant Projects included in an SOQ that (1) are currently on track to be completed, or were successfully completed (within the past ten years), on-time and on-budget or (2) (a) received an award (e.g., from DBIA, ENR, AIA, AGC, CMAA, Architect's Newspaper, Architectural Record (including the Women in Architecture Award), and Architectural League, etc.) or (b) utilized best practices proliferated by major industry associations specializing in Design-Build education and outreach, will in each case be given additional consideration.

(iii) DB Team Experience Working Together

A Proposer's DB Team's recent and Relevant Project experience working together on successful projects. For projects where DB Team members worked together, DDC will evaluate how collaboratively the team worked together during design and construction.

(iv) Required Experience vs. Desirable Experience Scoring

For purposes of Tab 1, “Required Experience” is mandatory and may serve as a basis for deeming a Proposer disqualified. “Desirable Experience” is not mandatory, but is strongly-recommended to be included in a Proposer's SOQ. For purposes of evaluating the SOQs, Proposers are not required to include Relevant Projects satisfying all criteria for “Desirable Experience” in order to receive full credit in the SOQ evaluation for their past performance. However, Proposers can maximize their SOQ scores by submitting DB Teams that satisfy both the “Required Experience” and as much of the “Desirable Experience” as is deemed relevant to achieving the Program Goals and applicable Project Goals.

(b) Project Past Performance/Experience - Submission Requirements / Evaluation Criteria

Except as provided in Appendix A (*Abbreviations and Definitions*), Proposers must only describe a maximum of five (5) projects to demonstrate satisfactory Required Experience and Desirable Experience using the Project Profile Form found in Appendix E-7 (*Project Profile Form*). On each Project Profile Form provided for this Tab 1, highlight only Tab 1 Evaluation Criteria. Each Project Profile Form must provide a brief description of the DB Team's collaborative approach to Design-Build, including:

- interactions within the DB Team and with the client during design; and
- the role and interaction between the design team and the construction team during design and construction of the projects.

Images may be included in the Project Profile Form. However, no additional pages will be allotted for images.

(i) **Required Experience**

The DB Team must demonstrate:

- recent, relevant experience in successfully completing at least one DB project;
- at least one (1) recent, relevant project involving complex remediation and demolition activities; and
- at least one (1) recent, relevant project involving demolition of multi-story structures in dense urban environments.

(ii) **Desirable Experience**

Additional desired experience, which may include experience of members of a DB Team that will have a significant role in the performance of the Work, includes projects that had:

- Projects demonstrating Proposer's ability to minimize construction impacts, particularly dust and noise, on surrounding community, including civic and municipal facilities (e.g., courts, police, correctional, buses, trains and subways).

(c) **Project Evaluation Forms.**

For every Project Profile Form (Appendix E-7 (*Project Profile Form*)) included in Tab 1, Proposers must include a Project Evaluation Form (Appendix E-8 (*Project Evaluation Form*)) following the Project Profile Form (Appendix E-7 (*Project Profile Form*)).

A maximum of one form per project will be considered. All Project Evaluation Forms should be completed and signed by the owner or owner's agent for each project.

In lieu of the Project Evaluation Form, Proposers may submit the last available evaluation they have from the owner, owner's agent or client for the project considered. Performance evaluations must highlight the role and impact a DB Team member provided on the project.

(d) **Prior Experience Matrix:** Provide a matrix (see Prior Experience Working Together Form – Appendix E-9 (*Prior Experience Working Together Form*)) showing recent and Relevant Projects the DB Team is working on currently or has successfully completed.

(e) **Project Relevancy Forms:** Provide a completed Project Relevancy Form found in Appendix E-10 (*Project Relevancy Form*), which should demonstrate that the project profiles included in the submission are relevant to the Program Goals and that each project profiled satisfies one or more of the "Required Experience" or "Desirable Experience" criteria and constitutes a Relevant Project.

5.7 Design-Build Team Key Personnel Resumes (Tab 2)

Each Proposer's SOQ Tab 2 will be evaluated based on:

- (a) **Design-Build Team Key Personnel Evaluation Criteria:**
- (i) **Team Introduction and Organization Chart**
- Proposers will be evaluated based on the Proposer's DB Team structure, roles of the members of its DB Team, responsibilities and functional relationships, capability to perform assigned responsibilities and the Proposer's rationale for selecting the team structure relative to delivering the Program Goals and the Project Goals.
- (ii) **Resumes**
- Proposers will be evaluated based on the qualifications, experience and past performance of its proposed Key Personnel, with the evaluation considering, among other things, the individual's experience working on Relevant Projects in similar roles to those proposed in the SOQ.
- (iii) **Resume Compliance Matrix**
- Proposers exhibiting more competencies in the resume compliance matrix will be viewed more favorably, than those with less.
- (b) **Submission Requirements:**
- (i) **Team Introduction and Organization Chart**
- Provide a narrative introducing Key Personnel and major team organizations, including key trade and design partners, and provide an organization chart showing the team structure and relationship. There is no role-requirement for the leadership of the team; for example, teams may be designer-led.
- (ii) **Resumes**
- Provide a resume for each of the positions on the following chart for the DB Team. Use the Resume Form provided in Appendix E-11 (*Resume Form*). Other than the Design-Build Project Executive, none of the individuals proposed as Key Personnel are required to be employees, officers, or principals of the Proposer or its Principal Participants (i.e., Key Personnel, other than the Design-Build Project Executive, may be Subcontractors).
- (iii) **Additional Evaluation Consideration**
- DBIA professional designation is desirable for all personnel and will receive additional consideration. Additional consideration will also be given (i) with respect to any award (e.g., from DBIA, ENR, AIA, AGC, CMAA, Architect's Newspaper, Architectural Record (including the Women in Architecture Award), and Architectural League, etc.), (ii) in the case of the Design-Build Project Manager, if such person is certified Project Management Professional, or (iii) in the case of the Design-Build Construction Manager, if such person is Certified Construction Manager.
- (iv) **Resume Compliance Matrix**
- Provide completed Resume Compliance Matrix as found in Appendix E-12 (*Resume Compliance Matrix*) demonstrating that members of the DB Team meet as many of the competencies listed on the Resume Compliance Matrix as possible.
- (c) **Description of Key Personnel Roles**

All Key Personnel listed below, except for the Design-Build Project Executive and Design Lead, are expected to dedicate 100% of their time necessary to perform the Work and to satisfy each of the following requirements, as applicable.

| Number | Title | Role | Education/ Certification | Preferred Experience |
|--------|---------------------------------|--|---|--|
| 1 | Design-Build Project Executive | This is the senior DB Team leader with the authority to contractually bind the company. This individual is the corporate sponsor responsible to commit all necessary resources and resolve potential conflicts. Identify percentage of time devoted to this project. | N/A | Fifteen (15) years of design or construction experience, including Design-Build projects. |
| 2 | Design Lead (Individual) | Design Lead may also serve as the Designer-of-Record (Individual) if they meet the qualification for both. | Degree in a related field or sufficient relevant experience (i.e., the applicable experience set forth under "Preferred Experience"). | Fifteen (15) years of experience in demolition projects, including complex demolition of multistory buildings in urban environments. |
| 3 | Designer-of-Record (Individual) | The Designer-of-Record (Individual) may also serve as the Design Lead (Individual), if they meet the qualification for both. | New York Licensed Engineer | Fifteen (15) years of experience in Relevant Projects. Experience in complex demolition of multistory buildings in urban environments. Experience serving as Designer-of-Record (Individual) on Design-Build projects is required. |
| 4 | Design-Build Project Manager | This is the primary liaison on the DB Team and will act as the first point of contact between the | Degree in Construction Management, Construction Science or | Ten (10) years of experience in construction and construction management projects with Relevant Projects. |

| Number | Title | Role | Education/ Certification | Preferred Experience |
|--------|---|--|---|---|
| | | Design-Builder and the City. | Architecture / Engineering | Demonstrate satisfactory experience to manage and control the design and construction. |
| 5 | Design Integrator | This is the individual responsible for the development and implementation of the integrated design work plan to ensure alignment of design deliverables with construction needs. | Degree in Construction Management, Construction Science or Architecture/ Engineering OR 10 years of relevant experience (i.e., 5 years of experience in addition to the experience set forth under "Preferred Experience"). | Five (5) years of experience in design, construction and construction management projects with Relevant Projects. Must have experience on a large design-build project. |
| 6 | Design-Build Construction Project Manager | This role may be filled by the Design-Build Project Manager, if they meet the qualifications for both. | Degree in Construction Management, Construction Science or Architecture/ Engineering OR 15 years of relevant experience (i.e., 5 years of experience in addition to the experience set forth under "Preferred Experience"). | Ten (10) years of experience in construction and/or construction management projects with Relevant Projects. Experience in administration of City, Municipal or Federal projects. Ability to effectively manage, control, administer, and execute the integrated design and construction operations, safety, quality control program, and subcontracts. |
| 7 | Design-Builder Safety Officer | Responsible for site wide health of safety of the workers as well as the surrounding community. Must report directly to the Design-Build Project Executive and be given sufficient authority | Safety Manager must be a licensed NYC DOB Site Safety Manager with a Bachelor's degree or higher. | At least fifteen (15) years of safety work experience in similar projects. Additional consideration may be given for a CSP or CIH certification |

| Number | Title | Role | Education/ Certification | Preferred Experience |
|--------|--|---|---|--|
| | | to oversee and implement health and safety | | |
| 8 | Design-Builder QA & QC Project Manager | Responsible for overall Project (both design and construction) Quality Assurance and Quality Control. Must report directly to the Project Executive and be given the authority to oversee the overall Project QA/QC | Degree in Construction Management, Construction Science or Architecture/ Engineering OR 15 years of relevant experience (i.e., 5 years of experience in addition to the experience set forth under "Preferred Experience"). | Ten (10) years of experience in design, construction and construction management projects with Relevant Projects. Demonstrate satisfactory experience to manage and control the QA/QC function for both design and construction. |

(d) **Key Licensing Requirements**

- (i) Section 7210 of the New York State Education Law requires that business entities providing professional engineering, geology, and land surveying services in the State of New York obtain a "Certificate of Authorization" to provide such services from the New York State Education Department. For more information, please visit <http://www.op.nysed.gov/corp/>. Proposers' Subcontractors providing professional engineering, geology, or land surveying services must provide a copy of their Certificate of Authorization prior to award. Other Subcontractors providing these services will be required to provide a copy of their Certificate of Authorization as part of the post-award subcontractor approval process.
- (ii) Prior to DB Agreement award, individuals providing professional services must be licensed and/or authorized to work in the State of New York, as required by law. Information about licensing/authorization can be found on the New York State Department of Education website at <http://www.op.nysed.gov/prof/>.
- (iii) All construction trades including, but not limited to electricians and plumbing and fire suppression trades, must be appropriately licensed. Information about licensing requirements for construction trades can be found on the website of the New York City Department of Buildings at <https://www1.nyc.gov/site/buildings/industry/licensing.page>

5.8 Project Excellence and DB Management Approach (Tab 3)

Each Proposer's SOQ Tab 3 will be evaluated based on the following factors in connection with the BBJ, Program Goals and Project Goals:

(a) **Evaluation Criteria**

The City will evaluate how well the Proposer's SOQ Tab 3 satisfies the submittal requirements in Section 5.8(b) (*Submission Requirements*) below, including the following:

(i) **Project Excellence**

The Proposer's approach to achieving Project Excellence, as defined in Appendix B (*Project Excellence*).

The City will evaluate the Proposer's submitted plan to achieve Project Excellence for the Project in compliance with Appendix B. Submit narrative specifically identifying opportunities for the Proposer to achieve Project Excellence through the design and construction process.

(ii) **Design-Build Management Approach**

The City will evaluate the clarity and strength of the overall approach, the structure and strategy to execute the Work. Explain the Proposer's ability to comply with the co-location requirements in the Project Description Appendices, including its co-location strategy during design and how best to have the Design Integrator co-located with the Designers during performance of the Work. DDC will evaluate the Proposer's understanding of the design process and the role of the Designer-of-Record (Individual) and Designer-of-Record (Firm), Design Lead (Individual), and Design Lead (Firm). The City will evaluate the Proposer's approach to how and when key trade partners will be brought on board and the Proposer's commitment to community engagement.

(iii) **M/WBE Approach**

The City will evaluate the Proposer's M/WBE proposed approach.

(iv) **Quality Assurance and Quality Control for Design and Construction**

1) The City will evaluate the DB Team's proven ability to develop comprehensive, integrated and complete incremental packages in the context of Design-Build. Specific information on how the DB Team will implement the quality assurance and quality control process, track evolution and changes during development to meet the schedule and to facilitate City reviews will also be evaluated.

2) The City will also evaluate the DB Team's capabilities to ensure and control quality construction. The evaluation will include how the DB Team implements all matters relating to quality assurance and quality control of construction and how this control and commitment will lessen the administrative burden on the City.

(v) **Design and Construction Scheduling**

The City will evaluate the Proposer's integrated scheduling capabilities on the systems that will be utilized to implement the schedule. Proposers that employ fast track Design-Build methodology and demonstrate high-quality design integration will be given additional consideration.

(b) **Submission Requirements**

(i) **Project Excellence**

Submit a detailed narrative describing specific opportunities and the Proposer's approach to achieving Project Excellence, as defined in Appendix B (*Project Excellence*).

(ii) **Design-Build Management Approach**

- 1) Provide an organization and technical approach narrative on the DB Team's approach to executing the Work in order to satisfy Program Goals and Project Goals within the anticipated schedule, site, and potential constraints.
- 2) Demonstrate an understanding of the risk management process associated with Design-Build projects.
- 3) Clearly and concisely describe the organizational and technical approach to project management and execution, describing how and when Subcontractors are contractually engaged and the prominent role(s) of the Designer-of-Record (Individual) and Design Lead (Individual), during the post-award design and construction phase. The Builder and key Subcontractors are encouraged to be actively involved in the design process.
- 4) Describe the DB Team's approach to having an effective management system to communicate, manage, control and track revisions to the design.
- 5) Describe the DB Team's overall approach to community engagement, including how the DB Team will keep the community apprised of the progress of the Work, how the DB Team will manage the construction activities (including demolition) to mitigate construction impacts, and how the DB Team intends to manage, track, and respond to community feedback and inquiries.

(iii) **M/WBE Approach**

DDC has set a Draft Goal for M/WBE utilization, as discussed in further detail in Section 8.1(b) (*BBJ Specific M/WBE Program Components*). Accordingly, please explain the Proposer's commitment and ability to satisfy such M/WBE goal. Address the DB Team's proposed organizational structure of the supplier/Subcontractor diversity program for the Work.

(iv) **Quality Assurance and Quality Control for Design and Construction**

- 1) Describe how the DB Team will develop excellent high-quality documents and implement in-house processes that the DB Team will utilize. Provide information on how design documents will be compiled from multiple sources and who will coordinate this effort. Provide information on how the DB Team has historically achieved complete incremental design documents at pre-determined design milestones. Provide information on how the multiple design teams and personnel will collaborate to create an integrated design.
- 2) Describe the DB Team's quality control and quality assurance approach, corporate systems, and capabilities to maintain quality control of the design and construction. Provide information on how

the Proposer will handle internal and external requests for information, shop drawings, submittal reviews, progress meetings, site visits, contract completion, closeout, record drawings, commissioning and completion documentation. Provide a brief description of the DB Team's quality control and quality assurance plan.

(v) **Design and Construction Scheduling**

Provide information on the scheduling methodology and software programs to be used for the Work. Describe the role of the Design Integrator and how the Proposer will integrate design, construction and City milestones into a comprehensive schedule. Describe any additional features the Proposer will provide such as cost loaded scheduling or, if offering building information modeling (BIM) for extraordinary reasons, how 4D Scheduling will be managed.

6. **PROTESTS**

6.1 **General Overview**

- (a) This Section 6 sets forth the exclusive protest remedies available to Proposers with respect to this RFQ. Each Proposer, by submitting its SOQ, recognizes the limitation on its rights to protest contained herein, expressly waives all other rights and remedies and agrees that the decision rendered on any protest shall be final and conclusive. These provisions are included in this RFQ expressly in consideration for such waiver and agreement by the Proposers. If a Proposer disregards, disputes or does not follow the exclusive protest remedies set forth in this Section 6, it shall indemnify, defend and hold the City, including its officials and employees, and the Consultant Support Team harmless from and against all liabilities, expenses, costs (including attorneys' fees and costs), fees and damages incurred or suffered as a result of such actions. The submission of an SOQ shall be deemed the Proposer's irrevocable and unconditional agreement with such indemnification obligation. By submitting an SOQ in response to this solicitation, the Proposer acknowledges that it has reviewed and acquainted itself with the protest procedures herein and agrees to be bound by such procedures as a condition of submitting an SOQ.
- (b) Subject to applicable New York State law, contents of SOQs, exclusive of proprietary information to the extent protected under applicable New York State law, will become public information upon execution of the DB Agreement or early termination of the procurement under this RFQ.
- (c) To be considered, a protest must be timely delivered and must include: (1) the name, street address, and e-mail address of the aggrieved party; (2) the name of the Detention Facility for which the protest is submitted; (3) a detailed description of the specific grounds for the protest and any supporting legal and/or factual documentation; and (4) a clear statement of the specific ruling or relief requested.
- (d) All protests must be in writing and delivered to the Agency Head at the address below by: (1) personal service, or (2) United States Postal Service Certified Mail or other delivery service that provides both proof of mailing and confirmation at delivery. The protest will be considered received on the date of actual delivery or five Days after mailing, whichever is sooner.

Agency Head
Department of Design and Construction
30-30 Thomson Avenue (Entrance on 30th Place)
Long Island City, NY 11101

6.2 **Time for Protest**

- (a) Any Protest based on the form or content of this RFQ which is or should have been apparent prior to the date established for submittal of the SOQ, will not be considered if received by the Agency Head later than fourteen Days prior to the specified SOQ Due Date.
- (b) If DDC selects the Short-listed Proposers, a debriefing will be made available to any Proposer that submitted an SOQ in response to this RFQ. A qualifying Proposer, if it wishes to have a debriefing, must make a request in writing to DDC's Designated Representative within four business days of notification of the Short-list. DDC will make every effort to ensure that debriefings occur within seven business days of DDC's receipt of a Proposer's request. An unsuccessful Proposer may not file a

protest until after the debriefing. The protest shall be filed no later than four business days after the debriefing. A copy of the protest must also be sent by regular mail to:

Agency Chief Contracting Officer
Department of Design and Construction
30-30 Thomson Avenue
Long Island City, NY 11101

and

New York City Comptroller
Office of Contract Administration
1 Centre Street, Room 835
New York, NY 10007

(c) **Procurement Not Obligated to Stay**

The City will not be obligated to stay the procurement process in any manner during the protest. By responding to this solicitation, Proposers acknowledge that a stay of procurement activities for the Project would cause substantial harm to the City and result in a delay of the closure of the Rikers Island Jail Complex.

(d) **Agency Head Determination**

- (i) The Agency Head may, in their sole discretion, invite written comment from the selected Proposer(s) (if any) or other interested party, and/or convene an informal conference with the protesting Proposer, the selected Proposer(s), and/or any other interested party to resolve the protest by mutual consent. No hearing shall be held.
- (ii) The Agency Head's determination shall set forth the reasons upon which it is based.
- (iii) The Agency Head's determination with respect to the merits of the protest shall be mailed (via regular mail or electronic mail) to the protesting vendor and the selected vendor (if any) within thirty (Days of receipt of the protest documents.
- (iv) Copies of all documents required by this Section 6 must be forwarded to the CCPO and the Comptroller as such documents become available to the agency.

(e) **Miscellaneous**

If the protest is denied, the protestor may be liable for the City's costs reasonably incurred in any action to defend against or resolve the protest, including legal and consultant fees and costs, and any unavoidable damages sustained by the City as a consequence of the protest. If the protest is granted, the City shall not be liable for payment of the protestor's costs, including, but not limited to, legal and consultant fees and costs.

In computing any period of time prescribed by this procedure, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period shall be included. Any document received after the close of regular business hours (5:00 p.m. Eastern Time) shall be deemed received the following business day.

(f) **Right of Appeal**

- (i) The determination of the Agency Head shall be final unless appealed to the New York City Office of Administrative Trials and Hearings (“OATH”). If a protestor wishes to contest the Agency Head determination, it may appeal to OATH, which shall hear and take final action in the matter in accordance with its rules. The petition to OATH shall be filed by the vendor within fifteen Days of the date of the Agency Head determination. Supporting documentation, if any, shall be included. The protestor must, at the same time, send a copy of appeal to the Agency Head, the CCPO, and the Comptroller.
- (ii) The Agency shall forward a copy of all appeal-related documentation within fourteen Days of its receipt of the copy of the protester’s appeal to OATH. OATH shall review the determination and determine whether that decision is arbitrary and capricious and whether it is based on substantial evidence.

7. **DDC'S RIGHTS AND DISCLAIMERS**

7.1 **DDC'S Rights**

DDC may investigate the qualifications of any Proposer under consideration, including DB Team members, may require confirmation of information furnished by a Proposer, and may require additional evidence of qualifications to perform the Work described in this RFQ. Proposers must cooperate fully with DDC. Failure to cooperate fully may result in disqualification of the Proposer from this RFQ. DDC reserves the right, in its sole and absolute discretion, to:

- (a) Reject any or all SOQs;
- (b) Issue a new RFQ;
- (c) Cancel, modify or withdraw this RFQ;
- (d) Issue Addenda, supplements and modifications to this RFQ;
- (e) Modify the RFQ process (subject to the notice and extension requirements in this RFQ);
- (f) Terminate the procurement at any time and for any reason;
- (g) Appoint a selection committee and/or evaluation teams and selection official to review SOQs, and seek the assistance of outside experts, including the Consultant Support Team, in the SOQ evaluation;
- (h) Approve or disapprove the use of any member of a DB Team and/or substitutions and/or changes in SOQs;
- (i) Revise and modify, at any time before the SOQ Due Date, the factors it will consider in evaluating SOQs and to otherwise revise or expand its evaluation methodology. DDC will post any such revisions or modifications on DDC's website. DDC may extend the SOQ Due Date if such changes are deemed by DDC, in its sole discretion, to be material and substantive;
- (j) Hold meetings and exchange correspondence with the Proposers responding or intending to respond to this RFQ to seek an improved understanding and evaluation of the SOQs;
- (k) Seek or obtain data from any source that has the potential to improve the understanding and evaluation of the SOQs;
- (l) Waive minor weaknesses, minor informalities and minor irregularities in SOQs;
- (m) Disqualify any Proposer whose conduct/and or SOQ fails to conform to the requirements of this RFQ;
- (n) Seek clarification of and revisions to SOQs;
- (o) Direct Proposers to submit modifications addressing subsequent RFQ amendments;
- (p) Require clarification at any time during the procurement process and/or require correction of arithmetic or other apparent errors for the purpose of assuring a full and complete understanding of a Proposer's SOQ and/or to determine a Proposer's compliance with the requirements of this RFQ;
- (q) Disqualify any Proposer that changes its SOQ without DDC written approval;
- (r) Remove or add a Short-listed Proposer or change the Selected Proposer;

- (s) Allow a competing Proposer to add or remove a DB Team member with or without the City notifying the other Proposers;
- (t) Modify or adjust any aspect of the procurement process, as the City determines is reasonably necessary, in its sole and absolute discretion; and/or
- (u) Refuse to consider an SOQ or reject an SOQ if such refusal or rejection is based upon, but not limited to, the following:
 - (i) Failure on the part of the Proposer or a Principal Participant, or Subcontractor deemed significant to Proposer's SOQ to pay, satisfactorily settle, or provide security for the payment of claims for labor, equipment, material, supplies, or services legally due on previous or ongoing contracts with DDC (or any other City agency);
 - (ii) Default on the part of the Proposer or a Principal Participant, or Subcontractor deemed significant to Proposer's SOQ, under previous contracts DDC (or any other City agency);
 - (iii) Unsatisfactory performance by the Proposer or a Principal Participant, or Subcontractor deemed significant to Proposer's SOQ under previous contracts with DDC (or any other City agency);
 - (iv) Issuance of a notice of debarment or suspension to the Proposer, a Principal Participant, or Subcontractor deemed significant to Proposer's SOQ;
 - (v) Submittal by the Proposer of more than one SOQ for the same work under the Proposer's own name or under a different name;
 - (vi) Existence of a conflict of interest or evidence of collusion between a prospective Proposer or any member of a DB Team and other Proposer(s) or member of their DB Team in the preparation of an SOQ or Proposal for any DDC construction project;
 - (vii) Uncompleted work or default on a contract in another jurisdiction for which the prospective Proposer or a Major Participant is responsible, which in the judgment of DDC might reasonably be expected to hinder or prevent the prompt completion of additional work if awarded;
 - (viii) Failure on the part of a Principal Participant to submit and certify the online application in PASSPort prior to the SOQ Due Date; and/or
 - (ix) Submittal by the Proposer of an SOQ that contains any false information or statements, or references to any documents that have been proven to be falsified.

This RFQ does not commit DDC to advance to Phase II or enter into a DB Agreement, nor does it obligate DDC to pay for any costs incurred in preparation and submission of the SOQs or in anticipation of a DB Agreement. By submitting an SOQ, a Proposer disclaims any right to be paid for such costs.

In no event shall DDC be bound by, or liable for, any obligations with respect to the Work until such time (if at all) as a DB Agreement, in form and substance satisfactory to DDC, has been executed and authorized by DDC and approved by all required parties and, then, only to the extent set forth therein.

7.2 DDC'S Disclaimers

In issuing this RFQ and undertaking the procurement process contemplated hereby, DDC specifically disclaims the following:

- (a) Any obligation to Short-list any Proposer, issue a subsequent RFP, award or execute a DB Agreement pursuant to a subsequent RFP; and

- (b) Any obligation to reimburse a Proposer for any costs it incurs under this RFQ.
- (c) Nothing contained in this RFQ is intended to modify, limit or otherwise constrain the process or commit the City, DDC, or any other entity, to undertake any action with respect to this procurement, including selection of a Design-Builder or the Work.

In submitting an SOQ in response to this RFQ, the Proposer is specifically acknowledging these disclaimers.

8. PUBLIC POLICY AND LEGAL REQUIREMENTS

8.1 M/WBE Policy

(a) **BBJ M/WBE Applicable Laws**

In the context of public works projects, the City’s existing M/WBE law under NYC Administrative Code Section 6-129 was developed for design-bid-build projects (the “**City M/WBE Law**”). Certain aspects of the City M/WBE Law were not written with the BBJ or the design-build delivery model in mind. To address this issue, the New York City Public Works Investment Act provides that the DDC requires compliance “with the objectives and goals” of the City M/WBE Law, as opposed to strict conformance with the City M/WBE Law. As a result, the DDC is afforded flexibility to choose the means, methods and processes to comply with City M/WBE objectives and goals. The following provides a high-level summary of those means, methods and processes which DDC is considering for BBJ:

(b) **BBJ Specific M/WBE Program Components**

DDC anticipates that some of the new aspects of the BBJ’s M/WBE policy afforded by the flexibility described above, may be similar to, and borrow aspects from, Article 15-A of the Executive Law and Title 5, Chapter XIV, Part 142 of the State’s Codes, Rules and Regulations (the “**State M/WBE Law**”) including:

- i. **State & City M/WBE Utilization** – the Design-Builder will be credited for M/WBEs certified with either the State’s or the City’s applicable certification agencies;
- ii. **Evaluating M/WBE** – the City anticipates evaluating the Proposer’s M/WBE utilization plan submitted with its Proposal at the RFP phase, as well as the Proposer’s past M/WBE compliance and a narrative on how the Proposer will partner with the City to achieve the M/WBE goals, as part of its best-value determination;
- iii. **Subcontractors at any Tier & Suppliers** – the Design-Builder will be credited for M/WBEs at any tier, as well as for suppliers, truckers, brokers and manufacturers. Joint venture entities will be credited for M/WBE participation based on the amount of Work performed by the M/WBE joint venture member, not by profit shared;
- iv. **Goal Setting** – DDC anticipates setting an initial M/WBE goal of 30% for design work and 30% for construction work for the Project (the “**Draft Goal**”);
- v. **Reporting** – similar to the State, DDC anticipates utilizing a digital civil rights reporting system to track M/WBE compliance;
- vi. **Compliance** – DDC expects to take M/WBE compliance for BBJ as a material and high-priority aspect of measuring success. For this reason, DDC anticipates having a dedicated independent validating M/WBE compliance and partnering with the Design-Builder to help ensure a successful M/WBE outcome; and
- vii. **Enforcement** – the DDC plans to utilize the City M/WBE Law for purposes of exercising legal remedies or assessing damages, including, where applicable, liquidated damages for a Design-Builder’s failure to comply with the M/WBE obligations in the DB Agreement.

(c) **Collaborative / Partnering M/WBE Process**

- i. Given the significant period of time that will elapse from the time of issuance of this RFQ to the time of execution of the DB Agreement, we expect the Proposer to begin good faith efforts from RFQ issuance and throughout the RFP process to confirm the viability and feasibility of achieving the Draft Goal. DDC, and the City will work collaboratively with the Proposers during the RFP process to finalize the Draft Goal. Based on the Proposer's and the City's good faith efforts as well as refinements for the scope and design, the DDC will set a separate final goal for each of design work and construction work during the RFP period and prior to the Proposal due date. DDC anticipates requiring the Proposer to submit a utilization plan that is similar to those required by the State M/WBE Law, but that also includes narrative explanations on how such utilization plan will be successfully implemented.
- ii. Following the award to a Selected Proposer, DDC and the Design-Builder will work collaboratively to implement the Design-Builder's M/WBE utilization plan for the duration of the project. Specifically, during the period in which the Design-Builder is soliciting and entering into subcontracts, the Design-Builder will exercise good faith efforts to achieve the final goals based on the project's further-advanced design and release of construction documents. The DDC anticipates a bi-annual assessment between the parties during this period to assess the efficacy of the parties' collective efforts to achieve the final goals.
- iii. The Design-Builder will have the opportunity to request DDC to consider modifications or waivers to the final goals and the Design-Builder's related utilization plan, after the Design-Builder has demonstrated that it has exhausted all good faith efforts to achieve the final goals. In making any determination to approve a modification or waiver, the City anticipates evaluating the Design-Builder's "good faith efforts" as well as whether a M/WBE contractor or supplier serves a "commercially useful function", consistent with the State M/WBE Law's definition of those terms.
- iv. The Proposer and the Design-Builder will be required to take necessary and reasonable steps to ensure that certified M/WBEs are provided with a fair opportunity to participate in the Work.

8.2 Equal Employment Opportunity

The Work is subject to the requirements of City Executive Order No. 50 (1980) ("**E.O. 50**"), as revised, and the rules set forth at 66 RCNY §§ 10-01 et seq. No agreement will be awarded unless and until these requirements have been complied with in their entirety. The DB Team must agree that it:

- (a) Will not discriminate unlawfully against any employee or applicant for employment because of race, creed, color, national origin, sex, age, disability, marital status, sexual orientation or citizenship status with respect to all employment decisions including, but not limited to, recruitment, hiring, upgrading, demotion, downgrading, transfer, training, rates of pay or other forms of compensation, layoff, termination, and all other terms and conditions of employment;

- (b) Will not discriminate unlawfully in the selection of subcontractors on the basis of the owners', partners' or shareholders' race, color, creed, national origin, sex, age, disability, marital status, sexual orientation, or citizenship status;
- (c) Will state in all solicitations or advertisements for employees placed by or on behalf of the Design-Builder that all qualified applicants will receive consideration for employment without unlawful discrimination based on race, color, creed, national origin, sex, age, disability, marital status, sexual orientation or citizenship status, and that it is an equal employment opportunity employer;
- (d) Will send to each labor organization or representative of workers with which it has a collective bargaining agreement or other contract or memorandum of understanding, written notification of its equal employment opportunity commitments under E.O. 50 and the rules and regulations promulgated thereunder;
- (e) Will furnish before the DB Agreement is awarded all information and reports including an Employment Report which are required by E.O. 50, the rules and regulations promulgated thereunder, and orders of the SBS, Division of Labor Services ("DLS"); and
- (f) Will permit DLS to have access to all relevant books, records, and accounts for the purposes of investigation to ascertain compliance with such rules, regulations, and orders.

8.3 Project Labor Agreement

As required by the New York City Public Works Investment Act, projects within the BBJ will be subject to a Project Labor Agreement ("PLA"). A copy of the PLA will be included with the subsequent RFP.

8.4 Professional Licensing and Registration

The City does not intend to contract for, pay for, or receive any design services which are in violation of any professional licensing laws. Professional services regulated by Articles 145, 147, and 148 of the New York State Education Law must be performed and stamped and sealed, where appropriate, by a professional licensed in accordance with such Articles. References in this RFQ, subsequent RFP, and contract documents to the Design-Builder's responsibilities or obligations to "perform" the design portions of the work are deemed to mean that the Design-Builder must "furnish" the design for the Work via designated firms and individuals holding appropriate licenses.

Prior to DB Agreement execution, all Persons participating in the DB Agreement, including those members of the Proposer's team responsible for leading the design and construction services for the Work, must obtain all certificates of authorization, licenses, registrations and any other requirements under applicable law, to conduct business in the State of New York and perform the Work required under the DB Agreement, including proposing and carrying out a contract consistent with the laws of the State of New York.

8.5 Authority to Issue RFQ

This RFQ is issued pursuant to DDC's authority under the New York City Public Works Investment Act. As a result, any requirements expressly provided in the New York City Public Works Investment Act, are also expressly requirements in this Phase I and any subsequent Phase II.

9. COMPLIANCE WITH APPLICABLE LAWS

In connection with this RFQ and the DB Agreement, Proposers shall comply with all applicable laws in all aspects in connection with the procurement process of the BBJ and this procurement and the performance of the DB Agreement.

9.1 **Governing Law**

- (a) The subsequent RFP and the resulting DB Agreements, if any, unless otherwise stated or except as otherwise required to carry-out the requirements in this RFQ, the subsequent RFPs or any DB Agreement, will be subject to all applicable provisions of New York State Law, the New York City Administrative Code, New York City Charter and New York City Procurement Policy Board (PPB) Rules. A copy of the PPB Rules may be obtained by visiting <https://www1.nyc.gov/site/mocs/legal-forms/procurement-policy-board-ppb-rules.page>.
- (b) Proposers are advised that the City Chief Procurement Officer (“**CCPO**”) has approved the use of an innovative procurement method in accordance with Section 3-12 of the PPB Rules. DDC anticipates that several areas of the PPB Rules will be revised to accommodate DDC’s procurement of Design-Build services. Specifically, DDC anticipates, without limitation, modification or alternative processes for the following areas currently addressed by the PPB Rules:
- Procurement methodology for DB services in accordance with the New York City Public Works Investment Act;
 - Performance security;
 - Contract changes and change order administration; and
 - Dispute resolution.

Such modifications and alternative processes will be set forth in the DB Agreement, which will be included with the subsequent RFP.

9.2 **Iran Divestment Act of 2012**

Pursuant to General Municipal Law Section 103-g, the City is prohibited from entering into contracts with persons engaged in investment activities in the energy sector of Iran. Each Proposer is required to complete the attached Bidders Certification of Compliance with the Iran Divestment Act, certifying that it is not on a list of entities engaged in investments activities in Iran created by the Commissioner of the NYS Office of General Services. If a Proposer appears on that list, DDC will be able to award a DB Agreement to that Proposer only in situations where the Proposer is taking steps to cease its investments in Iran or where the Proposer is a necessary sole source. Please refer to Appendix D-3 (*Iranian Divestment Act*) for information on the Iran Divestment Act required for this solicitation and instructions on how to complete the required form and to <http://www.ogs.ny.gov/About/regs/ida.asp> for additional information concerning the list of entities.

A Proposer will not be Short-listed if the Proposer fails to submit a signed and verified Bidders Certification. A certification form must be included with the SOQ.

10. COMPLAINTS

The New York City Comptroller is charged with the audit of contracts in New York City. Any Proposer who believes that there has been unfairness, favoritism or impropriety in the proposal process should inform the Comptroller, Office of Contract Administration, 1 Centre Street, Room 835, New York, NY 10007; the telephone number is (212) 669-3000. In addition, the New York City Department of Investigation should be informed of such complaints at its Investigations Division, 80 Maiden Lane, New York, NY 10038; the telephone number is (212) 825-5959.

APPENDIX A

Abbreviations and Definitions

“**Addenda**” or “**Addendum**” means written supplemental additions, deletions, and modifications to the provisions of the RFQ or RFP (where applicable) issued by DDC, after the date of issuance.

“**Agency Chief Contracting Officer**” or “**ACCO**” means the position delegated authority by the Agency Head to organize and supervise the procurement activity of subordinate Agency staff in conjunction with the City Chief Procurement Officer.

“**Agency Head**” means the Commissioner of the New York City Department of Design and Construction.

“**Borough-Based Jails Program**” or “**BBJ**” means DDC’s Design-Build Borough-Based Jail Program to demolish three existing jails in Manhattan, Brooklyn and Queens and to design and construct four new Detention Facilities in each of Manhattan, the Bronx, Brooklyn and Queens, as well as perform various Early Works necessary for the new Detention Facilities.

“**Builder**” means the Major Participant with overall responsibility for performance of the construction work necessary to deliver the Project.

“**CHS**” means the NYC Health + Hospitals/Correctional Health Services. CHS operates the City’s correctional health care systems. CHS provides medical and mental health care, substance use treatment, dental care, social work services, and reentry support services, to patients from pre-arraignment through discharge. CHS is a key stakeholder in the BBJ.

“**City**” is defined in Section 1.1 (*Executive Summary*).

“**City Chief Procurement Officer**” or “**CCPO**” is defined in Section 9.1(b) (*Governing Law*).

“**City M/WBE Law**” is defined in Section 8.1(a) (*BBJ M/WBE Applicable Laws*).

“**Comptroller**” means the Comptroller of the City of New York, their successors, or duly authorized representatives.

“**Conflicts of Interest**” means that a Person or organization had or has relations with Persons: (1) engaged or is engaging in activities; or (2) performed or is performing services, for DDC or another entity concerning the BBJ or a related project, that afford such Person or organization or any DB Team with a competitive advantage or that might otherwise impair the Person or organization’s objectivity, or that render such Person or organization unable, or potentially unable, to render impartial assistance, performance or advice to any DB Team.

“**Consultant Support Team**” is defined in Section 3.3 (*The City’s Consultant Support Team*).

“**Contract Documents**” means the documents identified as such in the DB Agreement, including all performance security instruments, the Design-Builder Proposal, the final design documents and provisions required by law to be inserted in the DB Agreement whether actually inserted or not.

“**Contract Price**” is defined in Appendix H (*Form of DB Agreement*).

“**CPSD**” is defined in Section 1.8 (*Project Information*).

“**Day**” or “**Days**” means calendar days unless otherwise specifically noted to mean business days.

“**DB Agreement**” means the written agreement between DDC and the Design-Builder setting forth the obligations of the parties with respect to a Detention Facility, including, but not limited to, the performance of the Work, the furnishing of labor and materials, and the basis of payment, and

including all provisions required by law to be inserted in the DB Agreement whether actually inserted or not.

“**DB Team**” means Principal Participants, Major Participants, Subcontractors, and all other Persons making up the team and acting on behalf of, or at the direction of, a Proposer or the Design-Builder, as applicable necessary to perform the Work.

“**DBIA**” means the Design-Build Institute of America.

“**DDC**” means the Department of Design and Construction of the City of New York acting by and through the Agency Head thereof, or their duly authorized representative.

“**DDC’s Designated Representative**” is defined in Section 3.2(a) (*Designated DDC Representative*).

“**Design-Build**” or “**DB**” means a project delivery methodology by which a single Design-Builder has responsibility for the design and construction of a project under a single design-build agreement.

“**Design-Build Construction Project Manager**” is the role and person to fill such role identified in number 8 of the table in Section 5.7(c) (*Description of Key Personnel Roles*).

“**Design-Build Project Executive**” is the role and person to fill such role identified in number 1 of the table in Section 5.7(c) (*Description of Key Personnel Roles*).

“**Design-Build Project Manager**” is the role and person to fill such role identified in number 4 of the table in Section 5.7(c) (*Description of Key Personnel Roles*).

“**Design-Builder**” means the Person selected pursuant to the RFP that enters into the DB Agreement with DDC to design and construct the Project.

“**Design Integrator**” is the role and person to fill such role identified in number 5 of the table in Section 5.7(c) (*Description of Key Personnel Roles*).

“**Design Lead (Firm)**” means the Major Participant that has responsibility for creative architectural design for the Project.

“**Design Lead (Individual)**” means the individual that has primary responsibility for creative architectural design for the Project, as further described in number 2 of the table in Section 5.7(c) (*Description of Key Personnel Roles*).

“**Designer-of-Record (Firm)**” means the licensed in New York State firm that shall be responsible for signing and sealing design packages, and for certifying that the Work has been performed in accordance with the requirements of the Contract Documents and the Design-Builder’s released for construction Documents.

“**Designer-of-Record (Individual)**” means the licensed in New York State individual that is a member of the Designer-of-Record (Firm) and that shall be responsible for signing and sealing design packages, and for certifying that the Work has been performed in accordance with the requirements of the Contract Documents and the Design-Builder’s released for construction documents, as further described in the table in Section 5.7(c) (*Description of Key Personnel Roles*).

“**Designers**” means the Major Participants and Key Personnel with overall responsibility for design of the Project.

“**DLS**” is defined in Section 8.2(e) (*Equal Employment Opportunity*).

“**DOC**” means the Department of Correction of the City of New York. The DOC provides for the care, custody, and control of persons held in custody once accused of crimes or convicted and sentenced to one year or less of jail time. DOC will manage and operate the BBJ. DOC is a sponsor agency for purposes of this RFQ.

“**Draft Goal**” is defined in Section 8.1(b) (*BBJ Specific M/WBE Program Components*).

“**E.O. 50**” is defined in Section 8.2 (*Equal Employment Opportunity*).

“**Early Works**” means the infrastructure, demolition, design and construction work being performed by DDC or DDC contractors in advance of commencement of construction of any of the Detention Facilities, including the construction of the parking structure in connection with the Queens Detention Facility.

“**Equity Participant**” means any Person holding (directly or indirectly) a 15% or greater interest in the Proposer.

“**High-Rise**” has the definition provided by Title 27, Subchapter 2 of the New York City Building Code.

“**Key Personnel**” means the individuals identified in the table in Section 5.7(c) (*Description of Key Personnel Roles*) and those additional individuals that may be designated as such in a subsequent RFP or by DDC’s designated project manager at a later date.

“**LEED Gold**” means gold certification by the U.S. Green Building Council as part of the Leadership in Energy and Environmental Design certification program.

“**Major Participant**” means the Proposer, each Principal Participant, the Design-Lead (Firm), the Designer-of-Record (Firm), and the Builder.

“**MOCJ**” means the Mayor's Office of Criminal Justice. MOCJ serves as the primary advisor to the Mayor on public safety. MOCJ shapes and funds strategies to increase safety and fairness throughout the public safety system. MOCJ is a sponsor agency for purposes of this RFQ.

“**M/WBE**” means minority owned business enterprises and/or woman-owned business enterprises.

“**New York City Public Works Investment Act**” means the design-build authorizing legislation enacted as 2019 State Senate Bill S6293—A.

“**OATH**” is defined in Section 6.2(f) (*Right of Appeal*).

“**Person**” means any individual, firm, corporation, company, sole proprietorship, limited liability company (LLC), joint venture, voluntary association, partnership, trust, unincorporated organization, or other legal entity.

“**Phase I**” means the RFQ phase of the procurement process, which commences at issuance of this RFQ and terminates at issuance of the Short-list.

“**Phase II**” means the RFP phase of the procurement process, which commences at issuance of the Short-list and terminates at execution of the DB Agreement.

“**PPB Rules**” means the rules of the Procurement Policy Board as set forth in Title 9 of the Rules of the City of New York (“RCNY”), § 1-01 et seq.

“Principal Participant” means any of the following entities:

- A) The Proposer;
- B) If the Proposer is a partnership, joint venture, or limited liability company, any general partner or any member of the partnership, joint venture or LLC; and/or
- C) Any Equity Participant.

“Procurement Policy Board” or **“PPB”** means the board established pursuant to Charter § 311 whose function is to establish comprehensive and consistent procurement policies and rules which have broad application throughout the City.

“Program Goals” is defined in Section 1.4 (*BBJ Program Goals*).

“Project” means the demolition and improvements to be designed and demolished or constructed by the Design-Builder and all other Work product to be provided by the Design-Builder in accordance with the Contract Documents.

“Project Description Appendix” is defined in Section 1.2 (*Purpose*).

“Project Excellence” is defined in Appendix B (*Project Excellence*).

“Project Goals” is defined in Section 1.4 (*BBJ Program Goals*).

“Project Labor Agreement” or **“PLA”** means the project labor agreement entered into or designated by the City for the BBJ. The PLA will be included with the RFP.

“Proposal” means the proposal submitted by a Proposer in response to an RFP, including any revisions thereto. If the RFP requests submittal of best and final offers, the term “Proposal” means the best and final offer submitted by the Proposer, including any revisions thereto.

“Proposer” means the Person submitting an SOQ in response to this RFQ or a Proposal in response to an RFP.

“Proposer’s Designated Representative” is defined in Section 3.2(b) (*Proposer Designated Representative*).

“Relevant Projects” is defined in Section 5.6(a)(i) (*Recent and Relevant Project Experience*).

“Request for Proposals” or **“RFP”** means a written solicitation, including all Addenda thereto, seeking Proposals (including quality and price) to be used to identify the Proposer offering the best value to DDC for the Project. The RFP will be issued only to Persons who are on the Short-list for the Project.

“Request for Qualifications” or **“RFQ”** means this written solicitation issued by DDC, including all Addenda thereto, issued by DDC seeking SOQs in order to identify and Short-listed Proposers to receive an RFP for the Project.

“Selected Proposer” means the Proposer whose Proposal in response to the RFP is found to provide the best value to the City for the Project.

“Short-list” means each list of Proposers that the City determines are the most highly qualified Proposers for delivery of the Project, based on an evaluation of the SOQs submitted by such Proposers.

“Short-listed Proposers” means the Proposers that have been Short-listed.

“**SOQ Due Date**” is defined in Section 1.3 (*RFQ Approach*).

“**State**” means the State of New York.

“**State M/WBE Law**” is defined in Section 8.1(b) (*BBJ Specific M/WBE Program Components*).

“**Statement of Qualifications**” or “**SOQ**” is defined in Section 1.2 (*Purpose*).

“**Structural Engineer**” is the role and person to fill such role identified in number 7 of the table in Section 5.7(c) (*Description of Key Personnel Roles*).

“**Subcontractor**” means a subcontractor of the Design-Builder or other entity on a DB Team.

“**Work**” means all of the administrative, demolition, design, engineering, utility support services, procurement, legal, professional, manufacturing, supply, installation, construction, supervision, management, testing, verification, labor, materials, equipment, maintenance, warranty, documentation, and other duties and services to be furnished and provided by the Design-Builder as required by the Contract Documents, including all efforts necessary or appropriate to achieve final acceptance of the Project and to fulfill the Design-Builder’s warranties. In certain cases, the term is also used to mean the products of the Work.

END

APPENDIX B

PROJECT EXCELLENCE

PROJECT EXCELLENCE

The City of New York is committed to achieving excellence in design and construction across its portfolio of public works by delivering quality infrastructure and public buildings that contribute to a thriving, equitable, sustainable and resilient city for all New Yorkers. As part of this commitment, the Department of Design and Construction's Project Excellence program builds on a strong tradition of innovation in architecture and engineering through strategies and practices that balance aesthetics, functionality, cost, constructability, and durability to bring form and meaning to public space.

Project Excellence encompasses all aspects of project delivery, from capital project planning through design, construction, commissioning, and close-out, to ensure on time and on budget delivery of exemplary civic projects. Integrated project delivery practices include enhanced project initiation and management tools, Quality-Based Selection (QBS) and best value procurements, performance evaluation and management, knowledge sharing, and continuing education. Together, these strategies ensure that all capital projects delivered to the City are inspiring, enduring, practical, constructible, and economical.

Achieving Project Excellence requires all team members to engage collaboratively in the capital project delivery process, prioritizing strategies that make responsible use of public funds and offer the best value for the City. DDC's project managers, technical reviewers, and support staff work to guide projects through complex and demanding project delivery processes in partnership with the most creative and experienced design and construction professionals. DDC and our partners share a commitment to Project Excellence in the public realm as characterized by the following overarching concepts:

Project Excellence utilizes the power of design and construction to positively transform our public space, inspiring pride in the people and City of New York. The design of public buildings and infrastructure must be guided by a civic consciousness and social responsibility to provide spaces that promote discourse, exemplify accessible government, and inspire pride in our communities. The design and construction process must reflect a collaborative effort that is inclusive of all stakeholders, including sponsor, partner, and regulatory agencies, and the community.

Project Excellence shapes the city we envision for today and the future by creating enduring and inclusive public spaces. With design and construction of public projects comes the responsibility of shaping the City for generations to come. Dignified, universally accessible, and community-oriented, public spaces must make all New Yorkers feel welcome and valued, comfortable and secure. By thoughtfully responding to surrounding context, including neighborhood character and natural systems, the design must create and reinforce a sense of place that is enhanced by strong connections to existing community resources and mobility networks. The design and construction process must engage relevant stakeholders and experts to consider cultural context and integrate artwork wherever possible in support of meaningful public spaces.

Project Excellence protects the legacy of our public space by carefully considering practical solutions that address the needs of our City. Public projects must be well suited for their intended use and adaptable to future needs. Our public buildings and infrastructure must meet the needs and aspirations of New York City's public agencies as expressed in their individual missions, goals, standards, and requirements. The design must seek a creative balance between functional and programmatic requirements, operational and maintenance protocols, construction practices, and performance and innovation. Sustainable, resilient, durable, and easily maintained, the project must be guided by a holistic view of the capital asset over its expected lifespan. The design must consider solutions to long-term and emergent risks and opportunities, such as changing climate and public safety conditions, as well as new technologies and ways of living and working.

Project Excellence strengthens the character of our public space by delivering constructible capital projects with safety and integrity. Building New York City requires the ability to execute projects in a safe, effective, and timely manner while maintaining the integrity of the design throughout construction. The design of our public buildings and infrastructure must be represented by complete, comprehensive, and accurate contract documents that are clearly detailed and coordinated across disciplines, and that meet or exceed requirements of code, zoning, accessibility, and local laws. Specifications must be carefully coordinated with drawings and material schedules and be tailored to the requirements of each project. Materials and systems must be proven, readily available, and achievable with local construction practices to minimize lead times, eliminate cost overruns, and prevent construction delays.

Project Excellence supports the value of our public space by employing an economical approach that leverages City resources to build lasting community assets. Design and construction by and for the City requires conscientious attention to schedule, budget, and operational costs to ensure that public funds are well spent, and communities well served. The project must incorporate a life-cycle cost analysis approach and prioritize selection of long-lasting systems and assemblies that are achievable within the allocated budget. Systems must perform to the highest standards of human health, comfort and efficiency, meet or exceed energy requirements, and operate as designed. The project must be calibrated to reduce construction and operating costs and complexity, positively impact the health of the environment, and use natural resources wisely. Using City-wide and agency standards and best practices, innovative methodologies, and appropriate technologies, the design must add value and do more with less.

To support Project Excellence, DDC seeks architects, landscape architects, planners, designers, engineers, construction managers, contractors, and design-build teams who are dedicated, responsive, and collaborative, and who possess the management skills necessary to complete work on time and on budget. DDC's partners must have a proven track record of delivering quality projects while resolving complex requirements and navigating unforeseen circumstances. Team-oriented and adept at balancing competing demands, these professionals must go beyond the creation of contract documents to serve as facilitator, mediator, and interpreter, building trust among the many stakeholders throughout the life of a project.

APPENDIX C

Project Description, Design-Builder
Responsibilities and Project Status

PROJECT DESCRIPTION

The Manhattan Site Dismantle and Swing Space Project (The Project) consists of Early Work necessary to realize the City's goal of closing the City's outdated jails as part of the Borough-Based Jails Program. Specifically, the Project is for the construction of an interim sally port and dismantling of the existing detention facilities in Manhattan, and other related activities. Once the Project is completed, the City will transfer control of the Project site to a different design-build team to design and construct a new, innovative facility in accordance with the Program goals.

The scope of the Project includes: construction of swing space provided up to the entrance of the courthouse, but not inside, and consisting of the construction of an interim vehicle sally port on the sidewalk of 100 Centre Street on the north side of the North Entrance Plaza of the Manhattan Criminal Court Building, and the dismantling of the existing north and south tower of the Manhattan Detention Complex, along with the underground tunnel and pedestrian bridge between the towers, and the pedestrian bridges to the Courthouse.

The existing Manhattan Detention Center consists of two towers designated as "Manhattan North Building" and "Manhattan South Building". The north building is approximately 256,547 square feet consisting of a cellar, nine (9) floors, four (4) mezzanine levels and six (6) roofs. The south building is approximately 247,311 square feet consisting of sub-cellar, cellar, eleven (11) floors, eight (8) mezzanine levels and three (3) roofs. An underground tunnel and pedestrian bridge connects the two towers. The pedestrian/people in detention bridges connecting the north building and courthouse are also to be demolished.

The existing detention complex (2 towers and adjacent low level building) will be vacated by the City.

The dismantling of the existing Manhattan Detention Complex located at 124-125 White Street includes the dismantle of the existing MDC except for the structure's basement walls and foundations slab and connecting tunnel. The DB must reinforce the basement walls to support loads imposed by earth and surrounding structures and backfill the excavation with compacted material. DB must remove and dispose of all materials including potential hazardous materials, asbestos abatement, decommissioning of all utility and infrastructure feeds; relocation and/or maintenance of utilities required to remain in place serving other buildings, and preparation of the site for the future construction of a new detention facility.

There is an existing 10" high tension electrical transmission line, 345kv (oil-o-static, OOS), that runs the length of White Street from Centre Street to Baxter Street. During the building demolition and excavation stage, the OOS line will need to be supported, maintained and fully protected in place. The temporary protection system must be approved by ConEd prior to start of work.

Existing City-owned public artwork on the site which was created under New York City's Percent for Art law will be removed and is subject to a process and plan developed by DDC in agreement with Department of Cultural Affairs (DCLA) and subject to advance approval of the Public Design Commission (PDC). The Design-Builder must handle, remove, crate, and transport, within the limits of New York City the salvaged pieces according to specifications to be provided in the conservator's report. The Design-Builder must carefully remove four bas relief medallions by Richard Haas, seven column sculptures by Kit-Yin Snyder, and one throne sculpture by Kit-Yin Snyder, as well as two artwork plaques. The Design-Builder is responsible for all costs associated with the disposal of deaccessioned artworks, removal of salvaged artworks, crating and transport of salvaged artworks to a storage location designated by NYCDDC. Design-Builder is not responsible for storage of salvaged artwork.

It is vital that the Work be performed in a manner that minimizes impact on the adjacent residents and community, including the operation of surrounding civic, commercial, residential, and municipal facilities including the courts, police, and transportation). Compliance with noise and air quality requirements will be monitored closely.

At Project completion, the Project site should be clean, vacant and ready for future development.

The Project work shall include the following:

1. Demolition and Abatement Work:

- Abatement of asbestos and any other hazardous materials.
- Demolition of the existing borough jails, except for the structure's basement walls and foundations slab and connecting tunnel, and disposal of materials.
- Protection of abutting building structures.
- Remove existing sally port after temporary sally port is constructed.
- Removal and transport of artwork to be salvaged.

2. Site Work:

- Site clearing and preparation of surfaces beyond the building, including removal of sidewalks, paving and landscaping.
- Backfilling project site within building basement areas to street grade once dismantle is complete.
- Maintain and protect the OOS line and other utility lines on White Street
- Remove existing lines within roadbed

3. Utility Work:

- Survey and investigation of existing private and public utilities.
- Protection and maintenance of utilities to remain operational.
- Coordination with other ongoing construction projects.
- Cut and cap existing watermain within White Street and maintain existing hydrants.
- Maintain existing sewer, basin connections and any house connections within White Street.

4. Structures:

- Construction of an interim sally port and retaining structure.
- Provide existing building foundation wall support/bracing/shoring to match existing design conditions.
- Repair and patch Courthouse where bridges are removed.

5. Systems:

- Installation of the security controls and CCTV system for the interim sally port.

6. Roadworks and Landscaping:

- Repair/restoration of road and sidewalks damaged during construction.
- Provide construction entrances with debris control measures.

7. USGBC

- Contribute to the Manhattan Detention Facility LEED Gold project certification.

8. Coordination

- The proposed dismantlement is within 200 feet of an existing MTA facility, and thus is within the “line of influence” for MTA consideration. Extensive coordination will be required with for all dismantling stages with the MTA, as well as other authorities having jurisdictions such as NYC DEP, NYC DOB, NYC DOT, etc. Design-builder is required to coordinate with public and private utilities.

9. Anticipated Work to be Performed by Other

- Relocation of people in detention from the existing Manhattan Detention Complex, and relocation of utilities outside the work limits of the site.
- ConEd removal of high and low voltage active voltage lines.

PROJECT SPECIFIC GOALS

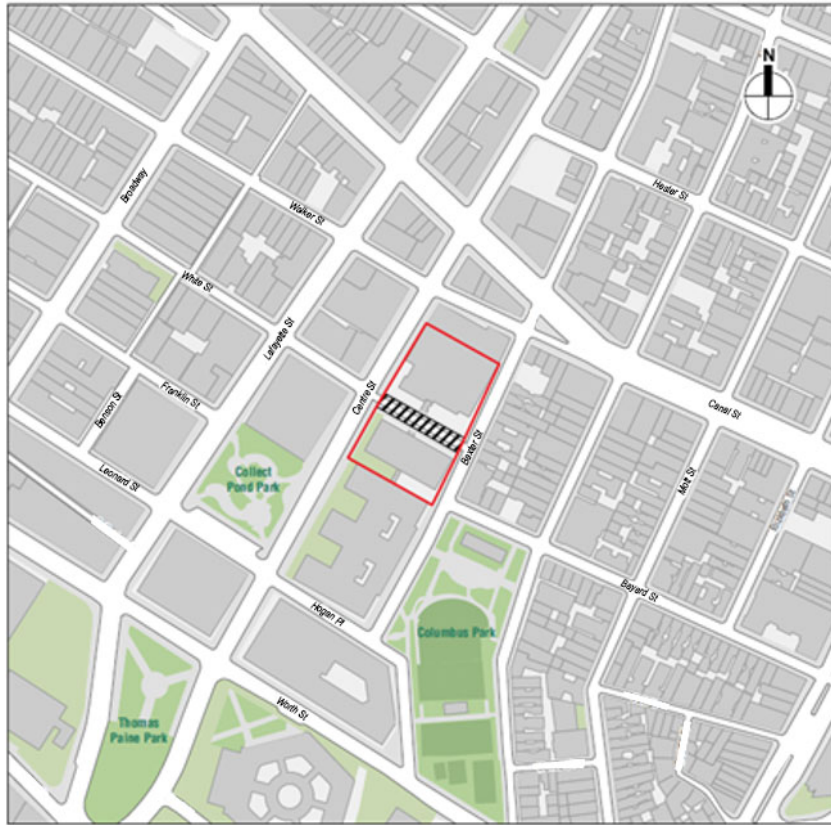
1. Safety in and around the project site
2. Promote transparency in the design and construction process for the community and the public at-large
3. Provide value to the City with innovative design and quality construction and materials
4. Achieve dust and noise mitigation standards that exceed minimum regulatory thresholds
5. Monitor and protect surrounding structures, including neighboring buildings and facilities
6. Create and maintain, safe, accessible and well-lit pedestrian pathways throughout construction activities
7. Complete the project within budget and on schedule
8. Incorporate sustainability into design, construction, and maintenance
9. Minimize loss of street parking and traffic impacts during construction
10. Minimize construction impacts to the surrounding community and facilities, particularly dust and noise, including impacts to civic and municipal facilities (e.g., courts, police, correctional, buses, trains, subways)

SITE LOCATION

The Project is located at 124-125 White Street (Block 198, Lot 1 and part of Block 167, Lot 1) between Chinatown and the Civic Center neighborhoods of Manhattan Community District 1 (see *Figure B-1*). The site is bounded by Centre Street, Hogan Place (the extension of Leonard Street), Walker Street, and Baxter Street (see *Figure B-2*).



Figure B-1 BBJ-M Location



-  Project Site
-  Proposed Demapped Area & Future Pedestrian Arcade

Figure B-2 BBJ-M Map Location

PRELIMINARY PROJECT SCHEDULE FOR THE MANHATTAN DISMANTLE AND SWING SPACE

DDC anticipates that a notice to proceed (NTP) shall be issued to the Design-Builder in or around December 2021, and that the Dismantle and Swing Space shall be substantially completed in October 2023.

PRELIMINARY BUDGET FOR THE MANHATTAN DISMANTLE AND SWING SPACE

Approximately \$100,000,000 - \$125,000,000

PROPOSAL STIPEND FOR THE MANHATTAN DISMANTLE AND SWING SPACE

Approximately \$200,000

APPENDIX D

Format and Organization for Statement of Qualifications

| RFQ (Phase I) Response Table of Contents | | |
|---|--|-----------------------------|
| Tab | Category | Page Limitation |
| 0 | FUNDAMENTAL QUALIFICATIONS | Up to 19 pages total |
| | Cover Letter | 2 pages |
| | Acknowledgment of Addenda Form (Appendix E-13) | 1 page* |
| | Equal Opportunity Employer Statement | 1 page |
| | Statement of Compliance with the filing of Construction Employment Report in PASSPort (Appendix E-1) | 1 page |
| | Doing Business Data Form (Appendix E-2)** | 2 pages |
| | Iran Divestment Act Form (Appendix E-3) | 1 page |
| | Preliminary Insurance Information (Appendix E-4) | 1 page |
| | Letter of Commitment from Surety | 1 page |
| | Legal Structure | 1 page*** |
| | Teaming Agreement | 1 page |
| | Safety Questionnaire (Appendix E-5) | 1 page |
| | Financial Questionnaire (Appendix E-6) | 5 pages |
| | Conflicts of Interest | 1 page |
| 1 | PROJECT PAST PERFORMANCE/EXPERIENCE | Up to 23 pages total |
| | Project Profile Forms (each project limited to 3 pages) (Appendix E-7) | 15 pages |
| | Project Evaluation Forms (Appendix E-8) | 5 pages |
| | Prior Experience Working Together Form (Appendix E-9) | 1 page |
| | Project Relevancy Form (Appendix E-10) | 2 pages |
| 2 | DESIGN-BUILD TEAM KEY PERSONNEL RESUMES | Up to 11 pages total |
| | Team Introduction and Organization Chart | 2 pages |
| | Design-Build Project Executive (Appendix E-11) | 1 page |
| | Design Lead (Appendix E-11) | 1 page |
| | Designer-of-Record (Appendix E-11) | 1 page |
| | Design-Build Project Manager (Appendix E-11) | 1 page |
| | Design Integrator (Appendix E-11) | 1 page |
| | Design-Build Construction Project Manager (Appendix E-11) | 1 page |
| | Design-Build Safety Officer (Appendix E-11) | 1 page |
| | Design-Build QA & QC Project Manager (Appendix E-11) | 1 page |
| | Resume Compliance Matrix (Appendix E-12) | 1 page |
| 3 | PROJECT EXCELLENCE AND DB MANAGEMENT APPROACH | Up to 13 pages total |
| | Project Excellence | 4 pages |
| | Design-Build Management Approach | 5 pages |
| | M/WBE Approach | 2 pages |
| | Quality Assurance and Quality Control for Design and Construction | 1 page |
| | Design and Construction Scheduling | 1 page |

* page limit does not include attached copies of each Addenda cover page signed by the Proposer

** Doing Business Data Form must be submitted as a separate file and must not be included in the body of the SOQ file.

*** page limit applies to the description of the Proposer's legal structure and does not include any copies of executed agreements or letters of intent, as required by the RFQ.

APPENDIX E

SOQ FORMS

APPENDIX E-1

Construction Employment Report

How to complete the Construction Employment Report

The Construction Employment Report and Instructions on how to complete the report can be obtained at the following Link:

<https://www1.nyc.gov/site/sbs/businesses/contract-compliance.page>

Where to submit the Construction Employment Report:

The Construction Employment Report must be uploaded to the EEO section of the proposer's PASSPort Vendor Profile.

Instructions on how to upload the Construction employment report can be found at the link below:

https://www1.nyc.gov/assets/mocs/passport-downloads/pdf/resources-for-vendors/UserManual-Vendors_Account_Management.pdf

Paper copies are not required and will not be accepted. A statement that this step has been completed must be included with the SOQ submission. The form must be uploaded to PASSPort no later than the SOQ Due Date.

APPENDIX E-2

Doing Business Data Form

Doing Business Data Form

To be completed by the City agency prior to distribution Agency _____ Transaction ID _____

Check One **Transaction Type (check one)**

Proposal Award Concession Economic Development Agreement Franchise Grant Pension Investment Contract Contract

Any entity receiving, applying for or proposing on an award or agreement must complete a Doing Business Data Form (see Q&A sheet for more information). Please either type responses directly into this fillable form or print answers by hand in black ink, and be sure to fill out the certification box on the last page. **Submission of a complete and accurate form is required for a proposal to be considered responsive or for any entity to receive an award or enter into an agreement.**

This Data Form requires information to be provided on principal officers, owners and senior managers. The name, employer and title of each person identified on the Data Form will be included in a public database of people who do business with the City of New York, as will the organizations that own 10% or more of the entity. No other information reported on this form will be disclosed to the public. **This Data Form is not related to the City's PASSPort registration or VENDEX requirements.**

Please return the completed Data Form to the City office that supplied it. Please contact the Doing Business Accountability Project at DoingBusiness@mocs.nyc.gov or 212-788-8104 with any questions regarding this Data Form. Thank you for your cooperation.

If you are completing this form by hand, please print clearly.

Entity Information

Entity EIN/TIN _____ Entity Name _____

Filing Status **(Select One)**

NEW: Data Forms submitted now must include the listing of organizations, as well as individuals, with 10% or more ownership of the entity. Until such certification of ownership is submitted through a change, new or update form, a no change form will not be accepted.

Entity has never completed a Doing Business Data Form. Fill out the entire form.

Change from previous Data Form dated _____. Fill out only those sections that have changed, and indicate the name of the persons who no longer hold positions with the entity.

No Change from previous Data Form dated _____. Skip to the bottom of the last page.

Entity is a Non-Profit Yes No

Entity Type Corporation (any type) Joint Venture LLC Partnership (any type) Sole Proprietor Other (specify) _____

Address _____

City _____ State _____ Zip _____

Phone _____ E-mail _____

Provide your e-mail address in order to receive notices regarding this form by e-mail.

Principal Officers

Please fill in the required identification information for each officer listed below. If the entity has no such officer or its equivalent, please check "This position does not exist." If the entity is filing a Change Form and the person listed is replacing someone who was previously disclosed, please check "This person replaced..." and fill in the name of the person being replaced so his/her name can be removed from the *Doing Business Database*, and indicate the date that the change became effective.

Chief Executive Officer (CEO) or equivalent officer This position does not exist
The highest ranking officer or manager, such as the President, Executive Director, Sole Proprietor or Chairperson of the Board.

First Name _____ MI _____ Last _____ Birth Date (mm/dd/yy) _____

Office Title _____ Employer (if not employed by entity) _____

Home Address _____

This person replaced former CEO _____ on date _____

Chief Financial Officer (CFO) or equivalent officer This position does not exist
The highest ranking financial officer, such as the Treasurer, Comptroller, Financial Director or VP for Finance.

First Name _____ MI _____ Last _____ Birth Date (mm/dd/yy) _____

Office Title _____ Employer (if not employed by entity) _____

Home Address _____

This person replaced former CFO _____ on date _____

Chief Operating Officer (COO) or equivalent officer This position does not exist
The highest ranking operational officer, such as the Chief Planning Officer, Director of Operations or VP for Operations.

First Name _____ MI _____ Last _____ Birth Date (mm/dd/yy) _____

Office Title _____ Employer (if not employed by entity) _____

Home Address _____

This person replaced former COO _____ on date _____

Principal Owners

Please fill in the required identification information for all individuals or organizations that, through stock shares, partnership agreements or other means, **own or control 10% or more of the entity**. If no individual or organization owners exist, please check the appropriate box to indicate why and skip to the **Senior Managers** section. If the entity is owned by other companies that control 10% or more of the entity, those companies must be listed. If an owner was identified on the previous page, fill in his/her name and write "See above." If the entity is filing a Change Form, list any individuals or organizations that are no longer owners at the bottom of this section. If more space is needed, attach additional pages labeled "Additional Owners."

There are no owners listed because (select one):

- The entity is not-for-profit The entity is an individual No individual or organization owns 10% or more of the entity

Other (explain) _____

Individual Owners (who own or control 10% or more of the entity)

First Name _____ MI ____ Last _____ Birth Date (mm/dd/yy) _____

Office Title _____ Employer (if not employed by entity) _____

Home Address _____

First Name _____ MI ____ Last _____ Birth Date (mm/dd/yy) _____

Office Title _____ Employer (if not employed by entity) _____

Home Address _____

Organization Owners (that own or control 10% or more of the entity)

Organization Name _____

Organization Name _____

Organization Name _____

Remove the following previously-reported Principal Owners

Name _____ Removal Date _____

Name _____ Removal Date _____

Name _____ Removal Date _____

Senior Managers

Please fill in the required identification information for all senior managers who oversee any of the entity's relevant transactions with the City (e.g., contract managers if this form is for a contract award/proposal, grant managers if for a grant, etc.). Senior managers include anyone who, either by title or duties, has substantial discretion and high-level oversight regarding the solicitation, letting or administration of any transaction with the City. At least one senior manager must be listed, or the Data Form will be considered incomplete. If a senior manager has been identified on a previous page, fill in his/her name and write "See above." If the entity is filing a Change Form, list individuals who are no longer senior managers at the bottom of this section. If more space is needed, attach additional pages labeled "Additional Senior Managers."

Senior Managers

First Name _____ MI ____ Last _____ Birth Date (mm/dd/yy) _____

Office Title _____ Employer (if not employed by entity) _____

Home Address _____

First Name _____ MI ____ Last _____ Birth Date (mm/dd/yy) _____

Office Title _____ Employer (if not employed by entity) _____

Home Address _____

First Name _____ MI ____ Last _____ Birth Date (mm/dd/yy) _____

Office Title _____ Employer (if not employed by entity) _____

Home Address _____

Remove the following previously-reported Senior Managers

Name _____ removal date _____

Name _____ removal date _____

Certification

I certify that the information submitted on these two pages and _____ additional pages is accurate and complete. I understand that willful or fraudulent submission of a materially false statement may result in the entity being found non-responsible and therefore denied future City awards.

Name _____ Title _____

Entity Name _____ Work Phone # _____

Signature _____ Date _____

Please return this form to the City agency that supplied it to you, not to the Doing Business Accountability Project.

Standard Form

APPENDIX E-3

IRAN DIVESTMENT ACT

IRAN DIVESTMENT ACT COMPLIANCE RIDER

FOR NEW YORK CITY CONTRACTORS

The Iran Divestment Act of 2012, effective as of April 12, 2012, is codified at State Finance Law (“SFL”) §165-a and General Municipal Law (“GML”) §103-g. The Iran Divestment Act, with certain exceptions, prohibits municipalities, including the City, from entering into contracts with persons engaged in investment activities in the energy sector of Iran. Pursuant to the terms set forth in SFL §165-a and GML §103-g, a person engages in investment activities in the energy sector of Iran if:

- (a) The person provides goods or services of twenty million dollars or more in the energy sector of Iran, including a person that provides oil or liquefied natural gas tankers, or products used to construct or maintain pipelines used to transport oil or liquefied natural gas, for the energy sector of Iran; or
- (b) The person is a financial institution that extends twenty million dollars or more in credit to another person, for forty-five days or more, if that person will use the credit to provide goods or services in the energy sector in Iran and is identified on a list created pursuant to paragraph (b) of subdivision three of Section 165-a of the State Finance Law and maintained by the Commissioner of the Office of General Services.

A bid or proposal shall not be considered for award nor shall any award be made where the bidder or proposer fails to submit a signed and verified bidder’s certification.

Each bidder or proposer must certify that it is not on the list of entities engaged in investment activities in Iran created pursuant to paragraph (b) of subdivision 3 of Section 165-a of the State Finance Law. In any case where the bidder or proposer cannot certify that they are not on such list, the bidder or proposer shall so state and shall furnish with the bid or proposal a signed statement which sets forth in detail the reasons why such statement cannot be made. The City of New York may award a bid to a bidder who cannot make the certification on a case by case basis if:

- (1) The investment activities in Iran were made before the effective date of this section (i.e., April 12, 2012), the investment activities in Iran have not been expanded or renewed after the effective date of this section and the person has adopted, publicized and is implementing a formal plan to cease the investment activities in Iran and to refrain from engaging in any new investments in Iran: or
- (2) The City makes a determination that the goods or services are necessary for the City to perform its functions and that, absent such an exemption, the City would be unable to obtain the goods or services for which the contract is offered. Such determination shall be made in writing and shall be a public document.

**BIDDER'S CERTIFICATION OF COMPLIANCE WITH
IRAN DIVESTMENT ACT**

Pursuant to General Municipal Law Section 103-g, which generally prohibits the City from entering into contracts with persons engaged in investment activities in the energy sector of Iran, the bidder/proposer submits the following certification:

[Please Check One]

BIDDER'S CERTIFICATION

- By submission of this bid or proposal, each bidder/proposer and each person signing on behalf of any bidder/proposer certifies, and in the case of a joint bid each party thereto certifies as to its own organization, under penalty of perjury, that to the best of its knowledge and belief, that each bidder/proposer is not on the list created pursuant to paragraph (b) of subdivision 3 of Section 165-a of the State Finance Law.

- I am unable to certify that my name and the name of the bidder/proposer does not appear on the list created pursuant to paragraph (b) of subdivision 3 of Section 165-A of the State Finance Law. I have attached a signed statement setting forth in detail why I cannot so certify.

SIGNATURE

PRINTED NAME

TITLE

Sworn _____ to _____ before _____ me _____ this
_____ day of _____, 20____

Notary Public Date

APPENDIX E-4

Preliminary Insurance Information

The policies and minimum limits provided below are for information purposes only. Section 5.5 (Fundamental Qualifications) with respect to the SOQ submission requires an acknowledgment that the DB Team carries or will carry coverage levels identified below. Further details regarding insurance requirements for the Project will be specified in the RFP (Phase II). The Selected Proposer will be required to provide evidence of insurance by providing certificates of insurance and may require complete copies of policies and/or policy endorsements.

| Type of Insurance | | Minimum Limits Required Per Claim/Occurrence | Minimum Limits Required Aggregate Policy Limits |
|---|--|---|--|
| 1. Worker's Compensation | | Statutory Limits | Statutory Limits |
| 2. Employer's Liability (Bodily Injury by Accident) | | Statutory Limits | Statutory Limits |
| 3. Commercial General Liability | | \$2,000,000 (Annual) | \$4,000,000 (Annual) |
| a. Bodily Injury/Property Damage per occurrence limit | | \$2,000,000 (Annual) | n/a |
| b. Bodily Injury/Property Damage aggregate limit | | n/a | \$4,000,000 (Annual) |
| c. Products/Completed Operation aggregate limit | | n/a | \$4,000,000 (Annual) |
| d. Personal and Advertising Injury aggregate limit | | n/a | \$4,000,000 (Annual) |
| 4. Commercial Automobile Liability | | \$2,000,000 (Annual) | \$2,000,000 (Annual) |
| 5. Professional Liability Insurance | | \$2,000,000 | \$2,000,000 |
| 6. Contractor's Pollution Liability including coverage for microbial matter (if applicable) | | \$10,000,000 | \$10,000,000 |
| 7. Umbrella Excess Liability Insurance | | \$50,000,000 (Annual) | \$50,000,000 (Annual) |
| 8. Builders' Risk | | TBD | TBD |
| 9. Railroad Protective Liability | | TBD | TBD |

Notes:

- Commercial General Liability: If the Work requires a permit from the Department of Buildings pursuant to 1 RCNY Section 101-08, the Design-Builder will be required provide Commercial General Liability Insurance with limits of at least those required by 1 RCNY section 101-08 or the limits required by the Contract, whichever is greater.
- Subject to DDC's approval, the Design-Builder may satisfy its obligation to provide general liability and automobile liability coverage through primary policies or a combination of primary and umbrella excess policies, so long as all policies provide the scope of coverage required by the DB Agreement.
- Builders' Risk limits and requirements will apply whenever the Project includes structures. If applicable, limits and requirements will be set forth in the RFP.
- Contractor's Pollution Liability limits and requirements will apply if there are hazardous materials at the site. If applicable, limits and requirements will be set forth in the RFP.
- Railroad Protective Liability limits and requirements will apply if railroad facilities exist within or adjacent to the Project site. If applicable, limits and requirements will be set forth in the RFP.
- Other types and amounts of insurance may be required. If applicable, limits and requirements will be set forth in the RFP.
- Except as set forth in the subsequent RFP, all policies will be required to name the City of New York, including its officials and employees, as additional insured. The Selected Proposer may be required to name additional parties as additional insured and may be required to name the City of New York as loss payee. Details and requirements will be set forth in the RFP for the Project.

APPENDIX E-5

Safety Questionnaire

TAB 0 – SAFETY QUESTIONNAIRE

SAFETY QUESTIONNAIRE

Attachments and explanations provided on a separate page, as requested in the questions below shall not be counted against Proposer's page count limit.

- 1 Has Federal OSHA or OSH cited and assessed penalties against the entity or any of its affiliates for any "serious," "willful" or "repeat" violations of its safety or health regulations in the past five (5) years?

Yes No

If "yes," on separate page describe the citations, state the case number, the party against whom the citation was made, date of citation, nature of the violation, project on which the citation was issued, owner of project, and the amount of penalty paid, if any.

- 2 Does the entity have an injury prevention program instituted pursuant to Occupational Safety and Health requirements? (A "No" answer is grounds for disqualification. There is no other or separate scoring of this answer.)

Yes No

- 3 At what frequency does the entity require documented safety meetings to be held for construction employees and field supervisors during the course of a project?

Weekly Monthly Other

If other, please describe:

- 4 List the entity's Experience Modification Rate (EMR) (New York workers' compensation insurance) for each of the past three (3) premium years:

(NOTE: An Experience Modification Rate is issued to your firm annually by your workers' compensation insurance carrier.)

2020:

2019:

2018:

If your EMR for any of these three (3) years is 1.00 or higher you must attach a one (1) page explanation.

- 5 List the entity's Total Recordable Case Incident Rate (TCIR):

2020:

2019:

2018:

- 6 List the entity's Days Away, Restricted or Transfer Case Incident Rate (DART):

2020:

2019:

2018:

APPENDIX E-6

Financial Questionnaire

FINANCIAL QUESTIONNAIRE

Attachments and explanations provided on a separate page, as requested in the questions below, shall not be counted against Proposer’s page count limit.

Provide the following information about the Proposer:

1. Name of Proposer:
2. Date of formation:
3. State of formation:
4. Number of employees?
5. If a corporation, provide the following:

Provide information for each officer of the corporation.

| Position | Name | Years with Co. | % Ownership |
|-----------------|-------------|-----------------------|--------------------|
| CEO | | | |
| President | | | |
| Secretary | | | |
| Treasurer/CFO | | | |
| Other (Title) | | | |
| Other (Title) | | | |
| Other (Title) | | | |
| Other (Title) | | | |

6. If an individual doing business as a sole proprietorship, please complete the following:

| Owner | Years as |
|--------------|-----------------|
| | |

7. If a joint venture, partnership, limited liability company (“LLC”), or other association, provide the following for each member of the joint venture, each partner, each member or manager of the LLC, or other association member. (Attach additional pages if necessary)

| Name of Individual Or Entity | Principal Contact | Position | Years with Joint Ven- ture/ Part- nership/ LLC/Other Associa- | % Owner- ship In- terest |
|---------------------------------|-------------------|----------|--|--------------------------------|
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

8. Has there been any change in ownership during the last three years?

(NOTE: A corporation whose shares are publicly traded is not required to answer this question with regard to public trades.)

If “yes”, please explain on a separate page.

Yes No

9. Is the entity a subsidiary, parent, holding company or affiliate of another firm?

(NOTE: Include information about other firms if one firm owns 50 percent or more of another, or if an owner, partner, or officer of your firm holds a similar position in another firm.)

Yes No

If “yes”, explain on a separate page.

State gross revenue for each of the last three years:

2020: \$

2019: \$

2018: \$

10. Is the entity or any of its affiliates currently the debtor in a bankruptcy case?

Yes No

If "yes," indicate the case number, bankruptcy court, and the date on which the petition was filed.

| | | |
|-------------|------------------|------------|
| _____ | _____ | _____ |
| Case Number | Bankruptcy Court | Date Filed |

11. Was the entity or any of its affiliates in bankruptcy at any time during the last five years? (This question refers only to a bankruptcy action that was not described in answer to question A-2, above).

Yes No

If "yes," indicate the case number, bankruptcy court, and the date on which the petition was filed.

| | | |
|-------------|------------------|------------|
| _____ | _____ | _____ |
| Case Number | Bankruptcy Court | Date Filed |

12. In the last five years has any insurance carrier, for any form of insurance, refused to renew an insurance policy due to non-payment or contractor losses?

Yes No

If "yes," on a separate page provide the name of the insured, name the insurance carrier, the form of insurance, and the year of the refusal.

13. Please provide the following information from most recent financial statement:

| | |
|---|----|
| Current Assets: | \$ |
| Current Liabilities: | \$ |
| Total Net Worth: | \$ |
| Current Ratio (Assets/Liabilities): | \$ |
| Working Capital (Current Assets - Current Liabilities): | \$ |

Debt to Equity Ratio: _____

History of Performance (Past Performance)

14. Has the entity or any of its affiliates ever been terminated for default on a construction contract?

Yes No

If “yes,” explain on a separate page.

15. In the last five years has the entity or any of its affiliates, been debarred, disqualified, removed or otherwise prevented from bidding on, or completing, any government agency or public works project for any reason?

Yes No

If “yes,” explain on a separate page. State the name of the organization debarred, the year of the event, the owner of the project, and the basis for the action.

(NOTE: The following two questions (Questions 16 and 17) refer only to disputes between the entity and project owners. Do not include information about disputes with suppliers, other contractors, or subcontractors. Do not include information about “pass-through” disputes in which the actual dispute is between a subcontractor and a project owner)

16. In the past five years has any claim in excess of \$50,000 been filed or made in court or arbitration against the entity or any of its affiliates concerning their work on a construction project?

Yes No

If “yes,” on a separate page identify the claim(s) by providing the project name, date of the claim, name of the claimant, the name of the entity the claim was filed against, a brief description of the nature of the claim, the court and case number, and a brief description of the status of the claim (pending or, if resolved, a brief description of the resolution).

17. In the past five years has the entity or any of its affiliates made any claim in excess of \$50,000 against a project owner concerning work on a project or payment for a contract and filed or made that claim in court or arbitration?

Yes No

If “yes,” on a separate page identify the claim by providing the name of claimant, the project name, date of the claim, name of the entity (or entities) against whom the claim was filed, a brief description of the nature of the claim, the court and case number, and a brief description of the status of the claim (pending, or if resolved, a brief description of the resolution).

18. Has the entity or any of its affiliates (or any manager of an affiliate if the affiliate is not a person) ever been found liable in a civil suit or found guilty in a criminal action for making any false claim or material misrepresentation to any public entity?

Yes No

If "yes," explain on a separate page, including identifying who was found liable or guilty, the court and case number, the name of the public entity, the civil or criminal verdict, the date and the basis for the finding.

19. Has there been more than one occasion during the last five years in which the entity or any of its affiliates was required to pay either back wages or penalties for failure to comply with the State's prevailing wage laws?

Yes No

If "yes," attach a separate page, describing the violator, nature of each violation, name of the project, date of its completion, the public agency for which it was constructed, the number of employees who were initially underpaid and the amount of back wages and penalties that were assessed.

20. During the last five years, has there been an occasion in which the entity or any of its affiliates have been penalized or required to pay back wages for failure to comply with the Federal Davis- Bacon prevailing wage requirements?

Yes No

If "yes," attach a separate page, describing the violator, nature of each violation, name of the project, date of its completion, the public agency for which it was constructed; the number of employees who were initially underpaid and the amount of back wages and penalties that were assessed.

APPENDIX E-7

Project Profile Form

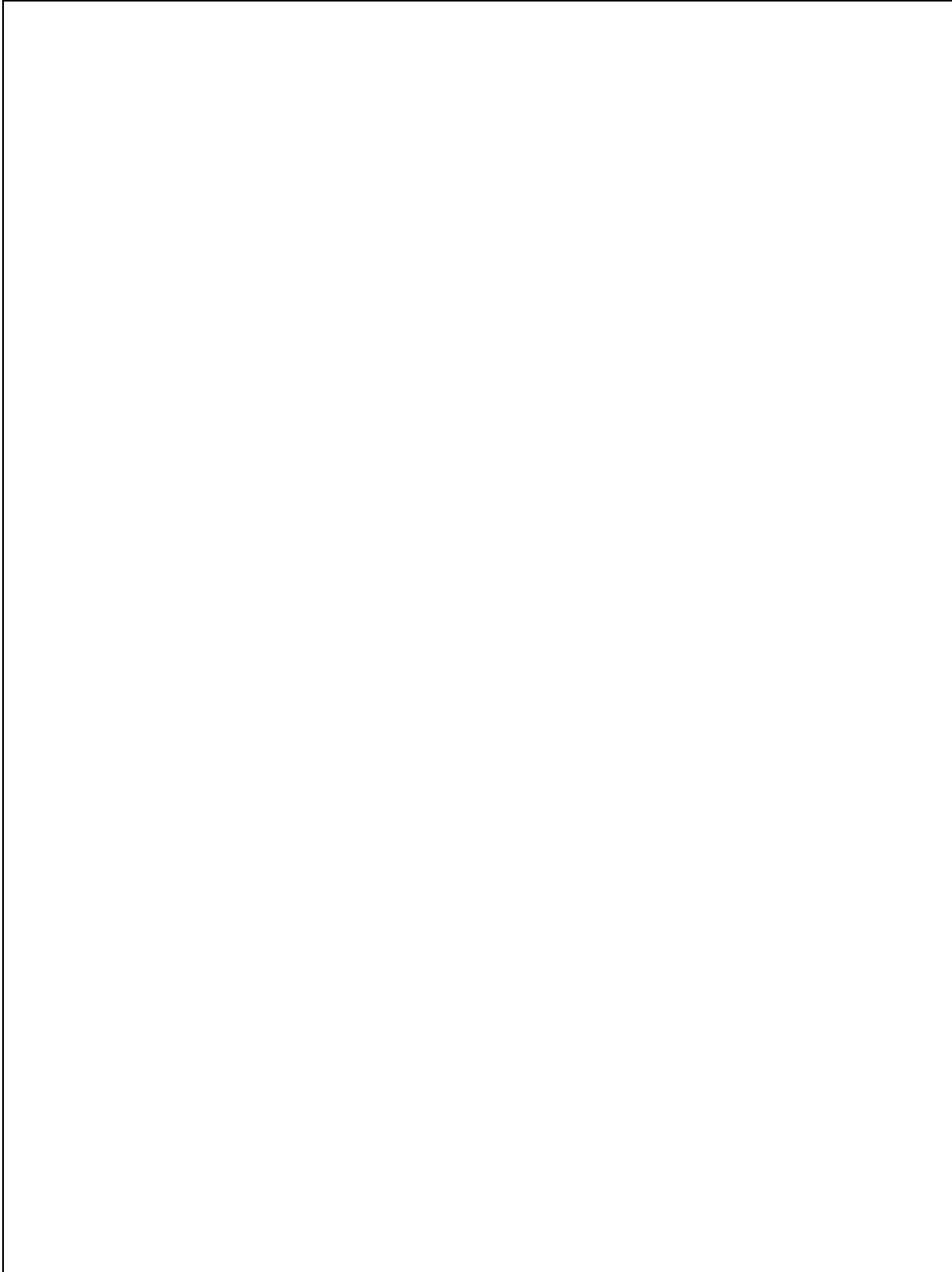
| | | | |
|--|--|--|--|
| [Use same form for all projects]*** Name of Proposer: _____ | | | |
| General Information: | | Project Number*: | |
| Project Name, Location and Size: | | | |
| Original Contract Amount: | | Original Completion Date: | |
| Final Construction Cost**: | | Actual Completion Date**: | |
| Reason for Difference if more than 10% | | Type of Facility: | |
| Proposer's Role: (Prime, Joint Venture, LLC, Integrated DB, Sub): | | | |
| Builder (Name): | | | |
| Designer of Record (Name): | | | |
| Project Delivery Method & RFP Type: | | | |
| Private Negotiated | | Construction Manager At Risk | |
| Design-Build w/out Bridging Docs | | Design-Build with Bridging Docs | |
| Design-Bid-Build | | Other | |
| What type of RFP documents were used for this project? | | | |
| Performance Requirements | | Describe any Awards this project received: | |
| Prescriptive Specifications | | | |
| Bridging Drawings and Specifications | | | |
| Past Performance Reference: The City of New York reserves the right to contact this organization or person and conduct a telephone interview for references. Confirm this reference is available. | | | |
| Organization: | | | |
| Contact Person Title: | | | |
| Telephone: | | | |
| Email: | | | |
| Address: | | | |
| City, State, Zip: | | | |
| Self-Performance | | | |
| Percentage of work self-performed: | | | |
| Detailed description of work self-performed: | | | |
| Describe any work you subcontracted to others: | | | |
| List Key DB Team Members (firm and / or individual) that were critical to this project that are also proposed for the Project. | | | |

* To match Project Number shown in Appendix D-8

** For projects currently under construction, provide the estimated final construction cost and completion date

***Use of this form without modification is mandatory

Provide a general description of the project, including only the project attributes directly applicable to Tab 1 Evaluation Criteria, including a brief description of the DB Team's collaborative approach to Design-Build, including: (a) interactions within the DB Team and with the client during design; and (b) the role and interaction between the design team and the construction team during design and construction of the projects. Images may be included, however no additional pages will be allocated for images.



APPENDIX E-8

Project Evaluation Form

Vendor Evaluation

Project Name: _____ CAP Project Number (if applicable): _____

(Contractor - Construction Manager - Builder)

(Project Manager)

(Superintendent)

(Consultant - Designer)

(Project Manager)

(Construction Administration Observer (if applicable))

(Agency)

(Agency Contact)

This evaluation is of the: Contractor Consultant Design-Builder Other: _____

Please rate each of the criteria on a scale of 1 to 10, with 10 representing that you were very satisfied/in complete agreement with the statement and 1 representing that you were very unsatisfied/in disagreement with the statement. Please rate each of the criteria to the best of your knowledge. If you do not have sufficient knowledge in a particular area or it is not applicable, leave it blank.

| NO | EVALUATION CRITERIA | UNIT | RATING |
|----|---|--------|--------|
| 1 | Ability to manage the project cost (minimize change orders) | (1-10) | |
| 2 | Ability to maintain project schedule (complete on-time or early) | (1-10) | |
| 3 | Quality of workmanship | (1-10) | |
| 4 | Professionalism and ability to manage (includes responses and prompt payment to suppliers and subcontractors) | (1-10) | |
| 5 | Close-out process (no punch list upon turnover, warranties, operating and maintenance manuals, etc. submitted promptly) | (1-10) | |
| 6 | Communication, explanation of risk, and documentation | (1-10) | |
| 7 | Ability to follow the State's and/or Agency's rules, regulations, and requirements (housekeeping, safety, etc.) | (1-10) | |
| 8 | Overall customer satisfaction and comfort level in hiring the vendor again based on performance | (1-10) | |

(Printed Evaluator Name)

(Evaluator Signature)

(Date)

(Telephone Number)

(Email Address)

(Position/ Title)

(Agency/Firm Name)

Comments:

APPENDIX E-9

Prior Experience Working Together Form

INSTRUCTIONS: For each of the up to 5 projects identified on the Project Profile Forms and listed in the matrix below, indicate the proposed Key Personnel who participated in each project. Clearly indicate project number corresponding to the Project Profile Forms.

| | Project 1 | Project 2 | Project 3 | Project 4 | Project 5 |
|--|-----------|-----------|-----------|-----------|-----------|
| Design-Build Project Executive | | | | | |
| Design Lead (Individual) | | | | | |
| Designer-of-Record (Individual) | | | | | |
| Design-Build Project Manager | | | | | |
| Design Integrator | | | | | |
| Design-Build Construction Project Manager | | | | | |
| Design-Build Safety Officer | | | | | |
| Design-Build QA & QC Project Manager | | | | | |

APPENDIX E-10

Project Relevancy Form

| Project Attributes | Project 1 Title, Location, Client | Project 2 Title, Location, Client | Project 3 Title, Location, Client | Project 4 Title, Location, Client | Project 5 Title, Location, Client |
|---|--------------------------------------|--------------------------------------|--------------------------------------|--------------------------------------|--------------------------------------|
| Year Completed or, if currently under construction, expected to be completed | | | | | |
| | | | | | |
| Attribute (examples) | | | | | |
| Complex Remediation and Demolition Activities | | | | | |
| Involves Demolition of Multi-Story Structure(s) in Dense Urban Environments | | | | | |
| Design-Build Project | | | | | |
| Design-Bid-Build Project | | | | | |
| Project Demonstrating Ability to Minimize Construction Impacts on Surrounding Community | | | | | |
| DBIA Best Practices | | | | | |
| Award-Winning Project (ENR, DBIA, or Similar) | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |

APPENDIX E-11

Resume Form

RESUME FORM

| | | | |
|--------------------------------------|--|---------------------|--|
| Position/Assignment for the Project: | | | |
| Firm Name: | | Years of Experience | |
| Name: | | This Firm: | |
| Title: | | Other Firms: | |
| Degree: | | Specialization: | |
| Year Earned: | | Registration: | |
| | | | |

APPENDIX E-12

Resume Compliance Matrix

Use of this form without modification is mandatory.

APPENDIX E-13

Acknowledgement of Addendum Form

ACKNOWLEDGEMENT OF ADDENDA

| | |
|---|--------------------------------------|
| <p>TITLE OF THE REQUEST FOR QUALIFICATIONS: [BBJ-JAIL, DESIGN-BUILD PROGRAM FOR THE NYC BOROUGH-BASED JAIL SYSTEM, MANHATTAN SITE DISMANTLE AND SWING SPACE]</p> | <p>PIN: 8502021CR0004P-6P</p> |
| <p>Instructions: The submitting firm is to complete Part I or Part II of this form (<u>CHECK ONE</u>), whichever is applicable, and sign and date this form. This form serves as the submitter's acknowledgement of the receipt of Addenda to this Request for Qualifications (RFQ) which may have been issued by the Agency prior to the Statement of Qualifications Due Date and Time.</p> | |
| <p><u> </u> Part I Listed below are the dates of issue for each Addendum received in connection with this RFQ.</p> <p>Addendum # 1 dated _____ Addendum # 2 dated _____ Addendum # 3 dated _____ Addendum # 4 dated _____ Addendum # 5 dated _____ Addendum # 6 dated _____ Addendum # 7 dated _____ Addendum # 8 dated _____ Addendum # 9 dated _____ Addendum #10 dated _____</p> <p>All addenda must be signed and <u>included behind this attachment</u>.</p> | |
| <p><u> </u> Part II No Addendum was received in connection with this RFQ.</p> | |
| <p>Submitting Firm Name: _____</p> | |
| <p>Submitting firm's Authorized Representative:</p> <p>Name: _____ Title: _____ Signature: _____ Date: _____</p> | |

APPENDIX F

Draft Request for Proposal (Phase II) Information

DRAFT REQUEST FOR PROPOSALS (PHASE II) INFORMATION

1. NOTICE

Information provided in this section is provided for informational purposes and understanding only. These documents may be revised prior to the issuance of the RFP (Phase II) solicitation. Clarifications and questions will NOT be addressed concerning these documents until after the start of the RFP (Phase II) competition.

2. RFP (PHASE II) - DRAFT PROCUREMENT SCHEDULE

DDC intends to conduct the RFP (Phase II) process for the Project based upon the schedule identified below. This schedule is an estimate only and is subject to change. The final solicitation schedule for the Project will be provided to the Short-listed Proposers for the Project when the RFP (Phase II) is issued.

| Manhattan Dismantle and Swing Space | |
|---|-------------------|
| Issue RFP: | April 2021 |
| Collaborative Dialog Meetings and Site Visits: | April – June 2021 |
| Proposals Due: | July 2021 |
| Notification of Selection of Best Value Proposal: | September 2021 |
| DB Agreement Award: | December 2021 |

3. RFP (PHASE II) - PRELIMINARY INFORMATION

For the Project, complete RFP (Phase II) solicitation documents will be provided to the Short-listed Proposers. Information listed here is in summarized to provide information to Respondents in evaluating the scope of work that will be expected during contract award.

4. RFP (PHASE II) -EVALUATION CRITERIA

The overarching goal for this procurement is to select a Design-Build (DB) Team to design and construct the Project in a manner that provides the best value to the City in support of its vision and mission. Through best value selection, the City is looking for high-quality, innovative and transformative design and solutions, such that the Project is completed on time and within budget. This procurement is not a low-bid procurement.

| RFP (Phase II) Evaluation Criteria |
|---|
| Design Solutions |
| Management Solutions |
| M/WBE Partnering Approach |
| Team Quality and Strength |
| Price |

5. RFP (PHASE II) -TABLE OF CONTENTS FOR THE SOLICITATION

DDC anticipates that design criteria will be organized according to Construction Specifications Institute (CSI) Uniformat II Standard structure, employing Preferred, Allowed, and Do Not Use elements.

- a. Statement of Work - The Statement of Work will be a key part of the RFP (Phase II) and will include the following information:

Program – The program will describe the needed spaces within the swing space, required adjacencies, and expected populations. Information will be provided about the program objective, site, aesthetic requirements, desired innovation, and iterative design.

- i. It is the intent of the City to allow the Design-Builder the opportunity to innovate, and creatively solve the programming challenges to design and construct the Project.
- b. Performance Specifications: DDC anticipates that the RFP will primarily utilize narrative performance specifications.
- c. Each of the following sections list some, but not all, of the requirements for design and construction after award. The intent of this information is to provide basis descriptions for each section. Full documents will be provided to the Short-listed Proposers for the Project.
- i. Design After Award - Design after award will address the following requirements: Design Quality Control Plan, partnering & project progress, fast tracking design and construction, interim design submittals, over-the-shoulder progress reviews, final design submissions, design submittals, design and code checklists, acceptance and release for construction, record drawings, interior design requirements, and fire and life safety code review.
- ii. Quality Control System (QCS) - QCS Software, users guide, training, database and database maintenance, quality control, submittal management, monthly coordination meetings and notifications of non-compliance.
- iii. Project Schedule - Basis for payment and cost loading, detailed schedule requirements, submission requirements, period schedule meetings, requests for time extensions, directed changes, progress meetings.
- iv. Submittal Procedures - Submittal classifications, approving and disapproving submittals, City approved submittals, for information only submittals, withholding payments, control of submittals, and submittal procedures.
- v. Contractor Quality Control - General requirements of the Quality Control Plan, coordination meetings, quality control organization, submittals and deliverables, tests, complete inspections, and notification of non-compliance.

- vi. Temporary Construction Facilities - Availability and use of utility services, bulletin board, Project sign and safety sign, protection and maintenance of traffic, maintenance of construction site, and contractor provided City field office.
- vii. Closeout Submittals - Required closeout submittals, Project record documents, equipment data, construction warranty management, mechanical testing, adjusting, balancing, and commissioning, operation and maintenance manuals, red zone meeting, and final cleaning.

APPENDIX G

List of Consultant Support Team

| NAME |
|---|
| AECOM |
| Hill International |
| CSA Group |
| PMX |
| Caso and Associates |
| PMA |
| Deborah Bradley |
| Velez |
| McKissack |
| Spectrum Communications |
| Athena Consulting |
| M-TO-Pros Development |
| Voorhis Robertson Justice Services, LLC |
| Stellar Services |
| S1 Food Service |
| PTG |
| Unger Security Solutions, LLC |
| TRC |
| Orrick, Herrington & Sutcliffe LLP |
| Hirani Engineering and Land Surveying |
| CDB Productions, LLC, DBA, iDEKO Strategies |
| Infinite Consulting Corp. |
| Haas Media LLC |
| Queen Strategy |
| Haydan Consultants |
| Marsh* |

* Marsh has been engaged by the City to provide insurance advisory services for the BBJ. However, Marsh is eligible to assist or participate as a DB Team member with any Proposer for any Detention Facility.

APPENDIX H

Form Design-Build Agreement

**DRAFT FORM OF DB AGREEMENT
SUBJECT TO CHANGE IN DRAFT RFP**



DESIGN-BUILD AGREEMENT

between

THE CITY OF NEW YORK

and

| | |
|------------------------------------|--|
| [DESIGN-BUILDER LEGAL NAME] | |
| FMS NO.: | |
| REGISTRATION NO.: | |
| PIN: | |
| E-PIN: | |

[RFP Phase: DRAFT: January 29, 2021]

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EXHIBITS

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Design-Build Agreement

This Design-Build Agreement (“**Agreement**”) is entered as of the date executed by all parties (the “**Agreement Date**”).

BETWEEN:

- (1) The City of New York, a municipal corporation organized under the Laws of the State of New York (the “**City**”) acting by and through its Department of Design and Construction (the “**DDC**”), and
 - (2) The Design-Builder identified in the Schedule A included with this Agreement,
- (each a “**Party**” and together the “**Parties**”).

BACKGROUND:

- (A) The DDC issued a “Request for Proposals” (including a form of this Agreement) (collectively, with all subsequently issued addenda, the “**RFP**”) to proposers.
- (B) The DDC received the Design-Builder’s proposal, including Design-Builder Proposal Commitments, from the Design-Builder in response to the RFP.
- (C) In accordance with the evaluation process outlined in the RFP, the DDC selected the Design-Builder as the preferred proposer under the RFP. The DDC’s decision was based on its evaluation of all responsive proposals received and the DDC’s conclusion that the proposal from the Design-Builder offered the best value to the City.

THE PARTIES AGREE as follows:

PART A – PRELIMINARY

1. DEFINITIONS, INTERPRETATION AND ORDER OF PRECEDENCE

1.1 Definitions

Capitalized terms and acronyms used in this Agreement have the meanings given in Exhibit 1 (*Definitions*), unless the context otherwise requires.

1.2 Interpretation

This Agreement must be interpreted according to the following provisions, except to the extent the context or the express provisions of this Agreement otherwise require:

- (a) Words of the masculine gender mean and include correlative words of the feminine and neuter genders and words importing the singular number mean and include the plural number and vice-versa.
- (b) Words importing persons include firms, individuals, legal representatives, companies, associations, joint ventures, general partnerships, limited partnerships, limited liability corporations, trusts, business trusts, corporations, governmental and other legal entities.
- (c) The table of contents and any headings preceding the text of the Parts, Sections, and subsections of this Agreement are solely for convenience of reference and do not affect its meaning, construction, or effect.

- (d) All references in this Agreement to days are references to calendar days, unless otherwise indicated. Each reference to time of day is a reference to Eastern Standard Time or Eastern Daylight-Saving time, as the case may be. If the time for doing an act falls or expires on a day that is not a Business Day, the time for doing the act will be extended to the next Business Day.
- (e) The words “include,” “includes” and “including” are to be construed as meaning “include without limitation,” “includes without limitation” and “including without limitation” respectively.
- (f) Each reference to a statute or statutory provision includes any statute or statutory provision which amends, extends, consolidates, or replaces the statute or statutory provision or which has been amended, extended, consolidated, or replaced by the statute or statutory provision and includes any orders, regulations, by-laws, ordinances, codes of practice or instruments made under the relevant statute or statutory provision.
- (g) Throughout this Agreement, references to any law, regulation, code, guidance, requirement, resolution, policy, standard or permit, either generally or specifically, will refer to such law, regulation, code, guidance, requirement, program, resolution, policy, standard or permit as in effect at the time actions described in this Agreement are taken that are subject to them, whether amended, modified or replaced by a successor to the law, regulation, code, guidance, requirement, program, resolution, policy, standard or permit referenced herein, unless in a particular case this Agreement explicitly states otherwise.
- (h) All references to “knowledge”, “knowing”, “know” or “knew” will be interpreted as references to a party having actual knowledge.
- (i) Any reference in this Agreement to materials, equipment, systems, supplies (regardless of whether the references are in lists, notes, specifications, schedules, or otherwise) will be construed to require the Design-Builder to furnish the same in accordance with the grades and standards indicated in this Agreement. Where this Agreement does not specify any explicit quality or standard for construction materials or workmanship, the Design-Builder must use only workmanship and materials specified elsewhere in the Project Requirements, and the Project Requirements are to be interpreted accordingly.
- (j) Some sections of the Project Requirements contain a general description of the Work required under that section. These descriptions are very general and are not intended to outline all the Work required by the Project Requirements and should be construed as aiding and supplementing, but in no case limiting, impairing or decreasing, the requirements for the Work to be performed as described in other sections of these Project Requirements.
- (k) References in this Agreement to all Applicable Standards, including professional and technical standards, codes and specifications are to the most recently published professional and technical standards, codes, and specifications of the institute, organization, association, authority or society specified, unless otherwise specified herein or by Applicable Law.
- (l) The language in all parts of the Contract Documents will in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any Party. The Parties acknowledge and agree that the Contract Documents have been the subject of arm’s length and careful negotiation over a considerable period of time, that each Party has been given the opportunity to independently review the Contract Documents with legal counsel, and that each Party has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions hereof. Accordingly, in the event of an ambiguity in or Dispute regarding the interpretation of the Contract Documents,

the Contract Documents will not be interpreted or construed against the Party preparing it, and instead other rules of interpretation and construction (as set forth in this Agreement) will be utilized.

1.3 Order of Precedence

- (a) Each of the Contract Documents is an essential part of the agreement between the Parties. The Contract Documents are intended to be complementary and to be read together with this Agreement as a complete agreement. Except as otherwise expressly provided in this Section 1.3, if there is any conflict, ambiguity or inconsistency between the provisions of the Contract Documents, the order of precedence from highest to lowest will be as follows:
- (i) any amendment to this Agreement;
 - (ii) any Change Order, Minor Waiver, Allowance Approval or Time Extension;
 - (iii) the provisions of the main body of this Agreement;
 - (iv) the provisions of the Exhibits to this Agreement, other than Exhibit 2 (Project Requirements) and Exhibit 3 (*Design-Builder Proposal Commitments*);
 - (v) the Deviations List included with Exhibit 3 (*Design-Builder Proposal Commitments*);
 - (vi) the provisions of Exhibit 2 (*Project Requirements*);
 - (vii) the Final Design Documents; and
 - (viii) Exhibit 3 (*Design-Builder Proposal Commitments*), other than the Deviations List.
- (b) With respect to Exhibit 2 (*Project Requirements*), except as otherwise expressly provided in this Section 1.3 or as required by Applicable Law, if there is any conflict, ambiguity or inconsistency between the General Project Requirements, the Specific Project Requirements and Reference Documents, the order of precedence will be as follows, from highest to lowest:
- (i) the General Project Requirements;
 - (A) Schedules A-E;
 - (B) All other portions of the General Project Requirements;
 - (ii) the Specific Project Requirements; and
 - (iii) the Reference Documents.
- (c) If the Contract Documents contain differing provisions or requirements with respect to the same subject matter, the provisions that establish the higher quality manner or method of performing the Work, or better performance, or that establish more stringent standards, will prevail.
- (d) Where the Project Requirements require a higher quality manner or method of performing the Work, or better performance, or establish more stringent standards than Applicable Law or Applicable Standards, the Project Requirements will prevail, provided those higher

quality or more stringent Project Requirements do not violate Applicable Law or Applicable Standards.

- (e) If the Design-Builder Commitments include statements, provisions, concepts or designs that can reasonably be interpreted as offering to provide a higher quality manner or method of performing the Work, or better performance, or that establish more stringent standards than otherwise required by the Final Design Document or as otherwise provided in the Contract Documents; then the Design-Builder will be obligated to comply with such statements, provisions, concepts and designs as set out in the Design-Builder Commitments.
- (f) Additional or supplemental details or requirements in a provision of the Contract Documents with lower priority will be given effect, except to the extent that they irreconcilably conflict with any provision of the Contract Documents with higher priority.

1.4 Resolving any Conflict or Ambiguity

- (a) If either Party becomes aware of any conflict, ambiguity or inconsistency between the provisions of this Agreement, it must promptly notify the other Party in writing of the conflict, ambiguity or inconsistency and its assessment of which provision should prevail in light of the application of the rules set forth in Section 1.3 (*Order of Precedence*).
- (b) If any conflict, ambiguity or inconsistency between the provisions of this Agreement cannot be reconciled and determined in accordance with Section 1.3 (*Order of Precedence*); or the Parties disagree with respect to any conflict, ambiguity or inconsistency between the provisions of this Agreement, the DDC will promptly issue a written determination to the Design-Builder, resolving the conflict, ambiguity or inconsistency. Such written determination will not constitute an Extra Work Directive (or other Relief Event), except where:
 - (i) the Design-Builder gives notice of the conflict, ambiguity or inconsistency strictly within the Scope Validation Period;
 - (ii) the conflict, ambiguity or inconsistency was not of a patent nature, such that the conflict, ambiguity or inconsistency could reasonably have been identified by an appropriately qualified and experienced contractor, engineer or expert working in that field exercising due care and skill and Best Management Practice in the same or equivalent circumstances through inspection of the Contract Documents, including the Project Requirements and Available Documents, prior to the Setting Date;
 - (iii) Work required by the DDC's resolution of the conflict, ambiguity or inconsistency was not otherwise reasonably inferable from the Contract Documents; and
 - (iv) DDC's determination resolving the same will result in an increase in Net Costs or material delay to the Critical Path.

The Design-Builder's entitlement to relief under this Section is subject to Article 25 (*Relief Events*).

1.5 Good Faith and Discretions

- (a) In all dealings under or in connection with this Agreement, the Parties must act in Good Faith.

- (b) All determinations, consents or approvals of the DDC or the Design-Builder under this Agreement must be made in Good Faith and, unless indicated otherwise in this Agreement, must not be unreasonably withheld, conditioned or delayed.

2. **JOINT AND SEVERAL LIABILITY**

If the Design-Builder is a joint venture, consortium or other form of general partnership, each Principal Participant is jointly and severally liable for the obligations of the Design-Builder under this Agreement.

3. **AVAILABLE DOCUMENTS AND DUE DILIGENCE**

3.1 **No Representation by the City**

- (a) Except as otherwise expressly provided in this Agreement:
 - (i) the City makes no representations or warranties as to the relevance, completeness, accuracy, adequacy or fitness for any purpose of any of the Available Documents, publicly-available information or any information provided by the City;
 - (ii) the Available Documents are for reference purposes only and are not mandatory or binding on the Design-Builder or the City; and
 - (iii) the Design-Builder is not entitled to rely on the Available Documents, publicly available information or any information provided by the City as completely or accurately describing past, existing or future conditions or information, presenting design, engineering or maintenance solutions or directions, or defining means or methods for complying with the requirements of this Agreement, including the applicable Standards of Performance.
- (b) Except as otherwise expressly provided in this Agreement, the Design-Builder must make, and will be deemed to have made, its own inquiries as to the relevance, completeness, accuracy, adequacy and fitness for purpose of any and all the Available Documents, publicly-available information and any information provided by the City.

3.2 **No Claims and No Liability**

Except as otherwise expressly provided in this Agreement:

- (a) the Design-Builder will not in any way be relieved from any obligation under this Agreement;
- (b) no Design-Builder Party will be entitled to bring any claims (whether under this Agreement or otherwise) and will have no cause of action against the City or any of its officials, employees, agents, representatives or consultants; and
- (c) neither the City nor any of its officials, employees, agents, representatives and consultants will have any liability to any Design-Builder Party,

in each case as a result of, or with respect to, the Available Documents, publicly-available information or any information provided by the City including any:

- (i) lack of relevance, completeness, accuracy, adequacy or fitness for any purpose of any kind whatsoever in the Available Documents or any other information provided by the City;

- (ii) failure to make available to the Design-Builder any materials, documents, drawings, plans or other information relating to the Work; or
- (iii) Losses suffered by any Design-Builder Party by reason of any use of information contained in, or any action or forbearance in reliance on, the Available Documents, publicly-available information or any information provided by the City.

3.3 Design-Builder Due Diligence

- (a) The Design-Builder represents and warrants to the DDC that:
 - (i) the Design-Builder and each Principal Participant is a sophisticated, qualified and experienced contractor capable of performing the Work and independently assessing the Available Documents, publicly-available information and any information provided by the DDC on the basis set out in Sections 3.1 (*No Representation by the DDC*) and 3.2 (*No Claims and No Liability*);
 - (ii) the Design-Builder and each Principal Participant have familiarized themselves with the Project Requirements, Available Documents, the requirements of this Agreement and all Applicable Laws, Applicable Standards and the obligations and conditions of the Governmental Approvals in effect, and have no reason to believe that any Governmental Approval required or reasonably anticipated to be obtained by the Design-Builder will not be granted in due course or will not remain in effect to enable the Work to proceed in accordance with this Agreement;
 - (iii) the Design-Builder and each Design-Builder Party have, in accordance with Best Management Practice:
 - (A) evaluated and ascertained the nature and location of the required Work and the constraints and conditions affecting the Work, including the Project Site and surrounding locations (based on the Available Documents and a visible inspection of the Project Site and surrounding locations), the terms of the Contract Documents, and the applicable Standards of Performance in effect;
 - (B) investigated and reviewed the Available Documents, any other information provided by the DDC, and other available public and private records;
 - (C) familiarized itself with the Project Site including:
 - (1) its physical conditions, including all site conditions (including geotechnical, hydrological, ecological, environmental);
 - (2) normal and usual soil conditions, roads, the existence of obstacles to performing the Work;
 - (3) the availability of Utilities, topographical conditions and air and water quality conditions, the location and character of existing or adjacent work;
 - (4) any existing City Assets or structures;
 - (5) the surrounding locations and other general and local conditions (including equipment and labor), including the availability of access to, on, under and through each part of the Project Site and

the adequacy of the access with respect to the Project Site for the purposes of carrying out the obligations under this Agreement;

- (6) the precautions, times and methods of work necessary to prevent or, if it is not possible to prevent, to mitigate or reduce, any nuisance or interference, whether public or private, being caused to any third parties (based on the Available Documents, publicly-available information and a visible inspection of the Project Site and surrounding locations); and
 - (7) all other local and other conditions that may be material to the Design-Builder's performance of the Work (including transportation; seasons and climate; access, availability, disposal, handling and storage of materials and equipment; and availability and quality of labor).
- (iv) as a result of the evaluation, review, inspection, examination and other activities referred to in clause (iii), the Design-Builder confirms that each Design-Builder Party:
- (A) is familiar with and accepts the conditions and constraints and physical requirements of the Work; and
 - (B) has reasonable grounds for believing, and does believe, that the Work can be fully performed within the conditions, constraints and physical requirements.

4. PERFORMANCE SECURITY

4.1 Guarantee Agreement

If required as part of the qualifications of the Design-Builder for this Agreement, on or before the Agreement Date, the Design-Builder has provided the DDC with a Guarantee executed by the Guarantor, attached to the Agreement as Exhibit 4 (Form of *Guarantee Agreement*), in which the Guarantor guarantees all of the Design-Builder's obligations under this Agreement. If the Design-Builder is a limited liability company or a joint venture comprised of more than one Principal Participant, each Principal Participant may provide a Guarantee by its parent company or affiliate guarantor; provided that each Guarantee will guarantee all of the Design-Builder's obligations under this Agreement in the form required by the DDC.

4.2 Performance Bond and Payment Bond

On or before the Agreement Date, the Design-Builder has provided the DDC with performance and payment bonds in the amount set forth in Schedule A, issued by a Qualified Surety, which executed bonds are attached to this Agreement as Exhibit 8 (*Performance Bond and Payment Bond*) (the "**Performance Bond**" and the "**Payment Bond**"), and under which the City will be entitled to claim following any default of this Agreement by the Design-Builder.

5. COLLABORATIVE NATURE OF THE PROJECT

5.1 Cooperation of the Parties

- (a) Each Party must cooperate in Good Faith, at its own expense, with the other Party in the fulfillment of the purposes and intent of this Agreement. Neither Party will be under any obligation to perform any of the other Party's obligations under this Agreement.
- (b) Except to the extent expressly provided in this Agreement, the Design-Builder is responsible for coordination activities necessary to complete the Work in accordance with the Contract Documents.
- (c) If Other Contractors' work requires access to the Project Site, if requested by the Design-Builder, DDC will require Other Contractors seeking access to the Project Site to execute hold harmless agreements, in a form acceptable to DDC, in favor of the Design-Builder for any activities performed by Other Contractors on the Project Site. If the Design-Builder seeks access to adjacent or other sites controlled by Other Contractors, DDC may require the Design-Builder to execute a hold harmless agreement, in a form acceptable to DDC and at no additional cost to DDC, in favor of such Other Contractors.

5.2 Acknowledgement with Respect to Other Contractors and the City Operations

The Design-Builder acknowledges that:

- (a) the City may award, at any time, additional contracts to contractors, and other third parties for demolition, construction and other work at or near the Project Site, including any of the Other Contractors;
- (b) the City may be engaged in various activities, including construction, maintenance and operations associated with the ongoing operation and use of the City Assets; and
- (c) at all times it is essential that any of the Work and work performed by others does not interfere with the efficient functioning of any City Asset or Adjacent Property.

5.3 No Interference with Public or Operation of any City Asset

- (a) Except as expressly provided by this Agreement, the Design-Builder must not interfere and must ensure that its Subcontractors do not interfere with the efficient operation of, or public access to, or use of, any City Asset (including interfering with or causing delays to vehicular or pedestrian traffic) or transit facilities or Utility facilities and must ensure compliance with the applicable Standards of Performance at all times, including noise control and environmental standards established by the Project Requirements and Applicable Law.
- (b) If the DDC determines that the Design-Builder has interfered with or is interfering with the efficient operation of, or public access to, any City Asset (including interfering with or causing delays to vehicular or pedestrian traffic) or transit facility or Utility facility:
 - (i) the DDC may direct the Design-Builder to take such steps as the DDC determines are necessary to cease causing such interference (including directing the Design-Builder to remove or relocate any equipment or materials that are causing the interference); and
 - (ii) the Design-Builder must promptly comply with any direction given by the DDC under Section 5.3(b)(i).

- (c) Subject to Section 5.3(d), any direction given by the DDC under Section 5.3(b)(i) must be in writing and signed or given by the DDC Representative or their designee.
- (d) In the case of an Emergency, the DDC may issue an oral direction under Section 5.3(b)(i), which will be confirmed in writing by the DDC within a reasonable time thereafter. .
- (e) If the Design-Builder fails to promptly take the steps required by the DDC under Section 5.3(b)(i):
 - (i) the DDC may take the steps that it determines are necessary to remove or mitigate the applicable interference and will notify the Design-Builder in writing of the steps it has taken; and
 - (ii) the Design-Builder must promptly reimburse the DDC for all costs, that the DDC incurs in taking action under Section 5.3(e)(i). DDC will be entitled to deduct such amounts from payments otherwise due and owing to Design-Builder.
- (f) Any direction given by the DDC under this Section 5.3 will not entitle the Design-Builder to claim a Relief Event.

5.4 **Reserved**

5.5 **Reasonable Assistance**

- (a) The DDC will provide reasonable assistance to the Design-Builder in connection with the Design-Builder's obligations in connection with
 - (i) Design-Builder's negotiation of each Force Account, if the Agreement requires the Design-Builder to obtain such agreements, and/or cooperation from Railroad Owners in providing any necessary and agreed Force Account Work;
 - (ii) the negotiation of any agreements for utility relocation and the resolution of any disputes with all third parties owning Utilities in connection with such agreements;
 - (iii) Governmental Approvals required from non-City entities including, as appropriate, signing permit applications, attending public hearings and meetings, and providing the Design-Builder with existing relevant data and documents that are within the DDC's custody or control or are reasonably obtainable by the DDC and which are reasonably required for such purpose; provided, however, that the DDC's obligation to provide such reasonable assistance will be limited, in light of the Design-Builder's primary role in the permitting and development of the Project, only to those actions which are legally required to be taken by the DDC as permittee or co-permittee or which involve providing information which is in the possession of or reasonably obtainable by the DDC.
- (b) Any such assistance will be provided only upon the reasonable request of the Design-Builder made directly to the DDC, and the DDC will have no affirmative obligation independently to initiate or to provide such assistance. This covenant will not obligate the DDC to staff the Design-Builder's permitting or development efforts, to undertake any new studies or investigations with respect to the Project, or to affirmatively seek to obtain the agreements or permits required to be obtained by the Design-Builder under this Agreement.

6. **RESERVED****PART B – THE WORK**7. **PERFORMANCE OF THE WORK**7.1 **Scope of Work and General Obligations**(a) **Performance Generally**

In performing the Work, as further described in the Contract Documents, the Design-Builder, in addition to performing all other requirements in the Contract Documents must furnish all Design Work and Construction Work, including all engineering and other services, provide construction management, Quality Controls, Quality Assurance and quality management and all work, including all materials, equipment, labor, and installations, and undertake all efforts necessary or appropriate to construct the Project in accordance with the Project Requirements, so as to achieve Substantial Completion and Final Completion by the applicable Guaranteed Completion Date set out in this Agreement.

(b) **Requirements and Standards**

The Design-Builder must perform the Work in accordance with the following “**Standards of Performance**”:

- (i) the Project Requirements and all other requirements of the Contract Documents;
- (ii) Best Management Practice;
- (iii) the Applicable Standards;
- (iv) all Applicable Laws;
- (v) the requirements of all Governmental Approvals; and
- (vi) the orders, directions and requirements of the DDC.

(c) **Means and Methods**

The means and methods of performing the Work will be in the Design-Builder’s discretion in accordance with, and subject to, the terms of this Agreement.

(d) **Notice to Proceed**

Subject to registration pursuant to section 328 of the City Charter, this Agreement will become in full force and effect on the date set forth in the Notice of Proceed (the “**NTP Date**” and “**NTP**”, respectively) issued by the DDC. The NTP Date is the date the Design-Builder is authorized, subject to Section 7.3 (*Access to Project Site*) and Section 7.4 (*Commencement of Construction Work*), to commence all Work. Any Work commenced prior to the NTP Date will be at the Design-Builder’s risk and the Design-Builder will not be entitled to compensation under this Agreement until the NTP Date.

7.2 Design Work

(a) Generally

The Design-Builder must ensure that all Design Work is undertaken by qualified design professionals licensed as required by the Standards of Performance to perform the Work.

(b) PDC Approval

- (i) The Design-Builder acknowledges that prior to obtaining a permit to commence Construction Work the DDC may first be required obtain PDC's approval of the Design-Builder's Design Documents in accordance with Applicable Law and PDC's policies.
- (ii) The Work includes, without limitation, Design-Builder's preparation of materials for submission to PDC, presentation of the same and responses to PDC's questions, requests for additional information and back-up documentation, including any Design Work related to the same, all in accordance with the Project Requirements and Applicable Law.
- (iii) Changes to the Design-Builder's Design Documents may be proposed by PDC. If accepted by DDC, the Design-Builder may be directed to implement such changes in accordance with this Agreement or issue a DDC Modification Request to the Design-Builder in accordance with Section 24.3 (*Change Proposals, Design-Builder Proposal Costs*).
- (iv) If such changes cause a material delay to the Critical Path or increases Net Costs to the Design-Builder to implement, and in each case, is not otherwise required by this Agreement, DDC's direction will be deemed an Extra Work Directive and Design-Builder will be entitled to seek relief in accordance with Article 25 (*Relief Events*).

(c) Design Document Completion

The Design-Builder must ensure that the Final Design Documents, Release for Construction Documents and Record Drawings:

- (i) satisfy all the Project Requirements and Governmental Approvals; and
- (ii) are Signed and Sealed by the Designer of Record in accordance with the Standards of Performance.

7.3 Access to Project Site

(a) Project Site Access

Subject to the Design-Builder satisfying each of the requirements below, the DDC grants the Design-Builder and its Subcontractors a non-exclusive right to enter and access the Project Site or portions of the Project Site in accordance with the Project Requirements , subject to Section 7.4 (*Commencement of Construction Work*) for the sole purpose of performing the Work until Final Completion:

- (i) the Design-Builder has provided the DDC with certificates of insurance evidencing that it has procured, put in place and is maintaining in force, all insurances required

to be provided by the Design-Builder under this Agreement to access the Project Site and perform the relevant Work;

- (ii) the Design-Builder has delivered all Submittals required to be submitted to and approved or reviewed, as applicable, by the DDC to gain access to the Project Site, and, where approval is required, the DDC has approved these plans prior to the Design-Builder gaining access to the Project Site or the relevant portion of the Project Site, as applicable; and
- (iii) the Design-Builder has satisfied all other requirements in the Contract Documents necessary to commence the applicable Work on the portion of the Project Site requested in accordance with the Project Requirements.

(b) **Staging Area**

The Project Site is the only area the City will make available to the Design-Builder to perform the Work, including any equipment or material staging, office space or material storage.

(c) **General Site Access Requirements**

- (i) The Design-Builder's right of access to the Project Site will be subject to the Design-Builder complying with the Standards of Performance, certifications and all other requirements of this Agreement with respect to access (including the requirements in the Project Requirements with respect to security and being escorted, where applicable).
- (ii) This Agreement does not constitute a lease to the Design-Builder or a grant of any right, title, interest or estate in the Project or the Project Site.
- (iii) Any additional property that the Design-Builder requires for its performance of the Work (including, without limitation, additional staging or temporary lay-down areas) must be obtained at its own expense.
- (iv) DDC may identify, in the Project Requirements or at any time throughout the Work, areas adjacent to the Project Site for temporary access and use by the Design-Builder, solely in the discretion of DDC ("Temporary Access Areas"). The Design-Builder will be permitted to use only so much of the applicable portions of Temporary Access Areas as for the period and purposes identified by the DDC. To the extent the Design-Builder has completed any Work required to be performed on, or within, any Temporary Access Areas, the Design-Builder must vacate and return such Temporary Access Areas back to the DDC in a condition that it was in prior to the Design-Builder gaining such Temporary Access Areas. Temporary Access Areas are not part of the Project Site and DDC may grant access, revoke access or deny an extension of access in its absolute discretion. Such grant, failure to grant, revocation or denial of an extension will not be deemed a Relief Event.
- (v) The DDC may at any time make joint or exclusive assignments of particular portions of the Project Site to the Design-Builder or to others and may take over and use for other purposes any portions that, in the DDC's discretion, are not required for the Design-Builder's performance of the Work.

7.4 **Commencement of Construction Work**

The Design-Builder will not commence:

- (a) any physically intrusive or destructive site investigation Work (e.g. geotechnical borings, wall samplings, etc.) necessary to identify any unknown site conditions, until the Design-Builder has certified to DDC that it has satisfied any Standards of Performance and any conditions identified in the Project Requirements for gaining physical access to the Project Site;
- (b) any other portion of the Construction Work, until:
 - (i) the Site Safety Plan for the applicable Construction Work has been approved and the Design-Builder has designated a safety representative with the necessary qualifications and experience to supervise the implementation and monitoring of all safety precautions and programs related to the Site Safety Plan;
 - (ii) all applicable Governmental Approvals necessary to commence such Construction Work have been obtained;
 - (iii) any other requirements and conditions identified in this Agreement and Project Requirements necessary to commence performance of the applicable Construction Work have been satisfied; and
 - (iv) the Design-Builder has submitted a certification in writing that it has satisfied all of the above.

7.5 Title to Work Product

- (a) Other than Licensed Work Product, all Work Product, as applicable, will be considered “work-made-for-hire” within the meaning and purview of Section 101 of the United States Copyright Act, 17 U.S.C. § 101, and upon delivery of Work Product (excluding Licensed Work Product) to the DDC, the City will:
 - (i) own all rights, title and interest in the Work Product (free and clear of all Claims, liens, encumbrances, and security interests); and
 - (ii) all Intellectual Property in the Work Product.
- (b) To the extent that the Work Product does not qualify as “work-made-for-hire” for any reason and is not identified in the DB Proposal Commitments as Licensed Work Product, the Design-Builder irrevocably transfers, assigns and conveys exclusive copyright ownership in and to such Work Product to the City, free and clear of any liens, claims, or other encumbrances. The Design-Builder will retain no copyright or intellectual property interest in such Work Product. The Work Product will be used by the Design-Builder for no purpose other than in the performance of this Agreement without the prior written permission of the City. DDC may grant the Design-Builder a license to use the Work Product on such terms as determined by the DDC and as set forth in the license.
- (c) With respect to Licensed Work Product, the Design-Builder grants the City a nonexclusive, transferable, royalty-free, irrevocable, worldwide, fully paid up right and license to use, reproduce, modify, adapt, disclose to and sublicense to other persons engaged by or on behalf of the City (directly or indirectly) the Licensed Work Product and Intellectual Property in the Licensed Work Product. Except as limited below, the Design-Builder will continue to have a full and complete right to use any and all duplicates or other originals of its Licensed Work Product in any manner it chooses. The Design-Builder’s use of Licensed Work Product is limited as follows: The Design-Build may not use duplicates or originals of Licensed Work Product describing or depicting non-public, secure areas of the Project or

security features of the Project (except depictions of the outside of the facility that can be discerned by the general public) for any reason, except as permitted in writing by the DDC.

- (d) If requested by the DDC, the Design-Builder must (at no cost to the DDC) promptly execute all documents and perform all other acts that the DDC determines may be necessary (if any) to ensure that the City's right, title and interest in the Work Product are protected and enforceable.
- (e) The Design-Builder will promptly and fully report to the DDC any discovery or invention arising out of or developed in the course of performance of this Agreement.
- (f) The Design-Builder acknowledges that as a result of the rights conferred on the City under this Section 7.5, without limiting any other rights the City may have, the City may use, reproduce and publish, as applicable, the Work Product for any purpose and at any time without any obligation to notify, or seek permission from, the Design-Builder.
- (g) The Design-Builder represents and warrants that the Work Product: (i) is wholly original material not published elsewhere (except for material that is in the public domain); (ii) does not violate any copyright law; (iii) does not constitute defamation or invasion of the right of privacy or publicity; and (iv) is not an infringement, of any kind, of the rights of any third party. To the extent that the Work Product incorporates any non-original material, the Design-Builder has obtained all necessary licenses, permissions and clearances, in writing, for the use of such non-original material under this Agreement, copies of which will be provided to the DDC upon execution of this Agreement.
- (h) **City Reuse of Work Product**
 - (i) Other than Licensed Work Product, the City may use Work Product in any manner and for any reason, including on other projects or procurements. If Design Documents are re-used for any other project or procurement, the City will (where permitted or required by law) remove or completely obliterate professional stamps and seals on the documents placed by the Design-Builder or its Subcontractors.
 - (ii) The City's use of the Work Product for any other project or procurement (excluding this Project) will be at the City's risk and the Design-Builder:
 - (A) makes no representation or warranty that the Work Product is suitable for use on another project or procurement; and
 - (B) will not be liable for any Losses incurred by the City arising out of the use of the Work Product on any other project or procurement.
 - (i) In no case will this Section 7.5 apply to, or prevent the Design-Builder from asserting or protecting its rights in any discovery, invention, report, document, data, photograph, deliverable, or other material in connection with or produced pursuant to this Agreement that existed prior to or was developed or discovered independently from the activities directly related to this Agreement.

7.6 **Title to Construction Work**

- (a) Title to all Construction Work will pass to the City free and clear of all Claims, liens, encumbrances, and security interests upon the incorporation of the Construction Work into the Project, or upon the Design-Builder's receipt of payment for the Construction Work, whichever occurs first. Notwithstanding such title transfer, risk of loss of any Construction

Work or Work Product will remain with the Design-Builder until Substantial Completion of the Project.

- (b) If requested by the DDC, the Design-Builder must (at no cost to the DDC) promptly execute all documents and perform all other acts that the DDC determines may be necessary (if any) to ensure that the City's right, title and interest in the Construction Work passes to the City in accordance with Section 7.6(a).

7.7 Minor Waiver Requests

The Design-Builder may make a written request to the DDC in the form attached as Exhibit 10 (*Minor Waiver Request Form*) to make Minor Waivers to the Project Requirements consistent with the intent of the Contract Documents. Any such Minor Waiver request may only be implemented by the Design-Builder if such Minor Waiver request form attached as Exhibit 10 (*Minor Waiver Request Form*) is signed in writing by the DDC. All Minor Waiver requests must certify that such Minor Waiver (i) will not impair or diminish any Project Requirement, (ii) will not cause a delay to achieving any Guaranteed Completion Date and (iii) will not cause the City to incur any additional cost or expense to complete the Project. To the extent such Minor Waiver causes the Design-Builder to incur any additional cost or expense, the Design-Builder acknowledges that such costs and expenses are the sole responsibility of the Design-Builder and waives any right to seek reimbursement of any kind from the City. The Design-Builder will be responsible for all costs associated with the burden of proof that the proposed Minor Waiver is compliant with the terms of this Section 7.7. All such approved Minor Waiver requests are deemed part of the Contract Documents.

8. QUALITY ASSURANCE, QUALITY CONTROL, INSPECTION AND MONITORING

The Design-Builder is responsible for the quality of the Work and must develop, maintain and implement a quality management program in accordance with this Agreement and Best Management Practice. Subject to the warranty provisions in Part F (Warranties, Defects and Liability), prior to Final Completion, the Design-Builder must rectify, replace and fix any nonconforming Work discovered at any time during the Design-Builder's performance under this Agreement, to the reasonable satisfaction of the DDC.

9. SAFETY

9.1 General

In performing the Work, the Design-Builder must exercise, and must ensure that its Subcontractors exercise, every precaution to prevent injury to persons (including workers and members of the public) or damage to City Assets or any other property, as applicable. The Design-Builder assumes complete responsibility for implementing and monitoring all safety precautions and programs related to the performance of the Work, in accordance with the Site Safety Plan, Safety Standards, other requirements of this Agreement and Best Management Practices. The Design-Builder is required to comply with all safety compliance orders issued by DDC.

10. SITE & SCOPE VALIDATION

10.1 Inspection of Site Conditions

- (a) The Design-Builder must undertake all tests, inspections and investigations of the Project Site (including additional geotechnical evaluations, Hazardous Materials or Utility studies) as the Design-Builder deems necessary to perform its obligations under this Agreement.

- (b) The Design-Builder must provide the DDC promptly with copies of all reports or analyses generated by the Design-Builder's tests, inspections and investigations of the Project Site.

10.2 Scope Validation Period

(a) Generally

Subject to satisfying the requirements in Section 7.4(a), the Design-Builder may enter the Project Site for the purpose of undertaking tests, inspections and investigations of the Project Site (including additional geotechnical evaluations, Hazardous Materials or Utility studies) subject to complying with all security and other access requirements set out in this Agreement.

(b) Entitlement to an Allowance Payment Request or Change Order

- (i) If the Design-Builder identifies any Unknown Archaeological Remains, Unknown Endangered Species, Unknown Utilities, Unknown Hazardous Environmental Conditions, Unknown Physical Conditions or Unknown Geotechnical Conditions, subject to complying with Section 10.3 (*Discovery of Unknown site conditions*) below, it may request a Compensable Relief Event under Article 25 (*Relief Events*).
- (ii) The Design-Builder may only request a Compensable Relief Event under Article 25 (*Relief Events*) for any Unknown Geotechnical Condition or Unknown Physical Condition if the Design-Builder submits the applicable Initial Relief Event Notice before the end of the Scope Validation Period.
- (iii) The Design-Builder will not be entitled to a Compensable Relief Event, on the basis of the conditions or subsurface conditions at the Project Site described in Section 10.2(b)(ii) that are identified or discovered after the Scope Validation Period.

(c) Extension to Scope Validation Period

The Parties recognize that the Design-Builder may be unable to conduct the investigations contemplated by this Section 10.2 because it will not (without any fault of the Design-Builder) be permitted by the DDC to have access to certain areas or portions of the Project Site within the Scope Validation Period to perform reasonable and necessary investigations on, or within, portions of the Project Site. The Design-Builder must notify the DDC within fifteen days of the NTP Date of all non-accessible areas and the dates upon which these areas are expected to become accessible. If the DDC agrees that these areas are not-accessible, then, for the limited purpose of performing Project Site validation solely within such non-accessible areas, the Scope Validation Period will be extended for the period of time such areas were inaccessible, not to exceed the amount of time otherwise indicated in the definition of Scope Validation Period. If the DDC, acting reasonably, does not agree that these areas are non-accessible, then the Scope Validation Period will not be extended.

10.3 Discovery of Unknown Site Conditions

If at any time during the performance of the Work, the Design-Builder becomes aware of any Unknown Site Condition or has cause to suspect the presence of an Unknown Site Condition, the Design-Builder must:

- (a) where required to comply with its safety obligations:

- (i) promptly stop the Work affected by the Unknown Site Condition, secure the area against injury to persons or damage to property; and
 - (ii) promptly (but not later than two days) notify the DDC (verbally followed by written notification) of the Unknown Site Condition and the steps that the Design-Builder intends to take to comply with its safety obligations; and
- (b) where the Unknown Site Condition may lead to a claim for a Compensable Relief Event under Article 25 (*Relief Events*) or otherwise adversely impact the Work, promptly notify the DDC (verbally followed by written notice) and specify in any notification (in addition to meeting all the timing, notice and other applicable requirements set forth in Article 25 (*Relief Events*)):
- (i) the nature and location of the Unknown Site Condition; and
 - (ii) the impact that the Unknown Site Condition will have on the Work.

11. GOVERNMENTAL APPROVALS

11.1 Design-Builder Responsibility for Governmental Approvals

- (a) Except with respect to the DDC's responsibility for City Governmental Approvals set forth in Section 11.2 (*City Governmental Approvals*), the Design-Builder is responsible for diligently pursuing (exercising all reasonable diligence and efforts and affirmative coordination and communications in accordance with Best Management Practice in the City) and obtaining all Governmental Approvals (including any application, revision, modification, amendment, supplement, renewal or extension) required in connection with its performance under this Agreement, all at its sole cost and expense.
- (b) The Design-Builder must apply for, and submit or file any information required to obtain any Governmental Approval in its own name, and may only do so after obtaining written approval from the DDC for such application, submission or filing; provided, however, that if such Governmental Approval may only be held in the name of the DDC or other City department or entity (a "**City Name Only Governmental Approval**"), and the DDC has approved such action in advance, in writing, then any application or information may lawfully be submitted by the Design-Builder in the DDC's name.
- (c) The Design-Builder will be responsible for all Work necessary to prepare, submit and obtain the City Name Only Governmental Approvals. Notwithstanding Section 11.1(b), where identified by DDC, the Design-Builder may only submit applications or information for certain DDC Name Only Government Approvals for a Governmental Entity's review and approval through the DDC (and not directly) and the DDC will (subject to its review of such Submittal for completeness) submit applications or information for such City Name Only Governmental Approval on behalf of the Project. To the extent DDC believes any such City Name Only Governmental Approval should be corrected either before or after submission to any such Governmental Entity, the Design-Builder must promptly modify and re-submit such City Name Only Governmental Approval to DDC for its submission or re-submission, as applicable, to the relevant Governmental Entity. This process will continue until the applicable Governmental Entity issues a permit or approval of the City Name Only Governmental Approval. The Design-Builder should afford adequate time for this DDC review and submission in its Project Schedule.

11.2 City Governmental Approvals

- (a) The DDC is responsible for obtaining and maintaining any City Governmental Approvals required for the Project. The Design-Builder will provide reasonable assistance to the DDC in maintaining and obtaining any such City Governmental Approvals, including providing to the DDC information and documentation required to obtain any City Governmental Approvals reasonably requested by the DDC in connection with the applications for such City Governmental Approvals.
- (b) Subject to first receiving the DDC's prior written approval, the Design-Builder may seek and is responsible for obtaining any modifications, revisions, renewals, extensions, supplements or amendments to any City Governmental Approvals as may be necessary to reflect its Release for Construction Documents or means and methods in performing the Work.
- (c) If any necessary changes under Section 11.2(b) are not permitted by the applicable Governmental Entity issuing such City Governmental Approvals, the Design-Builder must, at its own risk of delay and cost and subject to the DDC's approval, revise or alter its Design Documents or means and methods, or both, as necessary to satisfy the requirements and conditions of the applicable City Governmental Approvals as directed by the Governmental Entity issuing such approval.
- (d) The Design-Builder must afford adequate time for the DDC to review any required amendments described in this Section.

11.3 **Copies of Applications, Governmental Approvals & Log of Governmental Approvals**

- (a) Within five Business Days after either (i) submitting an application or other information (including an amendment, revision, modification, supplement, renewal or extension) for, or obtaining, a Governmental Approval or (ii) receiving a request for information or other response to such application or information from a Governmental Entity, the Design-Builder must deliver to the DDC true and complete copies of any documents submitted to or received from a Governmental Entity with respect to such application or Governmental Approval.
- (b) The Design-Builder must prepare and maintain a log of all Governmental Approvals to be obtained by the Design-Builder and the status of each. The Governmental Approvals log must be included with periodic progress reports required by the Project Requirements.

12. **ENVIRONMENTAL COMPLIANCE**

12.1 **Environmental Requirements**

Where required by Applicable Law and any other applicable Standards of Performance, the Design-Builder must:

- (a) design and construct the Project so that it complies with, and can be operated in compliance with, all Environmental Requirements; and
- (b) perform the Work in compliance with all Environmental Requirements.

Unless otherwise expressly provided in this Agreement, the Design-Builder is responsible for all Environmental Requirements, including all associated costs, Losses, liabilities and damages and obtaining any surety bond or Governmental Approval or providing any financial assurance that may be required in connection with the Work.

12.2 Hazardous Materials

(a) General Obligations

As part of the Work, the Design-Builder is responsible for the management, treatment, handling, storage, monitoring, remediation, removal, transport and disposal of all Hazardous Materials that are encountered in, under or on the Project Site during performance of the Work, in each case so as to be in full compliance with all Standards of Performance and the Contract Documents.

13. SUBMITTALS

13.1 General

The terms and procedures in this Article 13 and the Project Requirements govern Submittals protocols to the DDC under this Agreement.

13.2 Limitations on the Design-Builder's Right to Rely

Nothing in this Article 13 or the Project Requirements (including any act or omission of the DDC under these provisions or any approval of or any comment to any Submittal by the DDC pursuant to this Agreement) will:

- (a) relieve the Design-Builder from the performance of its obligations under this Agreement and complying with the Project Requirements;
- (b) constitute acceptance by the DDC that the Work satisfies the requirements of this Agreement;
- (c) subject or cause the DDC to assume or acquire any liability or claims for any Work performed by the Design-Builder in connection with such Submittal; or
- (d) prevent the DDC from subsequently raising an objection or comment on a Submittal if the same objection or comment was not made by the DDC on a previous Submittal and the objection or comment is necessary to ensure compliance with this Agreement.

14. TIME FOR COMPLETION & LIQUIDATED DAMAGES

14.1 Times for Completion

The Design-Builder must achieve each of the Completion Milestones set forth in Schedule A on or before the corresponding "**Guaranteed Completion Date**".

14.2 Delays

Upon the earlier of either (i) the Design-Builder or the DDC becoming aware that there will be, or is likely to be, a delay in achieving any Guaranteed Completion Date or (ii) the aggregate payments actually paid by the DDC to the Design-Builder are at least 10% less than the aggregate payments that were planned to be paid to the Design-Builder in accordance with the Project Schedule and Schedule of Values (as updated for any agreed Relief Events, Allowance Approvals or Change Orders) (each a "**Early Warning Trigger**"), the Design-Builder must:

- (a) promptly (and in any event within fifteen days) after becoming aware of the delay or likely delay, notify the DDC in writing of the delay or likely delay;

- (b) if required by the DDC, prepare a Remedial Plan in accordance with Section 34.3 (*Remedial Plan for Design-Builder Default or Early Warning Trigger*); and
- (c) if requested by the DDC, convene a meeting between the DDC, the Design-Builder, Principal Participants, relevant Subcontractors and other parties requested by the DDC to discuss any likely or actual delay and the steps that may be taken by the Design-Builder to avoid or mitigate the length of the delay and its consequences.

14.3 **Liquidated Damages for Delays**

(a) **LD Rates**

If the Design-Builder fails to achieve completion by the Guaranteed Completion Date(s) or other deadline(s) set forth in Schedule A, the Design-Builder must pay daily liquidated damages to the DDC ("**Delay Liquidated Damages**"), at the applicable daily rates set forth in Schedule A.

14.4 **Accrual and Payment of Delay Liquidated Damages**

Liquidated damages payable under this Article 14 will accrue daily. Such amounts may be set off by the City against unpaid portions of the Contract Price as provided further in Article 22 (*Payment Provisions*).

The Design-Builder must continue to pay any Delay Liquidated Damages until Substantial Completion or other stated milestone has been achieved. In no event will the payment of Delay Liquidated Damages excuse the Design-Builder from its obligation to cause the applicable Guaranteed Completion Date to occur or the performance of any of its other obligations under this Agreement.

14.5 **Liquidated Damages not a Penalty**

The Parties, as sophisticated and experienced parties, acknowledge that:

- (a) it is difficult or impossible to determine with precision the amount of damages and Losses that would or might be incurred by the DDC as a result of the Design-Builder's delay in completing the Work on or before the applicable Guaranteed Completion Date or meeting other deadlines set forth in Schedule A;
- (b) the sums that are payable under this Article 14 (including any increase in sums due for extended delays) are in the nature of liquidated damages (and not a penalty), are fair and reasonable and represent a reasonable estimate of fair compensation for the damages and Losses that will be incurred by the City as a result of the Design-Builder's delay, including additional or increased costs and Losses; and
- (c) the additional costs and Losses associated with each of the items referred to in clause (b) increase and compound as time passes and also become substantially more complex to ascertain as time passes.

14.6 **Exclusive remedy**

The Delay Liquidated Damages payable under this Article 14 are the DDC's exclusive monetary remedy for the City's Losses with respect to the Design-Builder's delay in achieving the relevant Guaranteed Completion Date or other deadline set forth in Schedule A, but will not excuse the Design-Builder from liability for any other breach of its obligations under this Agreement and will

not preclude the DDC from exercising any other rights it has under this Agreement (including under Article 34 (*Design-Builder Default*)).

14.7 **Limitation on Liability**

(a) **LD Cap**

The maximum aggregate liability of the Design-Builder to the City for liquidated damages under this Article 14 (the “**LD Cap**”) is set forth in Schedule A.

(b) **Aggregate Limitation on Liability**

Subject to Section 14.7(c) (*Exclusions from Limitations on Liability*), the total, maximum aggregate liability of the Design-Builder to the DDC arising out of this Agreement will be limited to the amount set forth in Schedule A (the “**Aggregate Liability Cap**”).

(c) **Exclusions for Limitation on Liability**

The limitation of liability in this Section 14.7 will not apply to the following, and none of the following will be taken into account in determining whether the LD Cap or the Aggregate Liability Cap has been reached:

- (i) any liabilities or obligations to the extent that:
 - (A) the amount of such liabilities or obligations is paid from the proceeds of insurance maintained by the DDC or required to be maintained by the Design-Builder or any Design-Builder Party under this Agreement;
 - (B) an amount is paid by the Design-Builder but subsequently recovered by the Design-Builder from proceeds of insurance referred to in (A) above, or from the DDC or any third party (other than an entity providing insurance or a Design-Builder Party); or
 - (C) the same would have been recovered by the Design-Builder through such insurance if the Design-Builder or any Design-Builder Party had maintained the coverage required to be maintained by it under this Agreement, or if the Design-Builder or such Design-Builder Party had otherwise complied with its obligations under, and the limitations of, such insurance policies and diligently pursued the relevant insurance claim;
- (ii) liabilities that arise out of the Design-Builder’s indemnity obligations under this Agreement or any third-party claims associated with the Work or the performance by the Design-Builder or any Design-Builder Party of any obligations under this Agreement (including any third-party claims for any damage or destruction of property, death or personal injury or third-party Intellectual Property);
- (iii) liabilities that arise out of the intentional tortious act, gross negligence or fraud of the Design-Builder or any Design-Builder Party; or
- (iv) any costs, liabilities or obligations that arise from the Design-Builder’s abandonment of the Work or from a Design-Builder Default due to an Insolvency Event.

15. SUBSTANTIAL COMPLETION

15.1 Conditions to Substantial Completion

- (a) Substantial Completion will occur when all conditions to Substantial Completion (“**Substantial Completion Conditions**”) have been achieved as set out in the Project Requirements, a Punch List has been approved, and DDC has issued a written determination that the Project is substantially complete.

15.2 Substantial Completion Process

- (a) The Design-Builder must provide written notice to the DDC of the anticipated date for satisfying all the Substantial Completion Conditions no later than ninety days prior to the anticipated date, unless an earlier or later deadline is set forth in Schedule A. The notice must include a list of all Substantial Completion Conditions that will be satisfied to allow the DDC to issue a determination of Substantial Completion.
- (b) No later than sixty days prior to satisfying all of the Substantial Completion Conditions, the Design-Builder must meet and confer with the DDC to confirm that the list of requirements provided under Section 15.2(a) is in accordance with this Agreement. Following the initial meeting, the Design-Builder and the DDC will meet, confer and exchange information on a regular basis to allow the DDC to orderly and timely inspect and test the Project, review the Final Design Documents and final Construction Documents for the Project, and determine whether the Design-Builder has satisfied all of the Substantial Completion Conditions.
- (c) The Design-Builder must provide written notice to the DDC promptly after it has satisfied all the Substantial Completion Conditions, together with all supporting documents.
- (d) In connection with its determination of Substantial Completion, the DDC may add or remove items to or from the Punch List.

15.3 Partial Substantial Completion

- (a) In the DDC’s sole discretion, the Design-Builder may seek and the DDC may determine that discrete portions of the Project are substantially complete. All terms and conditions of Substantial Completion set forth in this Agreement will apply to that portion of the Work determined to be substantially complete, except as set forth below.
 - (i) Risk of loss will not transfer to the City under Section 32.18 (*No-Fault Restoration Obligations*) until Substantial Completion of the Project as a whole, except where the DDC determines that transfer of risk of loss is appropriate and reasonable, which determination must be expressly stated in DDC’s written determination of Substantial Completion for the applicable portion of the Work.
 - (ii) Where the portion of the Work deemed substantially complete includes Work, areas or equipment that will be used by the Design-Builder for or during remaining Work, including, without limitation, areas used for ingress and egress to the areas where Work remains to be performed, heating, ventilation and cooling systems and elevators, the warranty period for warranties required under Article 28 (*Warranties*) for such Work will be extended, such that the warranty provided for each such item of Work expires no earlier than the minimum time required by this Agreement as measured from the date of Substantial Completion of the Project as a whole.

15.4 Effect of Determination of Substantial Completion

Determination of Substantial Completion will not:

- (a) relieve the Design-Builder of its obligation to complete the remaining Work;
- (b) cause the DDC to incur Losses or claims for the Design-Builder's performance of the Work;
- (c) be construed to constitute an extension of the Design-Builder's time to complete the remaining Work;
- (d) release the Design-Builder from any obligations under this Agreement, including its obligations with respect to insurance coverage.

16. FINAL COMPLETION

16.1 Conditions to Final Completion

Subject to the certification to be countersigned by the DDC under Section 17.2(a), Final Completion will occur when all the following conditions ("**Final Completion Conditions**") have been satisfied:

- (a) Substantial Completion has been achieved for the Project;
- (b) all conditions to Final Completion have been achieved as set out in the Project Requirements;
- (c) the Design-Builder has certified, substantially in the form of Exhibit 6 (*Completion Certificates*), that all the Work has been completed in accordance with the requirements of the Contract Documents;
- (d) the Design-Builder's quality management lead, or other personnel approved by DDC, has certified, substantially in the form of Exhibit 6 (*Completion Certificates*), that testing and inspection procedures have been carried out in accordance with the Contract Documents; and
- (e) the Designer of Record has inspected and certified, substantially in the form of Exhibit 6 (*Completion Certificates*), that all the Work has been completed in accordance with the requirements of the Contract Documents.

16.2 Final Completion Process

- (a) The Design-Builder must provide written notice to the DDC of the anticipated date for Final Completion no later than twenty days prior to the anticipated date for satisfying all the Final Completion Conditions. The notice must include a list of all Final Completion Conditions that will be satisfied to allow the DDC to countersign the Certificate of Final Completion.
- (b) No later than ten days prior to satisfying all Final Completion Conditions, the Design-Builder must meet and confer with the DDC to confirm that the list of requirements provided under Section 16.2(a) is in accordance with this Agreement and provide a Certificate of Final Completion signed by the Design-Builder. Following the initial meeting, the Design-Builder and the DDC will follow the Completion Protocols until the DDC countersigns the Certificate of Final Completion, as set forth in Section 17.2(a).

17. COMPLETION PROTOCOLS

17.1 Inspection and Review

After receiving any Design-Builder notice under any of the following, as applicable: 15.2(c) (*Substantial Completion Process*) or 16.2(a) (*Final Completion Process*) (each a “**Completion Notice**”), the DDC will inspect the applicable portion of the Project seeking Substantial Completion or Final Completion, as applicable, review the applicable Final Design Documents, final Construction Documents, Record Drawings and other Submittals and conduct any other investigation as may be necessary to determine whether, as applicable, either (i) the Substantial Completion Conditions have been satisfied, or (ii) the Final Completion Conditions have been satisfied (collectively, the “**Completion Conditions**”).

17.2 Certification

Following each inspection referred to in Section 17.1 (*Inspection and Review*):

- (a) if the DDC determines that all of the applicable Completion Conditions have been satisfied, the DDC will, for Substantial Completion, issue a written determination that the Project is substantially complete and, for Final Completion, countersign, the Certificate of Final Completion delivered to the DDC by the Design-Builder under Section 16.2(b); or
- (b) if the DDC determines that any applicable Completion Condition has not been satisfied, the DDC will notify the Design-Builder in writing of the applicable Completion Conditions that have not been satisfied.

17.3 Disputes

- (a) The Design-Builder must notify the DDC if it disputes the DDC’s determination under Section 17.2(b) within ten days of receiving the DDC’s determination. If the Design-Builder does not notify the DDC of a dispute within that five-day period, the Design-Builder will be deemed to have accepted the DDC’s determination.
- (b) If the Design-Builder accepts or is deemed to have accepted the DDC’s determination under Section 17.2(b), the Design-Builder may resubmit (over one or more iterations) a Completion Notice once all the applicable Completion Conditions have been satisfied (and Section 17.1 (*Inspection and Review*) will apply to that resubmission).
- (c) If the Design-Builder issues a notice under Section 17.3 (*Disputes*) and the Parties fail to resolve the dispute within a further fourteen days of that notice, the matter will be resolved in accordance with Article 40 (*Dispute Resolution Procedure*).

PART C – CONTRACTING PRACTICES AND PERSONNEL

18. PERSONNEL

- (a) The Design-Builder must retain, employ and utilize (or where applicable, must ensure that the relevant Key Subcontractor retains, employs and utilizes) the individuals specifically listed as Key Personnel in Exhibit 3 (*Design-Builder Proposal Commitments*) (or any replacements approved in accordance with Part C (*Contracting Practices and Personnel*)) of this Agreement to fill the corresponding positions until all responsibilities of that position have been completed.
- (b) The Design-Builder will not have anyone perform work under this Agreement who is not competent, faithful, and skilled in the work for which they will be employed. Whenever the DDC will inform the Design-Builder, in writing, that any individual is, in DDC’s opinion, incompetent, unfaithful, or unskilled, such individual will no longer perform work under this Agreement. Prior to making a determination to direct the Design-Builder that an individual will no longer perform work under this Agreement, the DDC will provide the Design-Builder

an opportunity to be heard on no less than five days' written notice. The DDC may direct the Design-Builder to prohibit the individual from performing work under the Agreement pending the opportunity to be heard and the DDC's determination.

19. **SUBCONTRACTING**

19.1 **Subcontracting**

- (a) For each proposed Subcontractor at any-tier, the Design-Builder must:
 - (i) submit information required to register such Subcontractor in the Payee Information Portal, including the name and address of the proposed Subcontractor; the portion of the Work and materials which it is to perform and furnish; the maximum Subcontract value and the start and end date of the Subcontract; and
 - (ii) where the applicable Subcontract (or all Subcontracts with the same Subcontractor for the Project in the aggregate) has a value of more than \$100,000 or if otherwise required by the DDC, the Design-Builder must:
 - (A) obtain DDC's prior approval of such Subcontractor prior to such Subcontractor commencing any Work under this Agreement; and
 - (B) where the Subcontract (or all Subcontracts with the same Subcontractor for the Project in the aggregate) has a value of more than \$250,000 in addition to the information in (i) above, must digitally submit through the Procurement and Sourcing Solutions Portal ("**PASSPort**") disclosure filings and any other information required by DDC necessary to demonstrate that the proposed Subcontractor has the necessary facilities, skill, integrity, past experience, and financial resources to perform the Subcontracted Work in accordance with the terms and conditions of this Agreement and the applicable Subcontract;
- (b) All Subcontractors providing services covered by this Agreement pursuant to a Subcontract with a value of \$100,000 or less are approved.
- (c) For proposed Subcontracts with a value of \$250,000 or less, not including Subcontractors approved in accordance with subsection (b), above, DDC's approval will be deemed granted if DDC fails to issue a written approval or determination of ineligibility within 45 days of DDC's receipt of a complete written application for approval.
- (d) The Design-Builder may not commence any applicable Work with any Subcontractor unless the Design-Builder has complied with the obligations under this Section 19.1. The Design-Builder must provide a copy of any draft or executed Subcontract at any-tier upon request by the DDC. DDC and the Design-Builder may agree on limited redactions to protect confidential information contained in each Subcontract, except that in no event will DDC be required to treat the amounts payable to Subcontractors by the Design-Builder for Work performed or to be performed under this Agreement as confidential.
- (e) Any Subcontractor may be deemed as ineligible by DDC (in its sole discretion), in which case the Design-Builder must perform the Work itself or through other approved or permitted Subcontractors.
- (f) DDC may revoke the approval of any Subcontractor granted or deemed granted pursuant to this Agreement at any time if revocation is deemed to be in the interest of the City. Without limiting any rights of DDC under Applicable Law or this Agreement, DDC will

provide the Design-Builder with a written determination of revocation, including reasons for such revocation, on no less than 10 days' notice unless a shorter period is warranted by considerations of health, safety, integrity issues, or other similar factors. The Design-Builder may request an opportunity to be heard to respond to DDC's determination. Upon the effective date of such revocation, the Design-Builder will cause the Subcontractor to cease all work under the Agreement. The City will not incur any further obligation for services performed by such Subcontractor pursuant to this Agreement beyond the effective date of the revocation.

- (g) The Design-Builder must retain or cause to be retained only Subcontractors that are qualified, experienced and capable of performing the portion of Work to be performed by that Subcontractor at least in accordance with Best Management Practice.
- (h) The Design-Builder will be fully responsible under this Agreement for the acts and omissions of all Subcontractors performing any work or services in relation to the Work, as if they were the acts and omissions of the Design-Builder.
- (i) The DDC's approval of a Subcontractor will not relieve the Design-Builder of any of its responsibilities, duties, and liabilities under this Agreement. The Design-Builder will be solely and fully responsible to the City for the acts, omissions or defaults of its Subcontractor and of such Subcontractor's officers, agents, and employees.
- (j) Nothing in this Agreement will create any contractual relationship between the City and any Subcontractor (or any of its employees).
- (k) No Subcontract entered into by any Design-Builder Party will impose any obligation or liability upon the City to any Subcontractor (or any of its employees).
- (l) The City will not be responsible to the Design-Builder for any Losses it incurs that are caused, in whole or in part, by any Subcontractor (or any of its employees).

19.2 Key Subcontracts

The Design-Builder must not, without the prior written consent of the DDC:

- (a) terminate or agree to terminate all or any part of a Key Subcontract, except in accordance with its terms;
- (b) enter into (or permit the entry into by any other person of) any agreement replacing a Key Subcontract;
- (c) amend or vary any Key Subcontract in any material respect, other than to the extent required to comply with any amendment of this Agreement or pursuant to Change Orders implemented in accordance with this Agreement; or
- (d) permit the assignment by the Key Subcontractor of any of its rights and obligations under the Key Subcontract.

19.3 Required Subcontract Provisions

The Design-Builder must ensure that every Subcontract is in writing and includes:

- (a) a requirement that the Subcontractor carry out the Work in accordance with the applicable Standards of Performance and the terms, conditions and standards set forth in this Agreement to the extent applicable to Work performed by the Subcontractor;

- (b) a covenant to maintain all Governmental Approvals for the performance of the applicable Work (other than City Governmental Approvals) and comply with all Governmental Approvals applicable to the Project Site or the Work;
- (c) customary representations, warranties, guaranties, performance security (if applicable) and liability provisions of the Subcontractor in accordance with Best Management Practice for work of similar scope and scale;
- (d) a requirement that the Subcontractor obtain and maintain in force any insurance coverages as are described in this Agreement and which are applicable to the Subcontractor (or if such requirement is not specified in this Agreement, then in accordance with Best Management Practice for work of similar scope and scale) and to comply with all applicable insurance requirements under Article 32 (*Insurance & Restoration*);
- (e) a requirement that any Subcontractor participate in meetings between the Design-Builder and the DDC (if participation is required by this Agreement or as otherwise requested or approved by the DDC) concerning matters pertaining to the Subcontractor, their Work or the coordination of their Work with others working at the Project Site, including any meetings required under the Project Requirements. All direction to the Subcontractor must be provided by the Design-Builder but nothing in this Agreement will limit the authority of the DDC to give any direction or take any action as it believes is necessary to remove an immediate and present threat to the safety of life or property;
- (f) a requirement that the Subcontractor participate in any dispute resolution proceeding pursuant to this Agreement if either the DDC or the Design-Builder request the Subcontractor's participation;
- (g) without cost to the DDC, a provision that expressly permits assignment to the DDC, or its successor, assignee or designee, of all Design-Builder's rights under the Subcontract contingent only upon delivery of a written request from the DDC in accordance with this Agreement, allowing the DDC or its successor, assignee or designee to assume the benefit of the Design-Builder's rights with liability only for those remaining obligations of the Design-Builder accruing after the date of assumption, the assignment to include the benefit of all Subcontractor warranties, indemnities, guarantees and performance security (if any), and expressly stating that any acceptance of assignment of any Subcontract, by the DDC, or its successor, assignee or designee, will not operate to make the DDC, or its successor, assignee or designee, responsible or liable for any breach of any Subcontract, by the Design-Builder or for any amounts due and owing under any Subcontract, for work or services rendered prior to the effective date of the assignment to, and assumption of, the Subcontract by the DDC, it being understood that no such assignment or assumption will release or discharge the Design-Builder of liabilities or obligations (including, without limitation, amounts due and owing under any Subcontract) accrued by the Design-Builder;
- (h) a covenant, expressly stated to survive termination of the Subcontract, to promptly execute and deliver to the DDC or its successor, assignee or designee a new contract between the Subcontractor and the DDC or its successor, assignee or designee on the same terms and conditions as the Subcontract, if (A) the Subcontract, is rejected in bankruptcy or is wrongfully terminated by the Design-Builder and (B) the DDC delivers to the Subcontractor written request for the new contract within 60 days following termination or expiration of this Agreement;
- (i) a requirement that the Subcontractor will comply with the applicable provisions of Article 41 (*Records and Audit*);

- (j) a requirement that the Subcontractor will indemnify and hold harmless the Indemnified Parties as indemnitees with an equivalent indemnity as required of the Design-Builder under this Agreement, with direct rights of enforcement, in any defense,
- (k) a requirement for an acknowledgement, with each payment received, on DDC's standard form, as provided to the Design-Builder;
- (l) (A) the right of the Design-Builder to terminate the Subcontract upon any termination of this Agreement or (B) an acknowledgement that the Subcontract automatically terminates upon any termination of this Agreement, in each case without liability of the DDC for the Subcontractor's lost profits or business opportunity, but subject to the right of the DDC to request a new contract as provided above;
- (m) a requirement that nothing contained in the Subcontract will impair the rights of the DDC;
- (n) a requirement that nothing contained in the Subcontract or this Agreement will create any contractual relationship between the Subcontractor and the DDC;
- (o) (A) a requirement that the Subcontractor comply, and cause its Subcontractors to comply, with the Project Labor Agreement and (B) compliance, monitoring and enforcement provisions consistent with the Project Labor Agreement;
- (p) provisions naming the DDC as a third-party beneficiary of (A) all Subcontractor representations and warranties contained in the applicable Subcontract and (B) each of the provisions identified in clauses (a) through (o) above incorporated in the Subcontract;
- (q) a requirement that the prevailing wage rates and supplemental benefits must be paid in accordance with Labor Law Section 220;
- (r) every Subcontract (or all Subcontracts with the same Subcontractor for the Project in the aggregate) in excess of fifty thousand dollars must provide that pursuant to the requirements of Section 6-123 of the City Administrative Code the Subcontractor must not engage in any unlawful discriminatory practice as defined in Title VIII of the Administrative Code (Section 8-101 et seq); and
- (s) language that expressly provides that any purported amendment with respect to any of the foregoing matters set forth in clauses (a) through (r) above without the prior written consent of the DDC will be void ab initio and of no force and effect.

19.4 **No Liability**

Notwithstanding the incorporation in any Subcontract any of the above, and notwithstanding any rights the City may have reserved to itself, the City will have no liabilities or obligations of any kind to any Subcontractor engaged by the Design-Builder or for any other matter in connection with the relevant Subcontract, and the Design-Builder releases and discharges the City of and from any and all such liability and obligations (excepting only those risks, responsibilities, costs and expenses arising from the gross negligence or intentional tortious act of the City or any of its officials, employees and agents).

20. **NEW YORK CITY LEGAL AND PUBLIC POLICY REQUIREMENTS**

(a) **DDC Legal and Policy Requirements**

The Design-Builder must perform, and must ensure that its Subcontractors perform, the Work in compliance with the requirements set forth in Exhibit 9 (*Standard Legal and Public Policy Requirements*).

(b) **M/WBE Requirements**

The Design-Builder must (i) meet the M/WBE Goals defined in Exhibit 7 (*M/WBE Requirements*), (ii) comply with all other requirements in Exhibit 7 (*M/WBE Requirements*), and (3) fulfill any additional commitments provided by the Design-Builder in Exhibit 3 (*Design-Builder Proposal Commitments*), all to ensure a successful M/WBE hiring program in its delivery and performance of the Work.

(c) **Project Labor Agreement**

As required by the Rikers Island Jail Complex Replacement Act or the New York City Public Works Investment Act, as applicable, the Project and all applicable Work performed under this Agreement will be subject to the Project Labor Agreement included with the Reference Documents.

(d) **Continuation of Work**

Whenever any labor strike, slowdown, work stoppage, picketing or other labor action that might interfere with the performance of this Agreement, or with other City contracts or the operation of any City facility at the Project Site or at any other City Asset as a result of the Design-Builder's (or its Subcontractor's) performance under this Agreement, the Design-Builder must pursue all remedies that are appropriate and available to avoid any interference to the Project, the DDC or the efficient operations of any City Asset, all in accordance with, and subject to, the Project Labor Agreement.

PART D – CONTRACT PRICE AND PAYMENTS

21. **CONTRACT PRICE**

21.1 **Contract Price**

As consideration to the Design-Builder for the full and complete performance of the Work, the DDC will pay, and the Design-Builder will accept, the “**Contract Price**” which consists of:

- (a) a firm, fixed-price, lump sum equal to the amount set forth in Schedule B (the “**Lump Sum Amount**”) to be paid in accordance with Article 22 (*Payment Provisions*); and
- (b) all Allowances identified in this Agreement, amounts for which are identified in Schedule B, subject to, and in accordance with Section 21.4 (*Allowances*), to be paid in accordance with Article 22 (*Payment Provisions*).

21.2 **Total Compensation**

The Contract Price is the total compensation for all the Design-Builder's costs and risks for performing the Work, including all costs for:

- (a) all Allowance Work, subject to, and in accordance with Section 21.4 (*Allowances*) and Article 22 (*Payment Provisions*);
- (b) Subcontractors, equipment, materials, labor, transportation and services;
- (c) any royalties or licensing or other fees with respect to any Intellectual Property rights;

- (d) obtaining, maintaining and complying with Governmental Approvals;
- (e) taxes and any increase in taxes, including corporate taxes, sales taxes, use taxes, taxes on all equipment, materials, labor and services;
- (f) any duties, fees and royalties imposed with respect to any equipment, materials, labor or services;
- (g) subject to payment for any Approved Materials, completion of the Work as required in this Agreement; and
- (h) all the Design-Builder's performance of any Work during the Warranty Period or to correct any latent defects or non-conforming Work.

21.3 No Adjustments to the Contract Price

Except for any adjustment to the Contract Price in accordance with Articles 24 (*Allowance Approvals, Change Orders and Extra Work Directives*) and 25 (*Relief Events*):

- (a) the Contract Price will not be adjusted; and
- (b) as a result, the Design-Builder is solely responsible for any costs it incurs in excess of the Contract Price.

21.4 Allowances

The Contract Price includes Allowances, for which the Design-Builder may request an Allowance Payment Request in accordance with, and subject to, the terms and conditions of the subject Allowance.

- (a) The Contract Price includes a “**Compensable Relief Event Allowance**” in an amount set forth in Schedule B, which may be disbursed by the DDC to the Design-Builder for the following:
 - (i) the Net Cost of any Compensable Relief Event approved under an Allowance Approval determined in accordance with Article 24 (*Allowance Approvals, Change Orders and Extra Work Directives*); and
 - (ii) to reimburse the Design-Builder for DDC's share of the fees and expenses required to be paid to the Disputes Review Board for performing its services under and in accordance with this Agreement;
- (b) Additional Allowances may be identified in the Project Requirements, including terms and conditions for each Allowance. The amount of each Allowance included in the Contract Price is identified in Schedule B.
- (c) The Design-Builder's entitlement to seek payment under any Allowance will be subject to submission of a compliant Payment Request and compliance with Section 24.1 (*Allowance Approvals*).

21.5 Allowance Contract Price Adjustment

Whenever amounts due for any Allowance Work or Compensable Relief Events exceeds the applicable Allowance funding, the Design-Builder will cooperate with the DDC to execute a Change

Order in accordance with Section 24.2 (*Change Orders*) to adjust the Contract Price to cover amounts due and owing to the Design-Builder.

22. PAYMENT PROVISIONS

22.1 Progress Payments

(a) Progress Payments

Subject to the Design-Builder satisfying the requirements in this Agreement, the DDC will pay the Contract Price by making progress payments to the Design-Builder of the undisputed amounts owed to the Design-Builder under this Agreement (“**Progress Payments**”). The Design-Builder must submit an accurate and complete Payment Request in writing to the DDC that satisfies the requirements in Section 22.2 (*Payment Request*), in an amount corresponding to:

- (i) Progress Payments for Work performed by the Design-Builder; plus
- (ii) any Allowance Approvals; plus
- (iii) any other amounts owed by the DDC under this Agreement, less
- (iv) any undisputed amounts owed by the Design-Builder under this Agreement to the DDC.

(b) Payment for Work Performed

Subject to the Design-Builder satisfying the requirements in this Agreement, the DDC will pay Progress Payments to the Design-Builder based on (i) the Design-Builder's percentage completion of each item listed in the Schedule of Values, (ii) each unit of Unit Price Work actually performed in accordance with the Contract Documents, and (iii) any other amount expressly approved by the DDC in writing, in each case, which is due and payable to the Design-Builder.

(c) Mobilization Payment

Notwithstanding Section 22.1(b) and subject to any requirements set forth in the Project Requirements, the Design-Builder may submit a Payment Request for the line item in the Schedule of Values identified as the “**Mobilization Payment**” on or after the NTP Date. Subject to registration of the Agreement as set forth above, the DDC will review and pay the Mobilization Payment (without taking any Retainage Amount) no later than fifteen Business Days after receipt of a Payment Request deemed complete by the DDC.

(d) Stored Materials

Except as permitted in accordance with Section 22.3 (*Payment for Stored Materials*), the Design-Builder must not include in any Payment Request any costs for material secured and stockpiled for future use on the Project. Only materials that have been incorporated in the Work may be included in a Payment Request.

22.2 Payment Request

The Design-Builder's Payment Request must include:

- (a) information regarding the Work completed in the immediately preceding payment period as well as specifying the percentages of the various divisions of Work included in the Schedule of Values actually completed at the time of certification;
- (b) a certification that the Design-Builder has performed the applicable elements of the Work required to receive the Progress Payment in accordance with the terms of this Agreement;
- (c) reasonable documentary evidence of the performance of the applicable elements of the Work, sufficient for the DDC to reasonably determine that the Design-Builder's performance has occurred, and payment is due;
- (d) all executed Allowance Approvals, as applicable and an accounting of the cumulative amounts of any Allowances expended to date;
- (e) all executed Change Orders relevant to the applicable Payment Request;
- (f) certifications from the Design-Builder as, and substantially in the form, set forth below:
 - (i) A statement signed by the Design-Builder Representative or other personnel authorized to certify on behalf of the Design-Builder and approved by DDC, certifying the following:
 - (A) That the Design-Builder certifies that all items, services and prices of Work shown in the Payment Request are correct; that all Work has been performed in compliance with of the Agreement; that the amounts stated in the Payment Request are a true and correct statement of the Agreement account up to and including the last day of the period covered by the Payment Request and that no part of the amount requested has been received.
 - (ii) A statement signed by the Designer of Record, or other personnel approved by DDC, certifying the following for Work covered by the Payment Request:
 - (A) The undersigned certifies that all Design Work has been prepared in accordance with the Contract Documents and all design review comments have been resolved, except as noted in the payment request;
 - (B) To the extent that special inspections were required for the Work covered by this payment request, I have identified all of the special inspections and tests required for compliance with the applicable codes and certify that the special inspections and approved agencies engaged to supervise the Work specified above are acceptable;
 - (C) I have reviewed the Design-Builder's documentation and all inspection reports, and as far as I deemed it necessary, conducted periodic inspections and have found no discrepancy between the approved construction documentation and the Work as designed;
 - (D) based upon the statements by the Design-Builder and the Design-Builder's quality lead as set forth herein and our review of inspection reports, all the Work covered by this payment requisition has been

witnessed and inspected by all responsible parties, including my office, in accordance with the Contract Documents; and

- (E) based on these inspections, our periodic inspections, and our review of inspection reports, all special inspection and test reports have been completed and accepted by my office and, to the best of my knowledge, information and belief, all Work covered by this payment request has been completed in compliance with Applicable Law, as well as the requirements of the Contract Documents (including all applicable Submittals and Release for Construction Documents).
- (iii) A statement signed by the Design-Builder's lead quality management personnel, or other personnel approved by DDC, certifying the following for Work covered by the Payment Request:
 - (A) The undersigned certifies that Work covered by the Payment Requisition, including all Design Work and Construction Work has been checked and/or inspected by the Design-Builder's quality control personnel, that all documentation regarding this quality control effort is in place, including but not limited to materials testing reports, and that all Work, except as specifically noted, conforms to the requirements of the Agreement; and
 - (B) That the quality assurance and quality control measures and procedures required under the Agreement have been followed, except as specifically noted.
- (g) the Monthly Progress Report for the immediately preceding month;
- (h) a verified statement in the form prescribed by the City Comptroller setting forth the information required under Labor Law Section 220-a;
- (i) a statement of any back charges and credits that the DDC is entitled;
- (j) statement of payments to Subcontractors;
- (k) certified payroll forms for the immediately preceding month; and
- (l) any other certifications or additional or supporting information as may be reasonably requested by the DDC.

22.3 **Payments for Stored Materials**

- (a) The Design-Builder may, as approved by the DDC, include as part of any Payment Request, the cost for any Approved Materials stored off the Project Site and pending incorporation in the Work, only if the Design-Builder satisfies the requirements in this Section 22.3 (*Payments for Stored Materials*).
- (b) The Design-Builder's right to seek payment for Approved Materials stored off the Project Site is subject to all of the following conditions being satisfied:
 - (i) the Approved Materials must have a minimum cost of \$250,000 and be in a condition ready for installation into the Project without further fabrication or processing, and must be materials that will be stored for a minimum of sixty days;

- (ii) the Approved Materials must be stored in a bonded warehouse located in the continental United States (a “**Warehouse**”) and that is approved in writing by the DDC. The Warehouse must be capable of storing any Approved Materials in accordance with standard industry practice for the type, quantity and size of Approved Materials being stored;
- (iii) the Approved Materials must be stored in a manner consistent with the Approved Materials’ manufacturers’ recommendations in order to ensure that the Approved Materials are sufficiently protected, and all manufacturers’ warranties remain unimpaired;
- (iv) the Approved Materials must be individually marked and identified in a conspicuous manner and in accordance with standard industry practice, as “Property of the City of New York – Contract [_____]”;
- (v) the Approved Materials must be available for the DDC to inspect at the Warehouse, at any time, as reasonably requested by the DDC;
- (vi) the Design-BUILDER must submit to the DDC, as part of the relevant Payment Request, certified and itemized Warehouse receipts for the Approved Materials stored. Such receipts must be in the name of the City of New York and must be in a form approved by the DDC. The receipt must be accompanied by invoices or other documentation verifying the cost of the stored Approved Materials. Following the initial submission, the Design-BUILDER must submit to the DDC a monthly update of the itemized inventory statement as part of each subsequent Payment Request. The updated inventory statement must show additional Approved Materials received and stored, along with supporting documentation, and Approved Materials removed from storage since the last certified inventory statement;
- (vii) the Design-BUILDER must provide the DDC all documents necessary and requested by the DDC to evidence the transfer of title to the Approved Materials to the DDC, including bills of sale and the affidavits of title in forms acceptable to the DDC;
- (viii) the Design-BUILDER must submit a certification that all off-site Approved Materials have been inspected in accordance with the Project Requirements; and
- (ix) the Design-BUILDER must deliver to the DDC a material delivery and storage plan (a “**MDS Plan**”) for the DDC’s approval. Once the MDS Plan is approved, the Design-BUILDER may then store Approved Materials only in a manner consistent with the approved MDS Plan. The Design-BUILDER’s MDS Plan must include:
 - (A) the name and location of the bonded Warehouse(s);
 - (B) a detailed description of the conditions of storage;
 - (C) a detailed description of the Approved Materials stored and duration of such storage;
 - (D) any plans for inspection and testing; and
 - (E) a description of all fees associated with storage, inspections, maintenance, testing, moving and any other kinds of expenses associated with off-site storage, and

in approving such a plan, the DDC will advise the Design-Builder of any requirements for the DDC's presence during the movement of items to or from any Warehouse.

- (c) The Design-Builder retains the risk of loss for any Approved Materials stored at a warehouse. If any of the Approved Materials stored in a warehouse are lost or become damaged, the Design-Builder must repair or replace them at no additional cost to the DDC. If a Progress Payment has been paid prior to any damage or loss, the amount so allowed or a proportionate part of the amount, will be withheld from subsequent Progress Payments until satisfactory repairs or replacement have been made.
- (d) The making of Progress Payments with respect to any stored Approved Materials will not be deemed to be final acceptance by the DDC of those Approved Materials, nor will it relieve the Design-Builder of its responsibility for those Approved Materials.

22.4 Parties Review, Confirmation and Approval of Payment Request

(a) Payment Request Completeness Determination

- (i) Except with respect to a final Payment Request subject to DBA 22.10, within fifteen days of the DDC's receipt of any Payment Request, the Parties will meet to discuss the contents of such Payment Request and the DDC will advise the Design-Builder in writing whether the Payment Request is complete or if any aspects are non-conforming to the requirements in this Agreement.
- (ii) To the extent any aspects of a Payment Request are incomplete or non-conforming, the Design-Builder must promptly (but no later than three days unless a longer period is agreed) resubmit the entire Payment Request. This process will continue until the DDC has informed the Design-Builder in writing that any Payment Request is complete.

(b) Approval

- (i) Payment Requests are subject to engineering audit by the EAO and review by DDC's Chief Financial Officer, or their designees.
- (ii) Upon receiving a completed Payment Requisition, the DDC will either approve or reject all or any portion of the amount requested by the Design-Builder in any Payment Request.
- (iii) The DDC may reject all, or any portion of, any Payment Request if the DDC disputes that such amount is payable and owing to Design-Builder pursuant to the terms of this Agreement
- (iv) Upon receipt of any rejection of any portion of a Payment Request, the Design-Builder must promptly (but no later than five days from such rejection) re-submit the applicable Payment Request.
- (v) Any continued dispute concerning any Payment Request may, following the DDC's rejection of all, or any portion of, the Design-Builder's second submission of a Payment Request, be resolved in accordance with Section 22.6 (*Disputes*).

22.5 DDC Payment of Payment Requests

- (a) Within thirty days of the DDC accepting a Payment Request under Section 22.4(b), the DDC will pay the Design-Builder the undisputed amount payable under such Payment Request minus:
- (1) an amount equal to the Retainage Percentage of that undisputed amount; and
 - (2) any amounts the DDC is entitled to withhold under Section 22.7 (*DDC's Right to Setoff*) and 22.9 (*Withholding*).
- (b) The thirty-day period for the DDC's payment will begin when the DDC Project Manager or other authorized DDC representative certifies on the Payment Requisition that the Work has been accepted.
- (c) No Progress Payment or other payment to the Design-Builder or any use of the Project by the DDC will be deemed to constitute an acceptance of any of the Work or relieve the Design-Builder of any of its obligations or liabilities with respect to the Project or the Work, as provided in this Agreement.

22.6 Disputes

- (a) Within seven days of receiving the DDC's determination under Section 22.4 (*Parties Review, Confirmation and Approval of Payment Request*) the Design-Builder must notify the DDC if it disputes any determination by the DDC to reject all or any portion of a Payment Request. If the Design-Builder does not notify the DDC of a dispute within that seven-day period, the Design-Builder will be deemed to have accepted the DDC's determination, including without limitation any amounts deducted.
- (b) If the Design-Builder notifies the DDC of a dispute in accordance with Section 22.6(a), the Design-Builder and the DDC will meet to seek to resolve the dispute. If the DDC and Design-Builder agree that all or a portion of the previously rejected amount is payable, the Design-Builder must request payment for such amounts in the following Payment Request and DDC will pay the agreed amount to the Design-Builder minus an amount equal to the Retainage Percentage of that agreed amount pursuant to Section 22.8 (*Retainage*).
- (c) If the DDC and the Design-Builder fail to resolve the dispute within twenty days of the Design-Builder's notice of dispute under Section 22.6(a), the matter will be referred to the Dispute Resolution Procedures.
- (d) If any amount is determined in accordance with the Dispute Resolution Procedures to be payable by the DDC, then within thirty days following receipt by DDC of a written requisition (together with all supporting documentation), the DDC will pay the determined amount to the Design-Builder minus an amount equal to the Retainage Percentage of that determined amount.

22.7 DDC's Right to Setoff

Where any amounts are due and payable by the Design-Builder to any Indemnified Party under this Agreement, including any liquidated damages payable under Article 14 (*Time for Completion, Liquidated Damages*), the DDC may deduct and set-off against any payment due and payable from the DDC to the Design-Builder under this Agreement.

22.8 Retainage

- (a) **Retainage Percentage.**

As security for the Design-Builder's performance of its obligations under this Agreement, either: (i) the Design-Builder must post a retainage bond, letter of credit or other liquid security, in a form, and by an issuer, as may be approved by the DDC in an amount equal to 5% (the "**Retainage Percentage**") of the Lump Sum Amount or (ii) the DDC will retain the Retainage Percentage from each Progress Payment in accordance with the terms of this Section 22.8.

(b) **Application of Retainage Amounts.**

The DDC may apply all or any portion of the total Retainage Amounts that it holds or may draw on any letter of credit, retainage bond or other liquid security, as applicable, at any time and for any reason described in Section 22.9 (*Withholding*).

(c) **Early Release of Retainage.**

- (i) **Designers** - Subject to Section 22.8(e), completion of any Release for Construction Documents, including approval of the same by DDC if required by the Agreement, and the Design-Builder's commencement of Construction Work, the Design-Builder may request in writing for a release of a portion of the Retainage Amounts to be paid or released, as applicable, to the Design-Builder solely for Design Work and deliver a requisition to the DDC setting forth such amounts. Promptly following receipt of such request and requisition, the DDC will, in its absolute discretion, either accept and pay or release such amounts (or a portion of such amounts) within fifty days or reject or respond with a more acceptable modification to any such request. Upon receipt of such released Retainage Amounts, the Design-Builder must promptly remit such released Retainage Amount to each of the applicable design firms that performed such Design Work, as applicable.
- (ii) **Smaller Subcontractors** – Subject to Section 22.8(e), upon completion of all Work required by any Subcontractor with a Subcontract (or all Subcontracts with the same Subcontractor for the Project in the aggregate) with a value of \$250,000 or less (a "**Small Value Contract**"), the DDC may release, in its absolute discretion, the Retainage Amounts associated with such Small Value Contract. Upon receipt of such released Retainage Amounts, the Design-Builder must promptly remit such released Retainage Amount to each of the applicable Small Value Contract Subcontractors that performed such Work.

In either case of (i) or (ii) above, any payment or release, as applicable, of such Retainage Amounts should not include any Retainage Amounts deemed reasonably necessary by the DDC to secure any ongoing obligations of any Persons performing ongoing Work, including for design integration and design oversight over the Construction Work and should also be reduced by any amounts that the DDC has applied, or on the day of such release, that the DDC determines that it may be entitled to apply against Retainage Amounts for various reasons, including unresolved claims by Subcontractors, the estimate of possible audit adjustments and an assessment of the risks to the DDC in making such a release of monies.

(d) **Release Upon Substantial Completion.**

Subject to Section 22.8(e), following the DDC's delivery of the Certificate of Substantial Completion, and within thirty days of receipt by the DDC of the Payment Request (together with all supporting documentation reasonably acceptable to the DDC), the DDC will release and return a portion of the total Retainage Amounts that it holds or maintains for its benefit, as applicable, to the Design-Builder equal to:

- (i) all Retainage Amounts previously retained or maintained for the DDC's benefit, up to the date of Substantial Completion, minus
 - (A) two hundred percent of the amount reasonably estimated by the DDC, after consultation with the Design-Builder, necessary to cover the costs of completing the remaining items required to achieve Final Completion; and
 - (B) any amounts that the DDC has applied, or on the day of such payment or release, as applicable, that the DDC determines that it may be entitled to apply, against Retainage Amounts in accordance with Section 22.9 (*Withholding*) for various reasons, including, unresolved claims by Subcontractors, the estimate of possible audit adjustments and an assessment of the risks to the DDC in making such a release of monies.
- (e) The DDC will not release any Retainage Amounts to the Design-Builder, if a Design-Builder Default has occurred and is continuing at the time the Design-Builder would otherwise be entitled to a reduced Retainage Percentage or a release of Retainage Amounts under this Section 22.8 (*Retainage*), until such time that the Design-Builder Default has been cured.
- (f) **Final Release.**

Any remaining Retainage Amounts retained or held, as applicable, for the benefit of the DDC following Substantial Completion will be released by the DDC to the Design-Builder with each Progress Payment, in an amount equal to the percentage of Work completed between Substantial Completion and Final Completion, with the final balance paid to the Design-Builder at the final payment under Section 22.10 (*Final Payment*).

22.9 Withholding

- (a) If:
 - (i) a Design-Builder Default has occurred under this Agreement (including its obligation to pay any resolved or unresolved Claim lawfully made against it by any Subcontractor, workman or other Person which arises out of or in connection with the performance of this Agreement or any other agreement with the DDC);
 - (ii) without limiting the generality of Section 22.9(a)(i), the Design-Builder fails to:
 - (A) rectify any defect or nonconforming Work within thirty days of the DDC notifying the Design-Builder of the defect or nonconforming Work;
 - (B) timely complete any Punch List items or any other remaining Work within the time period required under this Agreement;
 - (iii) any Claim (just or unjust) arising out of or in connection with this Agreement is made against any Indemnified Party;
 - (iv) the DDC determines that an audit adjustment for any Work or Extra Work under this Agreement may need to be made; or
 - (v) any Subcontractor fails to pay any Claims lawfully made against it by any Subcontractor, workman or other third person arising out of or in connection with this Agreement or any other agreement between the DDC and the Design-Builder;

the DDC may, in its absolute discretion, withhold out of any payment (final or otherwise and even though a payment has already been approved) an amount as the DDC may deem sufficient to protect itself and apply that amount in the manner as the DDC may deem proper to secure its protection or satisfy relevant Claims or release that amount once the relevant failure has been remedied.

- (b) All sums withheld and applied by the DDC under this Section 22.9 will be deemed to be payments for the Design-Builder's account under this Agreement. The Design-Builder will re-invoice any amounts of Progress Payment withheld under this Section 22.9 with the next monthly Payment Request if, and once, the cause for such withholding has been removed or resolved, as agreed by the DDC.
- (c) If the DDC does not withhold out of any payment (final or otherwise) a sum for any of the circumstances described in Section 22.9(a), even though the circumstance has occurred at the time of the DDC's payment to the Design-Builder, the DDC will not forfeit its right to exercise such withholding from a future payment or any other rights or remedies it may be entitled in order to obtain such amount from the Design-Builder.
- (d) Nothing under this Agreement (including Section 22.8 (*Retainage*) and this Section 22.9) will create any obligation of the DDC of any kind to any Subcontractors, architects, mechanics, laborers, engineers, workmen or other third persons.
- (e) The right of the Design-Builder to any amount to be paid under this Agreement (even where any amounts have already been approved or determined as due) will be subject to and subordinate to the rights of the DDC under this Section 22.9.
- (f) Without limiting any other provision of this Section 22.9 or any other rights of the DDC under this Agreement, if the DDC conducts an investigation and discovers that the Design-Builder or any of its Subcontractors has failed to pay wages or supplements as required by this Agreement or the relevant Subcontract:
 - (i) the Design-Builder must pay to the DDC an amount equal to the DDC's cost of conducting that investigation, within fourteen days of receiving a demand from the DDC for such payment; and
 - (ii) if the Design-Builder fails or refuses to pay for the cost of any investigation within that fourteen day period, the DDC may withhold out of any payment (final or otherwise and even though a payment has already been approved) due to the Design-Builder under this Agreement, or under any other agreement between the Design-Builder and the DDC, an amount equal to the cost of such investigations plus a fifteen percent administrative charge.

All amounts withheld by the DDC under this Section 22.9(f) will be deemed to be payments made to the Design-Builder under this Agreement on account of the Contract Price.

- (g) DDC may withhold out of any payment due to the Design-Builder under this Agreement, any amounts required or permitted under Article 23 (*Prompt Payment of Subcontractors*). All amounts withheld and paid by the DDC to any of the Design-Builder's Subcontractor under Article 23 (*Prompt Payment of Subcontractors*), will be deemed to be payments made to the Design-Builder under this Agreement on account of the Contract Price.

22.10 Final Payment

- (a) After receiving the Certificate of Final Completion, the Design-Builder must submit to the DDC its final Payment Request, together with the following:

- (i) a general release executed by the Design-Builder waiving, upon receipt of final payment as agreed or determined in accordance with this Section 22.9(f), all future Claims against the City (not already brought against the City) with respect to the Work or this Agreement;
 - (ii) a certificate signed by the Design-Builder in the form attached in Exhibit 6 (*Completion Certificates*), certifying to the DDC that no overdue amounts owing to any Subcontractor remain unpaid and that the Project and all Work are free and clear of all liens or claims arising out of or in connection with the performance of the Work by the Design-Builder or any of the Subcontractors;
 - (iii) consent of the Design-Builder's Surety to the final payment; and
 - (iv) certificates of insurance confirming that insurance required by this Agreement to remain in effect after Final Completion remain in effect together with a certificate from the Design-Builder that it is not aware of any reason that those insurances will not be renewed to cover the period required by this Agreement.
- (b) Within ten days of receiving a complete final Payment Request that satisfies all of the requirements of Section 22.10(a), the DDC will notify the Design-Builder whether it accepts or rejects all or any portion of the final Payment Request.
- (c) Within seven days of receiving the DDC's determination under Section 22.10(b), the Design-Builder must notify the DDC if it disputes any determination by the DDC to reject all or any portion of the Payment Request. If the Design-Builder does not notify the DDC of a dispute within that seven-day period, the Design-Builder will be deemed to have accepted the DDC's determination.
- (d) If the Design-Builder notifies the DDC of a dispute in accordance with Section 22.10(c), the Design-Builder and the DDC will meet to seek to resolve the dispute.
- (e) If the DDC and the Design-Builder fail to resolve the dispute within twenty days of the Design-Builder's notice of dispute under Section 22.10(c), the matter will be referred to the Dispute Resolution Procedures.
- (f) Within thirty days of the amount due with respect to the final Payment Request being agreed or determined in accordance with this Section 22.9, the DDC will pay the agreed or determined amount to the Design-Builder.

22.11 Late Payments

- (a) If either Party fails to make any payment when due under this Agreement, that Party must pay to the other Party, in addition to payment of the delayed payment, interest calculated per annum for each day of delay, from the date on which the payment was due (and the expiry of any applicable cure periods), at an interest rate equal to the interest rate jointly set by the Comptroller and the City's Office of Management and Budget in accordance with PPB Rule 4-06(d).
- (b) If the Design-Builder is paid interest, the proportionate share(s) of that interest will be forwarded by the Design-Builder to its Subcontractor(s).

22.12 Payroll Records

- (a) The Design-Builder and its Subcontractors will keep such employment and payroll records as are required by Section 220 of the Labor Law. The failure of the Design-Builder or

Subcontractor(s) to comply with the provisions of this Section 22.12 may result in the DDC declaring the Design-Builder in default or the withholding of payments otherwise due under this Agreement, or both.

- (b) At the time the Design-Builder makes application for each Payment Request, the Design-Builder must submit to the DDC a written payroll certification of compliance with the prevailing wage, minimum wage, and other provisions and stipulations required by Labor Law Section 220 and of compliance with the training requirements of Labor Law Section 220-h. This certification of compliance will be a condition precedent to payment and no payment will be made to the Design-Builder unless and until each such certification will have been submitted to and received by the DDC.
- (c) This Agreement is executed by the Design-Builder with the express warranty and representation that the Design-Builder is not disqualified under the provisions of Section 220 of the Labor Law from the award of this Agreement.
- (d) Any breach or violation of this Section 22.12 will be deemed a breach or violation of a material provision of this Agreement, and grounds for a Design-Builder Default and termination by the DDC.

23. **PROMPT PAYMENT OF SUBCONTRACTORS**

- (a) The Design-Builder must timely pay, and must ensure that all its Subcontractors timely pay, all claims lawfully made against it by Subcontractors, workmen and third parties in connection with the Work.
- (b) Within seven days of receiving any sum from the DDC attributable to the Work performed by a Subcontractor, workmen and third parties, the Design-Builder must pay that sum to the Subcontractor, workmen or third-party, as applicable less an amount, if any, as the Design-Builder is authorized to retain under the Subcontract.
- (c) To the extent any Subcontractor remains unpaid any undisputed amounts following the time frames in Section 23(b):
 - (i) the Design-Builder must pay interest on amounts due to such Subcontractor at the rate of interest in effect on the date such payment is made by the Design-Builder computed in accordance with Section 756-b(1)(b) of the New York General Business Law. Accrual of interest will commence on the day immediately following the expiration of the seventh day following receipt of payment by the Design-Builder from the DDC and will end on the date on which payment is made; and
 - (ii) the DDC may withhold payment and directly pay Subcontractors as set forth in Sections 22.9(f) and 22.9(g).
- (d) Any payment made by the DDC to a Subcontractor under this Article 23 will be deemed to be a payment to the Design-Builder under this Agreement.
- (e) Nothing in this Article 23 will create any obligation of any kind from the DDC to any Subcontractors, workmen or other third persons.
- (f) The Design-Builder must include in its Subcontracts a provision requiring each Subcontractor to make payment to each of its Subcontractors for Work performed under this Agreement in the same manner and within the same time period set out above.

- (g) The Design-Builder must report in the Payee Information Portal payments made to each Subcontractor within thirty days of making the payment. If any of the information provided in accordance with Section 19.1(a)(i) changes prior to expiration or termination of the applicable Subcontract, the Design-Builder must update the information in the Payee Information Portal, as appropriate. Failure of the Design-Builder to list a Subcontractor or to report Subcontractor payments in a timely fashion, or a failure to do both, will entitle the DDC to declare the Design-Builder in default under this Agreement thirty days following the Design-Builder's receipt of the DDC's written notice of the Design-Builder's breach of this provision. Notwithstanding the foregoing, if the Design-Builder cures such breach prior to the expiration of such thirty-day period, the DDC may not declare a Design-Builder Default for any such breach.

PART E – ALLOWANCE APPROVALS, CHANGE ORDERS AND RELIEF EVENTS

24. ALLOWANCE APPROVALS, CHANGE ORDERS AND EXTRA WORK DIRECTIVES

24.1 Allowance Approvals

- (a) The Design-Builder may at any time request that funds be paid to the Design-Builder from an Allowance, subject to the terms and conditions of such Allowance and this Article. If the request for approval is in connection with a Relief Event, other than, where applicable, the City's share of Dispute Review Board, as provided by this Agreement, the Design-Builder must first obtain DDC's approval in accordance with Article 25 (Relief Events).
- (b) Any Allowance Work performed prior to DDC's approval is performed at the Design-Builder's sole risk and expense. Notwithstanding the above, the Design-Builder may begin or fully perform Allowance Work at risk and seek the DDC's approval for the same during or after performance, subject to the terms and conditions of this Article, including requirements for record keeping and documentation.
- (c) The price to be paid for Allowance Work will be determined in accordance with Article 26 (Calculating Allowance Work, Extra Work and Net Costs) and the terms of such Allowance.
- (d) The DDC may grant preliminary approval of Allowance Work, subject to the following terms and conditions, in which case the Design-Builder's performance of the Allowance Work, up to the not-to-exceed amount set forth in such approval, will not be considered at the Design-Builder's risk. The DDC's approval of Allowance Work will be deemed "preliminary", notwithstanding anything to the contrary in such approval, and subject to final review and approval by the DDC:
- (i) Whenever Allowance Work is to be paid on a unit price basis and the final quantities actually performed or provided in accordance with the Contract Documents is not yet known or accepted by DDC;
 - (ii) Whenever Allowance Work is to be paid on a time and material basis or cost-based basis, and the final amounts actually and reasonably incurred and documented in accordance with the Contract Documents is not yet known or accepted by DDC; or
 - (iii) Whenever Allowance Work is to be paid on a lump sum basis and the Parties have agreed on the scope of the Allowance Work but not a final price for the same.
- (e) To the extent the Parties cannot come to a final agreement on payment for any Allowance Work, the DDC may unilaterally issue final approval of the same, which final approval will set forth, in the DDC's view, the reasonable price to be paid and method of payment. The

Design-Builder must comply DDC's final approval, which compliance, including requisition of payment in accordance with the terms of DDC's final approval, will be without prejudice to the Design-Builder's ability to seek relief pursuant to Article 40 (*Dispute Resolution Procedure*).

24.2 Change Orders

- (a) Changes to this Agreement may only be made in writing as set forth in a duly executed Change Order, as applicable, and in accordance with this Article.
- (b) Approved Minor Waiver requests will not be considered changes to this Agreement within the meaning of this Section 24.2.
- (c) Change Orders are subject to the review and approval of the ACCO in accordance with PPB Rule 4-02 and to registration in accordance with City Charter 328.
- (d) Changes reflected in a Change Order may include non-material changes to the Work or time for performance and may be at no cost. Costs for Extra Work and Change Orders will be calculated in accordance with Article 26 (*Calculating Allowance Work, Extra Work and Net Costs*).
- (e) In connection with any Change Order, the Parties may agree to an extension or reduction in the time for performance, subject to the approval of the ACCO. Time Extensions will be subject to the DDC's approval in accordance with Section 25.6(b) (*Entitlement to Applicable Relief*).
- (f) If any change to the Contract Documents, data, documents, deliverables or other Work to be provided under this Agreement because of negligence or error on the part of the Design-Builder or any Design-Builder Party, subject to the Standards of Performance required and warranties provided under this Agreement, no additional compensation will be due or paid to the Design-Builder for making such change, and the Design-Builder is obligated to make such change without additional compensation.
- (g) Extra Work directed by DDC will become Work subject to all applicable provisions of the Contract Documents, except as expressly set forth in the subject Change Order.
- (h) Reductions in the Contract Price
 - (i) Whenever changes to this Agreement result in a reduction in the Contract Price, including as a result of an omission of Work by DDC, a DDC Modification Request, or a DB Modification Request, such reduction and savings, will be retained entirely by the DDC, except where:
 - (A) the Project Requirements expressly permit the Design-Builder to submit value engineering proposals;
 - (B) the Contract Price reduction is the result of a DB Modification Request that qualifies as a value engineering proposal in accordance with the Project Requirements; and
 - (C) the Project Requirements provide for shared savings between the DDC and the Design-Builder.

24.3 Change Proposals, Design-Builder Proposal Costs

- (a) The Design-Builder may request and DDC may direct non-material changes to the Work in accordance with this Agreement (a “Modification”). All Modifications will become part of the Work, subject to any price and/or time relief, if any, that may be due under this Agreement. The Design-Builder must effect such Modifications as approved or directed by DDC.
- (b) A Minor Waiver in accordance with Section 7.7 (Minor Waiver Requests) will not be deemed a Modification for purposes of this Article.
- (c) The Design-Builder may propose a Modification by submitting a request for Modification (a “DB Modification Request”) and proposal for Modification in accordance with Section (f) (a “Modification Proposal”).
- (d) The DDC may direct the Design-Builder to prepare a Modification Proposal (a “DDC Modification Request”) at any time and may require the Design-Builder to provide an estimate of the cost for Design Work to prepare such Modification Proposal prior to incurring any costs in connection with the DDC Modification Request.
 - (i) The Design-Builder’s estimate of the cost of Design Work necessary to prepare its Modification Proposal must comply with Section 26.2 (*Design Work*). The Design-Builder may be required to attend meetings to discuss its estimate and Modification Proposal. The method of payment for Design Work for preparation of a Modification Proposal in connection with a DDC Modification Request may be hourly rate using the rates set forth in Section 26.2 (*Design Work*), subject to a not to exceed amount, or lump sum, as determined by the DDC in its sole discretion.
 - (ii) The Design-Builder will be paid for Design Work in connection with preparation of a Modification Proposal in response to a DDC Modification Request where the Design-Builder’s estimate for the same was accepted by DDC and the Design-Builder was directed to proceed with preparation of a Modification Proposal, up to the value of the accepted estimate, even if DDC ultimately determines not to proceed with the Modification. DDC has no obligation to reimburse the Design-Builder for proposal costs in connection with a DB Modification Request.
 - (iii) The Design-Builder will not be paid for Modification Proposal costs in accordance with the above unless its estimate for the same has been approved by DDC and the Design-Builder has been directed to proceed with preparation of the Modification Proposal.
- (e) The Design-Builder may seek preliminary review and feedback prior to submitting a full Modification Proposal, whether in connection with a DDC Modification Request or DB Modification Request. In providing such preliminary review and feedback, any indication by DDC, whether in writing or verbally, that a DB Modification Request is or may be acceptable to DDC will not be deemed
 - (i) to convert a DB Modification Request into a DDC Modification Request;
 - (ii) an approval of the DB Modification Request,
 - (iii) or be binding on DDC in any way, subject to Section 24.3(i).
- (f) A Modification Proposal must include the following, unless provided otherwise by DDC in writing:
 - (i) a general description of the proposed Modification, and if proposed by the Design-Builder, the reason for the change;

- (ii) the Design-Builder's proposed reasonable adjustment to the Contract Price (if any) on account of the Net Costs it would incur as a result of the proposed Modification. In the case of any categories of costs that are subject to Article 26 (*Calculating Allowance Work, Extra Work and Net Costs*), such costs must be determined in accordance with Article 26 (*Calculating Allowance Work, Extra Work and Net Costs*);
 - (iii) a scope of Work (including all activities and Project impacts associated with the proposed Modification) that must be described in sufficient detail and broken down into suitable components and activities to enable the DDC to evaluate the reasonableness of the proposed adjustment (if any) to the Contract Price;
 - (iv) a detailed and reasonable timetable for implementation of the proposed Modification and, if the Design-Builder believes that the proposed Modification would impact the time for performance of the Work (positively or negatively), a Time Impact Analysis demonstrating that the proposed Modification will result in an identifiable and measurable disruption to or time saving in performance of the Work;
 - (v) any date or dates by which a decision by the DDC is critical;
 - (vi) any amendment that would be reasonably required to this Agreement as a result of the proposed Modification;
 - (vii) any consents or permits that will be required as a result of the proposed Modification and any variances from Applicable Law that may be required; and
 - (viii) any other supporting documentation as may be reasonably requested by the DDC.
- (g) The Design-Builder's proposed adjustment to the Contract Price in a Modification Proposal may be subject to pre-audit review by the EAO or their designated representative.
 - (h) At any time, the DDC may (in its absolute discretion) withdraw a DDC Modification Request or reject a DB Modification Request or Modification Proposal. The DDC is not required to give reasons for any rejection.
 - (i) If accepted and agreed between the Parties, Modifications must be reflected in a duly executed Allowance Approval or Change Order, or combination thereof. Once the Allowance Approval is signed by the DDC Representative and the Design-Builder Representative, it will represent the final agreement among the Parties regarding such Modification. Change Orders are subject to registration in accordance with City Charter Section 328.
 - (j) In no event will DDC be obligated to pay Modification Proposal costs in excess of the accepted estimate in accordance with Section 24.3(d).

24.4 Continuation of Work and Commencement of Extra Work

- (a) The Design-Builder must not suspend performance of the Work during the negotiation of any Allowance Approval or Change Order, except where expressly directed to do so by DDC or to the extent the suspension is otherwise expressly permitted under Article 35 (*Design-Builder Suspension Rights*).
- (b) Except in the event of an emergency to protect life and property, the Design-Builder will not commence any Extra Work described in a DDC Modification Request, a DB

Modification Request until the DDC has issued a Allowance Approval, Change Order or an Extra Work Directive as described in Section 24.5 (*Extra Work Directive*).

24.5 Extra Work Directive

- (a) An “**Extra Work Directive**” is a written directive prepared and signed by the DDC directing the Design-Builder to perform Extra Work, including where the Parties have not reached agreement on a Modification in connection with a Modification Proposal or otherwise agreed on an Allowance Approval or a Change Order.
- (b) The DDC may at any time deliver to the Design-Builder an Extra Work Directive.
- (c) An Extra Work Directive must set out the kind, character and limits of the Extra Work that the Design-Builder is required to perform.
- (d) Upon receipt of an Extra Work Directive, the Design-Builder must promptly implement and perform the Extra Work as directed by the DDC in the Extra Work Directive.
- (e) DDC will issue an Allowance Approval, Change Order and/or Time Extension, as applicable, in connection with each Extra Work Directive, subject to Article 25 (*Relief Events*) and Article 26 (*Calculating Allowance Work, Extra Work and Net Costs*).
- (f) Without limiting any right of DDC set forth in this Agreement or pursuant to Applicable Law to act otherwise, it is DDC’s intention that Modifications to the Work will be discussed and reviewed between the Parties in accordance with the proposal processes set forth in this Article 24 (*Allowance Approvals, Change Orders and Extra Work Directives*) whenever reasonably practicable and not, in DDC’s sole discretion, detrimental to the Project or the safety of persons or property, such that each Extra Work Directive is issued contemporaneously or concurrently with an Allowance Approval, Change Order and/or Time Extension, as applicable. Whenever DDC issues, or the Design-Builder believes that DDC has issued, an Extra Work Directive without an agreed upon Allowance Approval, Change Order and/or Time Extension, including, without limitation, where the Parties disagree as to whether direction given by DDC constitutes an Extra Work Directive, the Design-Builder must seek relief in accordance with Article 25 (*Relief Events*).

25. RELIEF EVENTS

25.1 Entitlement to Request Applicable Relief

- (a) If a Relief Event occurs, the Design-Builder may request one or more of the following in accordance with, and subject to, this Article 25 (the “**Applicable Relief**”):
 - (i) an extension to the Guaranteed Completion Dates for one or more Completion Milestones pursuant to a Time Extension;
 - (ii) relief from a Design-Builder Default under this Agreement; or
 - (iii) in the case of a Compensable Relief Event only, either payment from an appropriate Allowance or an adjustment to the Contract Price, in each case, in accordance with Article 24 (*Allowance Approvals, Change Orders and Extra Work Directives*) for any Net Costs that the Design-Builder has incurred or will incur as a direct result of a Compensable Relief Event.
- (b) Applicable Relief may be granted through one or more of the following “**Relief Authorizations**”:

- (i) an extension to any Guaranteed Completion Date may only be granted pursuant to a Time Extension approved by the DDC in accordance with Section 25.6(b)(i).;
- (ii) relief from a Design-Builder Default may be granted by DDC following its determination that the Design-Builder is entitled to Applicable Relief in Section 25.6(b)(ii);
- (iii) to receive compensation for any Compensable Relief Event that has any remaining Allowances, through an Allowance Approval, in accordance with Section 24.1 (*Allowance Approvals*); or
- (iv) to receive compensation for any Compensable Relief Event that has no applicable or sufficiently funded applicable Allowance, through a Change Order, in accordance with Section 24.2 (*Change Orders*).

25.2 Process for Requesting Applicable Relief

- (a) The Design-Builder must comply with the procedures in this Section 25.2 to request Applicable Relief in connection with the occurrence of any Relief Event.
- (b) The Design-Builder must submit a notice that complies with Section 25.2(c) (an “**Initial Relief Event Notice**”) to the DDC promptly (and in any event within fifteen days) after the date that the Design-Builder first became aware, or should reasonably have become aware, that the relevant Relief Event has occurred or will occur, and will, or is reasonably likely to, have the effect or impact that is the subject of the Design-Builder’s request for Applicable Relief.
- (c) An Initial Relief Event Notice must:
 - (i) state that it is an Initial Relief Event Notice;
 - (ii) identify and describe in detail the relevant Relief Event (including any information then available to the Design-Builder having made due inquiry);
 - (iii) describe any additional studies or investigations that the Design-Builder must perform to prepare a Detailed Relief Event Notice; and
 - (iv) state the Design-Builder’s intention to request Applicable Relief for an extension of time and/or, if a Compensable Relief Event, compensation under this Article 25, together with a description of any likely or foreseeable impacts on the Project Schedule or Net Costs that may be included in the Detailed Relief Event Notice and any associated documented supporting evidence.
- (d) In addition to the Initial Relief Event Notice, if the Design-Builder has not already provided information required under a Detailed Relief Event Notice, or the Design-Builder becomes aware of further details regarding the applicable Relief Event, the Design-Builder must submit a notice that complies with Section 25.2(e) (a “**Detailed Relief Event Notice**”) to the DDC within forty-five days after the date that the Design-Builder first became aware, or should reasonably have become aware, that the relevant Relief Event had occurred or will occur, and will have the effect or impact that is the subject of the Design-Builder’s request for Applicable Relief. The Design-Builder may request a reasonable extension of time for submission of Design-Builder’s Detailed Relief Event Notice, which extension will not be unreasonably withheld by DDC. The extension of time must be in writing and will not exceed ninety additional days (one hundred and thirty-five total days) to submit the Design-Builder’s Detailed Relief Event Notice.

- (e) A Detailed Relief Event Notice must include:
- (i) a statement that it is a Detailed Relief Event Notice and full details of the relevant Relief Event (as available to the Design-Builder having made due inquiry);
 - (ii) full details of any extension of time or adjustment to the Contract Price (as applicable) requested under this Article 25;
 - (iii) a Time Impact Analysis (based on the then current Progress Schedule) demonstrating that the relevant Relief Event will result in:
 - (A) an identifiable and measurable disruption to the Work that will impact a Critical Path and why total float is not available;
 - (B) an extension to the time required to achieve the relevant Guaranteed Completion Date; and
 - (C) the start and end dates or expected end dates of the claimed periods of delay and, in addition a description of the operations that were delayed, an explanation of how they were delayed and the reasons for the delay;
 - (iv) details of the steps that the Design-Builder has taken or will take to mitigate the effect or impact of the Relief Event in accordance with Section 25.3 (*Mitigation*);
 - (v) evidence reasonably satisfactory to the DDC demonstrating that the Design-Builder will suffer a delay to one or more Critical Path activities or, where applicable with respect to Compensable Relief Events, incur Net Costs, despite the Design-Builder complying with its obligation to take steps to mitigate the effect or impact of the Relief Event in accordance with Section 25.3 (*Mitigation*) and to provide evidence of no concurrent delay in accordance with Best Management Practice;
 - (vi) a verified written statement of the details and estimates of the amounts of any delay damages, including categories of expected damages and projected monthly costs, together with documentary evidence of such damages as the Design-Builder may have at the time of its submission; and
 - (vii) a statement indicating the Design-Builder's understanding that DDC may grant a Time Extension without prejudicing its review and determination with respect to a Compensable Relief Event requested by the Design-Builder, if any.
- (f) If at the time of issuing the Detailed Relief Event Notice, the Relief Event is continuing, the Design-Builder must keep the DDC regularly (at least monthly) updated as to the status of the Relief Event, including any changes in the effects or impacts of the Relief Event on the Work.

25.3 Mitigation

The Design-Builder must act promptly and use Reasonable Efforts in accordance with Best Management Practice to mitigate the delay and any other adverse impact (including incurring Net Costs) of any event that is the subject of a notice under Section 25.2 (*Process for Requesting Applicable Relief*), including by re-sequencing, reallocating, or redeploying its forces to other portions of the Work. In the event that the Design-Builder fails to take mitigation measures as required in this Agreement, the delay and excuse of performance permitted under this Agreement will be reduced to the extent that such mitigation measures, if taken, would have reduced the impact of such event on the Design-Builder.

25.4 Failure to Provide Required Notice or Information

Time is of the essence in the Design-Builder's delivery of the Initial Relief Event Notice and any Detailed Relief Event Notice, and if any notice or information is not provided to the DDC in accordance with the requirements of Section 25.2 (*Process for Requesting Applicable Relief*):

- (a) the Design-Builder will have irrevocably and forever waived and released any Claim or any right to request a Change Order, Allowance Approval, any extension of time or compensation or adjustment to the Contract Price (as applicable) with respect to the relevant Relief Event, accruing both before and after the fifteen day or thirty day notice requirement (as applicable) and until the Design-Builder submits the written notice of a Relief Event to the DDC; and
- (b) following one-hundred twenty days after the date the Design-Builder was required to submit a notice under Section 25.2 (*Process for Requesting Applicable Relief*), the Design-Builder will be deemed to have irrevocably and forever waived and released any and all rights to relief (including extension of time for performance of the Work or compensation) for any adverse effect attributable to such Relief Event.

25.5 Demonstration of Facts & Concurrent Delay

(a) **Burden of Proof**

The Design-Builder is responsible for clearly stating and demonstrating the facts and justification behind the occurrence of a Relief Event and the resulting direct and adverse impacts on it.

(b) **Concurrent Delay**

- (i) The Design-Builder will not be entitled to receive a separate extension of time for each of several causes of delay operating concurrently, but only for the actual period of delay in completion of the Work as determined by the DDC in accordance with Section 25.6 (*Entitlement to Extension of Time and Compensation*), irrespective of the number of causes contributing to produce such delay.
- (ii) The Design-Builder's entitlement to compensation for any Compensable Relief Event under this Article 25 will be nullified to the extent that one of several causes of delay operating concurrently results from any act, fault or omission of any Design-Builder Party, and would of itself (irrespective of the concurrent causes) have delayed the Work. Design-Builder will still be eligible for a Time Extension, notwithstanding such concurrent delay, so long as one of several causes of delay operating concurrently is a Relief Event. Concurrent delay will be determined by utilizing a Time Impact Analysis as described in the Project Requirements and in accordance with Best Management Practice.

25.6 Entitlement to Extension of Time and Compensation

(a) **Pre-Requisites for Applicable Relief.**

The Design-Builder will be entitled to Applicable Relief in accordance with Section 25.6(b), only if the Design-Builder has:

- (i) complied with its applicable obligations under this Agreement, including Section 25.2 (*Process for Requesting Applicable Relief*), Section 25.3 (*Mitigation*) and Section 25.5 (*Demonstration of Facts & Concurrent Delay*);

- (ii) demonstrated, to the reasonable satisfaction of the DDC, that a Relief Event has occurred or will occur;
- (iii) demonstrated, to the reasonable satisfaction of the DDC, that a Relief Event was the direct cause or will be the direct cause of:
 - (A) a delay in achieving a Guaranteed Completion Date;
 - (B) in the case of a Compensable Relief Event only, the Design-Builder incurring Net Costs; and
- (iv) demonstrated, where applicable, to the DDC, including through a Time Impact Analysis, that (i) the relevant Relief Event will result in an identifiable and measurable disruption to the Work that will extend the time required to achieve completion by the applicable Guaranteed Completion Date and (ii) there was no concurrent delay caused by the Design-Builder .

(b) Entitlement to Applicable Relief.

Within sixty days of receipt of a complete and final Detailed Relief Event Notice for any Relief Event, the DDC will notify the Design-Builder of its determination as to whether the Design-Builder is entitled to Applicable Relief as set forth below. The DDC may request a reasonable extension of time for review of Design-Builder's Detailed Relief Event Notice, which extension will not be unreasonably withheld by the Design-Builder.

- (i) in the case of any Relief Event where the Design-Builder has satisfied the requirements in Section 25.6(a) (*Pre-Requisite for Applicable Relief*), the applicable Guaranteed Completion Date will be extended through a Time Extension by the time the DDC determines to be reasonable based on the evidence provided to the DDC regarding the effect or impact of the applicable Relief Event on the Design-Builder's performance of the Work;
- (ii) in the case of any relief from a Design-Builder breach or Design-Builder Default, the applicable breach or Design-Builder Default will be waived by the DDC for the time the DDC determines to be reasonable for the applicable Relief Event based on the information satisfying the requirements in Section 25.6(a) (*Pre-Requisite for Applicable Relief*); or
- (iii) in the case of a Compensable Relief Event only, where the Design-Builder has satisfied the requirements in Section 25.6(a) (*Pre-Requisite for Applicable Relief*), the Design-Builder will be entitled to an amount that the DDC determines to be reasonable to compensate the Design-Builder for any Net Costs in connection with the applicable Compensable Relief Event, to be granted to the Design-Builder in connection with:
 - (A) where there are any Allowances available to fund such Net Costs, through an Allowance Approval under Section 24.1 (*Allowance Approvals*); or
 - (B) where there are no remaining or applicable Allowances available to fund such Net Costs, through an adjustment to the Contract Price under a Change Order under Section 24.2 (*Change Orders*).

The Design-Builder will only be compensated for delay damages, (unless otherwise expressly agreed as part of a lump sum under Article 26 (Calculating

Extra Work, Allowance Work and Net Costs)), as and when such delay damages have actually occurred.

25.7 Disputes

If the Design-Builder disputes any determination by the DDC regarding any Design-Builder request for relief under this Article 25, then the Design-Builder must notify the DDC within ten days of the DDC's determination and if the Parties fail to resolve the dispute within a further twenty days of that notice, the matter will be resolved in accordance with Article 40 (*Dispute Resolution Procedure*).

25.8 Continuation of Work

The Design-Builder must not suspend performance of the Work as a result of a Relief Event, or while requesting Applicable Relief with respect to a Relief Event, except as may be otherwise directed by the DDC in writing or to the extent the suspension is otherwise expressly permitted under Article 35 (*Design-Builder Suspension Rights*).

25.9 Sole Remedy

The Design-Builder's sole remedy in relation to any Relief Event will be the operation of this Article 25.

26. CALCULATING ALLOWANCE WORK, EXTRA WORK AND NET COSTS

26.1 GENERALLY

(a) Options for Calculating Extra Work and Allowance Work Compensation

Where the DDC is required to pay the Design-Builder for Allowance Work, Extra Work or for its Net Costs in connection with a Compensable Relief Event, as applicable, such compensation may be agreed between the Parties in one or more of the following ways:

- (i) in connection with a Unit Price Item, by the applicable Unit Prices specified in this Agreement;
 - (ii) by agreement of a fixed price or lump sum;
 - (iii) by time and material records;
 - (iv) in any other manner approved by the CCPO; or
 - (v) or any combination of (i)-(iv).
- (b) To the extent the Parties negotiate and work to agree to a fixed price or lump sum, the Parties must derive any negotiated amount by utilizing the calculations and values included in this Article 26 as a basis for calculating a fair and reasonable fixed price or lump sum. Where the Parties do not otherwise agree in writing to a fixed price or lump sum compensation for any portion of the applicable Allowance Work or Extra Work, such compensation will be calculated in accordance with Sections 26.2 (*Design Work*) and 26.3 (*Construction Work*).
- (c) Negotiated Change Orders or Allowance Approvals which are connected to Unit Prices will be negotiated and include all costs for labor, material, overhead and profit.

26.2 DESIGN WORK

- (a) Notwithstanding anything to the contrary in 26.3 (*Construction Work*) below, the cost for Net Costs, Extra Work or Allowance Work, as applicable, consisting of Design Work will not exceed an amount equal to the time spent by technical personnel multiplied by hourly rates for such technical personnel, calculated using the Direct Salary Rate for each individual multiplied by the Multiplier.
- (b) As agreed by the Parties, the cost for Extra Work or Allowance Work consisting of Design Work may be payable as a lump sum, based upon the Parties estimate of the time to be spent by technical personnel, or on a time card basis, based upon the time actually spent by technical personnel. Whenever services are payable on a time card basis, such payments will be subject to a maximum price. The Design-Builder will be solely responsible for the costs for technical employees in excess of the maximum price, subject to Relief Events provided by this Agreement.
- (c) Approval of Assigned Personnel:
 - (i) Subject to subsection (iii), below, prior to performing Extra Work or Allowance Work consisting of Design Work, the Design-Builder will submit for DDC's approval a Staffing Plan:
 - (A) listing the names and titles of all individuals that the Design-Builder proposes to perform the Work and type of services to be performed by each individual;
 - (B) the Direct Salary Rate of each individual proposed, calculated in accordance with Section 26.2(e) (*Direct Salary Rate*);
 - (C) resumes for each individual proposed to fulfill each title with proof of appropriate licensure to perform the services.
 - (ii) The Design-Builder will be paid only for services performed by technical personnel approved to serve in those titles listed in the Staffing Plan. Once approved, personnel included in the Staffing Plan are deemed "Assigned Personnel" for purposes of this Article 26.
 - (iii) Subject to compliance with Article 25 (*Relief Events*), the Design-Builder's right to seek compensation for Extra Work or Allowance Work will not be prejudiced, notwithstanding lack of an approved Staffing Plan prior to the performance of Extra Work consisting of Design Work in any of the following circumstances, provided that the Design-Builder has informed DDC in writing and accounted, in accordance with this Article 26, for all personnel and hours of Extra Work performed up to the date of the notice as soon as reasonably practicable (and, in any event, not more than fifteen days) after the start of such Extra Work and, at the completion of such Extra Work, provides all records and supporting documentation required.
 - (A) an emergency or exigent circumstance affecting the safety of persons or property;
 - (B) the Design-Builder is expressly directed or permitted in writing by DDC to proceed with Extra Work consisting of Design Work in the absence of an approved Staffing Plan; or
 - (iv) subject to compliance with Article 19.1 (*Subcontracting*), a disagreement has arisen between the Parties as to whether Work performed or to be performed is

Extra Work and it is agreed or determined after the fact that such Work performed was Extra Work.

- (d) A Multiplier for overhead and profit is set forth in Schedule B and will apply for the duration of the Agreement. Except as set forth in Section 26.2(h), the Multiplier is inclusive of all anticipated profit, costs, expenses, and overhead of any kind incurred by the Design-Builder for Extra Work and Allowance Work consisting of Design Work, including, without limitation, costs and expenses related to administrative personnel or tasks in connection with Design Work, taxes, employee benefits, insurance or office overhead. The Design-Builder will not be eligible for any additional cost, expenses, overhead or profit for Extra Work or Allowance Work consisting of Design Work.
- (e) Direct Salary Rate
- (i) Direct Salary Rate: "Direct Salary Rate" means the approved billable hourly rate for each Assigned Personnel in accordance with the terms and conditions set forth below. Once approved, the Direct Salary Rate per hour for each Assigned Personnel will be included in the Staffing Plan.
- (ii) Computation of hourly rate: For each Assigned Personnel, the Direct Salary Rate will be equal to the Annual Direct Salary, as defined in subsection (iv), below, divided by the number 2080. If the Direct Salary Rate is unacceptable to the DDC, the Parties may negotiate a lesser amount, which lesser amount, once approved, will be the Direct Salary Rate. If the Parties cannot agree on a Direct Salary Rate, the Design-Builder will propose alternative personnel acceptable to the DDC.
- (iii) Annual Direct Salary: "**Annual Direct Salary**" means the Assigned Personnel's actual annual direct salary that is directly payable to such individual on an annual basis, not including the following costs or payments:
- (A) any payments for services performed during other than regular business hours (i.e., premium for night differential and/or overtime);
- (B) any employer payments mandated by law, including without limitation, social security and Medicare taxes, insurance (e.g., worker's compensation, employers liability, unemployment);
- (C) any employer contributions to retirement plans, including without limitation pension and/or deferred compensation plans; and
- (D) any costs for any other fringe and/or supplemental benefits.
- (iv) For each Assigned Personnel, the Design-Builder will submit its calculation of the Direct Salary Rate, and all records or documentation requested by the DDC to verify such calculations, including, without limitation, copies of payroll registers for the prior twelve months for any Assigned Personnel.
- (f) The Design-Builder must request approval to have Assigned Personnel perform Extra Work and Allowance Work during other than regular business hours. Non-regular business hours will be defined as any hours in excess of eight (8) hours per day, Monday through Friday (i.e., evenings, weekends and holidays). Whenever the Design-Builder has been authorized to perform Extra Work or Allowance Work during non-regular business hours and the Design-Builder actually incurs overtime or nighttime differential costs for such Work, the Design-Builder will be reimbursed for any additional payments made to the Assigned Personnel above the Direct Salary Rate, subject to the limitations set forth below:

- (i) The Design-Builder must submit a copy of its company overtime policies and will only be reimbursed additional costs reflected in such policy.
 - (ii) The Design-Builder will only be entitled to a maximum premium for night differential of ten percent of the Assigned Personnel's Direct Salary Rate, and a maximum premium for overtime of fifty percent of such Direct Salary Rate.
 - (iii) The Design-Builder submits proof of the additional costs in the form of a payroll register or other documentation acceptable to DDC.
 - (iv) The premium payment and/or overtime payment made to the Assigned Personnel will be reimbursed at cost and will not be subject to the Multiplier.
- (g) Where Net Costs, Extra Work or Allowance Work consisting of Design Work is payable on a time card basis, the Design-Builder will be paid only for hours actually worked by Assigned Personnel performing the applicable Extra Work or Allowance Work, which hours will not include any of the following:
- (i) time spent commuting and/or traveling;
 - (ii) time spent performing Work included as part of any other fees payable to the Design-builder under this Agreement, including the Lump Sum Amount or other lump sum amounts;
 - (iii) time spent performing administrative tasks;
 - (iv) time spent during non-regular business hours, unless expressly authorized in writing by the DDC;
 - (v) time allocable to an employee's paid time off, including without limitation vacation time, sick time and personal time off;
 - (vi) time allocable to any other category consistent with standard accounting practices.

For each billable hour, the billable rate will be calculated as the Direct Salary Rate multiplied by the Multiplier.

- (h) Reimbursable Expenses. The following expenses incurred by the Design-Builder in the performance of Extra Work or Allowance Work consisting of Design Work are not included in the Multiplier. The Design-Builder will be reimbursed at cost, without any mark-up for overhead or profit, for the following:
- (i) Long distance travel for technical personnel performing Extra Work or Allowance Work consisting of Design Work, to the extent such travel and costs are pre-approved by DDC and allowable under the Comptroller's Directive #6. Long distance travel means travel which is in excess of 75 miles from whichever of the following is closer to the destination: (1) Columbus Circle, or (2) the Design-Builder's Project office.
 - (ii) Where expressly requested in writing by the DDC, printing costs for copies of Design Documents in excess of one original set and two copies.

26.3 CONSTRUCTION WORK

(a) Unit Price Items

- (i) In the performance of the Work, the Design-Builder will be paid at the Unit Price identified in Schedule B for the applicable Unit Price Work up to one hundred twenty-five percent of the Unit Price Cost. If during the progress of the Unit Price Work the Unit Price Cost required to complete the Unit Price Work for any Unit Price Item approaches the Unit Price Cost, and for any reason it is reasonably determined by the Design-Builder that the actual Unit Price Cost necessary to complete the Unit Price Work will exceed the Unit Price Cost by twenty-five percent (a "Unit Price Excess Cost"), the Design-Builder must promptly notify the DDC of such Unit Price Excess Cost.
 - (ii) Upon receipt of any notice of a Unit Price Excess Cost, the Parties must promptly meet and either (i) confirm the existing Unit Price for the applicable Unit Price Item, or (ii) negotiate a new Unit Price, as may be appropriate (in the DDC's discretion) at such time.
 - (iii) If the Parties cannot agree on a new Unit Price, then the DDC may direct the Design-Builder to perform the applicable Unit Price Work on the basis of time and material records subject to the limitations in this Article for the actual and reasonable cost, but in no event at a Unit Price exceeding the Unit Price included in Schedule B.
- (b) **Construction Work Net Costs**
- (i) For Extra Work or Allowance Work (excluding any Unit Price Work), where payment is based on time and material records, the price to be paid for such Extra Work or Allowance Work will be the actual and reasonable cost of the items described below, calculated in accordance with the following formulas, as applicable:
 - (A) Materials - Necessary materials (including transportation to the Project Site); plus
 - (B) Labor - Necessary direct labor, including payroll taxes (subject to statutory wage caps) and supplemental benefits; plus
 - (C) Taxes - Sales and personal property taxes, if any, required to be paid on materials not incorporated into such Extra Work; plus
 - (D) Rental Value of DB Owned Equipment - Reasonable rental value of Design-Builder-owned (Principal Participant or Subcontractor-owned, as applicable), necessary plant and equipment other than Small Tools, plus fuel and energy costs. Except for fuel costs for pick-up trucks which will be reimbursed based on a consumption of five gallons per shift, fuel costs will be reimbursed based on actual costs or, in the absence of auditable documentation, using the following fuel consumption formula per operating hour: $(.035) \times (\text{HP rating}) \times (\text{fuel cost per gallon})$. Reasonable rental value is defined as the lower of either seventy-five percent of the monthly prorated rental rates established in "The AED Green Book, Rental Rates and Specifications for Construction Equipment" published by Equipment Watch (the "Green Book"), or seventy-five percent of the monthly prorated rental rates established in the "Rental Rate Blue Book for Construction Equipment" published by Equipment Watch (the "Blue Book") (the applicable Blue Book rate being for rental only without the addition of any operational costs listed in the Blue Book). The reasonable rental value is deemed to be inclusive of all operating costs except for fuel and energy

consumption and equipment operator's wages and costs. For multiple shift utilization, reimbursement will be calculated as follows:

- (1) first shift will be seventy-five (75%) percent of such rental rates;
 - (2) second shift will be sixty (60%) percent of the first shift rate; and
 - (3) third shift will be forty (40%) percent of the first shift rate.
- (E) Standby-Equipment - Equipment on standby must be reimbursed at one-third the prorated monthly rental rate. Design-Builder-owned (Principal Participant-owned or Subcontractor-owned, as applicable) equipment includes equipment from rental companies affiliated with or controlled by the Design-Builder (Principal Participant or a Subcontractor, as applicable), as determined by the DDC. In establishing cost reimbursement for non-operating Design-Builder-owned (Principal Participant-owned or Subcontractor-owned, as applicable) equipment (scaffolding, sheeting systems, road plates, etc.), the DDC may restrict reimbursement to a purchase-salvage and life cycle basis if less than the computed rental costs; plus
- (F) Installation & Dismantling - necessary installation and dismantling of such plant and equipment, including transportation to and from the Project Site, if any, provided that, in the case of non-Design-Builder-owned (non-Principal Participant-owned or non-Subcontractor-owned, as applicable) equipment rented from a third party, the cost of installation and dismantling are not allowable if such costs are included in the rental rate; plus
- (G) Governmental Fees - necessary fees charged by governmental entities; plus
- (H) Non-Governmental Fees - necessary construction-related service fees charged by non-governmental entities; plus
- (I) Rental Value of Non-DB Owned Equipment - Reasonable rental costs of non-Design-Builder-owned (non-Principal Participant-owned or non-Subcontractor-owned, as applicable) necessary plant and equipment other than Small Tools, plus fuel/energy costs. Except for fuel costs for pick-up trucks which will be reimbursed based on a consumption of five gallons per shift, fuel costs will be reimbursed based on actual costs or, in the absence of auditable documentation, the following fuel consumption formula per hour of operation: $(.035) \times (\text{HP rating}) \times (\text{Fuel cost/gallon})$. Instead of renting, the DDC reserves the right to direct the Design-Builder to purchase non-operating equipment (scaffolding, sheeting systems, road plates, etc.), with payment on a purchase-salvage and life cycle basis, if less than the projected rental costs; plus
- (J) Insurance - workers' compensation insurance, and any insurance coverage expressly required by the DDC for the performance of the Extra Work or Allowance Work (excluding Unit Price Work) that is different or additional than the types of insurance required by Article 32 (*Insurance & Restoration*) or additional premiums and costs for any Insurance Policies required by this Agreement that are incurred as a result of the Extra Work or Allowance Work. The cost of workers' compensation insurance is subject to applicable payroll limitation caps and will be based upon the

carrier's manual rate for such insurance derived from the applicable class loss cost and carrier's lost cost multiplier approved by the New York State Department of Financial Services, and with the exception of experience rating, rate modifiers as promulgated by the New York Compensation Insurance Rating Board; plus

- (K) Performance Security - Incremental costs incurred for increases to the Performance Bonds and Payment Bonds procured solely by the Design-Builder that are caused by the Extra Work under a Change Order; plus
 - (L) Overhead - Twelve percent of the total of items in Sections 26.3(b)(i)(A) through 26.3(b)(i)(F), as compensation for overhead, except that no percentage for overhead will be allowed on payroll taxes or on the premium portion of overtime pay or on sales and personal property taxes. Overhead will include without limitation, all costs and expenses in connection with administration, management superintendence, Small Tools, and insurance required by this Agreement, other than workers' compensation insurance; plus
 - (M) Profit - Ten percent of the total of items in Sections 26.3(b)(i)(A) through 26.3(b)(i)(F), plus the items in 26.3(b)(i)(L), as compensation for profit, except that no percentage for profit will be allowed on payroll taxes or on the premium portion of overtime pay or on sales and personal property taxes; plus
 - (N) Overhead & Profit - Five percent of the total of items in Sections 26.3(b)(i)(G) through 26.3(b)(i)(K) as compensation for overhead and profit.
- (ii) For purposes of this Agreement, "Small Tools" are items that are ordinarily required for a worker's job function, including, equipment that ordinarily has no licensing, insurance or substantive storage costs associated with it; such as circular and chain saws, impact drills, threaders, benders, wrenches, socket tools, etc.
 - (iii) Where the Extra Work or Allowance Work (excluding Unit Price Work), as applicable, is performed in whole or in part by any Subcontractors (excluding Principal Participants) pursuant to Section 26.3(b) (*Construction Work Net Costs*), the Design-Builder must be paid, subject to pre-audit by the DDC, the cost of such Work (excluding the cost of any Subcontractor performance bond or payment bond) computed in accordance with Section 26.3(b)(i) above, plus an additional allowance of five percent for the Design-Builder's overhead and profit.

26.4 NET COSTS FOR COMPENSABLE RELIEF EVENTS

Net Costs incurred or to be incurred by the Design-Builder will be calculated in accordance with the following:

- (a) Extra Work or Allowance Work

To the extent the Design-Builder performs any Extra Work or Allowance Work in connection with a Compensable Relief Event, then any applicable Allowance Approval or Change Order will, to the extent applicable, be calculated utilizing Sections 26.1 (*Generally*) through 26.3 (*Construction Work*) above.

- (b) Delay Damages

To the extent the Design-Builder incurs or will incur Net Costs in connection with a delay to the Project Schedule caused by a Compensable Relief Event and such amounts are not otherwise covered under Section 26.4(a) above, any such Net Costs under a Change Order or Allowance Approval will be calculated utilizing the following:

- (i) all costs under Sections 26.326.3(b)26.3(b)(i)26.3(b)(i)(A) (Materials), 26.3(b)(i)(B) (Labor), 26.3(b)(i)(D) (Rental Value DB Owned Equipment), 26.3(b)(i)(E) (Standby Equipment), 26.3(b)(i)(F) (Installation & Dismantling), 26.3(b)(i)(I) (Rental Value of Non-DB Owned Equipment) and 26.3(b)(i)(J) (Insurance);
- (ii) labor escalation costs based on actual costs;
- (iii) materials and equipment escalation costs based on applicable indices, including the applicable Unit Price indices (where applicable), or documentation of actual increased costs where provided. However, if the Project Requirements include escalation provisions for particular materials or equipment, escalation costs will only be allowed to the same extent the Project Requirements provide for escalation on such materials or equipment;
- (iv) additional actual material and equipment storage costs based on actual documented costs and additional costs necessitated by extended manufacturer warranty periods;
- (v) fees paid to service providers for required field office rental, utility charges, potable water, sanitation, cleaning, and other related charges, plus a five percent Design-Builder service fee for contract supervision, overhead and profit; and
- (vi) documented additional or escalated Project Site overhead costs during the delay period, including superintendent, office engineer, clerical staff, but not including working foremen or any costs covered under subsection (v), above.

26.5 OPEN BOOK BASIS

All pricing, estimating and negotiations of any Extra Work costs or Net Costs under this Article 26 will be done on an Open Book Basis. Open Book Basis means allowing the DDC to review all underlying assumptions and data associated with each request for compensation in accordance with a Compensable Relief Event, including assumptions as to costs of the Work, schedule, composition of equipment spreads, equipment rates, labor rates, productivity, estimating factors, design and productivity allowance, contingency and indirect costs, risk pricing, discount rates, interest rates, inflation and deflation rates, and other items reasonably required by the DDC to satisfy itself as to the reasonableness and accuracy of the amount.

26.6 NO DOUBLE COUNTING

- (a) No double-counting of any amounts, profits or overhead amounts will be permitted as between the application of any provision in this Article 26, including Sections 26.2 (*Design Work*), 26.3 (*Construction Work*), and 26.4 (*Net Costs for Compensable Relief Events*).
- (b) The Design-Builder will not be entitled to any additional compensation for any delay or Extra Work or any Net Costs not expressly contemplated or provided for in this Article 26, including costs, losses or damages which it might otherwise be entitled to claim under Applicable Law.

26.7 NON-RECOVERABLE COSTS

The City will not have any liability in connection with a Compensable Relief Event, Change Order or Allowance Approval for any of the following:

- (a) profit, or loss of anticipated or unanticipated profit, except as provided in Sections 26.3(b)(i)(M), 26.3(b)(i)(N), 26.3(b)(iii), and 26.4(b)(v);
- (b) consequential or indirect damages, including, construction or bridge loans or interest paid on such loans, loss of bonding capacity, bidding opportunities, or interest in investment, or any resulting insolvency; and
- (c) attorneys' fees and dispute and claims preparation expenses.

26.8 OMITTED WORK & REDUCTION IN THE CONTRACT PRICE

(a) **Lump Sum Amount**

If any Work is omitted by the DDC pursuant to a Change Order or Extra Work Directive, the Lump Sum Amount, subject to audit by the EAO, will be reduced by a pro rata portion of the Lump Sum Amount based upon the percent of Work omitted, subject to Section 26.8(d).

(b) **Unit Price**

For Unit Price Items that have been started but are only partially completed, the applicable Allowance will be reduced by a pro rata portion of the Unit Price Cost omitted subject to Sections 26.8(c) and 26.8(d).

(c) **Non-Cancelable Material**

In the event the Design-Builder, with respect to any omitted Work, has purchased any non-cancelable material or equipment, or both, that is not capable of use except in the performance of the Agreement and has been specifically fabricated for the sole purpose of the Agreement, but not yet incorporated into the Work, the Design-Builder will be paid for such material or equipment in accordance with Section 33.3(a)(ii) of the Agreement; provided, however, such payment will be contingent upon the Design-Builder's delivery of such material or equipment, or both, in acceptable condition to a location designated by the DDC.

(d) **Lost Overhead or Profit**

The Design-Builder agrees to make no claim for damages or for loss of overhead and profit with regard to any omitted Work, except as follows:

- (i) Subject to submission of a compliant Payment Request in accordance with Article 22, the Design-Builder will be entitled to payment for overhead on omitted Work otherwise payable under the Lump Sum Amount solely to the extent that such overhead cost is actually and reasonably unavoidably incurred, notwithstanding the omission. DDC will not be obligated to pay such overhead costs in excess of 3% of the value of Work omitted from the Lump Sum Amount.
- (ii) Without limitation, overhead payable under subsection (i) does not include delay damages of any kind, home office overhead, general overhead, overhead on omitted Work that would otherwise have been payable through an Allowance, including Unit Price Work, anticipated profit, or any other expense other than those specifically stated above.

26.9 RESTRICTIONS ON COMPENSATION

The Design-Builder's compensation under this Article 26 excludes the following costs:

- (a) amounts paid or to be paid to Affiliates in excess of the pricing the Design-Builder could reasonably obtain in an arm's length, competitive transaction with an unaffiliated contractor;
- (b) costs incurred in asserting, pursuing or enforcing any Claim or Dispute, other than those expressly permitted in this Article 26; and
- (c) any other costs or expenses otherwise impermissible under the City Comptroller's Directive #2.

26.10 RECORDS

- (a) Whenever any Extra Work or Allowance Work in connection with a Change Order or Allowance Approval is performed (whether by the Design-Builder directly or through a Principal Participant or Subcontractor), the Design-Builder must, at the end of each day, submit to the DDC (for verification by the DDC):
 - (i) daily time slips showing the name and number of each worker employed on the Extra Work or Allowance Work, the number of hours that the worker is employed on the Extra Work or Allowance Work, the character of their duties, and the wages actually paid to the worker. The Design-Builder must complete, sign and deliver to the DDC the time slips individually and sequentially numbered for all applicable Work performed by the Design-Builder, any Principal Participant and any Subcontractors;
 - (ii) a memorandum showing the rates and amounts of workers' compensation insurance premiums, if any, and state and federal taxes based on these wages, and vacation allowances and union dues and assessments, which the employer actually pays in accordance with contractual obligations based on these wages;
 - (iii) a memorandum showing the amount and type of the materials furnished for the Extra Work or Allowance Work, as applicable, from whom they were purchased and the amount to be paid for the materials; and
 - (iv) a memorandum of equipment used in the performance of the Extra Work or Allowance Work, listing the actual hours of operation for each piece of equipment, together with the rental claimed for each piece of equipment.
- (b) The DDC will provide templates for the time slips to the Design-Builder before commencement of the Work.
- (c) These memoranda and time slips are for the purpose of enabling the DDC to determine the amounts to be paid by the DDC under this Article 26 and, accordingly, they constitute a condition precedent to the applicable payment. The failure of the Design-Builder to furnish these memoranda and time slips with respect to any applicable Work will constitute a conclusive and binding determination that the applicable Work is not Extra Work or Allowance Work and will constitute a waiver by the Design-Builder of claims for payment for such Work.

27. FORCE MAJEURE & CHANGES IN APPLICABLE STANDARDS

27.1 Force Majeure

(a) Effect of Force Majeure on Obligations

Without limiting Article 25 (*Relief Events*), neither Party may bring a Claim for a breach of obligations under this Agreement by the other Party or incur any liability to the other Party for any Losses or damages incurred by that other Party if a Force Majeure Event occurs and the Affected Party is prevented from carrying out its obligations by that Force Majeure Event.

(b) Relief

The Design-Builder may only claim an extension of time with respect to a Force Majeure Event in accordance with, and subject to, Article 25 (*Relief Events*).

(c) Consultation

As soon as practicable following the Design-Builder's notification of a Force Majeure Event, the Parties must consult with each other in good faith and use all Reasonable Efforts to agree to appropriate terms to mitigate the effects or impacts of the Force Majeure Event and facilitate the continued performance of this Agreement.

(d) Unable to Agree

If no such terms are agreed on or before the date falling one hundred twenty days after the date of commencement of the Force Majeure Event and such Force Majeure Event is continuing or its consequence remains such that the Affected Party is unable to comply with its relevant obligations under this Agreement (an "**Extended Force Majeure Event**"), the Design-Builder may request that this Agreement be terminated, and/or the DDC may terminate this Agreement in accordance with Article 36 (*Termination for Extended Force Majeure Event*).

27.2 Changes in Applicable Standards

(a) To the extent any Applicable Standards required under this Agreement are modified and become materially different from those in effect as of the Setting Date (a "**P&T Standard Change**"), the Design-Builder will be required to implement such P&T Standard Change, unless otherwise determined by the DDC under this Section 27.2 (*Change in Applicable Standards*). A P&T Standard Change does not constitute a Change in Law.

(b) To the extent the Design-Builder becomes aware of any P&T Standard Change, the Design-Builder must promptly, but no later than within thirty days following the date the Design-Builder knew, or should have known, of such P&T Standard Change, notify the DDC of such P&T Standard Change. Any such notification must explain the P&T Standard Change in sufficient detail to allow the DDC to objectively assess any schedule or cost implications associated with implementing such P&T Standard Change. DDC may request additional or supplemental information, at least as detailed as a Detailed Relief Event Notice.

(c) Promptly following the DDC's receipt of such notice of a P&T Standard Change, the Parties will meet and confer, and the DDC will determine, in its discretion, whether:

(i) the P&T Standard Change is necessary and appropriate for the Project;

- (ii) an extension to a Guaranteed Completion Date will be necessary to implement the P&T Standard Change, in which case the Design-Builder may be eligible for a Relief Event; and
 - (iii) Net Costs, Allowance Work or Extra Work will be necessary to implement the P&T Standard Change, in which case the Design-Builder may be eligible a Compensable Relief Event.
- (d) If the DDC determines that the P&T Standard Change is necessary and appropriate for the Project, and
- (i) DDC determines that either subsection (c)(ii) or (c)(iii) above apply, DDC will issue an Extra Work Directive; or
 - (ii) DDC determines that neither subsection (c)(ii) or (c)(iii) above apply, then the Design-Builder must implement such P&T Standard Change at its own cost and expense.
- (e) Within seven days of receiving the DDC's written determination under subsection **Error! Reference source not found.**, above, the Design-Builder must notify the DDC if it disputes any part of the DDC's determination. If the Design-Builder does not notify the DDC of a dispute within that seven-day period, the Design-Builder will be deemed to have accepted the DDC's determination.
- (i) If the Design-Builder notifies the DDC of a dispute in accordance with this subsection (e), the Design-Builder and the DDC will meet to seek to resolve the dispute.
 - (ii) If the DDC and the Design-Builder fail to resolve the dispute within twenty days of the Design-Builder's notice of dispute, the matter will be referred to the Dispute Resolution Procedures.
- (f) If the DDC does not determine a P&T Standard Change is necessary and appropriate for the Project or for any other reason as determined by the DDC, the DDC may issue a written waiver to the Design-Builder regarding its implementation of such P&T Standard Change and the Design-Builder will not be required to implement any such P&T Standard Change.

PART F – WARRANTIES, DEFECTS AND LIABILITY

28. WARRANTIES

28.1 General Warranties

- (a) The Design-Builder warrants to the City that:
- (i) all Design Work performed under the Contract Documents, including that done by its Subcontractors and manufacturers, will be completed in accordance with the requirements of the Contract Documents, and will be performed in accordance with the standard of care, skill and diligence as would be provided by an engineering or architecture firm experienced in supplying similar services nationally in the United States of America to entities owning projects of technology, complexity and size similar to that of the Project;
 - (ii) all Construction Work (including all materials and equipment furnished as part of the Construction Work) will be:

- (A) completed in accordance with the requirements of the Contract Documents;
 - (B) new, unless otherwise specified in the Contract Documents;
 - (C) of good quality, undamaged and in conformance with all requirements of the Contract Documents;
 - (D) free of all defects in materials and workmanship, and
 - (E) the completed Project must perform its intended functions as explicitly described or implied in the Contract Documents; and
- (iii) the Final Design Documents, the final Construction Documents, the Record Drawings and all other records required under this Agreement will be:
- (A) accurate and complete;
 - (B) in conformance with all requirements of the Contract Documents; and
 - (C) accurate in their reflection of the Project's condition as of Final Completion.
- (b) The Design-Builder's warranty obligation excludes, each solely to the extent caused by persons other than a Design-Builder Party, defects caused by abuse, alterations, ordinary wear and tear, or failure to maintain the Work.
- (c) Nothing in this warranty is intended to limit any manufacturer's or Subcontractor's warranty that provides more extensive warranty rights (including longer warranty term) than set forth in this Article 28 or the Contract Documents. Upon Final Completion, the Design-Builder will provide and assign to the City all manufacturers' warranties that extend past Final Completion, to be enforceable directly by the City, as well as any such Subcontractors' warranties that are not extended to the City already.
- (d) The Project Requirements may provide for certain warranties of portions of the Work. These warranties are intended for the greater assurance of the City and not as a substitute for rights that the City otherwise has under this Agreement. No requirement of this Agreement with respect to warranties by the Design-Builder nor any guarantee or warranty given to the Design-Builder or the City by any manufacturer will be deemed to be a limitation upon any rights that the City would have, either expressed or implied, in the absence of these guarantees or warranties.

28.2 **Manufacturer Certification**

- (a) Where the Project Requirements require materials and equipment to conform to certain specifications or requirements of any organizations, the Design-Builder must deliver to the City the manufacturer's written certification that the applicable materials or equipment conform to the applicable standard or tentative specifications or requirements. This certification must be provided before the applicable materials or equipment are installed as part of the Work.
- (b) The DDC may reject any certification under Section 28.2(a) if it reasonably determines that it is incorrect, improper or otherwise unsatisfactory by notifying the Design-Builder thereof, within thirty days after the receipt of such certification, setting forth in reasonable detail its reasons for such rejection.

28.3 Extension of Subcontractors Warranties to the DDC

- (a) Where warranty standards are not specifically designated in the Project Requirements for any Work anticipated to be subcontracted, the Design-Builder must obtain, from all of its Subcontractors, the appropriate representations, warranties, guarantees, and obligations, in accordance with Best Management Practice, for work of similar scope and scale, with respect to design, materials, workmanship, equipment, tools and supplies provided by these Subcontractors, and must cause these warranties to be expressly extended to the DDC.
- (b) The requirements of Section 28.3(a) will not apply to standard, pre-specified manufacturer warranties of mass-marketed materials, products (including software products), equipment or supplies where the warranty cannot be extended to the City using Reasonable Efforts.
- (c) The City will have the right to exercise remedies under any such warranties extended by a Subcontractor if the Design-Builder has breached its obligation to diligently pursue such remedies under these warranties.

28.4 Design-Builder Use of Project Equipment

Any installed equipment (heating, ventilation and cooling systems, elevators, or otherwise) used by the Design-Builder during the performance of the Work prior to Substantial Completion must be refurbished or replaced to the required standard indicated in Section 28.1 (*General Warranties*), and the Design-Builder must ensure that any manufacturers' warranties for such equipment are extended to satisfy the minimum warranties required in this Agreement, which in either case, must commence as of Substantial Completion.

29. RECTIFICATION OF DEFECTS DURING WARRANTY PERIOD**29.1 Warranty Period**

- (a) Subject to any extension under Section 29.3 (*Extension of Warranty Period*), the "**Warranty Period**" is:
 - (i) other than that referred to in 29.1(a)(ii):
 - (A) for all Work completed on or prior to Substantial Completion, the period set forth in Schedule A, measured from the date of Substantial Completion and
 - (B) for all Work completed during the period from the date of Substantial Completion to Final Completion, the period set forth in Schedule A, measured from the date of Final Completion; and
 - (ii) with respect to any element of the Work where the Project Requirements specify a warranty period that would expire after the date referred to in clause (i), the period specified in the Project Requirements,

in each case, or any longer period to the extent required by any Standards of Performance.

- (b) The Warranty Period is in addition to, not in lieu of, the DDC's statutory rights under Applicable Law, as it pertains to defects, latent defects and non-conforming Works. The Warranty Period applies only to the Design-Builder's obligation to correct defects in accordance with Section 29.2 (*Rectification of Defects at Any Time*) and is not intended to constitute a period of limitations for any other rights or remedies the DDC may have

regarding the Design-Builder's performance under this Agreement and will not impair or limit the DDC's statutory rights available under Applicable Law.

29.2 Rectification of Defects and Nonconforming Work at Any Time

- (a) Where the DDC notifies the Design-Builder, or the Design-Builder becomes aware of any nonconforming Work before Final Completion or any defects within the applicable Warranty Period, the Design-Builder must, at its cost, promptly and completely correct such defects or nonconforming Work, as applicable.
- (b) The Design-Builder must within fifteen days of receipt of written notice from the DDC that any portion of the Work is defective or, not in conformance with this Agreement, (as applicable) take meaningful steps to commence correction of the defects or nonconforming Work, including the correction, removal or replacement of the defective or nonconforming Work and any damage caused to other parts of the Work affected by the defects or nonconforming Work.
- (c) If the Design-Builder fails to commence the necessary steps within the seven-day period referred to in Section 29.2(b), the DDC may take any steps that it considers necessary to correct the defective or nonconforming Work.
- (d) If the City performs corrective Work, or engages a third party to do so, the Design-Builder must reimburse the City for all costs and expenses incurred by the City in performing the correction, within fourteen days of receiving a demand from the City.
- (e) If, in the DDC's judgment, any defective or nonconforming Work (as applicable) creates an Emergency, the seven-day periods identified in 29.2(b) and 29.2(c) will not apply.
- (f) The DDC's and the City's rights under this Section 29.2 are in addition to, and do not qualify, any other rights and remedies available to the DDC under this Agreement or Applicable Law, including for latent defects.

29.3 Extension of Warranty Period

If any item of Work is repaired or replaced during the last twelve months of the then current Warranty Period for that Work, the Warranty Period for that item of Work will be extended for an additional twelve months from the date the repair or replacement is completed and Section 29.2 (*Rectification of Defects and Nonconforming Work at Any Time*) will continue to apply with respect to that Work for the extended Warranty Period. For any item of defective Work, the Warranty Period will only be extended once pursuant to this Article 29.3.

30. CONSEQUENTIAL LOSS

- (a) Subject to Section 30(b) and the rights offered to the DDC under Article 31 (*Indemnity from the Design-Builder*), neither Party will have the right to claim damages, including punitive, consequential and incidental damages, against the other Party for breach of this Agreement, in tort or on any other basis whatsoever, to the extent that any Losses claimed by either Party are for Indirect Losses.
- (b) The limitation in Section 30(a) will not apply to or limit either Party's right to recover from the other Party:
 - (i) any Losses (excluding defense costs) to the extent that they are either covered by the proceeds of Insurance Policies required to be maintained under Article 32 (*Insurance & Restoration*), or to the extent the Design-Builder is deemed to have

self-insured against the Loss in accordance with Article 32 (*Insurance & Restoration*);

- (ii) any Losses (excluding defense costs) to the extent they are covered by the proceeds of insurance actually carried by or insuring the Design-Builder under policies solely with respect to the Project and the Work, regardless of whether such coverage is required by Article 32 (*Insurance & Restoration*);
- (iii) Losses arising out of fraud, corruption, or other criminal activity on the part of the relevant Party;
- (iv) liquidated damages payable by the Design-Builder to the DDC under Article 14 (*Time for Completion and Liquidated Damages*); or
- (v) amounts payable by the Design-Builder to the DDC under any indemnity in this Agreement in respect of Third Party Claims.

PART G – INDEMNITIES AND INSURANCE

31. INDEMNITY FROM THE DESIGN-BUILDER

31.1 General Indemnity

To the fullest extent permitted by Applicable Law, the Design-Builder must release, defend, indemnify and hold harmless the Indemnified Parties on demand from and against any and all liability arising from Third Party Claims with respect to:

- (a) any breach of this Agreement by the Design-Builder or any negligence, strict liability or intentional tortious act in the performance by the Design-Builder or any Design-Builder Party of the obligations under this Agreement, which contribute to or cause, any of the following:
 - (i) death, sickness and bodily injury;
 - (ii) loss of, or damage to, tangible property; or
 - (iii) any claim or assertion by any other developer or contractor that any Design-Builder Party interfered with or hindered the progress or completion of work being performed by the other contractor or developer, or failed to cooperate reasonably with the other developer or contractor, so as to cause disruption, delay or loss;
- (b) non-payment of amounts due under a Subcontract at any-tier as a result of furnishing materials or services to Design-Builder or any of its Subcontractors in connection with the Work, to the extent that the DDC has paid the Design-Builder all applicable undisputed amounts then due and payable from the DDC to the Design-Builder;
- (c) failure of the Design-Builder to comply with Applicable Law, Applicable Standards or a Governmental Approval; or
- (d) any other failure by the Design-Builder or any Design-Builder Party to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement or the other Contract Documents.

31.2 Indemnity with respect to Hazardous Materials and Intellectual Property

Without limiting the generality of Section 31.1 (*General Indemnity*), to the fullest extent permitted by Applicable Law, the Design-Builder must release, defend, indemnify and hold harmless the Indemnified Parties on demand from and against any and all Third Party Claims to the extent related to:

- (a) Hazardous Materials introduced or brought onto the Project Site by any Design-Builder Party;
- (b) the failure by the Design-Builder or any Design-Builder Party to comply with any Project Requirements or the Contract Documents relating to Hazardous Materials;
- (c) any actual or threatened Design-Builder Release of Hazardous Materials;
- (d) any Claim or proceeding made or brought against an Indemnified Party, alleging that the Indemnified Party's or any Design-Builder Party's use of any Work Product or Intellectual Property provided to the DDC under the terms of this Agreement or any materials, plant, machinery or equipment (whether or not the alleged infringement, violation, or unauthorized use arises out of compliance with the Agreement's scope of Work), infringes, violates or is an authorized used of any Intellectual Property of a third party.

31.3 Intellectual Property

Without limiting any other rights of the DDC under this Agreement, if as a result of a Claim referred to in Section 31.2(d) an injunction is granted preventing the Design-Builder or the DDC from using any portion of the Work, the Design-Builder must, without cost or expense to the DDC:

- (a) promptly take reasonable steps to procure the right to use the Work; and
- (b) if the Design-Builder does not procure the right to use the Work within a reasonable time:
 - (i) promptly remove any portion of the Work that is subject to the injunction and, if the DDC has already paid amounts on account of the Contract Price with respect to that Work, refund these amounts to the DDC;
 - (ii) promptly modify the Work or take any other steps necessary to ensure compliance by the Design-Builder and the DDC with the injunction, all to the satisfaction of the DDC; or
 - (iii) replace the Work, with Work that is not subject to an injunction and that does not infringe any patent, copyright or other Intellectual Property right.

31.4 Exclusions from Indemnity

The Design-Builder will not be responsible or be obliged to release, indemnify, defend or hold harmless an Indemnified Party to the extent that the Claims or liability for Losses arise solely as a direct and proximate result of the fraud, gross negligence, recklessness or intentional tortious act of that Indemnified Party. Insofar as the facts or Applicable Law relating to any of the foregoing would preclude the Indemnified Parties from being fully indemnified by the Design-Builder, the Indemnified Parties will be partially indemnified by the Design-Builder to the fullest extent permitted by Applicable Law.

31.5 No Limitation on Indemnities

- (a) Each indemnity by the Design-Builder under any provision of this Agreement is without limitation to any indemnity by the Design-Builder under any other provision of this Agreement. The Design-Builder's obligation to release, indemnify, defend and hold harmless the Indemnified Parties will neither be (i) limited in any way by the Design-Builder's obligations to obtain and maintain insurance under this Agreement, nor (ii) adversely affected by any failure on the part of the Indemnified Parties to avail themselves of the benefits of such insurance.
- (b) The Design-Builder's indemnity will cover any Indemnified Party's costs and expenses associated with the applicable Third Party Claim, including all costs and expenses incurred in defending the underlying claim and those incurred in connection with the enforcement of any indemnification provisions in this Agreement by way of cross-claim, third-party claim, declaratory action or otherwise. The Parties expressly agree that the indemnification obligation under this Agreement contemplates (1) full indemnity in the event of liability imposed against the Indemnified Parties without negligence and solely by reason of statute, operation of Applicable Law or otherwise; and (2) partial indemnity for an Indemnified Party in the event of any gross negligence or intentional tort on the part of such Indemnified Parties either causing or contributing to the underlying claim (in which case, indemnification will be limited to any liability imposed over and above that percentage attributable to actual fault whether by statute, by operation of Applicable Law, or otherwise). Where partial indemnity is provided under this Agreement, all costs and expenses will be indemnified on a pro rata basis.

31.6 Actions by or against Third Parties

- (a) If any claim is made or any action brought in any way relating to this Agreement other than an action between the DDC and the Design-Builder, the Design-Builder must diligently render to the DDC without additional compensation all assistance that the DDC may reasonably require of the Design-Builder in connection with such claim or action.
- (b) The Design-Builder must report to the DDC in writing within five Business Days of the initiation by or against the Design-Builder of any legal action or proceeding relating to this Agreement.

31.7 Conduct of Third Party Claims

- (a) Where an Indemnified Party wishes to make a Claim under this Agreement against the Design-Builder in relation to a Third Party Claim for which the Design-Builder is required to provide indemnity under this Agreement, the Indemnified Party must promptly give notice of the relevant claim setting out the full particulars and any related correspondence or documentation from the third party asserting the Third Party Claim, including a copy of the Third Party Claim (if applicable).
- (b) An Indemnified Party may, by providing written notice to the Design-Builder, require the Design-Builder to defend any such Third Party Claim against that Indemnified Party even if the Third Party Claim is groundless, false or fraudulent.
- (c) If an Indemnified Party exercises its rights under Section 31.7(b):
 - (i) the Design-Builder must defend such Third Party Claim, with counsel acceptable to the City Corporation Counsel, at the Design-Builder's sole expense;

- (ii) the Design-Builder must not, without obtaining express advance written permission from the City Corporation Counsel, raise any defense involving in any way the jurisdiction of a Tribunal over the person of the City, the immunity of an Indemnified Party, the governmental nature of the City or the provisions of any statutes concerning suits against the City; and
 - (iii) if all or a portion of the Third Party Claim is covered by insurance as required by this Agreement and the applicable insurer has reserved rights or disclaimed coverage as to part or all of the Third Party Claim, any defense counsel appointed by the applicable insurer will not automatically be deemed satisfactory to the City Corporation Counsel.
- (d) Despite the Design-Builder selecting counsel satisfactory to the City Corporation Counsel in any action, an Indemnified Party may employ either in-house counsel (including the City Corporation Counsel) or separate external legal counsel to represent the Indemnified Party and the Design-Builder, where external legal counsel is engaged by an Indemnified Party, must pay the reasonable fees, costs and expenses of such external counsel if:
- (i) the Indemnified Party's use of the counsel chosen by the Design-Builder to represent the Indemnified Party would present that counsel with a conflict of interest;
 - (ii) the actual or potential defendants in, or targets of, a Third Party Claim include both the Indemnified Party and the Design-Builder, and the Indemnified Party has reasonably concluded that there may be legal defenses available to it or to other Indemnified Parties that are different from or additional to the legal defenses available to the Design-Builder; or
 - (iii) the Design-Builder has not employed counsel to represent the Indemnified Party within a reasonable time after notice that the action has been instituted.
- (e) The Design-Builder must not enter into any settlement or compromise in connection with a Third Party Claim against the City without the City's prior written consent.

32. **INSURANCE & RESTORATION**

32.1 **Types of Insurance Required**

The Design-Builder must obtain, pay for all premiums and maintain, or cause to be obtained, paid and maintained, the following types of insurance policies if and as indicated in Schedule A, and with the minimum limits and special conditions specified in Schedule A (collectively, the "**Insurance Policies**"). Such Insurance Policies must be maintained from the date the Design-Builder is required to provide proof of its Insurance Policies as set forth Section 32.8 (*Verification of Coverage*) through the date of Final Completion, unless otherwise noted in Schedule A. All Insurance Policies must meet the requirements set forth in this Article 32 and Schedule A.

- (a) **Workers' Compensation Insurance, Employers' Liability Insurance, and Disability Benefits Insurance:**
- (i) The Design-Builder must provide and must cause its Subcontractors to provide, Workers' Compensation Insurance, Employers' Liability Insurance, and Disability Benefits Insurance in accordance with Applicable Law on behalf of all employees providing services under this Agreement (except for those employees, if any, for which the Applicable Law requires insurance only pursuant to Section 32.1(h) below).

(b) Commercial General Liability Insurance:

- (i) The Design-Builder must provide Commercial General Liability (“CGL”) Insurance covering claims for property damage and/or bodily injury, including death, which may arise from any of the operations under this Agreement. Coverage under this insurance must be at least as broad as that provided by the latest edition of Insurance Services Office (“ISO”) Form CG 0001. Such Insurance Policy must include, without limitation, the following types of coverage: premises operations; products and completed operations; contractual liability (including the tort liability of another assumed in a contract); broad form property damage; independent contractors; explosion, collapse and underground (XCU); construction means and methods; and incidental malpractice.
 - (A) Such CGL Insurance must name the City, its officials and employees as additional insured. Coverage for additional insured must be at least as broad as the latest edition of ISO Form CG 20 10 and provide completed operations coverage at least as broad as the latest edition of ISO Form CG 20 37.
 - (B) If the Construction Work requires a permit from the Department of Buildings pursuant to 1 RCNY Section 101-08, the Design-Builder must provide CGL Insurance with limits of at least those required by 1 RCNY section 101-08 or greater limits required by the DDC in accordance with Schedule A. If the Construction Work does not require such a permit, the minimum limits will be those provided for in Schedule A.
 - (C) If any of the Construction Work includes repair of a waterborne vessel owned by or to be delivered to the City, such Commercial General Liability must include, or be endorsed to include, Ship Repairer’s Legal Liability Coverage to protect against, without limitation, liability arising from navigation of such vessels prior to delivery to and acceptance by the City.

(c) Builders Risk Insurance:

- (i) If specified in Schedule A, the Design-Builder must provide Builders Risk Insurance on a completed value form for the total value of the Construction Work through Final Completion of the Construction Work in its entirety. Such insurance must be provided on an All Risk basis and include coverage, without limitation, for windstorm (including named windstorm), storm surge, flood and earth movement. Unless waived by the DDC, it must include coverage for ordinance and law, demolition and increased costs of construction, debris removal, pollutant clean up and removal, and expediting costs. Such insurance must cover, without limitation, (a) all buildings and/or structures involved in the Construction Work, as well as temporary structures at the Project Site, and (b) any property that is intended to become a permanent part of such building or structure, whether such property is on the Project Site, in transit or in temporary storage. Policies must name the Design-Builder as Named Insured and list the City as both an Additional Insured and a Loss Payee as its interest may appear.
- (ii) Such Insurance Policies must specify that, in the event a loss occurs at an occupied facility, occupancy of such facility is permitted without the consent of the issuing insurance company.
- (iii) Such insurance may be provided through an Installation Floater, at the Design-Builder’s option, if it otherwise conforms with the requirements of this Section 32.1(c).

(d) **Commercial Automobile Liability Insurance:**

The Design-Builder must provide Commercial Automobile Liability Insurance for liability arising out of ownership, maintenance or use of any owned (if any), non-owned and hired vehicles to be used in connection with this Agreement. Coverage must be at least as broad as the latest edition of ISO Form CA0001. If vehicles are used for transporting hazardous materials, the commercial automobile liability insurance must be endorsed to provide pollution liability broadened coverage for covered vehicles (endorsement CA 99 48) as well as proof of MCS-90.

(e) **Professional Liability Insurance:**

- (i) The Design-Builder must maintain professional liability insurance or errors and omissions insurance appropriate to the type(s) of such services to be provided under this Agreement. The policy must:
- (A) include a professional services definition that provides the broadest scope commercially available of professional services coverage for claims arising from the errors, omissions, failure to render a service or the negligent rendering of professional services by the Design-Builder or Design-Builder Party providing professional architectural and engineering services, Construction work, and any other entities rendering professional services for which the Design-Builder is responsible;
 - (B) include rectification coverage;
 - (C) provide coverage for punitive damages where insurable by law and commercially available;
 - (D) not include any exclusion for faulty workmanship resulting from professional services rendered;
 - (E) not contain a deductible or self-insured retention that is more than that set forth in Schedule A; and
 - (F) have a retroactive date effective before the commencement of any design and will not include any exclusionary language relating to joint ventures or partnerships, or both.
- (ii) Except where the Subcontractor is covered under the Design-Builder's or other Design-Builder Party's policies (e.g., coverage for the Subcontractor is provided through a contractor's protective professional indemnity policy), each Subcontractor providing professional services under this Agreement for which professional liability insurance or errors and omissions insurance is reasonably commercially available must maintain such insurance in compliance with Section 32.1(e)(i) above in the minimum amount of \$1,000,000. At the time of the request for Subcontractor approval, the Design-Builder must provide to the DDC, evidence of such professional liability insurance on a form acceptable to the DDC.
- (iii) Claims-made policies will be accepted for professional liability insurance. All such policies must have an extended reporting period option or automatic coverage of not less than six years. If available as an option, the Design-Builder must purchase extended reporting period coverage effective on cancellation or termination of such insurance unless a new policy is secured with a retroactive date, including at least the last policy year.

- (f) **Crime Insurance:**
- (i) If indicated in Schedule A, the Design-Builder must maintain crime insurance during the term of the Agreement in the minimum amounts listed in Schedule A. Such insurance must include coverage, without limitation, for any and all acts of employee theft including employee theft of client property, forgery or alteration, inside the premises (theft of money and securities), inside the premises (robbery or safe burglary of other property), outside the premises, computer fraud, funds transfer fraud, and money orders and counterfeit money. The policy must name the Design-Builder as named insured.
- (g) **Cyber Liability Insurance:**
- (i) If indicated in Schedule A, the Design-Builder must maintain cyber liability insurance covering losses arising from operations under this Agreement in the amounts listed in Schedule A. If additional insured status is commercially available under the Design-Builder's cyber liability insurance, the insurance must cover the City, together with its respective officials and employees, as additional insured.
- (h) **United States Longshoremen's and Harbor Workers Act and/or Jones Act Insurance:**
- If specified in Schedule A or if required by Applicable Law, the Design-Builder must provide insurance in accordance with the United States Longshoremen's and Harbor Workers Act and/or the Jones Act, on behalf of all qualifying employees providing services under this Agreement.
- (i) **Contractors Pollution Liability Insurance:**
- (i) If specified in Schedule A, the Design-Builder must maintain, or cause the Subcontractor doing such Work to maintain, Contractors Pollution Liability Insurance covering bodily injury and property damage. Such insurance must provide coverage for actual, alleged or threatened emission, discharge, dispersal, seepage, release or escape of pollutants (including asbestos), including any loss, cost or expense incurred as a result of any cleanup of pollutants (including asbestos) or in the investigation, settlement or defense of any claim, action, or proceedings arising from the operations under this Agreement. Such insurance must be in the Design-Builder's name and list the City as an Additional Insured and any other entity specified in Schedule A. Coverage must include, without limitation, (a) loss of use of damaged property or of property that has not been physically injured, (b) transportation, and (c) non-owned disposal sites.
- (A) Coverage for the City as Additional Insured must specifically include the City's officials and employees and be at least as broad as provided to the Design-Builder for this Project.
- (B) If such insurance is written on a claims-made policy, such policy must have a retroactive date on or before the effective date of this Agreement, and continuous coverage must be maintained, or an extended discovery period exercised, for a period of not less than ten years from the time the Work under this Agreement is completed
- (j) **Marine Insurance:**
- (i) Marine Protection and Indemnity Insurance: If specified in Schedule A or if the Design-Builder engages in marine operations in the execution of any part of the

Work, the Design-Builder must maintain, or cause the Subcontractor doing such Work to maintain, Marine Protection and Indemnity Insurance with coverage at least as broad as Form SP-23. The insurance must provide coverage for the Design-Builder or Subcontractor (whichever is doing this Work) and for the City (together with its officials and employees) and any other entity specified in Schedule A as an Additional Insured for bodily injury and property damage arising from marine operations under this Agreement. Coverage must include, without limitation, injury or death of crew members (if not fully provided through other insurance), removal of wreck, damage to piers, wharves and other fixed or floating objects and loss of or damage to any other vessel or craft, or to property on such other vessel or craft.

- (ii) Hull and Machinery Insurance: If specified in Schedule A or if the Design-Builder engages in marine operations in the execution of any part of the Work, the Design-Builder must maintain, or cause the Subcontractor doing such Work to maintain, Hull and Machinery Insurance with coverage for the Design-Builder or Subcontractor (whichever is doing this Work) and for the City (together with its officials and employees) as Additional Insured at least as broad as the latest edition of American Institute Tug Form for all tugs used under this Agreement and Collision Liability at least as broad as the latest edition of American Institute Hull Clauses.
 - (iii) Pollution Liability Insurance: If specified in Schedule A or if the Design-Builder engages in marine operations in the execution of any part of the Work, the Design-Builder must maintain, or cause the Subcontractor doing such Work to maintain, Marine Pollution Liability Insurance covering itself (or the Subcontractor doing such Work) as Named Insured and the City (together with its officials and employees) and any other entity specified in Schedule A as an Additional Insured. Coverage must be at least as broad as that provided by the latest edition of Water Quality Insurance Syndicate Form and include, without limitation, liability arising from the discharge or substantial threat of a discharge of oil, or from the release or threatened release of a hazardous substance including injury to, or economic losses resulting from, the destruction of or damage to real property, personal property or natural resources.
- (k) The Design-Builder must provide such other types of insurance, at such minimum limits and with such conditions, as are specified in Schedule A.

32.2 **Generally**

- (a) The requirements for insurance in this Agreement (i) will not in any way be construed as a limitation on the nature or extent of the contractual obligations assumed by the Design-Builder and (ii) are not a representation by the DDC as to the adequacy of the insurance necessary to protect the Design-Builder against the obligations imposed on it by this Agreement and any applicable Project Requirements. The Design-Builder must obtain, pay for all premiums and maintain, or cause to be obtained, paid and maintained, the Insurance Policies against all claims, losses and expenses for injuries to persons, death or damages to property which may arise from, or in connection with, any Design-Builder Party's performance of the Work.
- (b) All policies must contain no wrap-up exclusion and as a result, the limits of coverage for all types of insurance for the benefit of the City, and its officials and employees, and any other additional insureds required under this Agreement are the greater of (a) all the insurance coverage and limits carried by or available to the Design-Builder or its Subcontractor, or (b) the minimum insurance coverage requirements and limits in this Agreement.

- (c) Where Insurance Policies purchased or obtained by the Design-Builder or its Subcontractors with respect to the Project would otherwise be required to name the City and/or other entities as additional insured, the full amount of such policy limits must be available to the City and additional insureds to respond to any claim in connection with the Work asserted against the City and/or additional insureds required to be named by this Agreement, regardless of any minimum limits set forth elsewhere.
- (d) The Design-Builder may satisfy its insurance obligations under this Agreement through primary policies or a combination of primary and excess/umbrella policies, so long as all Insurance Policies provide the scope of coverage required under this Agreement.

32.3 Compliance with Insurance Policies

The Design-Builder must:

- (a) comply with the terms, conditions and requirements of all Insurance Policies; and
- (b) not do or omit to do anything, or permit (insofar as it is within its power) any other Person to do or omit to do anything, on or with respect to the Project Site, the Project or with respect to the Work that: (i) results in or could reasonably be expected to result in the cancellation of any Insurance Policies, (ii) will entitle any insurer to refuse to pay any claim under any Insurance Policies (in whole or in part) or (iii) will otherwise prejudice the interests of the City in an Insurance Policy or claim under any Insurance Policy.

32.4 Insurers

(a) Minimum Rating

The Design-Builder must ensure that all Insurance Policies are obtained from insurers that have an A.M. Best rating of at least A- / VII, a Standard & Poor's rating of at least A, a Moody's Investors Service rating of at least A3, or a similar rating by any other nationally recognized statistical rating organization acceptable to the City Corporation Counsel unless prior written approval is obtained from the City Corporation Counsel.

(b) Ratings Change

If an insurer providing any of the Insurance Policies required by this Agreement:

- (i) becomes the subject of bankruptcy proceedings;
- (ii) has its rating downgraded below the minimum rating referred to in Section 32.4(a) above;
- (iii) becomes insolvent; or
- (iv) is the subject of an order or directive limiting its business activities given by any Governmental Entity (including the New York State Department of Financial Services).

the Design-Builder must promptly (but no later than thirty days), and at its own cost and expense, secure alternative coverage in compliance with the insurance requirements in this Agreement and Schedule A in order to avoid a default under this Agreement.

32.5 General Insurance Requirements

(a) **Premiums**

As between the DDC and the Design-Builder, the Design-Builder will be responsible for paying for all premiums and expenses with respect to the Insurance Policies the Design-Builder is required to provide pursuant to this Agreement and the Design-Builder will have no recourse against the DDC for payment of any premiums or expenses.

(b) **Deductibles and Self-Insured Retentions**

(i) The Design-Builder will be responsible for paying all Insurance Policy deductibles and self-insured retentions and the DDC will have no liability for deductibles, self-insured retentions or claim amounts in excess of the required coverage. If self-insured retention or deductibles (or both) are expressly permitted in this Agreement, or are approved by DDC for use, the Design-Builder must:

- (A) maintain sufficient financial strength to ensure the Design-Builder's ability to meet any self-insured retention obligations at all times;
- (B) ensure that the self-insured retention covers any liability imposed in this Agreement and the Design-Builder and its Subcontractors with respect to all Work, operations and obligations assumed by the Design-Builder and its Subcontractors;
- (C) pay for all claims, defenses, any claims-related costs and damages (at their sole cost) without any contribution from the additional insureds; and
- (D) ensure that such self-insured retention program provides the additional insureds with all rights, immunities and protections, including defense, that would be provided to it by traditional, commercially procured insurance programs.

(c) **Primary Coverage**

The Design-Builder must ensure that:

- (i) each Insurance Policy provides that the coverage is primary (and non-contributing) with respect to the City, all named and additional insureds and loss payees, as their interests may appear (not applicable to professional liability insurance/errors and omissions insurance);
- (ii) any insurance or self-insurance beyond that specified in this Agreement that is maintained by an insured or any additional insured must not contribute with it; and
- (iii) each Insurance Policy does not include any exclusions for "action over claims" (insured vs. insured).

(d) **Off-Site Coverage**

To the extent applicable, the Design-Builder must obtain and maintain, or cause to be obtained and maintained, CGL policies (with endorsements naming the City, its officials and employees, as additional insureds and the immunity clause endorsement) and workers' compensation policies (with endorsement naming applicable Subcontractors named insureds) that a reasonable and commercially prudent contractor in North America performing work similar to that to be performed by the Design-Builder would maintain to cover the Design-Builder's operations off-site.

32.6 Named Insureds, Additional Insureds and Loss Payees

- (a) Each Insurance Policy (except Insurance Policies required under Section 32.1(a), 32.1(e), 32.1(f), if not commercially available 32.1(g), and 32.1(h)) must name “The City of New York, including its officials and employees” as an additional insured.
- (b) Schedule A identifies the relevant Persons to be named as insured, additional insured, and loss payee for each Insurance Policy, as applicable and to the extent required by this Agreement. The Design-Builder must ensure that each Insurance Policy names such Persons in their respective roles, as set forth in Schedule A.

32.7 Per Project and Project-Specific Insurance and Limits

- (a) Wherever indicated on Schedule A, the minimum aggregate limits stated are “per project” aggregate limits or must be purchased specifically and exclusively for the Work and extend to all aspects of the Work, with coverage limits devoted solely to the Work.
- (b) All Insurance Policies may be reviewed by DDC for adequacy of terms, conditions, coverages and limits of coverage at any time. The DDC may at any time during the term of this Agreement change or modify the limits and coverages of insurance. To the extent such changes or modifications cause the Design-Builder to incur additional costs, the Design-Builder will be entitled to an Allowance Approval or Change Order, with costs for the same calculated in accordance with Article 26. DDC will not require changes or modifications to Insurance Policies, or require new policies, that are not commercially available.
- (c) Notwithstanding anything to the contrary above or indicated on Schedule A, when the Design-Builder is providing required Insurance Policies through a DDC-approved CCIP, such Insurance Policies are not required to be purchased specifically and exclusively for the Work, although DDC may require such CCIP to provide the minimum “per project” aggregate coverage.

32.8 Verification of Coverage

- (a) The Design-Builder must deliver proof of its Insurance Policies and, where applicable, proof that the City, and its officials, employees, and its agents and consultants, as expressly required in this Agreement, and any other additional insureds, are additional insureds on each Insurance Policy required by this Agreement and Schedule A: (1) within a time specified in Schedule A, (2) each time thereafter that the Design-Builder is required to obtain or cause to be obtained or to renew or cause to be renewed an Insurance Policy, and (iii) not less than fifteen Business Days prior to the expiration date of each Insurance Policy, and (iv) upon written request by the DDC or the City Corporation Counsel. The following proof is acceptable:
 - (i) for Insurance Policies other than Worker’s Compensation, Disability, and Employer’s Liability, a certificate of insurance accompanied by a completed certification of insurance broker or agent (included in Schedule A) and any endorsements by which the City, including its officials, employees, agents and consultants and any other additional insureds have been made an additional insured;
 - (ii) For Worker’s Compensation, Disability, and Employer’s Liability, the only acceptable proof must be one of the following forms:
 - (A) Form C-105.2, Certificate of Workers’ Compensation Insurance;

- (B) Form U-26.3, State Insurance Fund Certificate of Workers' Compensation Insurance;
 - (C) Form SI-12, Certificate of Workers' Compensation Self-Insurance;
 - (D) Form GSI-105.2, Certificate of Participation in Worker's Compensation Group Self-Insurance;
 - (E) Form DB-120.1, Certificate of Disability Benefits Insurance;
 - (F) Form DB-155, Certificate of Disability Benefits Self-Insurance;
 - (G) Form CE-200 – Affidavit of Exemption;
 - (H) Other forms approved by the New York State Workers' Compensation Board; or
 - (I) Other proof of insurance in a form acceptable to the City.
- (iii) Alternatively, the Design-Builder may provide a full copy of the Insurance Policy, including declarations and endorsements, certified by an authorized representative of the issuing insurance carrier.

Proof submitted pursuant to (i) above must (x) be on the most recent ACORD or ISO form, as applicable (or other form approved by DDC) consistent with the required coverage, (y) state the identity of all insurers, named insureds and additional insureds, and (z) state the type and limits of coverage and where applicable, include as attachments all additional insured endorsements.

Each Insurance Policy must (i) be on the most recent ACORD or ISO form, as applicable (or other form approved by DDC) consistent with the required coverage, (ii) state the identity of all insurers, named insureds and additional insureds, and (iii) state the type and limits of coverage and where applicable, include as attachments all additional insured endorsements.

- (b) Promptly (and in any event within ninety days) after the effectiveness of each Insurance Policy, the Design-Builder must deliver to the DDC:
 - (i) a true and complete certified copy of each Project-specific Insurance Policy or modification, or renewal or replacement Insurance Policy and all endorsements; and
 - (ii) evidence of payment (including clear allocation methodology on non-project specific policies) of any premium then due that is acceptable to the DDC.
- (c) Without limiting (a) and (b) above, the Design-Builder must deliver to the DDC a true and complete certified copy of each Insurance Policy applicable to the Work within seven Business Days of receiving a written request from the DDC.
- (d) If the Design-Builder:
 - (i) does not provide the DDC with a certificate of insurance and proof of payment within seven Business Days after receiving a written request from the DDC; or

- (ii) fails or refuses to obtain or maintain in force the Insurance Policies required by Agreement and Schedule A,

the DDC may, without prejudice to any other available remedy and without further inquiry as to whether the Insurance Policy is actually in force, exercise its remedies under Article 34 (*Design-Builder Default*) of this Agreement, for a Design-Builder Default under Section 34.1(n) (*Insurance Default*) of this Agreement.

- (e) The Design-Builder indemnifies the City and the DDC for Losses incurred in connection with any Design-Builder Default under Section 34.1(n) (*Insurance Default*) of this Agreement.
- (f) The DDC may, without obligation or liability, suspend all or any portion of Work during any time that the proofs of coverage, in compliance with this Agreement and Schedule A, have not been provided as required in this Agreement. If the Work is so suspended, the Design-Builder will not be entitled to claim any Relief Event or Change Order.
- (g) Insurance coverage provided pursuant to this Agreement or otherwise will not relieve the Design-Builder of any liability under this Agreement, nor will it preclude the DDC from exercising any rights or taking such other actions available to it under any other provisions of this Agreement or Applicable Law.

32.9 Endorsements, Waivers and Additional Requirements

- (a) Except as specified in (b) below, the Design-Builder must ensure, and must cause all Subcontractors, as applicable, to ensure that all Insurance Policies comply with all requirements specified in this Agreement, including the following:
 - (i) any failure on the part of a named insured to comply with reporting provisions or other conditions of the policies, any breach of warranty, any action or inaction of a named insured or others, or any change in ownership of all or any portion of the Project will not affect coverage provided to the other named insureds or additional insureds and their respective officials, employees, agents and consultants;
 - (ii) the Insurance Policies will apply separately to each named insured and additional insured against whom a claim is made, or suit is brought, except with respect to the limits of the insurer's liability;
 - (iii) endorsements adding additional insureds to required policies must not contain additional limitations, conditions, restrictions or exceptions to coverage, and must state that the interests and protections of each additional insured will not be affected by any misrepresentation, act or omission of a named insured or any breach by a named insured of any provision in the policy which would otherwise result in forfeiture or reduction of coverage;
 - (iv) the certificate of insurance and each liability policy must contain the following endorsement for the above liability coverages:
 - (A) any automobile liability policy must be endorsed as required to include Motor Carrier Act Endorsement-Hazardous Materials Clean-up (MCS-90) for those Subcontractors who will at any time transport Hazardous Materials;

- (B) unless specified otherwise in Agreement or Schedule A, each Insurance Policy must provide coverage on an “occurrence” basis and not a “claims made” basis; and
- (C) excess/umbrella policies must ‘follow form’ to the underlying policy and must have a drop-down provision and must be at least as broad as the underlying policies;
- (v) to the extent any insurance coverage contains “Other Insurance” language or provisions, such language or provisions must not be applicable to the additional insureds or to any insurance coverage maintained by an additional insured.
- (vi) insurance coverage must not contain any special limitations on the scope of coverage and/or protection afforded to the City, its officials and employees, and the other additional insureds.
- (vii) coverage for additional insureds must not be restricted to vicarious liability unless required by Applicable Law;
- (viii) each Insurance Policy must contain a separation of insured and severability of interests clauses so that coverage will respond as if separate policies were in force for each insured. An act or omission of one of the insureds must not reduce or void coverage to the other insureds; and
- (ix) each Insurance Policy must provide that the City, its officials and employees, and the other additional insureds will not be prejudiced by the Design-Builder’s or its Subcontractors’ error, omission or misdescription of the risk insured, incorrect declaration of values, failure to advise insurers of change of risk interest or property insured or failure to comply with a statutory requirement, nor by any other misrepresentation, act or omission by the Design-Builder or its Subcontractors that would otherwise result in forfeiture or reduction of coverage.
- (b) Sections 32.9(a)(i), 32.9(a)(ii), 32.9(a)(iii), and 32.9(a)(iv)(A) and 32.9(a)(iv)(B) will not apply to the professional liability policy.
- (c) In the event that any Insurance Policy required of any Subcontractor by the Agreement or by the Design-Builder is cancelled or reduced, the Design-Builder must notify DDC as soon as practicable and, in any event, not more than thirty Days after the Design-Builder learns of such cancellation or reduction. DDC may, at its sole option, suspend the performance of Work by such Subcontractor until coverage is restored or an alternative Insurance Policy acceptable to DDC is obtain and proof of the same has been accepted by DDC. Any such suspension will not constitute a Relief Event.

32.10 Waivers of Subrogation

- (a) To the greatest extent permitted by law, the Design-Builder waives all rights against the City and any other additional insureds and their officials, employees, agents and consultants for any claims to the extent covered by insurance required pursuant to this Agreement and Schedule A (whether or not such insurance is actually procured or claims are paid) or any other insurance applicable to the operations of the Design-Builder and/or its Subcontractors in the performance of this Agreement, except the rights the Design-Builder may have to the proceeds of said insurance.
- (b) The Design-Builder must require all Subcontractors to provide similar waivers in writing each in favor of all the City, and any other additional insureds.

32.11 Defense Costs

Unless otherwise agreed in writing by the DDC, defense costs must not be included within or erode the limits of coverage of any of the Insurance Policies, except that defense costs may be included within the limits of coverage of professional liability, director's & officers liability, crime, EPL, cyber liability, network security and data breach insurance, contractor's pollution and environmental impairment liability policies.

32.12 Contesting Denial of Coverage

If any insurer under an Insurance Policy described in this Agreement and Schedule A denies coverage with respect to any claims reported to the insurer, the Design-Builder will initiate and bear all costs of contesting the denial of coverage.

32.13 Subcontractor Insurance Requirements

- (a) To the extent that any Insurance Policy required by this Agreement and Schedule A does not cover a Subcontractor under a Design-Builder provided CCIP:
 - (i) the Design-Builder must cause each Subcontractor to obtain, prior to commencing any Work, and maintain all insurance, including commercial general liability, auto, workers compensation, required by Applicable Law, required by this Agreement, and that a reasonable and commercially prudent contractor in New York performing work similar to that to be performed by the Subcontractor would maintain;
 - (ii) the Design-Builder must cause each Subcontractor to include the additional insureds specified in this Agreement and Schedule A;
 - (iii) the Design-Builder must ensure that no Subcontractor's policy includes any exclusions for "action over claims" (insured vs insured); and
 - (iv) the Design-Builder must cause each Subcontractor to require that its insurer agree to waive any subrogation rights the insurers may have against the additional insureds specified in this Agreement and in Schedule A.
- (b) It is the Design-Builder's responsibility to maintain, enforce and ensure that the type of coverages and all limits maintained by it and any and all Subcontractors are accurate, adequate and in compliance, and the Design-Builder must retain a copy of its Subcontractors' certificates of insurance, as applicable.
- (c) If requested by the DDC, the Design-Builder must promptly (and in any event within five Business Days) provide certificates of insurance evidencing coverage for each Subcontractor.

32.14 Application of Insurance Proceeds

All insurance proceeds received for physical property damage to the Project under any Insurance Policies required under this Agreement and Schedule A, other than business interruption insurance maintained as part of the Insurance Policies (the "**Insurance Proceeds**"), must be first applied to repair, reconstruct, rehabilitate, restore, renew, reinstate and replace each part or parts of the Work, unless otherwise directed by DDC, in respect of which the proceeds were received. The Design-Builder will be responsible for all deductibles, self-insured retentions and losses not paid by commercial insurance, whether or not the City is an insured under the Insurance Policy.

32.15 Support of Indemnification

The insurance coverage that the Design-Builder is required to provide under this Agreement will support, but is not intended to limit, the Design-Builder's indemnification obligations otherwise set out under this Agreement.

32.16 Notices

The Design-Builder must comply with the following notification requirements in the event of any loss, damage or injury to Work, persons or property, or any accidents arising out of the Work:

- (a) The Design-Builder must make a full and complete report in writing to the DDC within three days after the occurrence.
- (b) The Design-Builder must also send written notice of any such event to all insurance carriers that issued potentially responsive policies (including commercial general liability insurance carriers for events relating to the Design-Builder's own employees) no later than twenty days after such event and again no later than twenty days after the initiation of any resulting claim or action, or both. Such notice must contain the following information:
 - (i) the number of the insurance policy;
 - (ii) the name of the Named Insured;
 - (iii) the date and location of the incident, and the identity of the persons injured or property damaged; and
 - (iv) for any policy on which the City or the PMC are Additional Insureds, such notice must expressly specify that "this notice is being given on behalf of the City of New York as Additional Insured, such other Additional Insureds, as well as the Named Insured."
- (c) The Design-Builder must provide DDC with copies of all notices of any claim made by the Design-Builder or any other party under any insurance obtained in connection with the Project, promptly (and in any event within five days) of the occurrence or receipt of the claim, denial of the claim (if applicable) and, on a quarterly basis, a summary of all claims (open and closed).
- (d) At least thirty days prior to any cancellation, termination, non-renewal or reduction of coverage, or any modification to a policy that materially affects the City or any additional insured's coverage, the Design-Builder must provide notice to DDC, at the address below, and the City Comptroller, attn: Office of Contract Administration, Municipal Building, One Centre Street, Room 1005, New York, New York 10007.

Except as noted in (d) above, whenever such notice is sent under an Insurance Policy on which the City is an Additional Insured, the Design-Builder must provide copies of the notice to the City Comptroller, the DDC and the City Corporation Counsel. Copies to the City Comptroller must be sent to the Insurance Unit, NYC Comptroller's Office, 1 Centre Street – Room 1222, New York, New York, 10007. Copies to the City Corporation Counsel must be sent to Insurance Claims Specialist, Affirmative Litigation Division, New York City Law Department, 100 Church Street, New York, New York 10007.

If the Design-Builder fails to provide any of the required notices in (a) or (b) above to any appropriate insurance carriers in a timely and complete manner, the Design-Builder must indemnify the City,

as applicable, for all losses, judgments, settlements, and expenses, including reasonable attorneys' fees, arising from an insurer's disclaimer of coverage citing late notice by or on behalf of the City.

32.17 Protection of City Property and Restoration of the Project

- (a) During the performance of the Work and up to the date of the DDC's countersigning the Certificate of Final Completion, the Design-Builder will be under an absolute obligation to protect the finished and unfinished Work against any damage, loss, injury, theft or vandalism, or any combination of each. Except as set forth in Section 32.18 (*No-Fault Restoration Obligation*), in the event of such damage, loss, injury, theft or vandalism, or any combination of each, the Design-Builder will promptly replace and repair such Work at the Design-Builder's sole cost and expense, as provided in this Agreement or directed by the DDC.
- (b) The Design-Builder must take all reasonable precautions to protect all persons and the property of the City and of others from injury, damage, or loss resulting from any Design-Builder Party's performance under, or in accordance with, this Agreement, including the duty to provide, place or replace, and adequately maintain at or about the Project site suitable and sufficient protection such as lights, barricades, and enclosures.
- (c) The Design-Builder assumes the risk of, and will be responsible for, any loss or damage to City property, including the Work, the Project or property and equipment leased by the City, used or encountered in the performance of this Agreement, where such loss or damage is caused by negligence, any tortious act, or failure to comply with the provisions of this Agreement by any Design-Builder Party.
- (d) The Design-Builder will be responsible for the damage or destruction of any property caused by any Design-Builder Party (including to the Project or any of the Work) in connection with this Agreement, and the Design-Builder must, at its own expense, repair, rebuild, restore or replace such damaged or destroyed property to a condition at least equal to the condition of such property before such damage or destruction occurred.
- (e) If Design-Builder fails to make such repair, replacement, or restoration within the established time frame required by the DDC, the DDC will have the damage or injury repaired, replaced, or restored and will deduct the cost of such repair, replacement, or restoration (plus twenty five percent for supervisory and administrative personnel costs) from monies due to the Design-Builder or where such deduction is not feasible, charge such amounts directly to the Design-Builder.

32.18 No-Fault Restoration Obligations

The Design-Builder retains all risk of loss for the Project and the Work, up and until Substantial Completion of the Project. If the Project or the Work suffers damage or destruction prior to Final Completion, subject to the terms and conditions under this Agreement, the Design-Builder must:

- (a) where such damage or destruction is valued at less than 5% of the Contract Price, promptly repair and restore the Project and the Work at no cost to the City; or
- (b) where such damage or destruction is valued at 5% or more of the Contract Price, as soon as practicable and in any event within ten days of such damage or destruction, and before undertaking any material remedial work (other than any emergency work required to stabilize other parts of the Project), provide the DDC with a draft plan (the "**Draft Reinstatement Plan**") for the carrying out of the Work necessary to repair, replace and restore the damaged or destroyed portions of the Project and related assets (the

“**Reinstatement Works**”), and containing to the extent possible the details required to be included in the Reinstatement Plan under subsection (d).

- (c) As soon as reasonably practicable and in any event within fifteen days after the delivery of the Draft Reinstatement Plan, the Parties will meet and confer on the feasibility of the Draft Reinstatement Plan.
- (d) As soon as reasonably practicable and in any event within ten days after the Parties have met and discussed the Draft Reinstatement Plan, the Design-Builder must deliver to the DDC a revised plan (the “**Reinstatement Plan**”) to reasonably take into account the concepts discussed between the Parties and making changes to the Draft Reinstatement Plan necessary to reflect the contractual terms agreed (as negotiated and finalized) with the person effecting the Reinstatement Works.
- (e) Once approved by the DDC, the Design-Builder will promptly implement such Reinstatement Works in accordance with the Reinstatement Plan and will be subject to payment either through Insurance Proceeds or other third party payments or, for a Compensable Relief Event, through a combination of Insurance Proceeds and a Compensable Relief Event to the extent permitted under Article 25 (*Relief Events*).
- (f) As directed by DDC, all Insurance Proceeds available for the repair, replacement or restoration of the Project are to be deposited by the Design-Builder in an insurance trust account, pursuant to the terms of an insurance trust agreement, to be established by the Design-Builder, as approved by the DDC.

32.19 Prosecution of Claims

- (a) Unless otherwise directed by the DDC in writing with respect to the City’s insurance claims, the Design-Builder will be responsible for reporting and processing all claims and potential claims to insurers. Such processing of claims must be given even where the Design-Builder may not be covered under an Insurance Policy if this Agreement requires that the City, its officials and employees, be additional insureds (for example, where the Design-Builder’s employees are insured).
- (b) The Design-Builder must:
 - (i) promptly report to the insurers under these policies any and all matters that may give rise to an insurance claim by the Design-Builder or the City;
 - (ii) promptly, using Reasonable Efforts, pursue these insurance claims in accordance with the claims procedures specified in these policies, whether for defense or indemnity or both; and
 - (iii) promptly provide the DDC with first- and third-party claims information, including loss reports, claims data, reserves, investigation, root cause analysis and preventive loss control measures.
- (c) The Design-Builder must enforce all legal rights against the insurer under the applicable Insurance Policies and Applicable Laws, including pursuing necessary litigation and enforcement of judgments. The Design-Builder will be deemed to have satisfied this obligation if:
 - (i) a judgment is not collectible through the exercise of lawful and diligent means in accordance with Best Management Practice; or

- (ii) in relation to the pursuit of litigation, there is no reasonable likelihood of success for the litigation.
- (d) The Design-Builder and its insurers must not, without obtaining the advance written consent of the City Corporation Counsel, raise any defense involving in any way the jurisdiction of a tribunal over the City, the immunity of the City or its officials, employees, consultants or agents, the governmental nature of the City, or the provisions of any statutes respecting suits against the City.
- (e) The DDC must:
 - (i) promptly notify the Design-Builder of the DDC's incidents, potential claims, and matters that may give rise to a City insurance claim, to tender to the Design-Builder's insurer the City's defense of the claim under the Insurance Policies; and
 - (ii) cooperate with the Design-Builder as reasonably necessary for the Design-Builder to fulfill its duties under this Agreement.
- (f) If at any time the Design-Builder:
 - (i) has not performed its obligations with respect to insurance coverage under this Agreement; or
 - (ii) is unable to enforce and collect any insurance for failure to (A) assert claims in accordance with the terms of the Insurance Policies or (B) prosecute claims using Reasonable Efforts,

for purposes of (x) Section 30 (Consequential Loss) of the Agreement or (y) calculating withholdings in compensation to the Design-Builder on account of such failures, in each case, the Design-Builder will be treated as if it has elected to self-insure up to the full amount of insurance proceeds that would have been available had the Design-Builder performed its obligations and the DDC will be entitled to reduce any such compensation due and payable to the Design-Builder to the extent any amounts representing such insurance proceeds are not promptly paid by the Design-Builder. Except as provided in the foregoing, there must be no self-insurance program, unless approved in writing by DDC.
- (g) If in any instance the Design-Builder has not promptly performed its obligation to report to applicable insurers and process any potential insurance claim tendered by the City, the City may, but is not obligated to, report the claim directly to the insurer and process the claim.

PART H – DEFAULT AND TERMINATION

33. TERMINATION BY DDC WITHOUT CAUSE

33.1 Right to Terminate Without Cause

- (a) The DDC may terminate this Agreement at any time without cause by delivering a Termination Notice to the Design-Builder stating:
 - (i) that the DDC is terminating this Agreement under this Article; and
 - (ii) that this Agreement will terminate on the date specified in the Termination Notice, which must be a minimum of ten days after the date of delivering the Termination Notice.

- (b) This Agreement will terminate on the date specified in the Termination Notice referred to in Section 33.1(a).

33.2 Design-Builder's Obligations Upon Termination

- (a) If the DDC terminates this Agreement in accordance with this Article, the Design-Builder must promptly satisfy the following ("**Termination Requirements**"):
- (i) stop all Work, and thereafter continue only such performance as may be expressly directed in writing by the DDC;
 - (ii) not enter into any further Subcontracts and ensure that its Subcontractors do not enter into any further Subcontracts and not terminate any insurance, surety bonds or other forms of security required by the Contract Documents;
 - (iii) unless instructed otherwise by the DDC, terminate all Subcontracts to the extent they relate to the Work;
 - (iv) expeditiously settle outstanding liabilities and Claims arising out of termination of Subcontracts;
 - (v) take no action which will increase the amounts payable by the City under this Agreement;
 - (vi) to the extent requested by the DDC, assign to the DDC or its nominee all of the right, title and interest of the Design-Builder under its Subcontracts in accordance with provisions required pursuant to Article 19.3(g);
 - (vii) provide the DDC a written statement of: (1) all Subcontracts, purchase orders, architect, engineer, or other contracts that are outstanding, as well as any change orders, amendments and modifications thereto; (2) the status of invoicing, payments and balance owing under each such Subcontract, purchase order and contract; (3) the status of performance and any claims asserted under each such Subcontracts, purchase order and contract; and (4) such other information as the DDC may determine to be necessary in order to decide whether to accept assignment of any such Subcontracts, purchase order or contract;
 - (viii) cancel, on the most favorable terms reasonably possible, any Subcontract, purchase order or contract, or portion thereof, that the DDC does not elect to accept by assignment and if requested by the DDC, settle, with the prior written approval of the DDC of the terms of settlement, outstanding liabilities to Subcontractors with respect to the Work terminated or discontinued;
 - (ix) transfer and deliver to the DDC or its nominee possession and control of the Project and return the Project Site in a safe and hazard-free condition;
 - (x) transfer and deliver to the DDC or its nominee all right, title and interest of the Design-Builder in and to:
 - (A) the completed Work;
 - (B) the Work in progress;
 - (C) supplies and materials and manufacturer's certifications produced or acquired for the Work;

- (D) any completed or partially completed Design Documents, Construction Documents, Final Design Documents and Record Drawings; and
 - (E) all Intellectual Property and Work Product developed for the Project.
- (xi) Take all action that may be necessary, or that the DDC may direct, for the protection and preservation of the property related to the Contract Documents that is in the possession of Design-Builder and in which the DDC has or may acquire an interest; and
 - (xii) As authorized by the DDC, use its best efforts to sell at fair market value any inventory; but the Design-Builder: (1) must not take any action with respect to any items for which title has previously transferred to the DDC; (2) is not required to extend credit to any purchaser; and (3) may acquire the property itself, under the conditions prescribed and at prices approved by the DDC. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by the DDC under the Contract Documents or paid in any other manner directed by the DDC.
- (b) The Design-Builder will not be liable for any warranties with respect to the Work that has not achieved Substantial Completion, including such Work that is substantially completed by a Subcontractor after the effective date of an assignment of a Subcontract in accordance with this Agreement. The Design-Builder will be responsible for the cost to repair any Design-Builder's non-conforming Work as may be required by DDC for DDC's or any replacement contractor's achievement of Substantial Completion.
 - (c) Request by DDC for assignment of any or all Subcontracts in accordance with this Agreement, and acceptance of the same by DDC or its nominee, successor, assignee or designee, or entrance by DDC or its nominee, successor, assignee or designee into a new contract with any Subcontractor, will not operate to make the DDC, or its nominee, successor, assignee or designee, responsible or liable for any breach of any Subcontract by the Design-Builder or for any amounts due and owing under any Subcontract, for work or services rendered prior to the effective date of the assignment to, and assumption of, the Subcontract, it being understood that no such assignment or assumption will release or discharge the Design-Builder of liabilities or obligations (including, without limitation, amounts due and owing under any Subcontract) accrued by the Design-Builder prior to the effective date of the assignment or new contract, as applicable.
 - (i) Notwithstanding the above, to the extent that monies are owed to the Subcontractor for Work performed prior to termination of this Agreement and for which DDC has not paid the Design-Builder, DDC and the Design-Builder may agree that such monies may be deducted from monies owed to the Design-Builder for payment directly to the Subcontractor, which amounts will not exceed amounts that would have been paid to the Design-Builder for such Work pursuant to this Agreement. Such agreement will be reflected in a payment assignment on the City's standard form and duly executed by the Design-Builder.
 - (ii) With respect to Work that has not achieved Substantial Completion as of the effective date of termination of this Agreement and that is subsequently completed pursuant to a Subcontract that was assigned to DDC by the Design-Builder in accordance with this Agreement, the DDC will look only to, and hold liable, the applicable Subcontractor, and not the Design-Builder, for defective or incomplete Work.

33.3 Termination Without Cause Payments

- (a) If this Agreement is terminated in accordance with this Article, the DDC must pay the Design-Builder an amount equal to the following (“**Termination Without Cause Payment**”):

the sum of the following:

- (i) the portion of the Lump Sum Amount (and any approved Allowance Approval Requests or Change Orders) that is due and payable by the DDC and applicable to the Work completed up to the date of termination and which has not been previously paid to the Design-Builder; plus
- (ii) the reasonable and properly documented out-of-pocket costs and expenses directly incurred by the Design-Builder (excluding overhead) in (A) demobilization and withdrawing its equipment and personnel from the Project Site, and (B) any unpaid amount under any supply contract for non-cancelable material and equipment (using commercially reasonable efforts to cancel) that is not capable of use except under this Agreement and has been fabricated solely for this Project; plus
- (iii) any properly documented cancellation and breakage fees incurred by the Design-Builder in terminating Subcontracts that are not acceded or transferred to DDC; plus
- (iv) the amount of any resolved or outstanding Claims to which the Design-Builder is entitled as at the termination date under this Agreement; plus
- (v) either of the following:
 - (A) if the Agreement is terminated within ninety days following registration pursuant to section 328 of the City Charter, one percent of the difference between the Lump Sum Amount and the total of all Progress Payments made by DDC prior to the notice of termination (less amounts received from Allowances); or
 - (B) if the Agreement is terminated on, or after, ninety days following registration pursuant to section 328 of the City Charter, an amount equal to the difference between the Lump Sum Amount and the total of all Progress Payments made by DDC prior to the notice of termination (less amounts received from Allowances) multiplied by each of the following, as applicable:
 - (1) five percent of the first five million dollars; plus
 - (2) three percent of any amount between five million dollars and fifteen million dollars; plus
 - (3) one percent of any amount over fifteen million dollars, (collectively with (A) and (B) above), not to exceed 1% of the Lump Sum Amount,

minus the sum of any amounts:

- (i) due and payable by the Design-Builder under this Agreement to the DDC or any Indemnified Party; plus

- (ii) received or receivable (or should have been receivable if such Insurance Policy was in effect as required in this Agreement) by the Design-Builder under any Insurance Policy in connection with the termination of this Agreement.
- (b) The Design-Builder must:
- (i) document in detail the costs and expenses claimed under this Article to the DDC's reasonable satisfaction; and
 - (ii) provide the DDC with copies of Subcontractor invoices covering amounts claimed under this Article.
- (c) The DDC's determination of any Termination Without Cause Payment amount will be final, binding, and conclusive.

33.4 **Exclusive Remedy and Waiver**

Payment to the Design-Builder under Section 33.3 (*Termination Without Cause Payments*) constitutes the Design-Builder's sole and exclusive remedy for termination of this Agreement and any outstanding Claims, except unresolved Claims for Extra Work for which the Design-Builder has delivered an Initial Delay Event Notice pursuant to Section 25.2 (*Process for Requesting Applicable Relief*) prior to the issuance of a Termination Notice by DDC pursuant to Section 33.1 (*Right to Terminate Without Cause*). Accordingly, upon payment of the termination payment under Section 33.3 (*Termination Without Cause Payments*) or termination of this Agreement under Article 34 (*Design-Builder Default*), the Design-Builder waives all Claims against the DDC with respect to the Work or this Agreement, except as provided in the previous sentence.

33.5 **No Waiver by the DDC**

Termination under this Article will not waive any right or claim to damages that the DDC may have with respect to Work that has achieved Substantial Completion or Final Completion before the date of termination, and the DDC may pursue any cause of action which it may have at law or under this Agreement with respect to the completed Work.

34. **DESIGN-BUILDER DEFAULT**

34.1 **Design-Builder Default**

The occurrence of any one or more of the following will constitute a "**Design-Builder Default**":

- (a) the Design-Builder Abandons the Project or makes any written repudiation of this Agreement or any of its terms;
- (b) following an Early Warning Trigger under Section 14.2 (*Delays*), where requested by the DDC, the Design-Builder fails to (i) timely provide a Remedial Plan to the DDC or (ii) timely comply with the terms of any such Remedial Plan;
- (c) the Design-Builder fails to achieve Substantial Completion by the Substantial Completion Long Stop Date as set forth in Schedule A;
- (d) the Design-Builder fails to pay any amount due to the DDC under this Agreement when due, except to the extent the payment is being reasonably disputed by the Design-Builder, which failure continues for twenty days after written notice of such non-payment;

- (e) the Design-Builder fails, for any reason other than failure of the DDC to make payments to the Design-Builder when obligated in accordance with this Agreement, to make prompt payments required to be made by the Design-Builder to any Subcontractor that are not in dispute, which failure continues for thirty days after written notice of such non-payment (which notice requirement will be waived if Applicable Law prohibits the giving of such notice);
- (f) any representation or warranty made by the Design-Builder in this Agreement or any certification or instrument delivered to the DDC in accordance with this Agreement that is or was materially false, materially misleading or materially inaccurate when made or which omits material information when made and which causes a material loss. Any schedule, report or other document (except those enumerated in the prior sentence) delivered to the DDC in accordance with this Agreement that is intentionally false, intentionally misleading or intentionally inaccurate when made or intentionally omits material information when made and which causes a material loss;
- (g) the Design-Builder fails to comply in any material respect with any Governmental Approval, Applicable Standard or Applicable Law;
- (h) the Design-Builder fails to promptly comply with any Suspension Order issued by the DDC in accordance with Section 34.4 (*Suspension Orders*);
- (i) the Design-Builder fails to comply with any safety compliance order issued by the DDC in accordance with Article 9 (*Safety*);
- (j) the Design-Builder fails to allow the DDC, representatives of the Department of Investigation or the Integrity Monitor to inspect the Project Site, the Works and any materials or documents, where required under this Agreement;
- (k) the Design-Builder fails to comply with Article 45 (*Assignment*);
- (l) an Insolvency Event arises with respect to the Design-Builder, any Principal Participant or any Guarantor, unless:
 - (i) with respect to a Principal Participant or a Guarantor, the Design-Builder, within thirty days of the relevant Insolvency Event, or within such longer period as agreed with the DDC, so long as the Design-Builder is diligently pursuing such replacement, replaces such Principal Participant or Guarantor with a reputable counterparty that possesses the technical and financial capability to perform all remaining applicable portion of the Work, reasonably acceptable to the DDC; or
 - (ii) in the absence of replacing such Principal Participant, the Design-Builder demonstrates to the satisfaction of the DDC that (i) the Design-Builder either possesses the technical and financial capability to perform all remaining Work in accordance with this Agreement or (ii) the Design-Builder demonstrates to the satisfaction of the City that the remaining Principal Participant or Guarantor, with respect to which a Insolvency Event has not occurred possesses the technical and financial capability to perform all remaining Work in accordance with this Agreement;
- (m) the Design-Builder fails to obtain any Guarantee or Performance Bond or Payment Bond when required under this Agreement or any such Guarantee or Performance Bond or Payment Bond is terminated, or is no longer maintained in full force and effect or the Guarantor is in default under the Guarantee, unless in the case of the Guarantee,

- (i) the Design-Builder replaces such Guarantor under the terminated Guarantee with a reputable counterparty reasonably acceptable to the DDC that possesses the technical and financial capability to perform all remaining applicable portion of the Work, within thirty days of the termination of such Guarantee, or within such longer period as agreed with the DDC, so long as the Design-Builder is diligently pursuing such replacement; or
- (ii) in the absence of replacing such Guarantor, the Design-Builder demonstrates to the satisfaction of the DDC that the remaining Guarantor possesses the technical and financial capability to perform all remaining Work in accordance with this Agreement;
- (n) the Design-Builder, at any time, fails to obtain, provide and maintain the Insurance Policies in accordance with the requirements of this Agreement;
- (o) (i) the Design-Builder's aggregate liability for liquidated damages assessed by the DDC under this Agreement exceeds the LD Cap or (ii) the Design-Builder's overall liabilities due to the DDC under this Agreement exceeds the Aggregate Liability Cap;
- (p) a material failure by the Design-Builder or its Subcontractors to cooperate with the Inspector General or the Integrity Monitor;
- (q) if the Design-Builder or any Principal Participant or their respective officers, directors, partners, five percent or greater shareholders, principals, or other employees or persons substantially involved in the Work are charged, indicted, plead guilty or convicted after execution of this Agreement under any State or federal law of any of the following:
 - (i) a criminal offense incident to obtaining or attempting to obtain or performing a public or private contract;
 - (ii) fraud, embezzlement, theft, bribery, forgery, falsification, or destruction of records, or receiving stolen property;
 - (iii) a criminal violation of any State or federal antitrust law;
 - (iv) violation of the Racketeer Influence and Corrupt Organization Act, 18 U.S.C. §§ 1961 *et seq.*, or the Mail Fraud Act, 18 U.S.C. §§ 1341 *et seq.*, for acts in connection with the submission of bids or proposals for a public or private contract;
 - (v) conspiracy to commit any act or omission that would constitute grounds for conviction or liability under any statute described in subparagraph (iv) above; or
 - (vi) an offense indicating a lack of business integrity that seriously and directly affects responsibility as a City vendor;
- (r) if the Design-Builder or any Principal Participant or their officers, directors, partners, five percent or greater shareholders, principals, or other employees or persons substantially involved in the Work are subject to a judgment of civil liability under any state or federal antitrust law for acts or omissions in connection with the submission of bids or proposals for a public or private contract;
- (s) if the Design-Builder or any Principal Participant or their officers, directors, partners, five percent or greater shareholders, principals, or other employees or persons substantially involved in the Work makes or causes to be made any false, deceptive, or fraudulent

material statement, or fail to make a required material statement in any bid, proposal, or application for City or other government work; or

- (t) without limiting 34.1(a) through (s), the Design-Builder breaches any other material obligation under this Agreement or any Design-Builder Party engages in fraud, criminal conduct, intentional tortious act, recklessness or bad faith in connection with this Agreement.

34.2 Notice of Design-Builder Default and Cure Periods

(a) Notice

The DDC may provide written notice to the Design-Builder and any or all of the Sureties upon the occurrence of a Design-Builder Default ("**Design-Builder Default Notice**").

(b) Cure Periods

Upon receipt of a Design-Builder Default Notice, the following cure periods will apply:

- (i) for a Design-Builder Default under Sections 34.1(a) (*Abandonment or Repudiation*), 34.1(b) (*Remedial Plan Default*), 34.1(c) (*Substantial Completion Long Stop Date*), Section 34.1(h) (*Suspension Order*), 34.1(i) (*Safety Order*), 34.1(k) (*Assignment*), 34.1(l) (*Insolvency*), 34.1(m) (*Performance Security*), , Section 34.1(n) (*Insurance*), 34.1(o) (*Liability Cap*) or 34.1(q) (*Criminal Activity*) to 34.1(s) (*Fraudulent Activity*), there is no cure period; or
- (ii) for each other Design-Builder Default, unless otherwise noted in Section 34.1 (*Design-Builder Default*) for any specific Design-Builder Default, a period of ten days after the Design-Builder receives the Design-Builder Default Notice.

(c) DDC Remedies

If a Design-Builder Default occurs that has no cure period or if it is not cured within the applicable cure period, the DDC may, in its discretion:

- (i) require the Design-Builder to prepare and implement a Remedial Plan in accordance with Section 34.3 (*Remedial Plan for Design-Builder Default or Early Warning Trigger*); or
- (ii) terminate this Agreement in accordance with Section 34.5 (*Termination for Design-Builder Default*).

(d) Ethical or Criminal Defaults

For any Design-Builder Default determined to exist by the DDC under Sections 34.1(q) (*Criminal Activity*), Section 34.1(r) (*Antitrust Activity*) and 34.1(s) (*Fraudulent Activity*), the Design-Builder may only rebut or Dispute such Design-Builder Default (which is deemed an Ineligible Dispute for purposes of the Dispute Resolution Clause) as follows:

- (i) on not less than ten business days' notice, the DDC will provide the Design-Builder with an opportunity to be heard as to why the Design-Builder believes that the applicable ethical or criminal Design-Builder Default has not occurred;
- (ii) the Design-Builder will provide copies of any supporting documentation at least two business days prior to the date of the scheduled opportunity to be heard;

- (iii) following such opportunity to be heard (which may not exceed 2 Business Days), the DDC will either confirm, modify or reject its initial determination of the occurrence of the applicable ethical or criminal Design-Builder Default and such confirmation or modification will be deemed final and binding; and
- (iv) with respect to any such determination, the Design-Builder may only commence an action in a court of competent jurisdiction sitting in the City and County of New York under Article 78 of the New York Civil Practice Law and Rules.

34.3 Remedial Plan for Design-Builder Default or Early Warning Trigger

- (a) Without prejudice to any other right or remedy available to the DDC, if a Design-Builder Default occurs (whether or not any cure period under Section 34.2 (*Notice of Design-Builder Default and Cure Periods*) has expired), the DDC may require the Design-Builder to prepare and submit to the DDC, within any period as the DDC reasonably determines, a plan to remedy or cure the relevant Design-Builder Default (“**Remedial Plan**”).
- (b) Within thirty days of receiving a Remedial Plan, the DDC must notify the Design-Builder as to whether the DDC accepts the Remedial Plan. If the DDC determines that the Remedial Plan is not acceptable, the DDC may terminate this Agreement in accordance with Section 34.5 (*Termination for Design-Builder Default*).
- (c) If the DDC notifies the Design-Builder that its Remedial Plan is acceptable, the Design-Builder must diligently implement the Remedial Plan in accordance with its terms.

34.4 Suspension Orders

(a) **Generally**

The DDC may at any time issue a Suspension Order, including following, or in connection with, a Design-Builder Default. Except in the event of an Emergency, a Suspension Order must be in writing and signed by the DDC Representative (a “**Suspension Order**”).

(b) **Form**

In the case of an Emergency, the DDC may issue a Suspension Order orally. The DDC must confirm any oral Suspension Order in writing within three days of giving the oral order. To the extent that a Suspension Order and a safety compliance order derive from, or are related to, the same event or occurrence, the DDC may issue one combined order including the terms of both such orders.

(c) **Duty to Comply**

Subject to Section 34.4(d) (*Relief*), if the DDC issues a Suspension Order, the Design-Builder must proceed, at its sole cost and expense, to carry out the Suspension Order, as expeditiously as possible. The Design-Builder must undertake Reasonable Efforts to overcome any inability to comply with any Suspension Order caused by a Relief Event.

(d) **Relief**

The DDC’s issuance of a Suspension Order will constitute a Compensable Relief Event, except when the DDC issues the Suspension Order in response to, or in connection with any failure of any Design-Builder Party to comply with this Agreement, including in response to or in connection with:

- (i) any conduct of any Design-Builder Party that is disruptive to the efficient functioning of the City Assets, including material interference with traffic or the public or which causes an Emergency; or
- (ii) the existence of conditions unsafe or hazardous for workers, other Project personnel or the general public due to any Design-Builder Party's failure to comply with Safety Standards.

(e) **Rectification**

Any Suspension Order will cease as notified by the DDC to the Design-Builder in writing.

34.5 Termination for Design-Builder Default

If a Design-Builder Default occurs and:

- (a) there is no cure period for that Design-Builder Default under Section 34.2 (*Notice of Design-Builder Default and Cure Periods*);
- (b) the DDC determines that the Design-Builder Default has not been cured within the relevant cure period under Section 34.2 (*Notice of Design-Builder Default and Cure Periods*); or
- (c) if the DDC requires the Design-Builder to deliver a Remedial Plan under Section 34.3 (*Remedial Plan for Design-Builder Default or Early Warning Trigger*), one of the following applies:
 - (i) the Design-Builder fails to deliver the required Remedial Plan within the time required by the DDC, or the DDC rejects any Remedial Plan that is delivered within the required time, in each case in accordance with Section 34.3 (*Remedial Plan for Design-Builder Default or Early Warning Trigger*); or
 - (ii) where a Remedial Plan has been accepted by the DDC, the DDC determines that the Design-Builder or its Sureties have failed to comply with the Remedial Plan or cure the Design-Builder Default, in each case in accordance with the schedule provided in that Remedial Plan,

the DDC may by written notice to the Design-Builder terminate this Agreement ("**DDC Termination Notice**"). A DDC Termination Notice must specify the Design-Builder Default that has occurred and the date that this Agreement will terminate.

34.6 Payments on Termination for Design-Builder Default

- (a) If the DDC terminates this Agreement in accordance with Section 34.5 (*Termination for Design-Builder Default*):
 - (i) the Design-Builder will not be entitled to receive any further payments under this Agreement; and
 - (ii) the Design-Builder must pay the DDC, within thirty days upon demand, an estimated amount equal to the aggregate of:
 - (A) all Losses incurred or estimated to be incurred by the DDC associated with termination of this Agreement and the Design-Builder Default (the "**Estimated DDC Damages**"); and

- (B) any outstanding liquidated damages or other claims that have accrued up to, and remain unpaid as of, the date of termination of this Agreement.
- (iii) upon Final Completion, the DDC will calculate its actual Losses incurred due to such termination of this Agreement (the “**DDC Actual Damages**”), and based on such calculation:
 - (A) if the DDC Actual Damages are less than the Estimated DDC Damages, then DDC will return any Estimated DDC Damages received in excess of the DDC Actual Damages; or
 - (B) if the DDC Actual Damages are more than the Estimated DDC Damages, the DDC may issue a demand to the Design-Builder to pay the DDC, within thirty days upon demand, a final amount equal to the DDC Actual Damages not otherwise previously received from the Design-Builder.
- (b) Without limiting the generality of Section 34.6(a)(ii)(A), the DDC’s Losses associated with termination of this Agreement for a Design-Builder Default will include:
 - (i) the DDC’s costs and expenses in completing the Work including:
 - (A) all costs and expenses that the DDC has incurred or will incur in completing all of the Work, less the remaining balance of the Contract Price;
 - (B) all Losses and expenses (including attorney and other advisor fees and expenses) incurred by the DDC in connection with any re-procurement of the Work; and
 - (C) all costs and expenses (including attorney and other advisor fees and expenses) incurred by the DDC defending claims arising from the Design-Builder’s performance or non-performance (including any Claims by the Design-Builder), and
 - (ii) subject to Section 14.7 (*Limitation on Liability*), losses that have or will be incurred by the DDC for any reasonable delay or projected delay to the timely achievement of all Guaranteed Completion Dates that remain outstanding on the date of termination of this Agreement.

34.7 Improper Termination for Design-Builder Default

If it is finally determined, pursuant to Article 40 (*Dispute Resolution Procedure*), that the DDC incorrectly terminated this Agreement for a Design-Builder Default:

- (a) the DDC will be deemed to have terminated this Agreement for convenience under Article 33.3 (*Termination Without Cause*); and
- (b) the Design-Builder’s sole relief for such improper termination will be the applicable termination compensation under and in accordance with Section 33.3 (*Termination Without Cause*).

35. DESIGN-BUILDER SUSPENSION RIGHTS

35.1 Suspension Trigger

Each of the following will constitute a “**Suspension Trigger**”:

- (a) DDC’s failure to pay the Design-Builder any undisputed Progress Payment amount, which failure continues for thirty days after written notice of failure to make such payment has been received by the DDC from the Design-Builder; or
- (b) DDC’s failure to pay any other required undisputed amount due and payable to the Design-Builder under this Agreement, which failure continues for thirty days after written notice of failure to make such payment has been received by the DDC from the Design-Builder.

35.2 **Suspension Notice**

In order for a Suspension Trigger to occur, the Design-Builder must notify the DDC of the occurrence of any such Suspension Trigger once the applicable cure periods have elapsed (“**Suspension Trigger Notice**”).

35.3 **Suspension Rights**

- (a) The Design-Builder may suspend its performance of the Work no earlier than thirty days after the Design-Builder delivers to the DDC notice of the Design-Builder’s intention to suspend its performance of the Work; provided, that the Suspension Trigger has not been cured by the end of such thirty-day period.
- (b) When the Suspension Trigger has been remedied the Design-Builder must promptly resume performance of the Work and must mitigate any further losses or delay to the Design-Builder. Unless the Design-Builder is entitled to suspend its performance pursuant to this Section, the Design-Builder will not suspend or delay performance of the Work because of any other breach by the DDC that does not constitute a Suspension Trigger. To the extent there is a good faith Dispute concerning any Progress Payment, the Design-Builder must continue performance of the Work during any such Dispute as provided in Section 22.6 (*Disputes*).

36. **TERMINATION FOR EXTENDED FORCE MAJEURE EVENT**

36.1 **Notice to Continue**

Subject to Section 27.1(d) (*Unable to Agree*), the Design-Builder may request termination of, or the DDC may terminate, this Agreement due to an Extended Force Majeure Event on twenty Business Days’ notice. If the Design-Builder gives such notice prior to Final Completion, then the DDC has the option, in its absolute discretion, either to accept such notice or to respond in writing on or before the date falling ten Business Days after the date of its receipt stating that it requires this Agreement to continue until the time the DDC terminates this Agreement.

- (a) If the DDC gives the Design-Builder notice of acceptance of termination or issues a notice of termination due to an Extended Force Majeure Event, this Agreement will terminate at the expiration of written notice from the DDC to the Design-Builder that either:
 - (i) DDC has accepted the Design-Builder’s request for termination; or
 - (ii) DDC is terminating this Agreement due to an Extended Force Majeure Event.
- (b) If the DDC does not accept the Design-Builder’s request for the termination, then the Design-Builder must, to the extent reasonably practicable, continue to perform the Work and will be entitled to claim such Extended Force Majeure Event as a Compensable Relief Event (to the extent not covered by insurance proceeds) for Net Costs incurred on or after

the date beginning one hundred twenty-one days from the date of the Extended Force Majeure Event.

36.2 Termination for Extended Force Majeure Event

- (a) If either the DDC terminates this Agreement for an Extended Force Majeure Event, or the DDC accepts the Design-Builder's termination notice delivered in connection with Section 36.1 (*Notice to Continue*), this Agreement will terminate within twenty Business Days following the DDC's notification, or acceptance, of such termination.
- (b) The DDC will pay for all Work completed by the Design-Builder, including all Retainage Amounts held, subject to submission of a payment request in accordance with Article 22 (*Payment Provisions*).
- (c) The Design-Builder will comply with all termination obligations under Article 37 (*Design-Builder Termination Obligations*).
- (d) Acceptance by DDC of the Design-Builder's request to terminate or termination by DDC in accordance with this Article 36 will not be deemed a termination without cause in accordance with Article 33 (Termination by DDC Without Cause) or a termination for Design-Builder default in accordance with Article 34.5 (Termination for Design-Builder Default).

37. DESIGN-BUILDER TERMINATION OBLIGATIONS

If this Agreement is terminated for any reason by either the DDC or the Design-Builder in accordance with the terms of this Agreement in addition to any other right available at law, the DDC may:

- (i) take possession, for the purpose of completing the Work, of all materials, equipment, scaffolds, tools, appliances, completed Work, Subcontracts, Intellectual Property, Work Product, Insurance Policies (to the extent assignment or transference is permissible under such Insurance Policies) and other items that have been purchased or provided for the performance of the Work;
- (ii) employ any Person or Persons to complete the Work and provide all of the required labor, services, materials, equipment and other items; and

the Design-Builder must at no cost to the DDC transfer and assign the items referred to in Section 37(i) and comply with all requirements in Section 33.2(a) (*Design-Builder's Obligations Upon Termination*), including assigning all Subcontracts to the DDC as may be requested by the DDC.

PART I – ADMINISTRATION OF THIS AGREEMENT

38. AUTHORIZED REPRESENTATIVES

38.1 Authorized Representatives

- (a) Each of the DDC and the Design-Builder must designate an authorized representative to make decisions and bind that Party on matters relating to the Contract Documents (the "**DDC Representative**" and "**Design-Builder Representative**" respectively and together the "**Authorized Representatives**") by giving notice to the other Party of such designation. Each Party may change its Authorized Representative by a notice delivered to the other Party.

- (b) The Design-Builder Representative is identified in Schedule A. DDC will identify the DDC Representative in the NTP.
- (c) The DDC Representative will have the authority to exercise all powers, rights and obligations under this Agreement on behalf of DDC, subject to Applicable Law and any limitations set forth in DDC's notice of designation. All powers, rights and obligations excepted from the DDC Representative's designation of authority are reserved to the Commissioner acting through their Deputy and Associate Commissioners and may be designated elsewhere in writing.
- (d) DDC's Project Manager or Engineer in Charge
 - (i) In addition to the DDC Representative and without limiting the authority of the same, DDC will designate a DDC Project Manager or Engineer in Charge who will generally be authorized, except where such authority is specifically delegated elsewhere in this Agreement and subject to any limitations set forth in DDC's notice of designation, to act on behalf of DDC and with whom the Design-Builder may consult at all reasonable times, and whose instructions, requests and decisions will be binding upon DDC as to all matters pertaining to the Contract Documents.
 - (ii) Unless specifically authorized in writing by DDC, the DDC Project Manager or Engineer in Charge does not have authority to issue Change Orders or to issue Allowance Approvals in connection with Relief Events.
 - (iii) The DDC Project Manager, Engineer in Charge and other representatives designated by DDC may be City employees or third-party consultants.

38.2 **DDC's Program and Project Management Consultant for BBJ**

- (a) The Design-Builder acknowledges that the DDC has engaged AECOM-Hill Joint Venture (the "PMC"), a program and project management consultant, to act as an "owner's representative" for the implementation of the Project. Subject to the limitations in this Agreement, the PMC will support DDC in the administration, coordination, management, technical oversight and construction oversight of the Project, all as may be authorized by the DDC. The Design-Builder will at all times cooperate and coordinate with the PMC, and will follow directions of the PMC except where such directions exceed the PMC's authority.
- (b) The PMC's role and discretions for the Project include:
 - (i) inspect and supervise the performance of the Work, except that the PMC will not have the power to issue a Change Order or an Allowance Approval in connection with a Relief Event, except as specifically designated in writing by DDC;
 - (ii) to determine the amount, quality, and location of the Work to be paid for under this Agreement;
 - (iii) excluding any legal interpretations or questions, which will be reserved for DDC, to determine all questions in relation to the Work, to interpret the Contract Drawings, Specifications, and Addenda, and to resolve all patent inconsistencies or ambiguities;
 - (iv) to determine how the Work will be coordinated with Work of Other Contractors engaged on BBJ, including the power to suspend any part of the Work, but not the whole of the Work;

- (v) to approve any Minor Waivers, subject to, and in accordance with this Agreement; and
- (vi) without limiting the above, to review, comment, and where delegated by DDC approve any Submittals required under this Agreement.
- (c) The DDC Representative will designate, in writing, members of the PMC to exercise the above authority. Determinations, including approval of Submittals, will not be binding on DDC except where made or issued by designated members of the PMC.

38.3 Delegates

An Authorized Representative may, by a notice delivered to the other Party, delegate its authority under Section 38.1 (*Authorized Representatives*) or any other matter to be performed by the Authorized Representative under this Agreement, to another individual or individuals to perform those functions, and make binding decisions with respect to those matters, specified in that notice.

39. PARTNERING PROVISIONS

- (a) Prior to escalating a Dispute to Senior Representative Negotiations under Article 40 (*Dispute Resolution Procedures*) below, and where there is any lack of concurrence regarding either Party’s performance or obligations under this Agreement, the Parties must promptly begin discussions between the personnel of each organization at the tier levels and for a period not to exceed the maximum time periods described in the table below (the “**Escalation Resolution Ladder**”). The Parties will identify personnel of the appropriate tier promptly after issuance of the NTP.

| TIER | TIME LIMIT* |
|--------|--------------------|
| Tier 1 | Five Business Days |
| Tier 2 | Five Business Days |

**Time in which Dispute must be resolved or passed on to the next tier*

- (b) The personnel of both organizations may agree to terminate their discussions prior to the expiration of the time periods above and escalate the Dispute to the next tier or to Senior Representative Negotiations, as applicable. The Escalation Resolution Ladder must only be used to achieve consensus on interpretation of the Parties’ obligations or performance under this Agreement (an “**Informal Dispute**”). The Escalation Resolution Ladder must not be used to resolve, and Informal Disputes do not include, disputes that (i) require a Change Order to implement, (ii) principally involve issues that are purely legal in nature, (iii) authorize a deviation from the Project Requirements or any other terms of the Agreement or (iv) authorize any additional compensation to the Design-Builder or extension to any Guaranteed Completion Date. As a result, each of the Disputes identified in (i)-(iv) (“**Formal Disputes**”) will be directly resolved pursuant to the Article 40 (*Dispute Resolution Procedures*).
- (c) The resolution of an Informal Dispute must be agreed to in writing among the Parties. To the extent any Informal Dispute (other than a Fast-Track Dispute which will be resolved pursuant to Section 40.3 (*Fast-Track Dispute*)) is not resolved pursuant to the Escalation Resolution Ladder, the Parties must then seek to resolve such Dispute through Senior Representative Negotiations in Article 40 (*Dispute Resolution Procedures*) below.
- (d) If within thirty days following the expiration or termination of any Informal Dispute resolution under the Escalation Resolution Ladder, a Party fails for any reason to commence

engaging in Senior Representative Negotiations or resolving a Fast-Track Dispute in accordance with Section 40.3 *Fast-Track Dispute*) to resolve such Informal Dispute not otherwise resolved under this Article 39 (*Partnering Provisions*), such Party will be deemed to have irrevocably and forever waived and released any claim or right to damages attributable to such Informal Dispute that such Party may otherwise have been able to claim under this Article 39 (*Partnering Provisions*) or Article 40 (*Dispute Resolution Procedures*).

40. DISPUTE RESOLUTION PROCEDURE

40.1 General Provisions

All Disputes (excluding Ineligible Disputes) arising out of, or relating to, the Contract Documents, that are not otherwise resolved by the Parties, must be resolved in accordance with this Article 40 (the “**Dispute Resolution Procedure**”).

40.2 Senior Representative Negotiations

- (a) **Notification.** Within thirty Business Days of either (i) the date the disputing party is aware, or should have been aware, of a Formal Dispute or (ii) the expiration or termination of any Informal Dispute resolution under the Escalation Resolution Ladder, the disputing Party must notify the other Party of such Dispute (a “**Dispute Notification**”), and the Senior Representatives of the Parties must meet and use all Reasonable Efforts to resolve such Dispute in accordance with this Section 40.2. Such Dispute Notification must be in substantially the form attached in Part C of Exhibit 5 (*Disputes Review Board*).

If, for any reason, a Party fails to deliver a Dispute Notification within the time period required in the above paragraph, such Party will be deemed to have irrevocably and forever waived and released any claim or right to damages attributable to such Dispute that such Party may otherwise have been able to claim under this Article 40 (*Dispute Resolution Procedure*).

- (b) **Response.** Within ten Business Days of receiving the Dispute Notification, the Senior Representative of the Party receiving the Dispute Notification will respond in writing (“**Dispute Notification Response**”) with a notification that must include the following information:
- (i) an identification of any disputed facts;
 - (ii) references to any relevant provisions from the Contract Documents;
 - (iii) a proposed resolution of the Dispute; and
 - (iv) any other information the responding Party considers relevant.
- (c) **Commencement.** The Senior Representative Negotiations must commence within seven Business Days of receipt of the Dispute Notification Response by the disputing Party and such Senior Representative Negotiations will not exceed thirty Business Days (or such longer period agreed by the Parties) commencing from the date of Senior Representative Negotiations commencement. Failure of a Party to submit its Dispute Notification Response within the time period set forth in clause (b) above, or to commence and engage in Senior Representative Negotiations in accordance with this Section 40.2, until such Dispute Notification Response is provided, will result in a waiver of such Party’s right to participate in (i) any Senior Representative Negotiations or (ii) any subsequent Disputes Review Board concerning the Dispute at issue.

- (d) **Rules.** To the extent a Dispute is not resolved within fifteen Business Days of commencement of the Senior Representative Negotiations, either Party may then request an independent mediator be appointed in accordance with the Rules (as defined below) to assist with mediating the Agreement's administration with regards to the Dispute at issue. The Parties will appoint such mediator no later than ten Business Days following receipt of such request for a mediator (unless the Parties agree to a longer period). The thirty Business Day time limit for Senior Representative Negotiations will be tolled for a maximum period of ten days from the time a Party requests an independent mediator to the time an independent mediator is appointed. Once an independent mediator is appointed, the Parties will utilize the subsequent fifteen Business Days to resolve the Dispute in accordance with engagement rules and procedures governed by the American Arbitration Association's Construction Industry Rules for Mediation in effect as of the date of the relevant Dispute Notification (the "**Rules**"). Any costs associated with such mediator will be split equally among the Parties.
- (e) **Confidentiality.** Statements, materials and information prepared for, made or presented at, or otherwise derived from Senior Representative Negotiations (including any meeting of the Senior Representatives) are confidential and may not be used as evidence in any proceedings or the Disputes Review Board. However, generic materials or information that are not bespoke to the Senior Representative Negotiations may be re-submitted as part of any evidence considered by the Disputes Review Board or any subsequent litigation.
- (f) **Resolution.** If the Senior Representative Negotiations resolve the Dispute, the Parties must promptly (but no later than five Business Days following resolution) record such agreement in a writing signed by the Senior Representatives.

40.3 Fast Track Dispute

- (a) If either Party provides a Dispute Notification that includes a Fast-Track Dispute (a "**Fast-Track Dispute Notification**"), and the non-disputing Party agrees within three Business Days of its receipt, that a Fast-Track Dispute exists, then such Fast-Track Dispute may then (at the disputing Party's option) bypass Senior Representative Negotiations and be directly submitted to the Disputes Review Board for a hearing and their determination in accordance with Section 40.4 (*Disputes Review Board*).
- (b) **Rejection Notice.** If upon receipt of a Fast-Track Dispute Notification, the non-disputing Party disagrees, within three Business Days of its receipt of such notification, that a Fast-Track Dispute exists (the "**Disagreeing Party**"), such Party must submit (within five Business days of its notification of disagreement) an equivalent notice to the Dispute Notification Response explaining its justification (a "**Fast-Track Dispute Rejection Notice**") simultaneously to the disputing Party and the Disputes Review Board. Failure to respond to a Fast-Track Dispute Notification within three Business Days of the non-disputing Party's receipt, will be deemed a concurrence by the non-disputing Party for purposes of this Section 40.3.
- (c) **Notice to DRB.** Within two Business Days of the disputing Party's receipt of a Fast-Track Dispute Rejection Notice, both the Fast-Track Dispute Notification and the Fast-Track Dispute Rejection Notice must be submitted to the Disputes Review Board for its review and consideration. The Disputes Review Board will issue a determination within five Business Days of its receipt of both notifications on whether such Dispute is a Fast-Track Dispute. Such Fast-Track Dispute determination will be final and binding for purposes of commencing a Disputes Review Board process under Section 40.4 (*Disputes Review Board*) below. If the Disputes Review Board determines such Dispute to be a Fast-Track Dispute, then the process set out in Section 40.4 (*Disputes Review Board*) will immediately apply.

40.4 Disputes Review Board

- (a) **Dispute Statement.** Within seven Business Days of either (1) the Parties being unable to reach agreement on a Dispute pursuant to Section 40.2 (*Senior Representative Negotiations*), (2) a Fast-Track Dispute having been agreed by the Parties or determined to exist by the Disputes Review Board under Section 40.3 (*Fast-Track Dispute*) or (3) either Party seeking reconsideration of the Disputes Review Board's recommendation in accordance with Section 40.4(h)(ii) below, then in each case, the Parties must each submit a description of their position with respect to the Dispute to the Disputes Review Board for its review and consideration providing an equivalent level of detail as the Dispute Notification (the "**Dispute Statement**"). Failure of a Party to submit its Dispute Statement within the time period set forth in this clause (a) may result in a waiver of its right to submit a Dispute Statement and participate in the Disputes Review Board with respect to the Dispute at hand, at the discretion of the Disputes Review Board.
- (b) **Administrative Procedures.** The authority and administrative procedures with respect to constituting the Disputes Review Board are set forth in Part B of Exhibit 5 (*Disputes Review Board*).
- (c) **Hearing Date.**
- (i) Upon each Party's submission of its respective Dispute Statement to the Disputes Review Board, the Disputes Review Board will decide when to conduct the hearing; provided, that the Disputes Review Board must hold the hearing within fifteen Business Days of receipt of both Dispute Statements, unless the Parties mutually agree to a longer time period.
- (ii) Any Fast-Track Dispute must be heard within seven Business Days of receipt of both Dispute Statements.
- (d) **Discovery.** Each Party may voluntarily furnish written evidence or documentation to the Disputes Review Board regarding the applicable Dispute in the time period required by the Disputes Review Board. If either Party intends to furnish such information to the Disputes Review Board, it must provide copies of such information to the other Party reasonably in advance of the scheduled hearing date and concurrently with providing it to the Disputes Review Board. If the Disputes Review Board requests any additional documentation or evidence prior to, during, or after the hearing, the relevant Party will provide the requested information to the Disputes Review Board and to the other Party, in accordance with the deadlines set by the Disputes Review Board.
- (e) **Hearing.** The Design-Builder and the DDC will each be afforded a reasonable opportunity to be heard by the Disputes Review Board and to offer evidence, but in no event will the time for hearings exceed sixty consecutive days from the notice of hearing commencement issued by the Disputes Review Board, without the consent of both Parties. Neither the DDC nor the Design-Builder may present information at the hearing that was not previously distributed to the Disputes Review Board and the other Party. A court-reporter may be requested by either Party for any Disputes Review Board hearing. In all Disputes pertaining to a Design-Builder Default, there will be a transcript prepared by a court-reporter to document the hearing for the record.
- (f) **Advisory Opinion.** Prior to commencing a hearing (including during Senior Representative Negotiations), based solely on the facts presented and other information otherwise made available to the Disputes Review Board, either Party may seek a declaratory judgment in the form of an advisory opinion of the Disputes Review Board, which determines the rights of the parties, without any hearing and without ordering anything be done or awarding any damages or extensions to performance. The Parties

may use such advisory opinion to reach a pre-Disputes Review Board determination settlement.

- (g) **Decision.** The Disputes Review Board's recommendations for resolution of the Dispute will be given in writing to both the DDC and the Design-Builder within fifteen Business Days after completion of the hearing. The Disputes Review Board's recommendation must be made with a majority vote of the Board Members. In cases of substantial complexity, both Parties may agree to allow additional time for the Disputes Review Board to formulate its recommendations.
- (h) **Acceptance.** Within fifteen Business Days of receiving the Disputes Review Board's recommendations, both the DDC and the Design-Builder will respond to the other and to the Disputes Review Board in writing, signifying either acceptance or rejection of the Disputes Review Board's recommendations. The failure of either Party to respond within the fifteen-Business Day period will be deemed an acceptance of the Disputes Review Board's recommendations by that Party.
 - (i) The recommendations of the Disputes Review Board will be final and binding only to the extent the Parties accept such recommendations, either expressly or to the extent deemed accepted by virtue of that Party's failure to respond within the fifteen-Business Day period. If the Parties accept (or are deemed to have accepted) any recommendation of the Disputes Review Board in accordance with this Article 40, each Party must (unless otherwise specified in the relevant recommendation) give effect to such recommendation as soon as is reasonably practicable.
 - (ii) To the extent any Disputes Review Board recommendation is accepted by both Parties and such recommendation requires a Change Order, then such Change Order must be agreed between the Parties in accordance with Section 24.2 (*Change Order*).
 - (iii) Should the Dispute remain unresolved, either Party within thirty days of receiving the Disputes Review Board's recommendation, may seek reconsideration of the decision by the Disputes Review Board only when there is material and relevant new evidence (not otherwise discoverable prior to any Disputes Review Board's decision) to present, and the Disputes Review Board must give such Party a reasonable opportunity to present such new facts for consideration. Any Party seeking reconsideration must provide written notice to the other Party as soon as practicable, but no later than thirty days of receiving the Disputes Review Board's recommendation.
- (i) **Design-Builder Default.** Notwithstanding anything to the contrary and subject to Section 34.2(d) (*Ethical or Criminal Defaults*), the DDC's decision to exercise its right to terminate the Design-Build Agreement due to a Design-Builder Default will only be subject to further review (i) following the DDC's decision to accept a Disputes Review Board's decision upholding DDC's exercise of such rights, which DDC decision will be considered final and binding, and (ii) in a court of competent jurisdiction sitting in the City and County of New York under Article 78 of the New York Civil Practice Law and Rules. Any statute of limitations will commence from the DDC's decision to accept or reject the Disputes Review Board's opinion in connection with any such Dispute regarding a Design-Build Default, or if DDC neither accepts nor denies the decision, upon the date the decision is deemed accepted under this Section 40.4(i)(ii).

40.5 Conduct During a Dispute

During any Dispute and throughout the Dispute Resolution Procedures:

- (a) the Design-Builder must continue with all Work (including Work that is the subject of the Dispute) in a diligent manner and without delay in accordance with (and subject to) all applicable provisions of the Contract Documents and must use Reasonable Efforts to mitigate any delay to the Project or any losses that may be incurred by the Parties; and
- (b) the Parties must continue to comply with all provisions of the Contract Documents (including payment of any amounts not in dispute that are payable under the Contract Documents).

40.6 Joinder

The Disputes Review Board may, or at the request of any party to the Dispute, will compel the participation of any of the Design-Builder's Subcontractors or Other Contractor with a contract related to the Work under this Agreement, and that Subcontractor or Other Contractor will be bound by the decision of the Disputes Review Board to the extent provided under this Agreement. Any Other Contractor or Subcontractor thus brought into the Dispute resolution proceeding will have the same rights and obligations under this Article 40 as the Design-Builder.

40.7 Record Keeping

If the Design-Builder fails to strictly comply with any notice provisions (including timing requirements with respect to a Fast-Track Dispute, Dispute Notification, Dispute Notification Response or Dispute Statement) or recordkeeping provisions of this Agreement, any claim of the Design-Builder with respect to such records or notice will be deemed waived, and the DDC will not have to show prejudice to its interest before such denial is made.

40.8 Venue and Seat

The venue for the Disputes Review Board will be in New York, New York, at a neutrally-designated location, as agreed upon by the members of the Disputes Review Board.

40.9 Governing Law

This Article 40 (*Dispute Resolution Procedure*), and the proceedings under this Agreement, will be governed by the laws of the State of New York, without regard to provisions governing conflicts of law principles.

40.10 Judicial Remedies

- (a) **Litigation.** If either (i) the Parties are unable to reach agreement on a Dispute following a Disputes Review Board's decision pursuant to Section 40.4(g) (*Decision*) or (ii) in the case of any Ineligible Dispute, then in each case, either Party may file a plenary action for such Dispute in a court of competent jurisdiction sitting in the City and County of New York within ninety days of the occurrence of either of the following (as applicable): (A) any recommendation of the Disputes Review Board under Section 40.4(g) (*Decision*) or (B) the earlier of either the date in which the disputing Party (1) has discovered or determined the existence of such Ineligible Dispute or (2) should have, reasonably discovered or determined the existence of such Ineligible Dispute. Except for Ineligible Disputes, no litigation or claim may be brought by either Party concerning any Dispute prior to using the procedures described in this Article 40. Failure of a Party to file an action within the ninety-day period in this clause (a) will result in an irrevocable waiver of such Party's right to file a claim with respect to the relevant Dispute.
- (b) **Jurisdiction.** Subject to first satisfying the terms of this Article 40, each Party irrevocably submits to the exclusive jurisdiction of any court of competent jurisdiction sitting in the City

and County of New York, and any appellate court thereof, for the settlement of any Dispute. The New York courts are the most appropriate and convenient courts to settle any such Dispute and each of the Parties to this Agreement waives objection to those courts on the grounds of inconvenient forum or otherwise in relation to proceedings in connection with this Agreement.

- (c) **JURY WAIVER.** EACH OF THE PARTIES TO THIS AGREEMENT WAIVES ANY RIGHT IT MAY HAVE TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION IN CONNECTION WITH ANY DISPUTE. THIS AGREEMENT MAY BE FILED AS A WRITTEN CONSENT TO TRIAL BY THE COURT.

40.11 **Claims and Actions**

- (a) Any Ineligible Dispute that is not subject to dispute resolution under this Article will not be made or asserted in any action, unless the Design-Builder will have strictly complied with all requirements of this Agreement relating to the giving of notice and of information with respect to such claims.
- (b) No action will be instituted or maintained on any Claim that is not subject to dispute resolution under this Article 40 unless such action is commenced within six months after the final payment under this Agreement, or within six months of the termination or expiration of this Agreement, or within six months after the accrual of the cause of action, whichever occurs first.

41. **RECORDS AND AUDIT**

41.1 **Maintenance of Records**

The Design-Builder must:

- (a) in accordance with Best Management Practice, keep and maintain separate and accurate books, records, documents, and other evidence and utilize appropriate accounting procedures and practices that sufficiently and properly reflect all direct and indirect costs of any nature expended in the performance of this Agreement or that otherwise relate to the Project, the Project Site or the Work (including copies of all original documents delivered to the DDC) at a Project Office or, where no Project Office exists or with the DDC's written approval, any other location (the "**B&R Site**");
- (b) ensure the DDC knows where these books, records and documents are kept at all times;
- (c) make all of its books, records and documents available for inspection by the City, State, and federal auditors and any other person duly authorized by the City at the B&R Site or the Design-Builder's offices at all times during normal business hours;
- (d) provide copies of its books, records and documents to the DDC as and when reasonably requested by the DDC;
- (e) retain all books, records, documents, other evidence relevant to this Agreement, including those required pursuant to Section 41.1(a), for six years after the completion or termination of this Agreement, or for such longer period required by this Agreement or prescribed by Applicable Law. In addition, if any litigation, claim, audit or Dispute, including those being processed or actions brought under the Dispute Resolution Procedures, concerning this Agreement has commenced before the expiration of such period, the books, records, documents, and other evidence must be retained and made available to the DDC until the completion of such litigation, claim, audit or Dispute, subject to exemptions under

Applicable Law. Any books, records, documents, and other evidence that are created in an electronic format in the regular course of business may be retained in an electronic format. Any books, records, documents, or other evidence that are created in the regular course of business as a paper copy may be retained in an electronic format provided that they satisfy the requirements of N.Y. Civil Practice Law and Rules (“**CPLR**”) 4539(b), including the requirement that the reproduction is created in a manner “which does not permit additions, deletions, or changes without leaving a record of such additions, deletions, or changes.” The Design-Builder agrees to waive any objection to the admissibility of any such books, records, documents, or other evidence on the grounds that such documents do not satisfy CPLR 4539(b).

41.2 Audits

- (a) In addition to any other specific audit rights that the DDC has under this Agreement, the DDC and the City Comptroller may review and audit the Design-Builder, its Subcontractors and their respective books, records and documents as the DDC or City Comptroller deems necessary.
- (b) The DDC’s audit rights extend to and include:
 - (i) the right to observe the business operations of the Design-Builder and its Subcontractors; and
 - (ii) calculations undertaken, and financial or business reports provided, by or on behalf of the Design-Builder in accordance with this Agreement.
- (c) The Design-Builder must:
 - (i) certify the completeness and accuracy in all material respects of all information it or its agents provide in connection with any audit by the DDC or other Governmental Entity;
 - (ii) use Reasonable Efforts to cause all Subcontractors to certify to the completeness and accuracy in all material respects of all information the Subcontractors provide in connection with any audit;
 - (iii) include appropriate terms in each Subcontract requiring the Subcontractor to provide the DDC with access and audit rights in accordance with the terms of this Article 40.11; and
 - (iv) include in its Project Management and Execution Plan:
 - (A) internal procedures to facilitate the DDC’s reviews and audits; and
 - (B) quality and compliance auditing responsibilities.

41.3 No Removal from Premises.

Where performance of this Agreement involves use by any Design-Builder Party of any City books, records, documents, or data (in hard copy, or electronic or other format now known or developed in the future) at City facilities or offices, such Design-Builder Party will not remove any such items or material (in the format in which it originally existed, or in any other converted or derived format) from such facility or office without the prior written approval of the City’s designated official. Upon the request by the DDC at any time during this Agreement or after the Agreement has expired or

terminated, the Design-Builder will return to the DDC any City records, documents, or data that has been removed from City premises.

41.4 **Electronic Records.**

As used in this Agreement, the terms “books,” “records,” “documents,” and “other evidence” refer to electronic versions as well as hard copy versions, subject to Section 41.1(e).

42. **NOTICES AND COMMUNICATIONS**

- (a) Unless otherwise expressly provided in this Agreement, all notices, directions, requests, consents and approvals required to be given to or by either Party under this Agreement must be in writing and:
- (i) delivered personally to the Party’s duly designated officer or representative;
 - (ii) delivered to the office of the Party’s duly designated officer or representative during regular business hours; or
 - (iii) sent to the Party’s duly designated officer or representative by certified or registered mail or a recognized overnight mail or courier service, with delivery receipt requested.
- (b) All notices, correspondence and other communication to the Design-Builder must be delivered to the address and attentions as set forth in Schedule A or as otherwise directed by the Design-Builder Representative.
- (c) All notices, correspondence and other communications to the DDC must be marked as regarding the Project and must be delivered to the addresses and attentions as set forth in Schedule A or as otherwise directed by the DDC Representative.
- (d) Any notice to the DDC invoking the Dispute Resolution Procedure must also be copied to:

Department of Design and Construction
3030 Thomson Avenue
Long Island City, NY 11101
Attn: General Counsel’s Office
Telephone: 718-391-2030
Email: DisputeResolution@ddc.nyc.gov

And to the DDC Representative identified in the NTP via email and regular mail to 3030 Thomson Avenue, Long Island City, NY 11101.

- (e) Notices will be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or, when delivery is refused, as shown on the receipt of the U.S. Postal Service, private carrier or other Person making the delivery. If mailed, notices will be deemed effective and served as of the date of the return of verification of delivery of certified or registered mailing of the notice, or 1 day after deposit with a recognized express overnight mail or courier service.
- (f) Nothing in this Section will be deemed to serve as a waiver of any requirements for the service of notice or process in the institution of an action or proceeding as provided by Applicable Law, including the New York Civil Practice Law and Rules.

PART J – MISCELLANEOUS**43. GENERAL REPRESENTATIONS AND WARRANTIES****43.1 Design-Builder Representations and Warranties**

The Design-Builder represents and warrants, or, if the Design-Builder is a joint venture, consortium or other form of general partnership, each Principal Participant represents and warrants that:

(a) Existence, Good Standing and Qualification

(i) The Design-Builder is:

- (A) duly organized, validly existing and in good standing under the laws of its state of organization; and
- (B) duly qualified and in good standing to do business in the State of New York and will remain in good standing for as long as it has any obligations under the Contract Documents.

(ii) The Principal Participants are:

- (A) duly organized, validly existing and in good standing under the laws of their state of organization; and
- (B) duly qualified and in good standing to do business in the State of New York and will remain in good standing for as long as they have any obligations under the Contract Documents.

(b) Power and Authority

The Design-Builder and, if applicable, the Principal Participants have the power and authority to execute, deliver and perform their respective obligations under this Agreement and the other Contract Documents.

(c) Authorization

- (i) The Design-Builder and each Principal Participant has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of their obligations under, this Agreement and the other Contract Documents.
- (ii) Each Person executing this Agreement and the other Contract Documents on behalf of the Design-Builder and, if applicable, each Principal Participant has been (or at the time of execution will be) duly authorized to execute and deliver each document on behalf of the Design-Builder or Principal Participant, as applicable.

(d) Execution

This Agreement and each other Contract Document has been (or will be) duly executed and delivered by the Design-Builder and, as applicable, the Principal Participants.

(e) Enforceability

This Agreement and each other Contract Document constitutes (or at the time of execution and delivery will constitute) a legal, valid and binding obligation of the Design-Builder and

each Principal Participant executing this Agreement, as applicable, enforceable against each of them, subject to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

(f) **No Contravention**

The execution, delivery and performance by the Design-Builder of this Agreement and the other Contract Documents does not (and at the time of execution will not) conflict with or result in a default under or a violation of:

- (i) the constituent or organizational documents of the Design-Builder and any Principal Participant executing this Agreement;
- (ii) any other material agreement or instrument to which the Design-Builder or any Principal Participant executing this Agreement is a party or that is binding on the Design-Builder or any Principal Participant executing this Agreement or any of their respective assets; or
- (iii) any Applicable Law or Applicable Standard.

(g) **No Litigation**

- (i) There is no action, suit, proceeding, investigation or litigation pending or served on the Design-Builder or any Principal Participant to the Design-Builder's knowledge, that:
 - (A) could reasonably be expected to have a material adverse effect on the ability of the Design-Builder, any Principal Participant or any Guarantor to perform its obligations under this Agreement or any other Contract Document;
 - (B) challenges either the Design-Builder's, any Principal Participant's or any Guarantor's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement or any other Contract Document; or
 - (C) challenges the DDC or the Design-Builder's, any Principal Participant's or any Guarantor's representative executing this Agreement or any other Contract Document.
- (ii) The Design-Builder, each Principal Participant and any Guarantor have disclosed to the DDC any pending and unserved or threatened action, suit, proceeding, investigation or litigation with respect to the matters referred to in Section 43.1(g)(i) that the Design-Builder, each Principal Participant or the Guarantor is aware of.

(h) **True and Accurate**

- (i) All written information and certifications:
 - (A) provided by or on behalf of the Design-Builder to the DDC, or any of its representatives or advisors, as part of or in connection with the Design-Builder Commitments and the negotiation of this Agreement or the other Contract Documents; or

- (B) delivered by or on behalf of the Design-Builder to the DDC or any Person on its behalf in accordance with this Agreement or the other Contract Documents,

were true and accurate in all material respects when given and are true and accurate on the date on which this representation is made or repeated.

- (ii) There are no other facts or matters where their omission makes any statement or information contained in the written information provided to the DDC or to any of its representatives or advisors misleading in any material respect as of the relevant date of delivery or the date that this representation is made or repeated.
- (iii) All opinions expressed and contained in the written information provided to the DDC or to any of its representatives or advisors were honestly made on reasonable grounds after due and careful inquiry.

(i) **Licenses, Skill and Expertise**

Each Design-Builder Party has all required authority, license status, professional ability, skills and capacity to perform the Work that it will perform and any professional services included in the Work that are regulated by articles 145, 147 and 148 of the State education law are performed and stamped and sealed, where appropriate, by a professional licensed in accordance with the appropriate articles.

(j) **Passage of Time or Default under this Agreement**

To the best of the Design-Builder's knowledge after diligent inquiry, no event has occurred that with the passage of time or the giving of notice will constitute:

- (i) An event that the Design-Builder may assert any Claim or seek any relief under this Agreement; or
- (ii) A Design-Builder Default under this Agreement.

(k) **Procurement of Agreement**

With respect to securing or soliciting the Agreement, the Design-Builder is in compliance with the requirements of the New York State Lobbying Law (Legislative Law §§ 1-a *et seq.*). The Design-Builder makes such representation and warranty to induce the DDC to enter into the Agreement and the DDC relies upon such representation and warranty in the execution of the Agreement. Upon any breach or violation of the representation and warranty set forth in this Section, the DDC will have the right to annul this Agreement without liability, entitling the DDC to recover all monies paid to the Design-Builder; and the Design-Builder will not make claim for, or be entitled to recover, any sum or sums due under this Agreement. The rights and remedies of the DDC provided in this Section are not exclusive and are in addition to all other rights and remedies allowed by Applicable Law or under this Agreement.

(l) **Conflicts of Interest**

- (i) Neither the Design-Builder, nor any of its directors, officers, members, partners or employees, has any interest nor will they acquire any interest, directly or indirectly, which conflicts in any manner or degree with the performance of this Agreement; and

- (ii) No person having such interest or possible interest will be employed by or connected with the Design-Builder in the performance of this Agreement.

(m) Certification Relating to Fair Practices

Together with each person signing on its behalf, under penalties of perjury, that to the best of its, each such person's knowledge and belief:

- (i) The prices and other material terms set forth in this Agreement have been arrived at independently, without collusion, consultation, communication, or agreement with any other bidder or proposer or with any competitor as to any matter relating to such prices or terms for the purpose of restricting competition;
- (ii) Unless otherwise required by Applicable Law or where a schedule of rates or prices is uniformly established by a government agency through regulation, policy, or directive, the prices and other material terms set forth in the Agreement that have been quoted in this Agreement and on the bid or proposal submitted by the Design-Builder have not been knowingly disclosed by the Design-Builder, directly or indirectly, to any other bidder or proposer or to any competitor prior to the bid or proposal opening; and
- (iii) No attempt has been made or will be made by the Design-Builder to induce any other person or entity to submit or not to submit a bid or proposal for the purpose of restricting competition.

The fact that the Design-Builder (i) has published price lists, rates, or tariffs covering items being procured, (ii) has informed prospective customers of proposed or pending publication of new or revised price lists for such items, or (iii) has sold the same items to other customers at the same prices or, or both, terms being bid or proposed, does not constitute, without more, a disclosure within the meaning of this Section 43.1(m).

(n) Disclosures Relating to Vendor Responsibility.

That it has duly executed and filed all disclosures as applicable, in accordance with Administrative Code § 6-116.2, PPB Rule § 2-08, and the policies and procedures of the Mayor's Office of Contract Services. The Design-Builder acknowledges that the DDC's reliance on the completeness and veracity of the information stated therein is a material condition to the execution of this Agreement, and the Design-Builder represents and warrants that the information it and its principals have provided is accurate and complete.

(o) Guarantor Financial Conditions

If a Guarantee is required under this Agreement, within three months of the expiration of each Guarantor's applicable fiscal year, the Design-Builder must provide annual audited financial statements for each Guarantor to DDC. To the extent any such audited financial statements indicate, in DDC's reasonable assessment, a material adverse decline in the Guarantor's ability to support its obligations under the Guarantee, the Design-Builder may be required, as reasonably requested by DDC, to (i) replace the Guarantor with an alternative financially capable entity or (ii) provide additional performance security for the benefit of the City, or (iii) both, where necessary.

(p) Disclosure Relating to Bankruptcy and Reorganization.

If the Design-Builder files for bankruptcy or reorganization under Chapter Seven or Chapter Eleven of the United States Bankruptcy Code, the Design-Builder will disclose such action to the DDC within seven days of filing.

44. CONFIDENTIALITY AND PUBLIC DISCLOSURE

44.1 Confidentiality

- (a) Unless otherwise required by the City, the Design-Builder agrees to hold confidential, both during and after the completion or termination of the Agreement, all of the reports, information, or data, furnished to, or prepared, assembled or used by, the Parties under the Agreement. The Design-Builder agrees to maintain the confidentiality of such reports, information, or data by using a reasonable degree of care, and using at least the same degree of care that the Design-Builder uses to preserve the confidentiality of its own confidential information. The Design-Builder agrees that such reports, information, or data will not be made available to any person or entity without the prior written approval of the DDC. The obligation under this Section 44.1 to hold reports, information or data confidential will not apply where the Design-Builder is legally required to disclose such reports, information or data, by virtue of a subpoena, court order or otherwise (“**Disclosure Demand**”), provided that the Design-Builder complies with the following: (1) the Design-Builder will provide advance notice to the DDC, in writing or by e-mail, that it received a disclosure demand to disclose such reports, information or data and (2) if requested by the DDC, the Design-Builder must not disclose such reports, information, or data until the DDC has exhausted its legal rights, if any, to prevent disclosure of all or a portion of such reports, information or data. The previous sentence will not apply if the Design-Builder is prohibited by Applicable Law from disclosing to the DDC the disclosure demand for such reports, information or data.
- (b) The Design-Builder will provide notice to the DDC within three days of the discovery of any breach of security, as defined in Administrative Code § 10-501(b), of any data, encrypted or otherwise, in use by the Design-Builder that contains social security numbers or other personal identifying information as defined in Administrative Code § 10-501 (“**Personal Identifying Information**”), where such breach of security arises out of the acts or omissions of the Design-Builder or its employees, subcontractors, or agents. Upon the discovery of such security breach, the Design-Builder will take reasonable steps to remediate the cause or causes of such breach and will provide notice to the DDC of such steps. In the event of such breach of security, without limiting any other right of the DDC, the DDC will have the right to withhold further payments under this Agreement for the purpose of set-off in sufficient sums to cover the costs of notifications or other actions, or both mandated by any Applicable Law, or administrative or judicial order, to address the breach, and including any fines or disallowances imposed by the State or federal government as a result of the disclosure.
- (c) Each Party will restrict access to confidential information to persons who have a legitimate work-related purpose to access such information. Each Party agrees that it will instruct its officers, employees, Subcontractors and agents to maintain the confidentiality of any and all information required to be kept confidential by this Agreement.
- (d) The Design-Builder, and its officers, employees, and agents will notify the DDC, at any time either during or after completion or termination of this Agreement, of any intended statement to the press or any intended issuing of any material for publication in any media of communication (print, news, television, radio, Internet, etc.) regarding the services provided or the data collected pursuant to this Agreement at least twenty-four hours prior to any statement to the press or at least five business days prior to the submission of the material for publication, or such shorter periods as are reasonable under the circumstances. The Design-Builder may not issue any statement or submit any material for publication that includes confidential information as prohibited by this Section 44.1.
- (e) The Design-Builder agrees to, at the request of the DDC, return to the DDC any and all confidential information in its possession, including, any Design-Builder Party. If either

Party is legally required to retain any confidential information, such Party will notify the other Party in writing and set forth the confidential information that it intends to retain and the reasons why it is legally required to retain such information. Each Party agrees to confer with the other Party, in good faith, regarding any issues that arise from such Party's retaining such confidential information. If the Design-Builder is retaining such confidential information and if Applicable Law does not require otherwise, such information will be maintained, in accordance with the requirements set forth in this Agreement.

- (f) The Design-Builder:
 - (i) acknowledges that the City is subject to the Freedom of Information Law; and
 - (ii) agrees that all Submittals, records, documents, drawings, plans, specifications and other materials in the City's possession relating to the Project and this Agreement, including materials submitted by the Design-Builder to the DDC, are subject to the Freedom of Information Law.
- (g) To the extent the Design-Builder believes any information or material submitted to the City is exempt from disclosure under the Freedom of Information Law, the Design-Builder may mark the information or materials as "Confidential" and accompany the information or materials with a concise statement of the reasons why it believes the information or material is exempt from disclosure.
- (h) Notwithstanding anything to the contrary, if the DDC receives a request for public disclosure under the Freedom of Information Law of information or material marked "Confidential", the DDC will:
 - (i) notify the Design-Builder of the request; and
 - (ii) give the Design-Builder a reasonable opportunity to assert, in writing, the reasons (if any) why it believes the DDC is not required to disclose any information or material in accordance with the Freedom of Information Law.
- (i) A breach of clauses (a)-(e) of this Section 44.1 will constitute a material breach of the Agreement for which the DDC may terminate the Agreement pursuant to Section 34.5 (*Termination for Design-Builder Default*). The DDC reserves any and all other rights and remedies in the event of unauthorized disclosure.

44.2 Information Security

The Design-Builder must implement security policies to protect City data consistent with the City's Cybersecurity Requirements for Vendors and Contractors, available here: <https://www1.nyc.gov/site/doitt/business/it-security-requirements-vendors-contractors.page>.

45. ASSIGNMENT

- (a) Neither Party will have the right, power or authority to assign or otherwise Transfer the Contract Documents or any portion of them, either voluntarily or involuntarily, or by operation of law, without the prior written consent of the other Party, which consent may be granted or withheld in the absolute discretion of the other Party, except that the DDC may, without the Design-Builder's consent, assign all or any portion of its rights, title and interests in and to the Contract Documents, the Project or the Project Site to any Governmental Entity.

- (b) Nothing in this Article 45 will preclude the Design-Builder from subcontracting portions of the Work in accordance with this Agreement.
- (c) Without limiting Section 45(a), the Design-Builder and each Principal Participant must not and the Design-Builder will cause each Principal Participant and Guarantor to not, without DDC's express prior written consent (acting reasonably):
 - (i) dispose of all or any material portion of the Design-Builder's, a Principal Participant's or a Guarantor's assets;
 - (ii) cause or effectuate any Change in Control;
 - (iii) make or attempt to make, or suffer a voluntary or involuntary, assignment or Transfer of all or any portion of the Design-Builder's and each Principal Participant's contractual or economic interest in this Agreement (collectively, (i)-(iii), a "**Restricted Transfer**").
- (d) The Design-Builder must provide written notification to DDC of its, or any Principal Participant's, intent to effectuate or implement a Restricted Transfer.
- (e) Notwithstanding Section 45(c), DDC will promptly approve, in its reasonable discretion, any Restricted Transfer that:
 - (i) will not have a material adverse effect on the Design-Builder's or any Design-Builder Party's ability to duly perform their obligations under this Agreement or any Subcontract; and
 - (ii) as applicable, the ultimate parent company of the transferee that caused an Equity Transfer that triggered either (i) a Change in Control or (ii) any other Restricted Transfer (A) is, of equal or better credit quality than the applicable Guarantor for the applicable Principal Participant prior to the Change in Control or other Restricted Transfer, and (B) enters into a new guarantee (on substantially the same terms as the existing Guarantee) with respect to the obligations of the applicable Principal Participant.
- (f) In addition, the Design-Builder and each Principal Participant must not change their legal form without the prior written approval of the DDC. Any changes made without the DDC's approval will be deemed a Restricted Transfer for the purposes of this Article 45.
- (g) Any Transfer made in violation of this Article 45 will be null and void ab initio and of no force and effect.
- (h) The Design-Builder and each Principal Participant must promptly notify the DDC of any change to its name.

46. **AMENDMENTS AND WAIVERS**

46.1 **Amendments**

This Agreement can only be amended or replaced by a written instrument duly executed by all of the Parties.

46.2 **Waiver**

- (a) No waiver of any term, covenant or condition of this Agreement will be valid unless in writing and signed by the party to which an obligation is owed.
- (b) The DDC's waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of this Agreement at any time will not in any way limit or waive the DDC's right to subsequently enforce or compel strict compliance with every term, covenant, condition or other provision of this Agreement, despite any course of dealing or custom of the trade (other than the waived breach or failure in accordance with the terms of the waivers).
- (c) If the Parties make and implement any interpretation of this Agreement without documenting their interpretation by an instrument in writing signed by all the Parties, the interpretation and implementation will not be binding in the event of any future Disputes.

47. **GOVERNING LAW**

This Agreement will be deemed to be executed in the City and State of New York, regardless of the domicile of the Contractor, and will be governed by and construed in accordance with the Laws of the State of New York (notwithstanding New York choice of law or conflict of law principles) and the Laws of the United States, where applicable.

48. **NON-LIABILITY OF CITY REPRESENTATIVES**

No official, employee, agent or representative of the City will be charged with any liability or held personally liable under any term or provision of this Agreement, or because of any of their acts or omissions or because of the execution or attempted execution of this Agreement, or because of any breach or attempted or alleged breach of any provision of this Agreement.

49. **OTHER**

49.1 **Independent Contractor; No Agent, Joint Venture or Partnership**

- (a) The Design-Builder is an independent contractor, and nothing contained in this Agreement will be construed as constituting any relationship with the DDC other than that of an independent contractor.
- (b) Nothing in this Agreement is intended or will be construed to create any partnership, joint venture, agency, landlord-tenant, lessor-lessee of real property, optionor-optionee, vendor-purchaser, mortgagor-mortgagee or similar relationship between the DDC and the Design-Builder;
- (c) In no event will either Party take a position in any tax return, insurance application or questionnaire, financial statement, financial report, regulatory filing, securities filing, loan document, or other writing of any kind that any of these relationships exists.
- (d) In no event will the relationship between the DDC and the Design-Builder be construed as creating any relationship whatsoever between the DDC and the Design-Builder's employees.
- (e) All persons who are employed by the Design-Builder and all the Design-Builder's Subcontractors (including without limitation, consultants and independent contractors) that are retained to perform services under or in connection with this Agreement are neither employees of the DDC nor under contract with the DDC. The Design-Builder, and not the DDC, is responsible for their work, direction, compensation, and personal conduct while the Design-Builder is engaged under this Agreement. Nothing in this Agreement, and no

entity or person's performance pursuant to or in connection with this Agreement, will create any relationship between the DDC and the Design-Builder's employees, agents, subcontractors, or subcontractor's employees or agents (including without limitation, a contractual relationship, employer-employee relationship, or quasi-employer/quasi-employee relationship) or impose any liability or duty on the DDC (i) for or on account of the acts, omissions, liabilities, rights or obligations of the Design-Builder, its employees or agents, its subcontractors, or its Subcontractor's employees or agents (including without limitation, obligations set forth in any collective bargaining agreement); or (ii) for taxes of any nature; or (iii) for any right or benefit applicable to an official or employee of the DDC or to any officer, agent, or employee of the Design-Builder or any other entity (including without limitation, workers' compensation coverage, employers' liability coverage, disability benefits coverage, unemployment insurance benefits, social security coverage, employee health and welfare benefits or employee retirement benefits, membership or credit). The Design-Builder and its employees, officers, and agents will not, by reason of this Agreement or any performance pursuant to or in connection with this Agreement, (i) hold themselves out as, or claim to be, officials or employees of the DDC, including any department, agency, office, or unit of the DDC, or (ii) make or support in any way on behalf of or for the benefit of the Design-Builder, its employees, officers, or agents any demand, application, or claim upon or against the DDC for any right or benefit applicable to an official or employee of the DDC or to any officer, agent, or employee of the Design-Builder or any other entity. Except as specifically stated in this Agreement, nothing in the Agreement and no performance pursuant to or in connection with the Agreement will impose any liability or duty on the DDC to any person or entity whatsoever.

- (f) Except as otherwise expressly provided in this Agreement, the Design-Builder has sole authority and responsibility to employ, discharge and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Subcontractors and for all other Persons that the Design-Builder or any Subcontractor hires to perform or assist in performing the Work.

49.2 **Conflicts of Interest**

- (a) Consistent with City Charter § 2604 and other related provisions of the City Charter, the Administrative Code and the New York State Penal Law, no elected official or other officer or employee of the City, nor any person whose salary is payable, in whole or in part, from the treasury of the City, will participate in any decision relating to this Agreement which affects such individual's personal interest or the interest of any corporation, partnership or other entity in which they are, directly or indirectly, interested; nor will any such official, officer, employee, or person have any interest in, or in the proceeds of, this Agreement. This Section 49.2 will not prevent directors, officers, members, partners, or employees of the Design-Builder from participating in decisions relating to the Agreement where their sole personal interest is in the Design-Builder.
- (b) The Design-Builder will not employ a person or permit a person to serve as a member of the board of directors or as an officer of the Design-Builder if such employment or service would violate Chapter 68 of the City Charter.

49.3 **Successors and Assigns**

This Agreement is binding upon and will inure to the benefit of the DDC and the Design-Builder and their respective successors and permitted assigns.

49.4 **Survival**

Notwithstanding any other provision of this Agreement, this Section and the following provisions will survive the expiration or any earlier termination of this Agreement:

- (a) Article 30 (*Consequential Loss*),
- (b) Article 31 (*Indemnity from the Design-Builder*);
- (c) Article 40 (*Dispute Resolution Procedure*);
- (d) Article 43 (*General Representations and Warranties*);
- (e) Article 44 (*Confidentiality and Public Disclosure*);
- (f) Article 49 (*Other*);
- (g) the express obligations of the Parties following the termination date; any obligations to pay amounts under this Agreement; and
- (h) all other provisions which by their inherent character should survive termination of this Agreement or completion of the Work will survive the termination of this Agreement or the completion of the Work.

49.5 **No Third-Party Rights**

Nothing contained in this Agreement is intended or will be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the Parties toward, any Person not a party to this Agreement, except rights expressly contained in this Agreement for the benefit of the Indemnified Parties.

49.6 **Integration of this Agreement**

- (a) This Agreement contains the entire understanding of the Parties with respect to the subject matter of this Agreement and supersedes all prior agreements, understandings, statements, representations and negotiations between the Parties with respect to their subject matter.
- (b) For the purposes of assumption or rejection under Section 365 of title 11 of the United States Bankruptcy Code, the DDC and the Design-Builder agree and expressly intend that this Agreement (including all Exhibits) constitutes a single, non-severable, integrated agreement whose terms are interdependent and non-divisible, so that, among other things, no part of this Agreement could be separated from any other part.

49.7 **Drafting Responsibility**

The Parties waive the application of any rule of law which otherwise would be applicable in connection with the construction of this Agreement to the effect that ambiguous or conflicting terms or provisions should be construed against the Party (or whose counsel) prepared the executed agreement or any earlier draft of the same.

49.8 **Severability**

- (a) If any clause, provision, Article, Section, subsection or part of this Agreement is ruled invalid (including due to a Change in Law) by a court having proper jurisdiction, the Parties must:
 - (i) promptly (and in any event within ten Business Days) after the ruling, meet and negotiate a substitute for the clause, provision, Article, Section, subsection or part, which will, to the greatest extent legally permissible, effect the original intent of the

Parties, including any adjustment to the DDC's compensation to the Design-Builder's account for any change in the Work resulting from the invalidated portion; and

- (ii) if necessary or desirable, apply to the court or other decision maker (as applicable) which declared the invalidity for an interpretation of the invalidated portion to guide the negotiations.
- (b) The invalidity or unenforceability of any clause, provision, Article, Section, subsection or part will not affect the validity or enforceability of the balance of this Agreement, which will be construed and enforced as if this Agreement did not contain the invalid or unenforceable clause, provision, Article, Section, subsection or part.

49.9 **Time of Essence**

Time being of the essence, the Design-Builder must perform the Work in accordance with the Project Schedule.

49.10 **Expenses**

Subject to the terms of this Agreement, each Party is presumed to perform its respective obligations under this Agreement at its own cost and expense.

49.11 **No Estoppel.**

Neither the City, any agency, official, agent or employee, will be bound, precluded or estopped by any determination, decision, approval, order, letter, payment or certificate made or given under or in connection with this Agreement by the City or any other official, agent or employee of the City, either before or after the Final Completion of the Work and payment for such Work:

- (a) from showing the true and correct classification, amount, quality or character of the Work actually done or that any such determination, decision, order, letter, payment or certificate was untrue, incorrect or improperly made, or that the Work, or any part, does not in fact conform to the requirements of the Agreement; and
- (b) from demanding and recovering from the Design-Builder any overpayment made to it, or such damages as the City may sustain by reason of the Design-Builder's failure to perform each and every part of its obligations under this Agreement.

49.12 **Tax Exemption**

- (a) The City is exempt from payment of Federal, State, and local taxes, including sales and compensating use taxes of the State of New York and its cities and counties on all tangible personal property sold to the City pursuant to the provisions of this Agreement. These taxes are not to be included in the Contract Price or any Allowance or Change Order. However, this exemption does not apply to tools, machinery, equipment or other property leased by or to the Design-Builder, Subcontractor or to tangible personal property which, even though it is consumed, is not incorporated into the completed Work (consumable supplies) and tangible personal property that the Design-Builder is required to remove from the Project Site during or upon completion of the Work. The Design-Builder and its Subcontractors will be responsible for and pay any and all applicable taxes, including sales and compensating use taxes, on such leased tools, machinery, equipment or other property and upon all such consumable supplies and tangible personal property that the Design-Builder is required to remove from the Project Site during or upon completion of the Work.

- (b) As part of the Contract Price, the Design-Builder agrees to transfer all tangible personal property, other than consumable supplies and other tangible personal property that the Design-Builder is required to remove from the Project Site during or upon completion of the Work, that is required, necessary or proper for or incidental to the construction of the Project covered by this Agreement.
- (c) In accordance with Section 20 NYCRR Section 541.3(d), the DDC will not pay sales tax for any such tangible personal property that it purchases from the Design-Builder pursuant to this Agreement. With respect to such tangible personal property, the Design-Builder, at the request of the DDC, will furnish to the DDC such bills of sale and other instruments as may be required by the DDC, properly executed, acknowledged and delivered assuring to the DDC title to such tangible personal property, free of liens or encumbrances, or both, and the Design-Builder will mark or otherwise identify all such tangible personal property as the property of the DDC.
- (d) Title to all tangible personal property to be transferred by the Design-Builder to the DDC pursuant to the provisions of this Agreement will immediately vest in and become the sole property of the DDC upon delivery of such tangible personal property to the Project Site. Notwithstanding such transfer of title, the Design-Builder will have the full and continuing responsibility to install such tangible personal property in accordance with the provisions of the Agreement, protect it, maintain it in a proper condition and forthwith repair, replace and make good any damage thereto, theft or disappearance, and furnish additional tangible personal property in place of any that may be lost, stolen or rendered unusable, without cost to the DDC, until such time as the Work covered by this Agreement is fully accepted by the DDC. Such transfer of title will in no way affect any of the Design-Builder's obligations under this Agreement. In the event that, after title has passed to the DDC, any of the tangible personal property is rejected as being defective or otherwise unsatisfactory, title to all such tangible personal property will be deemed to have been transferred back to the Design-Builder.
- (e) The purchase by Subcontractors of tangible personal property to be sold under this Agreement will be a purchase or procurement for resale to the Design-Builder (either directly or through other Subcontractors) and therefore not subject to the above sales and compensating use taxes, provided that the Subcontracts and purchase agreements provide for the resale of such tangible personal property and that such Subcontracts and purchase agreements are in a form similar to this Agreement with respect to the separation of the sale of consumable supplies and tangible personal property that the Design-Builder is required to remove from the Project Site during or upon completion of the Work from the Work and labor, services, and any other matters to be provided, and provided further that the Subcontracts and purchase agreements provide separate prices for tangible personal property and all other services and matters. Such separation will actually be followed in practice, including the separation of payments for tangible personal property from the payments for other Work and labor and other things to be provided.
- (f) At any time after the NTP Date, DDC will furnish the Design-Builder with an exempt purchase certificate upon request. The Design-Builder and its Subcontractors will furnish such certificate to all persons, firms or corporations from which they purchase tangible personal property for the performance of the Work covered by the Agreement.
- (g) In the event any of the provisions of this Section 49.12 will be deemed to be in conflict with any other provisions of the Agreement or create any ambiguity, then the provisions of this Section 49.12 will control.

49.13 **Counterparts**

This Agreement may be signed in any number of counterparts, each of which will be an original. Together, all counterparts form one single document.

This Agreement is executed by the Parties as of the date executed by all Parties.

DESIGN-BUILDER

[DESIGN-BUILDER]

[by its members]

[_____]

By: _____

Name: _____

Title: _____

[_____]

By: _____

Name: _____

Title: _____

THE CITY OF NEW YORK,
By and through **THE DDC,**

By: _____

Name: _____

Title: _____

Approved as to Form and
Certified as to Legal Authority

Acting Corporation Counsel

Date:

EXHIBIT 1

Definitions

Capitalized terms and acronyms used in this Agreement have the meanings given in this Exhibit 1 and should be construed to include each term in its singular and plural forms. Each bolded term below has the corresponding meaning opposite the term.

Abandon To abandon all or a material part of the Work, which will be deemed to have occurred if:

- (a) the Design-Builder demonstrates through statements, acts or omissions an intent not to continue (for any reason other than a Relief Event that materially interferes with its ability to continue) to perform all or a material part of the Work; or
- (b) no significant Work (taking into account the Progress Schedule and any Relief Event) on the Project or a material part of the Project is performed for a continuous period of more than 30 days.

Adjacent Property Means any private or public property adjacent to the Project Site, which may be impacted directly or indirectly by the Design-Builder’s performance of the Work, including any properties considered “adjoining properties” for purposes of City Administration Code Section 3309, et seq.

Adverse Weather Event

- (a) the actual monthly average temperature is more than 10% above or below the monthly normal temperature;
- (b) days in excess of four days per month wherein the DOB has formally directed all crane operations to cease as a result of adverse weather conditions, where site-specific wind speed thresholds are exceeded, or other site-specific adverse weather events mandate the suspension of crane lifting operations for one entire day; or
- (c) the actual number of days of precipitation (of more than 0.1 inch) for a month exceeds the corresponding number set out in the following table:

| Month | Days on which precipitation exceeds 0.1 inch |
|--------------|---|
| January | 9 |
| February | 9 |
| March | 10 |
| April | 9 |
| May | 8 |

| | |
|-----------|---|
| June | 8 |
| July | 7 |
| August | 9 |
| September | 8 |
| October | 8 |
| November | 9 |
| December | 9 |

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| Affected Party | Defined in the definition of Force Majeure Event. |
| Affiliate | In relation to any Person, any entity that, directly or indirectly, through one or more intermediaries: <ul style="list-style-type: none"> (a) has a 10% or more voting or economic interest in that Person; or (b) Controls, is Controlled by, or is under common Control with that Person. |
| Agency Chief Contracting Officer (ACCO) | The position delegated authority by the Commissioner to organize and supervise the procurement activity of subordinate DDC staff in conjunction with the City Chief Procurement Officer. |
| Aggregate Liability Cap | Defined in Section 14.7(b) and set forth in Schedule A. |
| Agreement | This Agreement (including all its Exhibits), as amended at any time. |
| Agreement Date | The date this Agreement is executed by the parties. |
| Allowance | An amount or amounts included in the Contract Price and identified in Schedule B, that is intended to cover costs of Allowance Work and for which the Design-Builder may be paid on the basis of stipulated unit prices or a formula set forth in the Contract or negotiated between the parties provided, as set forth in the applicable Allowance provisions. |
| Allowance Approval | Written approval issued by the DDC after the NTP Date in accordance with Section 24.1 (<i>Allowance Approvals</i>) and sets out the agreed or determined position regarding Allowance Work. |
| Allowance Payment Request | A written request to receive funds from any Allowance in the form acceptable to DDC and submitted for approval in accordance with this Agreement and Applicable Law. |
| Allowance Work | Work to be performed by the Design-Builder that is eligible to be paid for through any Allowance. |

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| Annual Direct Salary | Defined in Section 26.2(e). |
| Applicable Law | <p>Any of the following:</p> <ul style="list-style-type: none"> (a) the City Charter, the City Administrative Code, local rules of the City, the Constitutions of the United States and the State, and any other statute, law, code, regulation, ordinance, rule, common law, judgment, judicial or administrative order, decree, directive, or other requirement having the force of law or other governmental restriction (including those resulting from the initiative or referendum process); or (b) any similar form of decision of or determination by, or any interpretation or administration of any of the foregoing by, any Governmental Entity, <p>that is applicable and binding with respect to the Project Site, the Work, the Project or any relevant Person performing or responsible for performing the Work, whether taking effect before or after the Agreement Date, in each case as amended, revised, supplemented or otherwise modified from time to time. Applicable Standards, are excluded from the definition of Applicable Laws.</p> |
| Applicable Relief | Defined in Section 25.1(a) (<i>Entitlement to Request Applicable Relief</i>). |
| Applicable Standards | All applicable standards, manuals, references, guidelines, policies, specifications, handbooks and advisory circulars referenced in this Agreement or required to be used pursuant to Best Management Practice, as amended, revised, supplemented or otherwise modified from time to time, which are not issued by a Governmental Entity. Applicable Standards are not Applicable Laws and changes in Applicable Standards are not eligible to be Changes in Law. |
| Approved Materials | Steel and prefabricated units, including solar panels, windows or any other materials approved in writing by DDC. |
| Archaeological Remains | Any antiquities, fossils, coins, articles of value, precious minerals, cultural artifacts, human burial sites, paleontological and human remains and other similar remains of archaeological or paleontological interest discovered on any part of the Project Site. |
| Assigned Personnel | Defined in Section 26.2(c). |
| Authorized Representatives | Defined in Article 38 (<i>Authorized Representatives</i>). |
| Available Documents | <p>All written information provided to the Design-Builder or any Design-Builder Party by the DDC which pertain to the Project Site or the Project, including:</p> <ul style="list-style-type: none"> (a) the RFP and its contents (including the documents in Part III of the RFP); |

- (b) all contents provided on any digital document portal by the DDC; and
- (c) any Baseline Site Investigation Assessments provided to the Design-Builder.

Baseline Site Investigation Assessment

A report or reports, including investigation and sampling results, describing the Project Site, any existing structures on the Project Site, site conditions, including the identity, location and concentrations of Hazardous Materials provided by the DDC to the Design-Builder.

Best Management Practice

The exercise of the degree of skill, diligence, prudence and foresight that is reasonably and ordinarily expected from a skilled and experienced designer, engineer or construction contractor seeking in Good Faith to comply with its contractual obligations, complying with all Applicable Laws and Governmental Approvals, and Applicable Standards and engaged in the same type of undertaking under similar circumstances and conditions in the New York metro-area. Best Management Practice is not static but rather will change over time; provided, however, that Best Management Practice with respect to any particular activity will be determined at the time when such particular activity is performed.

Blue Book

Defined in Section 26.3(b) (*Construction Work Net Costs*).

Board Members

Members of the Disputes Review Board.

Business Day

Any day that is not a Saturday, a Sunday or any of the public holidays observed by the DDC from time to time.

CCIP

Contractor Controlled Insurance Program.

Certificate of Final Completion

A written certificate issued by the DDC certifying that the Design-Builder has achieved Final Completion.

Change in Control

Any Equity Transfer, that results, directly or indirectly, in a change in possession of the power to direct or control or cause the direction or control of the management of the Design-Builder or a Principal Participants or a material aspect of its respective business.

Change in Law

The repeal, replacement (in whole or in part) of, the amendment, alteration or modification to, any Applicable Laws by any Governmental Entity that occur at any time after the Setting Date and are either:

(i) binding on the Design-Builder's performance of the Work or;

(ii) if not binding on the Design-Builder, are both (A) typically complied with in the construction industries and (B) necessary in order to comply with Best Management Practice, unless expressly waived by the DDC,

and in either case, adversely impact the performance of the Work.

Change in Law excludes: (i) any repeal, amendment, alteration, modification or change in interpretation of any Applicable Law that is pending, passed or adopted, but not yet effective, as of the Setting Date, (ii) any Governmental Approval, (iii) any changes to Applicable Standards, (iv) any change in federal, state or local taxes or levies assessed on the basis of Design-Builder's income, profits, revenues or gross receipts, or any other taxes, fees, royalties or imposts, including tariffs, for which Design-Builder is responsible hereunder, and (v) a change in taxes, levies, withholdings or labor wage laws that vary the compensation, benefits or amounts to be paid to, on behalf of or on account of Design-Builder's or its Subcontractors' employees.

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| Change Order | A written document executed by authorized representatives for DDC and the Design-Builder in accordance with Section 24.2(<i>Change Orders</i>) that modifies the Agreement. |
| City | The City of New York. |
| City Administrative Code | New York City Administrative Code. |
| City Asset | Any airport, port, road, sidewalk, bike lane, bus lane, tunnel, train, bus, bridge, facility, structure, improvement, fixture, equipment, utility, or asset otherwise owned, leased, or operated by the City or any third-party on behalf, or at the direction, of the City. |
| City Charter | New York City Charter. |
| City Chief Procurement Officer or CCPO | The position delegated authority by the Mayor to coordinate and oversee the procurement activity of Mayoral agency staff, including the ACCOs. |
| City Comptroller | The Comptroller of the City of New York. |
| City Corporation Counsel | The Law Department of the City of New York. |
| City Governmental Approvals | The "City Government Approvals" listed in Schedule A. |
| City Name Only Governmental Approval | Defined in Section 11.1(b) (<i>Design-Builder Responsibility for Governmental Approvals</i>). |
| Claim | Any and all claims, disputes, allegations, causes of action, demands, suits or proceedings alleging or seeking damages, injuries, liabilities, obligations, losses, costs and expenses. |
| Commissioner | The agency head of DDC. |
| Compensable Relief Event | Each of the following events: <ul style="list-style-type: none"> (a) any of the following that cause a material delay or interruption to the Design-Builder's performance or ability to perform under this Agreement: |

- (i) failure by the DDC to grant or provide access to the Project Site or portion of the Project Site at any time, subject to the terms of this Agreement;
 - (ii) failure by the DDC to issue an NTP within fourteen days of registration of the Agreement pursuant to City Charter Section 328;
 - (iii) failure beyond thirty days in the aggregate by the DDC to timely provide responses to any Mandatory DDC Approval Submittals, following delivery of notice from the Design-Builder requesting such action in accordance with this Agreement;
 - (iv) any material interference of the Design-Builder's performance of the Work or physical damage to the Work directly attributable to the City's or its separate contractors' work in, or around, the Project Site, not otherwise expressly permitted or contemplated in the Stakeholder Coordination Plan or this Agreement; or
 - (v) failure by DDC to timely pay any undisputed amount due and payable to the Design-Builder under this Agreement;
- (b) the issuance by the DDC of an Extra Work Directive;
 - (c) any suspension of the Work that constitutes a Compensable Relief Event in accordance with Article 34.4 (*Suspension Orders*);
 - (d) the discovery of any Unknown Geotechnical Condition within the Project Site, solely during the Scope Validation Period;
 - (e) the discovery of any Unknown Physical Conditions within or adjacent to the Project Site, solely during the Scope Validation Period;
 - (f) the discovery of any Unknown Endangered Species within or adjacent to the Project Site;
 - (g) the discovery of any Unknown Archaeological Remains within or adjacent to the Project Site;
 - (h) the discovery of any Unknown Hazardous Environmental Conditions within or adjacent to the Project Site;
 - (i) the discovery of any Unknown Utility within or adjacent to the Project Site;
 - (j) the issuance of any preliminary or permanent injunction or temporary restraining order or other similar order, legal

restraint or prohibition by a Governmental Entity of competent jurisdiction under Applicable Law that materially adversely affects the DDC's or the Design-Builder's performance under this Agreement,

- (k) any latent defects in any existing City Assets which cause a material adverse impact on the Design-Builder's performance of the Work;
- (l) any Governmental Entity's (other than DDC or the City) performance of adjacent work causes a delay or increase in costs to the Design-Builder's performance of the Work;
- (m) any PDC directed modifications to the extent such modifications constitute a Compensable Relief Event under Section 7.2(b) (*Design Work*);
- (n) a Change in Law.

except no Compensable Relief Event will have occurred, in each case, to the extent attributable to either or both (A) any breach of (i) any Contract Document, (ii) Applicable Law, (iii) any Governmental Approval or (iv) any agreement or requirements by a Utility or (B) any negligence, recklessness, intentional tortious act of a Design-Builder Party.

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| Completion Conditions | Defined in Section 17.1 (<i>Inspection and Review</i>). |
| Completion Milestones | Substantial Completion and Final Completion. |
| Completion Notice | Defined in Section 17.1 (<i>Inspection and Review</i>). |
| Completion Protocols | The process and protocols for certifying completion of a Completion Milestone under and in accordance with 17.1 (<i>Inspection and Review</i>), 17.2 (<i>Certification</i>) and 17.3 (<i>Disputes</i>). |
| Construction Documents | All shop drawings, working drawings, fabrication plans, material and hardware descriptions, specifications, construction quality control reports, construction quality assurance reports and samples necessary or desirable for the Construction Work in accordance with this Agreement. |
| Construction Work | All Work related to the construction of the Project (including any demolition Work required in this Agreement). |
| Contract Documents | The documents referred to in Section 1.3(a) (<i>Order of Precedence</i>), the executed Performance Bond and Payment Bond, the Guarantee, the Release for Construction Documents and any Design-Builder plans for the performance of the Work approved by DDC. |
| Contract Price | The "Contract Price" defined in Article 21 and specified in Schedule B, as may be adjusted in accordance with this Agreement. |

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| Control | The possession, directly or indirectly, of the power, exercisable jointly or severally, to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise. A Person may have Control of a specified Person notwithstanding that one or more third parties may have rights to participate in major decisions of such specified Person. |
| Critical Path | Defined in the Project Requirements. |
| Day or day | A calendar day. |
| DB Modification Request | Defined in Section 24.3 (<i>Change Proposals, Design-Builder Proposal Costs</i>). |
| DDC | The New York City Department of Design and Construction. |
| DDC Actual Damages | Defined in Section 34.6(a)(iii). |
| DDC Modification Request | Defined in Section 24.3 (<i>Change Proposals, Design-Builder Proposal Costs</i>). |
| DDC Project Manager | In lieu of an Engineer in Charge, an individual designated in writing by the Commissioner or DDC Representative to act on behalf of DDC in accordance with Article 38. |
| DDC Representative | The individual designated as the DDC's authorized representative in accordance with Article 38 (<i>Authorized Representatives</i>). |
| DDC Termination Notice | Defined in Section 34.5 (<i>Termination for Design-Builder Default</i>). |
| Deemed Approval Submittal | Any Submittal that is identified in the Schedule of Submittals as a Deemed Approval Submittal and is subject to the approval or consent of the DDC but following a period of time specified in this Agreement or the Project Schedule, may be deemed approved for purposes of the Design-Builder advancing the Work. |
| Delay Liquidated Damages | Defined in Section 14.3 (<i>Liquidated Damages for Delay</i>). |
| Department of Investigation | The Department of Investigation of the City of New York. |
| Design-Builder | The Person that executed this Agreement as counterparty to the City, and their successors, personal representatives, executors, administrators, and assigns, and any Person that will at any time be substituted in the place of the Design-Builder under this Agreement. |
| Design-Builder Default | Defined in Section 34.1 (<i>Design-Builder Default</i>). |
| Design-Builder Default Notice | Defined in Section 34.2(a) (<i>Notice of Design-Builder Default and Cure Periods</i>). |
| Design-Builder Party | Each of the following: |

- (a) the Design-Builder;
- (b) the Principal Participants;
- (c) any Guarantor, if any;
- (d) the Subcontractors;
- (e) any other Persons performing any of the Work for or on behalf of the Design-Builder;
- (f) any other Persons for whom the Design-Builder may be legally or contractually responsible; and
- (g) the employees, agents, officers, directors, representatives, consultants, successors and assigns of any of the parties referred to in clauses (a) to (f).

Design-Builder Proposal Commitments

The Proposal and commitments made by the Design-Builder, as set out in Exhibit 3 (*Design-Builder Proposal Commitments*).

Design-Builder Release of Hazardous Materials

Any Hazardous Materials Release:

- (a) to the extent attributable to the acts, omissions, negligence, intentional tortious act or breach of Applicable Law or contract by any Design-Builder Party, provided that the removal of Hazardous Materials, or any Remedial Action in respect of Hazardous Materials, by a Design-Builder Party in accordance with the requirements of the Contract Documents will not be a "Design-Builder Release of Hazardous Materials."
- (b) involving any Hazardous Materials arranged to be brought onto the Project Site or elsewhere by a Design-Builder Party, regardless of cause; or
- (c) to the extent attributable to the use, containment, storage, management, handling, transport and disposal of any Hazardous Materials, by a Design-Builder Party in breach of any of the Contract Documents. Applicable Law, Applicable Standards or Governmental Approvals.

Design-Builder Representative

The individual designated as the Design-Builder's authorized representative in accordance with Article 38 (*Authorized Representatives*).

Design Documents

All drawings (including plans, profiles, cross-sections, notes, elevations, typical sections, details and diagrams), specifications, reports, studies, working drawings, shop drawings, calculations, electronic files, records and submittals necessary for, or related to, the design, redesign, engineering, or architecture of the Project.

Designer of Record

As required by the Agreement, the professional architect, architectural firm, engineer or engineering firm authorized or

licensed in the State of New York responsible for preparing Final Design Documents, all specifications, certification of all shop drawings and providing Record Drawings with respect to the Project.

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|--|---|
| Design Subcontract | The contract between the Design-Builder and the Designer of Record for performance of the Design Work, as identified in Schedule A. |
| Design Work | All work related to the design, redesign, engineering or architecture for the Project. |
| Detailed Relief Event Notice | Defined in Section 25.2(d). |
| Direct Salary Rate | Defined in Section 26.2(e). |
| Disagreeing Party | Defined in Section 40.3(b). |
| Disclosure Demand | Defined in Section 44.1 (<i>Confidentiality</i>). |
| Dispute | Any dispute, disagreement or controversy between the DDC and the Design-Builder concerning their respective rights, performance or obligations under the Contract Documents, including with respect to any Claim, alleged breach or failure to perform and any remedy or any Informal Dispute, but only to the extent such Informal Dispute is not otherwise resolved through the Escalation Resolution Ladder. |
| Dispute Notification | Defined in Section 40.2(a). |
| Dispute Notification Response | Defined in Section 40.2(b). |
| Dispute Resolution Procedure(s) | The procedures for resolving disputes in Article 40 (<i>Dispute Resolution Procedure</i>). |
| Dispute Statement | Defined in Section 40.4(a). |
| Disputes Review Board | The three-person board, comprised of the Board Members appointed in accordance with the DRB Agreement and this Agreement for the purpose of hearing Disputes under and in accordance with Section 40.4 (<i>Disputes Review Board</i>) of the Agreement. |
| Draft Reinstatement Plan | Defined in Section 32.18(b). |
| DRB Agreement | The Disputes Review Board Agreement to be entered into by the Design-Builder, the DDC, and the Board Members, substantially in the form attached hereto as Part 1 of Exhibit 5 (<i>Disputes Review Board</i>). |
| Early Warning Trigger | Defined in Section 14.2 (<i>Delays</i>). |
| Emergency | Any unplanned event affecting the Project or the Project Site that, in the DDC's sole judgment: |

- (a) presents an immediate or imminent hazard or risk to workers, other personnel or the general public,
- (b) presents an immediate or imminent hazard or risk to:
 - (i) the Project or any City Asset;
 - (ii) any third party's property or equipment;
 - (iii) the environment,
- (c) is declared a state of emergency under City, State or federal law;
- (d) will result in unreasonable interference with operations by any Person at any City Asset, as determined by the DDC; or
- (e) is recognized or declared by the Mayor, or designee of the Mayor or any law enforcement agency or Governmental Entity, as an emergency.

Endangered Species

Any animal or plant species listed as threatened or endangered in accordance with any Environmental Requirement or that is protected from harm or harassment under an Environmental Requirement.

Engineer in Charge

In lieu of a DDC Project Manager, an individual designated in writing by the Commissioner or DDC Representative to act on behalf of DDC in accordance with Article 38.

Engineering Audit Officer (EAO)

The person appointed by the Commissioner to perform audit functions in accordance with the Comptroller's Directive No. 7, or their designee.

Environment

Air, soils, surface waters (including wetlands), groundwater, land, sediments, surface or subsurface strata, biological resources, including Endangered Species, natural systems, including ecosystems, and cultural, historic, archaeological and paleontological resources.

Environmental Requirements

All requirements and conditions (including all mitigation) to be satisfied under the Contract Documents, Applicable Laws, Applicable Standards and Governmental Approvals (including any environmental Permit, article 8 of the State environmental conservation law, and where applicable, the requirements of the national environmental policy act), and any other requirements, policies and guidelines of the DDC, concerning the environment and Hazardous Materials that are applicable to the Project Site or the Work.

Equity Participant

Any Person holding (directly or indirectly) a 15% or greater interest in the Design-Builder.

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| Equity Transfer | Any assignment, mortgage, encumbrance, conveyance, sale, or other transfer of direct or indirect equity interests in the Design-Builder or any Principal Participant. |
| Escalation Resolution Ladder | Defined in Section 39(a) (<i>Escalation Resolution Ladder</i>). |
| Estimated DDC Damages | Defined in Section 34.6(a)(ii)(A). |
| Extended Force Majeure Event | Defined in Section 27.1(d). |
| Extra Work | Any work that is required to be performed by the Design-Builder and which at that time is not otherwise covered or included in the Work by the Contract Documents, whether it is in the nature of additional work, altered work, deleted work, or otherwise, including in accordance with an Allowance Approval, Change Order or an Extra Work Directive. |
| Extra Work Directive | Defined in Section 24.5(a) (<i>Extra Work Directive</i>). |
| Fast-Track Dispute | Disputes solely relating to either (i) amounts or Change Orders or Allowance Approvals that exceed 5% of the Contract Price or (ii) are in connection with DDC's refusal to certify Substantial Completion. |
| Fast-Track Dispute Notification | Defined in Section 40.3(a). |
| Fast-Track Dispute Rejection Notice | Defined in Section 40.3(b). |
| Final Completion | Satisfaction of all of the Final Completion Conditions, as and when confirmed by the DDC's issuance of a Certificate of Final Completion. |
| Final Completion Conditions | Those conditions listed in Section 16.1 (<i>Conditions to Final Completion</i>). |
| Final Design Documents | The complete final construction drawings, including plans, profiles, cross-sections, notes, elevations, typical sections, details and diagrams, design criteria, specifications, reports, studies, calculations, electronic files, records and Submittals prepared by the Design-Builder (and that have been Signed and Sealed by the Designer of Record) and accepted by the DDC, necessary or related to the Construction Work. |
| Force Account | An agreement between the City and a Railroad Owner or between the Design-Builder and a Railroad Owner for right of entry and payment for Force Account Work. |
| Force Account Costs | Any amounts billed to the City or the Design-Builder under a Force Account. |
| Force Account Work | Railroad review, coordination and inspection work performed by a Railroad Owner. |

Force Majeure Event

The occurrence of any of the following events after the date of this Agreement that directly causes either Party (the “**Affected Party**”) to be unable to comply with all or a material part of its obligations under this Agreement:

- (a) war, civil war, invasion, violent act of foreign enemy or armed conflict;
- (b) nuclear, chemical or biological contamination unless the source or cause of the contamination is brought to or near the Project Site by the Design-Builder or a Design-Builder Party, or is a result of any breach by the Design-Builder of the terms of this Agreement;
- (c) ionizing radiation unless the source or cause of the ionizing radiation is brought to or near the Project Site by the Design-Builder or a Design-Builder Party, or is as a result of any breach by the Design-Builder of the terms of this Agreement;
- (d) an act of Terrorism;
- (e) a quarantine or Work suspension imposed by a Government Entity with appropriate jurisdiction due a pandemic, epidemic, endemic, outbreak of infectious disease or other public health emergency (collectively, referred to as “Public Health Emergencies” for the purpose of this section) that is ordered by a Governmental Entity or Public Health Emergency, which in each case, prevents or delays manufacture, shipment or delivery of equipment or supplies to the Project Site in accordance with the Project Schedule or otherwise directly and adversely impacts the performance of the Work; and
- (f) outage or power failure caused by a non-City utility’s inability or failure to provide service;
- (g) acts of God (except that “acts of God” does not include events enumerated above or elsewhere in this Agreement, including as Relief Events or Compensable Relief Events).

Formal Dispute

Defined in Section 39(b) (*Partnering Provisions*).

General Project Requirements

Volume 3 (General Project Requirements) of Exhibit 2 (Project Requirements).

Geotechnical Baseline Report

The geotechnical report, if any, provided to the Design-Builder prior to the Setting Date.

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| Good Faith | Observance of reasonable commercial standards of fair dealing in a given trade or business. |
| Governmental Approval | All approvals, permits, permissions, consents, licenses, variances, certificates (including sales tax exemption certificates) registrations, notices, exemptions, exceptions, waivers, filings and authorizations (whether statutory or otherwise) that are required under Applicable Law in order to authorize the DDC or the Design-Builder to perform all or any part of the Work or obligations under this Agreement. |
| Governmental Entity | Any federal, state, municipal and other governmental authorities or quasi-governmental authorities, boards and agencies of any state, nation or government, including, without limitation, any court, and all agencies under the United States Departments of Interior, Commerce and Agriculture, the United States Food and Drug Administration and the United States Centers for Disease Control and Prevention, but not including the DDC. |
| Green Book | Defined in Section 26.3(b) (<i>Construction Work Net Costs</i>). |
| Guarantee | If required, the guarantee executed by the Guarantor in favor of the City with respect to the obligations of the Design-Builder, substantially in the form of the form of guarantee included as Exhibit 4 (<i>Form of Guarantee</i>). |
| Guaranteed Completion Date | The dates in Schedule A corresponding to achieving each of Substantial Completion, Final Completion and other completion milestones, as applicable. |
| Guarantor | Any entity that guarantees the Design-Builder's performance in accordance with this Agreement and that executes the form of Guarantee attached as Exhibit 4. |
| Hazardous Environmental Condition | The presence of any Hazardous Materials on, in, under or about the Project Site at concentrations or in quantities that are required to be removed or remediated by any Applicable Law or in accordance with the requirements of this Agreement or any Governmental Entity. |
| Hazardous Materials | Any element, chemical, compound, mixture, material or substance, whether solid, liquid or gaseous, which at any time is defined, listed, classified or otherwise regulated in any way under any Applicable Law, or any other substances or conditions (including mold and other mycotoxins, fungi or fecal material) which may create any unsafe or hazardous condition or pose any threat or harm to the Environment or human health and safety. |
| Hazardous Materials Release | Any spill, leak, emission, release, discharge, injection, escape, leaching, dumping or disposal of Hazardous Materials into the Environment, including any exacerbation of an existing Hazardous Environmental Condition. |

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| Indemnified Parties | The City of New York, its officials and employees, and any other Persons identified as “Indemnified Parties” in Schedule A. |
| Indirect Losses | Loss of profits, loss of use, loss of production, loss of business, loss of business opportunity or any claim for consequential loss or for indirect loss of any nature but excluding any of the same that relate to payments expressly provided under this Agreement. |
| Ineligible Dispute | Disputes that are beyond the scope of the Work, including patents, copyrights, trademarks or trade secrets, or relating to proprietary rights in computer software, as well as injunctive relief, insurance claims, torts, prevailing wage or Design-Builder employment disputes and disputes involving third-parties that are being litigated in court or any dispute pertaining to indictments, convictions, or other charges or admissions of criminal acts which have led to a Design-Builder Default under this Agreement. |
| Informal Dispute | Defined in Section 39(b) (<i>Partnering Provisions</i>). |
| Initial Relief Event Notice | Defined in Section 25.2(b). |
| Insolvency Event | With respect to any Person: <ul style="list-style-type: none"> (a) any involuntary bankruptcy, insolvency, liquidation, company reorganization, restructuring, suspension of payments, scheme of arrangement, appointment of provisional liquidator, receiver or administrative receiver, resolution or petition for winding-up or similar proceeding, under any Applicable Law, in any jurisdiction, except if the same has been dismissed within sixty days; (b) any voluntary bankruptcy, insolvency, liquidation, company reorganization, restructuring, suspension of payments, scheme of arrangement, appointment of provisional liquidator, receiver or administrative receiver, resolution or petition for winding-up or similar proceeding, under any Applicable Law, in any jurisdiction; or (c) any general inability on the part of that Person to pay its debts as they fall due. |
| Inspector General | The New York City Department of Investigation's Inspector General assigned to review or investigate matters in connection with the Project. |
| Insurance Policies | Defined in Section 32.1 (<i>Types of Insurance Required</i>). |
| Insurance Proceeds | Defined in Section 32.4 (<i>Insurers</i>). |
| Integrity Monitor (IM) | The private independent organization with legal, auditing, accounting, engineering and investigative expertise (and its subcontractors and sub-consultants) that the City has engaged to assist it in its fraud prevention efforts. |

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| Intellectual Property | Any and all patents, trademarks, service marks, copyright, database rights, moral rights, rights in a design, know-how, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United States or any other part of the world together with all or any goodwill relating or attached thereto which is created, brought into existence, acquired, used or intended to be used by any Design-Builder Party for the purposes of carrying out the Work or otherwise for the purposes of this Agreement. |
| Key Personnel | The key management and supervisory personnel identified in the Design-Builder Proposal Commitments and any Persons who replace these individuals in accordance with Article 18 (<i>Key Personnel / Key Subcontracts</i>). |
| Key Subcontract | To the extent such services are not performed by Principal Participants: <ul style="list-style-type: none"> (a) the Design Subcontract for the Designer of Record; and (b) any other Subcontract identified in Schedule A or the Design-Builder Proposal Commitments as a Key Subcontract. |
| Key Subcontractor | The contractual counterparty to the Design-Builder under any Key Subcontract. |
| Labor Law | The Labor Law of the State of New York. |
| LD Cap | Defined in Section 14.7(a) and set forth in Schedule A. |
| Licensed Work Product | Work Product and Intellectual Property created prior to the Agreement Date that was not created specifically for this Project, including Subcontractor Work Product, and specifically identified in the DB Proposal Commitments as "Licensed Work Product". |
| Losses | Any loss, damage, injury, liability, obligation, cost, response cost, expense, fee, charge, judgment, penalty or fine. Losses include injury to or death of Persons, damage or loss of property, and harm or damage to the Environment. |
| Lump Sum Amount | Defined in Section 21.1(a) and set forth in Schedule B. |
| MWBE | A Minority- or Women-Owned Business Enterprise (" MWBE ") is a for-profit, small business concern certified by either or both of the Empire State Development's, Division of Minority and Women's Business Development (" DMWBD ") in accordance with Article 15-A of the New York State Executive Law or by the New York City Department of Small Business Services (" NYCSBS ") in accordance with Section 1304 of the City Charter. |

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| MWBE Achievement and Utilization plan | Where applicable, the MWBE Achievement and Utilization Plan initially submitted in the Design-Builder's Proposal and updated in accordance with this Agreement. |
| MWBE Goals | Defined in Exhibit 7 (<i>MWBE Requirements</i>) of this Agreement and set forth in Schedule A. |
| MWBE Requirements | Defined in Exhibit 7 (<i>MWBE Requirements</i>) of this Agreement. |
| Mandatory DDC Approval Submittal | Any Submittal identified and agreed among the Parties as a Mandatory DDC Approval Submittal in the Schedule of Submittals that is subject to the approval or consent of the DDC, in its absolute discretion, prior to the Design-Builder performing the applicable Work subject to the Submittal. |
| Mayor | The Mayor of the City of New York. |
| MDS Plan | Defined in Section 22.3(b)(ix). |
| Minor Waiver | Minor Waivers to the Contract Documents that do not adversely impact the Project Requirements and do not involve an adjustment in the Contract Price or any Guaranteed Completion Date, or both, and do not materially and adversely affect the Work, including the design, quality, performance and workmanship required by the Contract Documents. |
| Modification | Defined in Section 24.1(a) (<i>Request for Proposal</i>). |
| Modification Proposal | Defined in Section 24.3 (<i>Change Proposals, Design-Builder Proposal Costs</i>). |
| Multiplier | Defined in Section 26.2(d) and set forth in Schedule B. |
| Net Costs | With respect to any Compensable Relief Event, the effect or impact of that event (whether of a one-off or recurring nature, and whether positive or negative) upon the actual or anticipated actual and out-of-pocket costs of the Design-Builder. In the case of any categories of costs that are subject to Article 26 (<i>Calculating Allowance Work, Extra Work and Net Costs</i>), such costs will be determined in accordance with Article 26, excluding in all cases Indirect Losses. |
| NTP | Any notice to proceed issued by the DDC to the Design-Builder for the purpose of commencing portions of the Work or gaining access to the Project Site, as applicable. |
| NTP Date | Defined in Section 7.1(d) (<i>Notice to Proceed</i>). |
| Other Contractor | Any other design-build contractor, general contractor or other Person, other than the Design-Builder, engaged by the City to perform work on or adjacent to the Project Site. |
| P&T Standard Change | Defined in Section 27.2 (<i>Changes in Applicable Standards</i>). |

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| Parties | The DDC and the Design-Builder. |
| PASSPort | Defined in Section 19.1(a)(ii)(B). |
| Payee Information Portal | The City's Payee Information Portal available at www.nyc.gov/pip . |
| Payment Bond | Defined in Section 4.2. |
| Payment Requests | Those payment request submitted by the Design-Builder in accordance with the Contract Documents. |
| PDC | The New York City Public Design Commission, also known as the art commission pursuant to Chapter 37 of the City Charter. |
| Performance Bond | Defined in Section 4.2 (<i>Performance Bond and Payment Bond</i>). |
| Person | any individual, firm, corporation, company, sole proprietorship, limited liability company, joint venture, voluntary association, partnership, trust, unincorporated organization, or other entity. |
| PPB Rule | The Procurement Policy Board Rules of the City of New York. |
| Pre-existing Hazardous Materials | Any Hazardous Materials that exist in, on or under the Project Site prior to the date on which the Design-Builder gains possession of a relevant portion of the Project Site, including those that existed prior to the date that Design-Builder gains possession of a relevant portion of the Project Site but that manifest themselves after that date. |
| Principal Participant | Any of the following entities: (a) the Design-Builder; (b) if the Design-Builder is a partnership, joint venture, or limited liability company ("LLC"), any general partner or any member of the partnership or joint venture or LLC; and/or (c) any Equity Participant. |
| Progress Schedule | The progress schedule developed and updated in accordance with the Project Requirements. |
| Project | The public improvement to which this Agreement relates, as described in the Project Requirements. |
| Project Labor Agreement | The Project Labor Agreement, if any, included with the Reference Documents and attached to this Agreement. |
| Project Requirements | The General Project Requirements, the Specific Project Requirements and the Reference Documents. |
| Project Schedule | The schedule, including any amendments, for performance of the Work necessary to deliver the Project by the Design-Builder and approved by the DDC under the terms of the Agreement. |

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| Project Site | The area described in the Project Requirements for performance of the Construction Work for the Project. |
| Punch List | An itemized list of Work that remains to be completed, corrected, adjusted, or modified following Substantial Completion, as approved by the DDC in accordance with this Agreement. |
| Qualified Surety | <p>A Surety or insurance company that:</p> <ul style="list-style-type: none">(a) is authorized to do business and issue bonds in the State of New York;(b) appears on the current list of the Treasury Department of the United States as acceptable as sureties to the Treasury Department of the United States and whose aggregate underwriting limitations on any one risk equals or exceeds \$20 million;(c) rated in the top 2 categories by 2 of the 4 major rating agencies or have a then-current A.M. Best's Financial Strength Rating and Financial Size of at least "A-/VIII"; and(d) is approved by the DDC. |
| Quality Assurance or QA | The system of procedures developed and performed independently of the design and construction activities to assure that the Quality Control activities are occurring as appropriate on a day to day basis and that the product of the work meets quality standards. It includes the planning and activities necessary to verify that the required Quality Control activities have been satisfactorily conducted and that the quality requirements are met. |
| Quality Control or QC | The system of procedures to be performed by the Design-Builder for the day to day checking, monitoring, inspection, sampling, testing and evaluation of Work throughout the Project to assess, adjust and approve design, production and construction processes to ensure that the design, materials and workmanship of the Work meets the requirements of the Contract Documents and to control the quality being produced in the Project. Quality Control ensures that (i) all Design Work is done in conformance with best engineering practice and State and the DDC codes and requirements, (ii) all Construction Work means and methods result in the appropriate Work quality; and (iii) quality characteristics are measured and activities that affect production are inspected at a time when corrective action can be taken to substantially decrease the likelihood that nonconforming material will be incorporated into the Project. |
| Quality Management Program | The overall program for Quality Assurance and Quality Control, to be performed in accordance with the Agreement. |

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| RCNY | The Rules of the City of New York. |
| Reasonable Efforts | All those steps in the power of the relevant Party that can produce the desired result, being steps which a prudent, determined and reasonable Person desiring to achieve that result would take. Subject to the other express provisions of this Agreement, Reasonable Efforts does not mean that the relevant Party is required to undertake additional obligations or the expenditure of costs under this Agreement except for those necessary to meet the reasonable costs reasonably incidental or ancillary to the steps to be taken by the relevant Party (including its reasonable travel expenses, correspondence costs and general overhead expenses). |
| Record Drawings | The Final Design Documents revised by the Designer of Record to incorporate all changes made during construction, including marked-up documents provided by the Design-Builder, and shop drawings approved or approved as noted for construction. |
| Reference Documents | Volume 4 (<i>Reference Documents</i>) of Exhibit 2 (<i>Project Requirements</i>). |
| Reinstatement Plan | Defined in Section 32.18(d). |
| Reinstatement Works | Defined in Section 32.18(b). |
| Release for Construction Documents | <p>Each discrete package of Design Work that is 100% complete and to be used by the Design-Builder to perform the Construction Work, and includes, design drawings, specifications, technical memos, studies, calculations, independent certifications and other pertinent data, as applicable, all as Signed and Sealed by the Designer of Record and approved by the DDC.</p> <p>The Release for Construction documents must include the Designer of Record's signature, date, and seal on the documents.</p> |
| Relief Authorizations | Defined in Section 25.1(b). |
| Relief Event | <p>Each of the following:</p> <ul style="list-style-type: none"> (a) a Compensable Relief Event; (b) a Force Majeure Event; (c) fire, explosion, tornados, hurricanes, flood, earthquakes, riot and civil commotion; (d) an Adverse Weather Event; (e) any blockade or embargo; (f) any official or unofficial strike, lockout, go-slow or other labor dispute generally affecting the construction industry or a significant sector of it; or |

- (g) following the Design-Builder's timely and complete submission of a compliant or legally sufficient application or request for approval or a permit, any unreasonable and unjustifiable delay by any Governmental Entity in issuing any permit or approval required for the performance of the Work, following a period equal to the greater of (i) the date identified in the Design-Builder's Project Schedule for such governmental approval to be issued or (ii) the time period provided for such issuance under applicable law, plus a period of thirty days;
- (h) any material failure by a Stakeholder (other than a Utility) to comply with the requirements and obligations under any Stakeholder Coordination Plan, as applicable;
- (i) any delay attributable to (i) a Utility Owner's refusing to enter or delay in entering into a utility relocation or similar agreement on terms customary for utility providers affected by projects of a similar size and scope either with the DDC or the Design-Builder, as applicable, necessary for performance of the Work or (ii) a Utility Owner failing to perform its obligations under a two-party agreement in accordance with the terms of such agreement, where such delay (or delays resulting from such failures by multiple Utility Owners) causes one or more Critical Path activities approved by the DDC to be adversely impacted for a period of fifteen days in the aggregate. The computation of fifteen days in the aggregate will treat any day of delay that runs concurrently with another day of delay, regardless of whether it is a delay caused by the Utility Owner or a different Utility Owner, as a single day and not as two days,

except, in each case, no Relief Event will have occurred, in each case, to the extent attributable to either or both (A) any breach of (i) any Contract Document, (ii) Applicable Law, (iii) any Governmental Approval or (iv) any agreement or requirements by a Utility or (B) any negligence, recklessness, intentional tortious act of a Design-Builder Party.

Remaining Contract Price

Defined in Section 26.3(b) (*Construction Work Net Costs*).

Remedial Action

Any investigation, clean-up remediation or removal of a Hazardous Environmental Condition that the Design-Builder is responsible for performing.

Remedial Plan

Defined in Section 34.3(a) (*Remedial Plan for Design-Builder Default or Early Warning Trigger*).

Request for Proposal or RFP

The final form of "Request for Proposals" issued by the City, in response to which the Design-Builder submitted its proposal for the Project.

Restricted Transfer

Defined in Section 45(c).

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| Retainage Amount | The amounts retained by the DDC from payments due to the Design-Builder in accordance with Section 22.8 (<i>Retainage</i>), without taking into account amounts: <ul style="list-style-type: none"> (a) returned to the Design-Builder in accordance with Section 22.8 (<i>Retainage</i>); or (b) otherwise applied by the DDC in accordance with Section 22.8 (<i>Retainage</i>). |
| Retainage Percentage | The percentage set out in Schedule A. |
| Review and Comment Submittal | Any Submittal that is identified in the Schedule of Submittals as a Review and Comment Submittal and that is only subject to the review or comment (or both) by the DDC but is not a Mandatory DDC Approval Submittal or Deemed Approval Submittal. |
| Safety Standards | Those provisions of the Project Requirements that are measures to protect public safety or worker safety, including Applicable Standards. Provisions of the Project Requirements primarily directed at durability of materials or equipment, where the durability is primarily a matter of life cycle cost rather than protecting public or worker safety, are not Safety Standards. |
| Schedule of Submittals | As described in Article 10.5 of the General Project Requirements. |
| Schedule of Values | The "Schedule of Values" submitted by the Design-Builder as part of its Proposal and incorporated with Schedule B, as updated to reflect the final Contract Price. |
| Senior Representative Negotiation | Good Faith negotiations between senior executives, with decision making authority on behalf of each Party, to resolve a Dispute in accordance with Section 40.2 (<i>Senior Representative Negotiations</i>). |
| Senior Representatives | Senior executives of each Party with authority to make decisions and resolve Disputes for their respective Parties. |
| Setting Date | The date that is 30 days before the date the Design-Builder submitted its proposal for the Project in response to the RFP. |
| Signed and Sealed | The signature and seal of the Designer of Record on a document indicating that the Designer of Record takes professional responsibility for the Work and, to the best of the Designer of Record's knowledge and ability, the Work represented in the document is accurate, in conformance with Applicable Law and has been prepared in conformity with Best Management Practice and with a view to the safeguarding of life, health, property and public welfare. The Designer of Record certifies that the documents have been signed and sealed in accordance with the Applicable Laws of the State of New York. |
| Scope Validation Period | The period immediately following the NTP Date and expiring as set forth in Schedule A. |

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| Small Value Contract | Defined in Section 22.8(c)(ii). |
| Specific Project Requirements | Volume 3 (<i>Specific Project Requirements</i>) of the Exhibit 2 (<i>Project Requirements</i>). |
| Standards of Performance | Defined in Section 7.1(b) (<i>Requirements and Standards</i>). |
| State | The State of New York. |
| Subcontract | Any contract, subcontract or other form of agreement between the Design-Builder, a Subcontractor and any other Person, other than employees of the Design-Builder, to perform any part of the Work or provide any materials, equipment or supplies for any part of the Work, at all tiers. |
| Subcontractor | Any Person with whom the Design-Builder has entered into any Subcontract to perform any part of the Work or provide any materials, equipment or supplies for the Project, and any other Person with whom any Subcontractor has further subcontracted any part of the Work, at all tiers. |
| Submittal | Any document, Work Product or other written or electronic product or item required under this Agreement (including the Project Requirements) to be delivered or submitted to the DDC for approval, review, comment or otherwise. |
| Substantial Completion | The written determination by the DDC that the Work required under this Agreement is substantially, but not entirely, complete and the approval of the Final Approved Punch List. |
| Substantial Completion Long Stop Date | Set forth in Schedule A. |
| Surety | The surety companies issuing the Performance Bond and the Payment Bond in connection with this Agreement. |
| Suspension Order | Defined in Section 34.4(a) (<i>Suspension Orders</i>). |
| Suspension Trigger | Defined in Section 35.1 (<i>Suspension Trigger</i>). |
| Suspension Trigger Notice | Defined in Section 35.2 (<i>Suspension Notice</i>). |
| Temporary Access Areas | Defined in Section 7.3(c). |
| Termination Notice | Any termination notice delivered under the terms of this Agreement, including a DDC Termination Notice and Design-Builder Termination Notice. |
| Termination Requirements | Defined in Section 33.2(a). |
| Termination Without Cause Payment | Defined in Section 33.3 (<i>Termination Without Cause Payment</i>). |
| Terrorism | Activities against Persons or property of any nature: |

- (a) that involve the following or preparation for the following:
 - (i) use or threat of force or violence; or
 - (ii) commission or threat of an act that interferes with or disrupts an electronic, communication, information or mechanical system;
- (b) when one or both of the following applies:
 - (i) it appears that the intent is to intimidate or coerce the City, a Governmental Entity or the civilian population or any segment of the civilian population, or to disrupt any segment of the economy;
 - (ii) it appears that the intent is to intimidate or coerce the City or a Governmental Entity, or to further political, ideological, religious, social or economic objectives or to express (or express opposition to) a philosophy or ideology; and
- (c) that are criminally defined as terrorism for purposes of Applicable Law, including in the State, federally or internationally.

Third Party Claim

Any and all claims, disputes, disagreements, causes of action, demands, suits, actions, investigations or administrative proceedings brought against an Indemnified Party by any Person that is not a party to this Agreement with respect to damages, injuries, liabilities, obligations, losses, costs, penalties, fines or expenses (including attorneys' fees and expenses) sustained or incurred by that Person.

Time Extension

An extension approved by the ACCO to any of the Guaranteed Completion Dates in connection with the DDC's approval of any Relief Event and may be issued in connection with a Change Order or Allowance Approval.

Time Impact Analysis

Described further in the Project Requirements.

Tribunal

A court, tribunal, agency, special district, commission or other authority exercising judicial or regulatory functions.

Unit Price

Each Unit Price Item and its corresponding price identified, as applicable, in Schedule B.

Unit Price Cost

The Design-Builder's cost and expense for performance any Unit Price Work.

Unit Price Excess Cost

Defined in Section 26.3(a) (*Unit Price Items*).

Unit Price Item

Any single unit of Work done on a Unit Price basis.

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| Unit Price Work | Any Work performed by the Design-Builder that is compensated on a Unit Price basis. |
| Unknown Archaeological Remains | <p>Any Archaeological Remains discovered at the Project Site that, as of the Setting Date, were neither:</p> <ul style="list-style-type: none">(a) known to the Design-Builder; or(b) reasonably capable of being identified by an appropriately qualified and experienced contractor, engineer or expert working in that field exercising due care and skill and Best Management Practice in the same or equivalent circumstances, including through review and analysis of the Available Documents that, in each case, were available to the Design-Builder before the Setting Date. |
| Unknown Endangered Species | <p>Any Endangered Species discovered at the Project Site, the temporary, continual or habitual presence of which, as of the Setting Date, was neither:</p> <ul style="list-style-type: none">(a) known to the Design-Builder;(b) identified or described in any applicable Governmental Approvals; or(c) reasonably to be expected to be found temporarily, continually or habitually at the Project Site based on review and analysis of the Available Documents that, in each case, were available to the Design-Builder before the Setting Date. |
| Unknown Geotechnical Condition | Any geotechnical condition (excluding Hazardous Environmental Conditions) that materially differs from the conditions described in the Geotechnical Baseline Reports, excluding any condition that could reasonably have been anticipated, identified or discovered by an appropriately qualified and experienced contractor, engineer or expert working in that field exercising due care and skill and Best Management Practice in the same or equivalent circumstances, including through (i) the access made available to the Design-Builder prior to the Setting Date for inspection and investigation of the Project Site and (ii) review and analysis of the Geotechnical Baseline Reports (and the investigations and assumptions on the basis of which the Geotechnical Baseline Reports were prepared), and the Available Documents that, in each case, were available to the Design-Builder before the Setting Date. |
| Unknown Hazardous Environmental Condition | Any Hazardous Environmental Condition that existed in, on or under a portion of the Project Site prior to the date on which the Design-Builder gains possession of a relevant portion of the Project Site and that represents a materially different condition to that described in the Available Documents or in Exhibit 2 (<i>Project Requirements</i>), excluding any Hazardous Environmental Condition that could reasonably have been identified or discovered by an appropriately qualified and experienced contractor, engineer or expert working in that field exercising due care and skill and Best |

Management Practice in the same or equivalent circumstances, including through (i) the access made available to the Design-Builder prior to the Setting Date for inspection and investigation of the Project Site and (ii) review and analysis of the Available Documents that, in each case, were available to the Design-Builder before the Setting Date. Unknown Geotechnical Conditions do not constitute Unknown Hazardous Environmental Conditions.

Unknown Physical Condition

Excluding Hazardous Environmental Conditions, Unknown Geotechnical Conditions and Unknown Utility, any subsurface or physical condition that materially differs from the conditions described in the relevant Project Site condition reports included as part of the Available Documents, excluding any condition that could reasonably have been identified or discovered by an appropriately qualified and experienced contractor, engineer or expert working in that field exercising due care and skill and Best Management Practice in the same or equivalent circumstances, including through (i) the access made available to the Design-Builder prior to the Setting Date for inspection and investigation of the Project Site and (ii) review and analysis of the Available Documents, in each case, were available to the Design-Builder before the Setting Date.

Unknown Site Conditions

Any site condition that the Design-Builder did not include or consider as part of its Proposal, whether or not such condition should have been anticipated or included in the Design-Builder's Proposal.

Unknown Utility

Any Utility present on the Project Site that was not identified or was materially incorrectly shown, identified or described in the Available Documents, excluding any Utility that:

- (a) was installed on a part of the Project Site after right of entry was granted to the Design-Builder in relation to the relevant part of the Project Site in accordance with the terms of this Agreement; or
- (b) could reasonably have been identified or discovered by an appropriately qualified and experienced contractor, engineer or expert in the field exercising due care and skill and Best Management Practice in the same or equivalent circumstances through (i) the access made available to the Design-Builder prior to the Setting Date for inspection and investigation of the Project Site and (ii) review and analysis of Available Documents and any public information that, in each case, were available to the Design-Builder before the Setting Date.

Utility

A publicly, privately, or cooperatively owned line, facility, or system (including conduits and concrete structures in which utility lines are contained) for transmitting or distributing communications, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with the highway drainage, or other similar commodities, including wireless telecommunications, television transmission signals and publicly owned fire and police signal systems, which directly or indirectly serve the public. The

necessary appurtenances to each Utility facility will be considered part of that Utility.

Value Engineering Proposal

A proposal developed and documented by the Design-Builder which (A) produces a net savings to the DDC without impairing essential functions or characteristics of the Project (including the meeting of requirements contained in all Governmental Approvals); and (B) would modify or require a change in any of the requirements of or constraints set forth in the Contract Documents in order to be implemented.

Warranty Period

Defined in Section 29.1 (*Warranty Period*).

Work

The Design Work and the Construction Work and all other work, services and obligations required to be furnished, performed and provided by the Design-Builder or any Design-Builder Party under and in connection with this Agreement, including demolition work, as may be necessary or foreseeable to achieve Substantial Completion and Final Completion of the Project and satisfy all the DDC claims and Design-Builder obligations during the Warranty Period or latent defects period.

Work Product

All drawings, data, photographs, specifications, calculations, reports, studies, notes or any other Submittal or documentation, whether in paper or electronic form, produced by or on behalf of the Design-Builder in connection with the Project.

EXHIBIT 2

Project Requirements

The following volumes are attached to this Exhibit 2:

Volume 2 – General Project Requirements

Volume 3 – Specific Project Requirements

Volume 4 – Reference Documents

EXHIBIT 3

Design-Builder Proposal Commitments

[Design-Builder's Proposal Commitments to be inserted from the Design-Builder's Proposal, as agreed by the City following award of the Preferred Proposer.]

EXHIBIT 4**Guarantee¹**

This Guarantee (the “**Guarantee**”), is made as of [●], by [_____], a [_____] existing under the laws of [_____] (the “**Guarantor**”), for the benefit of the City of New York, a municipal corporation organized under the laws of the State of New York (“the **City**”), acting by and through its Department of Design and Construction (the “**DDC**”), an agency of New York City.

RECITALS:

- (A) The DDC and [_____], [[a [_____] [_____]] of (1) [_____], a [_____] existing under the laws of [_____] and (2) [_____], a [_____] existing under the laws of [_____] the “**Design-Builder**”), entered into that Design-Build Agreement dated as of [____], 20[●] (as may be modified, amended or supplemented at any time, the “**DB Agreement**”) for design and construction of the Project;
- (B) [[_____], a [_____] organized and existing under the laws of [_____], is a [_____] member of the Design-Builder (the “**Principal Participant**”), and as the [parent company][Affiliate] of the Principal Participant, the Guarantor is willing to enter into this Guarantee to guarantee the Design-Builder’s performance of its obligations under the DB Agreement;]
- (C) Section 4.1 of the DB Agreement requires that this Guarantee be executed and delivered by the Guarantor on or before the date of execution of the DB Agreement as an inducement for DDC to enter into the DB Agreement; and
- (D) Guarantor has agreed to enter into this Guarantee in consideration for financial and direct or indirect benefits which will accrue to Guarantor by virtue of Design-Builder entering into the DB Agreement and that such benefits constitute adequate consideration therefor.

THE GUARANTOR AND THE DDC AGREE as follows:**1. DEFINITIONS**

Capitalized terms not otherwise defined in this Guarantee will have the meaning given to them in the DB Agreement.

2. GUARANTEE

- (a) Guarantor irrevocably, absolutely and unconditionally guarantees to the City, its successors and permitted assigns, as primary obligor and not merely as surety:
- (i) the full and punctual performance of each and all obligations (including all warranties, covenants, duties, terms, obligations and agreements to be performed or observed, as applicable);
 - (ii) the full and punctual payment to the City when due of each and all of the payment obligations and liabilities of the Design-Builder,

in each case under the DB Agreement and all other present or future agreements and instruments existing at any time between the DDC and the Design-Builder in connection

¹ Note for Conforming the DBA: Form of Guarantee is included with the draft DBA throughout the RFP process. If a Guarantee is not required, the conformed DBA should delete this Form of Guarantee and simply leave the exhibit blank or mark “NA”. If a Guarantee is required, the Form of Guarantee should be deleted and replaced with the executed Guarantee(s) in the final conformed DBA.

with the performance of the DB Agreement (these obligations of the Design-Builder collectively the “**Obligations**”). The obligations of Guarantor under this Guarantee are independent of the Obligations.

- (b) This Guarantee is a continuing guarantee, and will apply to all Obligations whenever arising, and will remain in full force and effect until, subject to Section 6 (*Guarantee Not Affected*) and Section 15 (*Reinstatement of Guarantee*), all of the Obligations have been irrevocably performed and paid in full.
- (c) If at any time the Design-Builder defaults in the payment or performance when due of any of the Obligations, Guarantor will, upon demand by the DDC, promptly pay or perform the Design-Builder’s Obligations as if the Guarantor instead of the Design-Builder were expressed to be the principal obligor, or cause the payment or performance of, those Obligations.
- (d) Except as otherwise expressly provided in this Guarantee:
 - (i) the liability of Guarantor under this Guarantee will not be greater than that of the Design-Builder under the DB Agreement (other than with respect to Guarantor’s obligation under this Guarantee to reimburse the DDC for its costs and expenses in enforcing this Guarantee, if any, in accordance with Section 5 (*Costs and Expenses*));
 - (ii) Guarantor will be entitled to the benefit of all limitations on the Design-Builder’s liability specified in the DB Agreement; and
 - (iii) Guarantor may, as a defense to the performance of the Obligations, assert any defense available to the Design-Builder under the DB Agreement that would excuse the Design-Builder from performing the Obligation against which a claim is made under this Guarantee.

3. **NATURE OF GUARANTOR’S PERFORMANCE OBLIGATIONS**

- (a) To the extent Guarantor’s obligations under this Guarantee relate to Obligations that require performance other than the payment of money, the DDC may proceed against Guarantor to effect specific performance of those Obligations (to the extent available) or for payment of damages or any amounts due under the DB Agreement resulting from the Design-Builder’s breach of the DB Agreement or failure to perform any Obligation.
- (b) If the DB Agreement is disaffirmed by the trustee in bankruptcy for the Design-Builder, at the option of the DDC, Guarantor must make and enter into a new contract (to perform or cause to be performed the balance of the Obligations which must, unless otherwise agreed by the DDC, be in form and substance identical to the DB Agreement).

4. **PAYMENTS**

All payments by Guarantor to the City must be made in the United States in United States Dollars and must be paid within five Business Days after receipt by Guarantor from the DDC of written demand for payment, and will not be subject to any offset against any amounts that may be owed by the City to Guarantor for any reason unrelated to the Project.

5. **COSTS AND EXPENSES**

Guarantor agrees to pay all costs, expenses and fees that may be incurred by the City in enforcing this Guarantee, whether by suit or otherwise, to the extent the City is the prevailing party with respect to a substantial portion of its claim.

6. **GUARANTEE NOT AFFECTED**

The obligations of Guarantor will not be affected, modified, impaired or prejudiced by any act, omission, matter or thing that would or might under applicable law (but for this Section 6) constitute a whole or partial defense to a claim against Guarantor or operate to release (without limitation) Guarantor from its obligations or liability, or any portion of them, under this Guarantee, including (without limitation):

- (a) any security held at any time by the DDC as security for the Obligations;
- (b) any proceeding, voluntary or involuntary, involving the winding up, dissolution, administration, bankruptcy, reorganization, insolvency, receivership, liquidation or arrangement or similar proceeding of the Design-Builder, or by any defense that the Design-Builder may have by reason of any order, decree or decision of any court or administrative body resulting from any such proceeding;
- (c) any modification to or termination of the DB Agreement or rejection of the DB Agreement in bankruptcy;
- (d) any right to require the DDC to proceed against the Design-Builder or any other person or to proceed against or exhaust any security held by the DDC at any time or to pursue any other remedy in the DDC's power before proceeding against Guarantor;
- (e) any defense based upon any right of setoff, counterclaim or other right, defense, or claim based on, or in the nature of, any obligation now or later owed to the Guarantor by the Design-Builder or any other person;
- (f) any defense that may arise by reason of the incapacity, lack of authority, death or disability of any other person or the failure of the DDC to file or enforce a claim against the estate (in administration, bankruptcy or any other proceeding) of any other person;
- (g) promptness, diligence, demand, presentment, protest and notice of any kind, including notice of the existence, creation or incurring of any new or additional Obligations or of any action or non-action on the part of the Design-Builder, the DDC, any creditor of the Design-Builder or Guarantor or on the part of any other person under this or any other instrument in connection with any obligation or evidence of indebtedness held by the DDC as collateral or in connection with any Obligations guaranteed by this Guarantee;
- (h) any defense based upon an election of remedies by the DDC that destroys, releases or otherwise impairs the subrogation, exoneration, contribution or indemnification rights of Guarantor or the right of Guarantor to proceed against the Design-Builder for reimbursement;
- (i) any defense based on the invalidity, illegality, nonbinding effect or unenforceability of (A) the Obligations or (B) the DB Agreement, with the intent that the Guarantor's obligations under this Guarantee will remain in full force and be enforceable as if there were no invalidity, illegality, nonbinding effect or unenforceability;
- (j) any duty on the part of the DDC to disclose to Guarantor any facts the DDC may know at any time about the Design-Builder, regardless of whether the DDC has reason to believe that these facts materially increase the risk beyond that which Guarantor intends to

assume, or has reason to believe that these facts are unknown to Guarantor, or has a reasonable opportunity to communicate these facts to Guarantor, since Guarantor acknowledges that Guarantor is fully responsible for being and keeping informed of the financial condition of the Design-Builder and of all circumstances bearing on the risk of non-payment of any Obligations guaranteed by this Guarantee;

- (k) any defense arising because of the exercise of any right or remedy available to, or election made by, the DDC pursuant to the U.S. Bankruptcy Code, whether as an unsecured or undersecured creditor, seeking adequate protection, or otherwise; and
- (l) Guarantor's failure to remain an Affiliate of Design-Builder

7. **WAIVER OF SUBROGATION; SUBORDINATION**

- (a) Guarantor irrevocably and absolutely waives, at all times prior to the Obligations being irrevocably paid or performed in full, any and all right of subrogation, contribution, indemnification, reimbursement or similar rights against the Design-Builder with respect to the Guarantee, whether these rights arise under an express or implied contract or by operation of law. Guarantor and the DDC intend that, at all times prior to the Obligations being irrevocably paid or performed in full, Guarantor will not be deemed to be a "creditor" (as defined in section 101 of the U.S. Bankruptcy Code or any other applicable law) of the Design-Builder by reason of the existence of this Guarantee in the event that the Design-Builder becomes a debtor in any proceeding under the U.S. Bankruptcy Code or any other applicable law.
- (b) In addition, Guarantor will not exercise any rights which it may acquire by way of subrogation under this Guarantee by any payment made under this Guarantee or otherwise, until all of the Obligations have irrevocably been paid or performed in full. If any amount is paid to Guarantor on account of any subrogation rights at any time when these liabilities and obligations have not been irrevocably paid in full, that amount will be held in trust for the benefit of the DDC and will be paid to the DDC and applied to such liabilities and obligations, whether matured or unmatured.
- (c) All existing or future indebtedness of the Design-Builder to the Guarantor is subordinated to all of the Obligations. Whenever and for so long as the Design-Builder shall be in default in the performance or payment of any Obligation, no payments with respect to any such indebtedness shall be made by the Design-Builder to the Guarantor without prior written notice to the DDC.

8. **BANKRUPTCY PROCEEDINGS**

To the greatest extent permitted by Applicable Law, so long as any Obligations are owed to the DDC, Guarantor may not, without the prior written consent of the DDC, commence, or join with any other Person in commencing, any bankruptcy, reorganization, or insolvency proceeding against the Design-Builder. With DDC's consent, the Guarantor shall file all claims against the Design-Builder in any bankruptcy or other proceedings in which the filing of claims is required or permitted by law upon any obligation or indebtedness of the Design-Builder to the Guarantor, and shall have assigned to the DDC all of the Guarantor's rights thereunder to the extent of outstanding and unsatisfied Obligations. If the Guarantor does not file any such claim, the DDC is authorized as the Guarantor's attorney-in-fact to do so in the Guarantor's name, or in the discretion of the DDC, the DDC is authorized to assign the claim to, and cause proof of claim to be filed in the name of the Design-Builder or its nominee. In all such cases, whether in administration, bankruptcy, or otherwise, the person or persons authorized to pay such claim shall pay to the DDC or its nominee the full amount payable on the claim in the proceeding before making any payment to the

Guarantor, and to the full extent necessary for that purpose, the Guarantor assigns to the DDC all of its respective rights to any payments or distributions to which it otherwise would be entitled.

9. NO MARSHALING

- (a) The City will not be required to marshal any collateral securing, or any guaranties of, the Obligations, or to resort to any item of collateral or any guarantee in any particular order, and the City's rights with respect to any collateral and guaranties will be cumulative and in addition to all other rights, however existing or arising.
- (b) Guarantor irrevocably waives, and agrees that it will not invoke or assert, any rights or remedies under any law requiring or relating to the marshaling of collateral or guaranties or any other law which might cause a delay in or impede the enforcement of the City's rights under this Guarantee or any other agreement.

10. NO THIRD-PARTY RIGHTS

This Guarantee is made for the benefit of the City (and its successors and assigns), and nothing contained in this Guarantee is intended or will be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the Guarantor toward, any other Person not expressly identified under this Guarantee.

11. SUCCESSORS AND ASSIGNS

Guarantor may not make an assignment or other transfer of this Guarantee or any interest in this Guarantee for any reason at any time, including by operation of law, unless it has obtained the prior written consent of the DDC to such assignment or other transfer. As provided in Section 10, no right of action will accrue to any third party under this Guarantee other than the City's successors and assigns.

12. NOTICES

All notices to the parties to this Guarantee that must be served under this Guarantee must be in writing and be served by registered mail or sent by facsimile or other means of generally accepted electronic transmission, followed by a hard copy and with receipt confirmed by return email, and must be addressed as follows:

- [_____]
- [_____]
- [_____]
- [_____]
- [_____]

or at another address that the party may designate in writing.

13. GOVERNING LAW, DISPUTES JURY WAIVER AND CONSENT TO JURISDICTION

- (a) This Guarantee will be governed by and interpreted in accordance with the laws of the State of New York governing contracts, without regard to its choice of law provision.

- (b) Section 13(a) does not apply to any claims between the Guarantor and the City that do not arise under this Guarantee or the DB Agreement (including claims in tort or any other non-contractual claims)
- (c) **JURY WAIVER.** EACH OF THE PARTIES TO THIS AGREEMENT WAIVES ANY RIGHT IT MAY HAVE TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION IN CONNECTION WITH ANY DISPUTE. THIS AGREEMENT MAY BE FILED AS A WRITTEN CONSENT TO TRIAL BY THE COURT.
- (d) Any Disputes arising under or related to the Obligations, the DB Agreement or this Guarantee must be resolved in accordance with the Dispute Resolution Procedures of the DB Agreement.
- (e) Subject to first exhausting the Dispute Resolution Procedures, each Party irrevocably submits to the exclusive jurisdiction of any court of competent jurisdiction sitting in the City and County of New York, and any appellate court thereof, for the settlement of any Dispute. The New York courts are the most appropriate and convenient courts to settle any such Dispute and each of the Parties to this Guarantee waive objection to those courts on the grounds of inconvenient forum or otherwise in relation to proceedings in connection with this Agreement.
- (f) If any person appointed by Guarantor as process agent is unable to act as agent for service of process, Guarantor must immediately appoint another agent on terms acceptable to the DDC, and the DDC may appoint another agent for this purpose if Guarantor fails to do so. Guarantor agrees that failure by a process agent to notify it of any process will not invalidate the relevant proceedings.
- (g) Guarantor agrees that final judgment against it in one jurisdiction in any action or proceeding may be enforced in any other jurisdiction by suit on the judgment, a certified or exemplified copy of which will be conclusive evidence of the fact and the amount of the judgment. Any finding of fact by, and any interim or award or decision made by the Disputes Review Board (and accepted by DDC and the Design-Builder), or a court or tribunal with jurisdiction over a claim arising under the DB Agreement will be binding on the Guarantor to the same extent that it is binding on the City for the purposes of this Guarantee.
- (h) The City may bring and prosecute a separate action or actions against Guarantor to enforce its liabilities hereunder, regardless of whether any action is brought against Design-Builder and regardless of whether any other person is joined in any such action or actions.

14. REPRESENTATIONS AND WARRANTIES

Guarantor represents and warrants to the City that:

(a) **Existence and Good Standing**

Guarantor is duly organized, validly existing and in good standing under the laws of its state of organization. Guarantor is [a [in]direct parent][Affiliate] of Design-Builder.

(b) **Power and Authority**

Guarantor has the power and authority to execute, deliver and perform its respective obligations under this Guarantee.

(c) **Authorization**

Guarantor has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of their obligations under, this Guarantee, and each Person executing this Guarantee on behalf of Guarantor has been (or at the time of execution will be) duly authorized to execute and deliver each document on behalf of Guarantor.

(d) **Enforceability**

This Guarantee is the legal, valid and binding obligation of Guarantor, enforceable against it in accordance with its terms, subject to the application of bankruptcy and similar laws and of general equitable principles.

(e) **No Contravention**

The execution, delivery and performance by Guarantor of this Guarantee does not (and at the time of execution will not):

- (i) conflict with or result in a default under or a violation of:
 - (A) the constituent or organizational documents of Guarantor;
 - (B) any other material agreement or instrument to which Guarantor is a party or that is binding on Guarantor or any of its respective assets; or
 - (C) any Applicable Law;
- (ii) constitute an event that would permit any person or entity to terminate rights or accelerate the performance or maturity of any indebtedness or obligation of Guarantor, the effect of which would materially affect Guarantor's ability to meet its obligations under this Guarantee; or
- (iii) constitute an event that would require any consent of a third party or under any agreement to which Guarantor is bound, the absence of which consent would materially and adversely affect Guarantor's ability to meet its obligations under this Guarantee.

(f) **No Litigation**

There is no action, suit, proceeding, investigation or litigation pending or served on Guarantor to Guarantor's knowledge that:

- (i) could reasonably be expected to have a material adverse effect on the ability of Guarantor to perform its obligations under this Guarantee;
- (ii) challenges Guarantor's authority to execute, deliver or perform, or the validity or enforceability of, this Guarantee; or
- (iii) challenges the authority of Guarantor's representative executing this Guarantee.

(g) **Financial Information**

Guarantor will timely provide to DDC any financial information required of a Guarantor under the DB Agreement, including any information required under Section 43.1(o) (*Guarantor Financial Conditions*).

(h) **Financial Statements**

All financial statements and data that have been given to DDC by the Guarantor with respect to the Guarantor: (A) are complete and correct in all material respects as of the date given; (B) accurately present in all material respects the financial condition of the Guarantor as of the date thereof; and (C) have been prepared in accordance with generally accepted accounting principles consistently applied throughout the periods covered thereby;

(i) **No Adverse Change**

There has been no material adverse change in the financial condition of the Guarantor since the date of the most recent financial statements given to the Design-Builder with respect to the Guarantor. The Guarantor shall advise the DDC in writing of any material adverse change in the respective business or financial condition of the Guarantor and promptly furnish to the DDC such information about the financial condition of the Guarantor as the DDC shall reasonably request.

15. **REINSTATEMENT OF GUARANTEE**

- (a) This Guarantee will be reinstated if, at any time following the purported satisfaction of all Obligations, any payment by Guarantor or the Design-Builder of the Obligations is rescinded or must otherwise be returned by the DDC or other Person upon the insolvency, bankruptcy, reorganization, dissolution or liquidation of the Design-Builder, Guarantor or otherwise, and is actually rescinded or returned to the party or parties making the payment, all as though the payment had not been made. This period of reinstatement will continue until full satisfaction of the Obligations and will continue to be subject to this Section 15.
- (b) This Guarantee will remain in effect despite any assignment of the DB Agreement to any Person. Upon request by the DDC after any assignment, Guarantor must acknowledge the continuing effectiveness of this Guarantee despite the assignment.

16. **SEVERABILITY**

- (a) If any clause, provision, section, subsection or part of this Guarantee is ruled invalid (including due to a Change in Law) by a court having proper jurisdiction, the parties to this Guarantee must:
- (i) promptly (and in any event within 10 Business Days) after the ruling, meet and negotiate a substitute for the clause, provision, article, section or part that will, to the greatest extent legally permissible, effect the original intent of the parties to this Guarantee; and
 - (ii) if necessary or desirable, apply to the court or other decision maker (as applicable) that declared the invalidity for an interpretation of the invalidated portion to guide the negotiations.
- (b) The invalidity or unenforceability of any clause, provision, article, section, subsection or part will not affect the validity or enforceability of the balance of this Guarantee, which will be construed and enforced as if this Guarantee did not contain the invalid or unenforceable clause, provision, article, section, subsection or part.

17. **NO WAIVER**

- (a) No waiver of any term, covenant or condition of this Guarantee will be valid unless in writing and executed by the DDC.
- (b) The DDC's waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of this Guarantee at any time will not in any way limit or waive the DDC's right to subsequently enforce or compel strict compliance with every term, covenant, condition or other provision of this Guarantee, despite any course of dealing or custom of the trade (other than the waived breach or failure in accordance with the terms of the waivers). The rights and remedies provided in this Guarantee are cumulative and may be exercised singly or concurrently, and are not exclusive of any rights or remedies provided by law.
- (c) If the parties to this Guarantee make and implement any interpretation of this Guarantee without documenting their interpretation by an instrument in writing signed by all of the parties, the interpretation and implementation will not be binding in the event of any future disputes.

18. **MERGERS ETC.**

The Guarantor shall not, in a single transaction or through a series of related transactions, consolidate with or merge with or into any other person or sell, assign, convey, transfer, lease or otherwise dispose of any material portion of its properties and assets to any person or group of affiliated persons, unless:

- (a) in case of a merger, the Guarantor shall be the continuing corporation; or
- (b) the person (if other than the Guarantor) formed by such consolidation or into which the Guarantor merges or the person (or group of affiliated persons) that acquires by sale, assignment, conveyance, transfer, lease or other disposition a material portion of the properties and assets of the Guarantor shall expressly agree to perform all of the obligations of the Guarantor hereunder, as a joint and several obligor with the Guarantor if the Guarantor continues to exist after such transaction, by a writing in form and substance reasonably satisfactory to the DDC.
- (c) Notwithstanding the agreement by any such person to perform the obligation of the Guarantor hereunder, the Guarantor shall not be released from its obligations hereunder unless released by operation of law or by prior written consent of the DDC.

19. **COUNTERPARTS**

This Guarantee may be executed in multiple counterparts, each of which will be deemed an original, but all of which will constitute one and the same document.

20. **ENTIRE AGREEMENT**

This Guarantee contains the entire understanding of the DDC and Guarantor with respect to the subject matter of this Guarantee and supersedes all prior agreements, understandings, statements, representations and negotiations between the DDC and Guarantor with respect to their subject matter.

[Signature Page Follows]

The Guarantor and the DDC have executed this Guarantee as of the date written above.

GUARANTOR

[_____]

By: _____

Name: _____

Title: _____

**ACKNOWLEDGED BY: THE CITY OF NEW YORK, BY AND THROUGH THE
DEPARTMENT OF DESIGN AND CONSTRUCTION**

By: _____

Name: _____

Title: _____

EXHIBIT 5
Disputes Review Board

PART A**FORM OF DISPUTES REVIEW BOARD AGREEMENT**

THIS DISPUTES REVIEW BOARD AGREEMENT (“DRB Agreement”) is made and entered into this [•] day of [•], 202[•], among the City of New York (the “**City**”), acting by and through its Department of Design and Construction (the “**DDC**”), [•] (the “**Design-Builder**”), and [INSERT BOARD MEMBER NAMES] (each a “**Board Member**,” and collectively, the “**Board Members**”), with reference to the following facts:

- (A) The DDC and the Design-Builder have entered into that certain Design-Build Agreement dated [•] (the “**Agreement**”). Pursuant to the Agreement, the Design-Builder has agreed, among other things, to design, construct, and commission the [•] Project (the “**Project**”).
- (B) Article 40 (*Dispute Resolution Procedure*) of the Agreement provides for the establishment and operation of a Disputes Review Board (the “**Board**”) to assist in resolving any Dispute that may arise among the DDC, the Design-Builder and others in respect to the Project.

NOW, THEREFORE, in consideration of the terms, conditions, covenants and agreements contained in this DRB Agreement, the signatories to this DRB Agreement agree as follows:

1. ESTABLISHMENT OF DISPUTE REVIEW BOARD

- (a) The Board will constitute and begin operation upon execution of this DRB Agreement by the DDC, the Design-Builder and all three Board Members. This DRB Agreement and the Board Members’ tenure will terminate on the earlier of (i) early termination of the Agreement and (ii) expiration of a hearing commenced within [twenty-four] months after Final Completion (unless otherwise extended or terminated in accordance with this DRB Agreement or applicable law).
- (b) Each Board Member represents, warrants and covenants on their behalf that they comply with the criteria and limitations for membership described in Part B (*Disputes Review Board Procedures*) of Exhibit 5 to the Agreement.
- (c) All three Board Members must have submitted and received approval of disclosure statements according to the requirements of Section 4 of Part B (*Disputes Review Board Procedures*) of Exhibit 5 to the Agreement.
- (d) If during the term of this DRB Agreement, a Board Member has a discussion regarding employment or enters into any agreement for employment with the DDC or the City of New York, the Design-Builder or a Design-Builder Party, the Board Member must immediately disclose such discussion or agreement to both the DDC and the Design-Builder, and the Board Member will be disqualified from serving on the Board.

2. BOARD RESPONSIBILITIES

- (a) The Board will fairly and impartially consider and provide written decisions for resolution of Disputes in accordance with Article 40 (*Dispute Resolution Procedure*) of the Agreement and Part 2 (*Disputes Review Board Procedures*) of Exhibit 5 to the Agreement. The Board Members will perform the services necessary to participate in the Board’s actions in accordance with this DRB Agreement.
- (b) Board Members will be kept informed of Project-related activities and other developments by means of quarterly progress reports, and other relevant information prepared by the DDC and the Design-Builder. Board Members will also attend material progress meetings

not more frequently than quarterly to keep informed of construction progress and any circumstances that could form the basis of a Dispute.

- (c) All Board Members are to act independently in the consideration of facts and conditions surrounding any Dispute. Seeking the Board Members' advice or consultation, *ex parte*, is expressly prohibited; provided, however, that either the DDC or the Design-Builder may seek such advice or consultation or a non-binding advisory opinion from the entire Board, at a Board meeting, after first giving notice to all interested parties. A Board Member who has *ex parte* contact with the DDC or the Design-Builder or a representative of either Party may be subject to disqualification and removal from the Board.
- (d) Board Members may withdraw from the Board upon delivery of written notice of withdrawal to the DDC, the Design-Builder and the other Board Members, which notice must specify a withdrawal date at least thirty days following the date of delivery of such notice. In addition, a Board Member may be disqualified from serving on the Disputes Review Board, as set forth in Section 8 of Part B (*Disputes Review Board Procedures*) of Exhibit 5 to the Agreement. Should the need arise to appoint a replacement Board Member, the replacement member will be appointed in the same manner as provided by the Agreement for appointment of the original member. The selection of a replacement Board Member will begin promptly upon notification of the necessity for a replacement and must be completed within thirty days thereafter. The change in Board membership will be evidenced by the new Board Member's signature on this DRB Agreement.
- (e) The personal services of the Board Member are a condition to receiving payment under this DRB Agreement. No Board Member will assign any of their work pursuant to this DRB Agreement without the prior written consent of both the DDC and the Design-Builder.
- (f) Subject to any requirements under law, each Board Member will keep matters related to the DRB Agreement and the Board confidential.
- (g) Each Board Member, in the performance of their duties on the Board, is acting as an independent contractor and not as an employee of either the DDC or the Design-Builder. No Board Member will be entitled to any employee benefits.

3. HEARINGS AND DECISIONS

- (a) Each Dispute under the Agreement must be heard and decided by the Board in accordance with the procedures and timelines established in Section 40.4 (*Disputes Review Board*) of the Agreement and as set forth in Part B (*Disputes Review Board Procedures*) of Exhibit 5 to the Agreement.
- (b) Within the limits set by Section 40.4 (*Disputes Review Board*) of the Agreement, the Board will have the right to establish its own procedures and time limits, including the right to establish or to waive evidentiary rules and procedures.

4. PROVISION OF DOCUMENTS TO BOARD

- (a) The DDC must furnish to each Board Member one copy of Project-related documents in accordance with Section 9(b)(1) of Part B (*Disputes Review Board Procedures*) of Exhibit 5 to the Agreement.
- (b) The Design-Builder must furnish to each Board Member one copy of all Project-related documents it might have, other than those furnished by the DDC, in accordance with Section 9(a)(2) of Part B (*Disputes Review Board Procedures*) of Exhibit 5 to the Agreement.

5. PAYMENT

- (a) The Design-Builder will pay all of the costs related to the services rendered by each Board Member in accordance with Section 10 of Part B (*Disputes Review Board Procedures*) of Exhibit 5 to the Agreement.
- (b) Invoices for payment for Board Member work completed under this DRB Agreement will be submitted monthly. Such invoices will be in a format approved by the DDC and the Design-Builder and accompanied by a general description of activities performed during the relevant period. The value of work accomplished for payment will be established from the billing rate and hours expended by the Board Member together with direct, reasonable, non-salary expenses. Billings for expenses will include an itemized listing supported by copies of the original bills, invoices, expense accounts and miscellaneous supporting data.
- (c) Each Board Member must keep available for inspection, for a period of six years after final payment, the cost records and accounts pertaining to this DRB Agreement.

6. MISCELLANEOUS

- (a) This DRB Agreement will commence upon execution of this DRB Agreement by the DDC, the Design-Builder, and all three Board Members, subject to the right of the DDC and the Design-Builder to terminate the services of Board Members as specified in this DRB Agreement.
- (b) Capitalized terms used but not defined in this DRB Agreement will have the meanings set forth in the Agreement.
- (c) The parties to this DRB Agreement intend for Article 40 (*Dispute Resolution Procedure*) of the Agreement and Part B (*Disputes Review Board Procedures*) of Exhibit 5 to the Agreement and the other terms of this DRB Agreement to be complementary. Except as otherwise specifically provided in this DRB Agreement, in the event of any conflict between this DRB Agreement and said Article 40 (*Dispute Resolution Procedure*) of the Agreement and Part B (*Disputes Review Board Procedures*) of Exhibit 5 to the Agreement, Article 40 (*Dispute Resolution Procedure*) of the Agreement and Part B (*Disputes Review Board Procedures*) of Exhibit 5 to the Agreement, will control.
- (d) Notices under this DRB Agreement must be sent as provided in Article 42 (*Notices and Communications*) of the Agreement. The addresses for the Board Members are set forth on the signature pages of this DRB Agreement.
- (e) Each Party irrevocably submits to the exclusive jurisdiction of any court of competent jurisdiction sitting in the City and County of New York, and any appellate court thereof, for the settlement of any Dispute. The New York courts are the most appropriate and convenient courts to settle any such Dispute and each of the Parties to this Agreement waive objection to those courts on the grounds of inconvenient forum or otherwise in relation to proceedings in connection with this Agreement.
- (f) **JURY WAIVER.** EACH OF THE PARTIES TO THIS AGREEMENT WAIVES ANY RIGHT IT MAY HAVE TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION IN CONNECTION WITH ANY DISPUTE. THIS AGREEMENT MAY BE FILED AS A WRITTEN CONSENT TO TRIAL BY THE COURT.
- (g) The Design-Builder irrevocably appoints [] as its agent for service of process in any proceedings before any court located in the State of New York. Each of the Board

Members irrevocably appoints the person named below as its respective agent for service of process in any proceedings before any court located in the State of New York:

- (i) [Board Member #1] _____ irrevocably appoints _____ as its agent for service of process;
 - (ii) [Board Member #2] irrevocably appoints _____ as its agent for service of process; and
 - (iii) [Board Member #3] irrevocably appoints _____ as its agent for service of process.
- (h) If any person appointed as process agent is unable for any reason to act as agent for service of process, the Design-Builder or the Board Member must immediately appoint another agent on terms acceptable to the DDC. Failing this, the DDC may appoint another agent for this purpose. The Design-Builder and each of the Board Members agrees that failure by its respective process agent to notify it of any process will not invalidate the relevant proceedings. This clause does not affect any other method of service allowed by law.
- (i) This DRB Agreement will be governed by and construed in accordance with the laws of the State of New York, without regard to conflict of laws principles.

IN WITNESS WHEREOF, the parties to this DRB Agreement have executed this DRB Agreement as of the day and year first above written.

[Signature Pages Follow]

This DRB Agreement is executed by the Parties as of the date written at the beginning of this DRB Agreement.

DESIGN-BUILDER

[DESIGN-BUILDER]

[by its members]

[_____]

By: _____

Name: _____

Title: _____

[_____]

By: _____

Name: _____

Title: _____

THE CITY OF NEW YORK,
By and through **THE DDC,**

By: _____

Name: _____

Title: _____

By: _____

Name: _____

Title: Board Member _____

By: _____

Name: _____

Title: Board Member _____

By: _____

Name: _____

Title: Board Member _____

PART B**DISPUTES REVIEW BOARD PROCEDURES****1. ESTABLISHMENT OF THE DISPUTES REVIEW BOARD****(a) Purpose**

The Parties will establish the Disputes Review Board to provide special expertise and assist in, and facilitate, the timely and equitable resolution of Disputes between the DDC and the Design-Builder as set forth under Article 40 (*Dispute Resolution Procedure*) of the Agreement and the Disputes Review Board Agreement.

(b) Board Membership

Composition. The Disputes Review Board will consist of three Board Members, selected as follows, with minimum qualifications set forth in Sections 2 and 3 of this Part B of Exhibit 5:

- (i) one member selected by the DDC (“**Member 1**”);
- (ii) one member selected by the Design-Builder (“**Member 2**”); and
- (iii) a third member, selected in accordance with Section 6 of this Part B of Exhibit 5 (“**Member 3**”) (each a “**Board Member**”, and collectively, the “**Board Members**”). The third member will serve as the chair of the Disputes Review Board.

Once established, the Disputes Review Board will remain active and in full force and effect until all Disputes submitted to such Disputes Review Board have been decided by it, or as otherwise specified in the Disputes Review Board Agreement.

(c) Neutral and Impartial

The Board Members of the Disputes Review Board must be neutral, act impartially, and not have any conflict of interest (as further detailed in Section 3 of this Part B of Exhibit 5).

2. EXPERIENCE CRITERIA FOR DISPUTES REVIEW BOARD MEMBERS AND TECHNICAL ADVICE

Each Board Member must be an engineer, architect or attorney licensed in at least one state within the United States and a nationally recognized expert in matters pertinent to a project of a similar size, type and complexity as the Project.

In addition, the chair of the Disputes Review Board will be a nationally recognized expert in matters pertinent to the resolution of commercial disputes and will have served on at least one Disputes Review Board, preferably as chair.

The Disputes Review Board may appoint a nationally recognized technical advisory firm qualified and experienced in design-build methodology and with significant experience in large-scale vertical construction projects in New York City. The firm appointed will be available at all times to advise the Disputes Review Board, solely on technical issues that are relevant to any Dispute before the Disputes Review Board. The costs of the technical advisory firm will be approved in advance and borne by the DDC and the Design-Builder, equally, per section 10, below.

The Disputes Review Board may also appoint a nationally recognized law firm licensed to practice in the State of New York and with significant experience mediating disputes involving in large-scale vertical construction projects in New York City. If appointed, this firm will be available at all times to advise the Disputes Review Board, solely on legal issues that are relevant to any Dispute before the Disputes Review Board. The costs incurred by the law firm will be approved in advance and borne by the DDC and the Design-Builder, equally, per section 10, below.

3. **ADDITIONAL CRITERIA APPLICABLE TO DISPUTES REVIEW BOARD MEMBERS**

In addition to the criteria set out above, the criteria for membership for all Board Members of the Disputes Review Board are the following:

- (a) no Board Member will have an ownership interest in any party involved in the Agreement, or a financial interest in the Agreement, except for payment for services on the Disputes Review Board; provided, that for purposes of determining conflicts of interests and disqualification, the term Board Member will include the Board Member's current primary or full-time employer, and involved will mean having a contractual relationship with the DDC or the Design-Builder at any tier;
- (b) except for fee-based consulting services on other projects, no Board Member will have been previously employed by, or have had financial ties to, any Party involved in the Agreement within a period of eight (8) years prior to award of the Agreement;
- (c) no Board Member will have provided to either Party fee-based consulting services within the two (2) years prior to award of the Design-Build Agreement, where the consulting fees paid by that Party have exceeded 20% of that member's total consulting revenue in either year;
- (d) no Board Member will have had a close professional or personal relationship with any key member of any Party involved in the Design-Build Agreement, including, for the avoidance of doubt, the City, which, in the judgment of either Party, could suggest partiality, or give an appearance of impropriety;
- (e) no Board Member will have had prior involvement in the Project;
- (f) each Board Member will have completed any disputes review board training course provided by the DDC for the Project, if any;
- (g) during their tenure as a member of the Disputes Review Board, no Board Member will be employed, including fee-based consulting services, by any Party involved in this Agreement except with express approval of both Parties;
- (h) during their tenure as a member of the Disputes Review Board, no Board Member will engage in any discussion or make any agreement with any Party regarding employment after the Project is completed; and
- (i) no Board Member will currently be a member of any other Disputes Review Board that involves issues related to the Party who did not appoint such Board Member.

4. **DISCLOSURE STATEMENT**

Before their appointments to the Disputes Review Board are final, prospective Member 1 and Member 2 must submit complete disclosure statements for the approval of both the DDC and the Design-Builder. Each statement will include a resume of experience, together with a declaration describing all past, present and anticipated or planned future relationships (including indirect

relationships through the prospective member's primary or full-time employer) to the Project and with all Parties involved in this Agreement. This disclosure must also include any financial relationship relative to the criteria in Section 3 of this Part B of Exhibit 5, and disclosure of close relationships, either professional or personal, with all key personnel of all Parties to the Agreement. Member 3 of the Disputes Review Board must supply such a disclosure statement to Member 1 and Member 2 and to the DDC and the Design-Builder before their appointment is final and a written certification of no conflicts of interests as required by the DDC.

5. **SELECTION OF MEMBER 1 AND MEMBER 2**

The DDC will select a proposed Member 1 and the Design-Builder will select a proposed Member 2 for the Disputes Review Board and convey the selected Board Member's name and reference information to the other Party within fifteen Business Days after execution of the Agreement. If either Party reasonably believes that the Board Member appointed by the other Party does not meet the criteria for membership as set forth in this Part B of Exhibit 5, that Party will notify the other Party of such failure and the reasons therefor and the Parties will agree either on an alternative Board Member or to resolve such discrepancy regarding qualifications.

6. **NOMINATION AND APPROVAL OF MEMBER 3**

Immediately after the DDC and the Design-Builder's selections for the Disputes Review Board are final, the Parties will agree on a list of at least five proposed Board Members acceptable to the Parties and that satisfy the requirements in this Exhibit 5. Member 1 and Member 2 will select Member 3 from the pre-qualified list within fourteen Business Days thereafter and will ensure that Member 3 meets all the relevant criteria listed above. If Member 1 and Member 2 do not select Member 3 within such fourteen-day period, the DDC will unilaterally make a selection from the pre-qualified list.

7. **EXECUTION OF THREE-PARTY AGREEMENT**

The DDC, the Design-Builder and all Board Members of the Disputes Review Board will execute a Disputes Review Board Agreement substantially in the form attached as Part 1 (*Form of Disputes Review Board Agreement*) of this Exhibit 5, within fourteen Business Days after selection of Member 3.

8. **DISQUALIFICATION AND REPLACEMENT OF BOARD MEMBERS**

In the event that:

- (a) any Board Member has a discussion regarding employment or enters into any employment agreement with the Design-Builder, the City or any Other Contractor on the Project during their tenure on the Disputes Review Board;
- (b) any Board Member is discovered not to meet the relevant qualifications set forth in this Exhibit 5; or
- (c) any Board Member cannot continue to serve because of death, illness or permanent disability;

that Board Member will be disqualified (and may be dismissed at the discretion of either Party) from serving on the Disputes Review Board. In the event of such a disqualification, a replacement Board Member meeting the qualifications in this Exhibit 5, will be selected by the DDC if the disqualified Board Member was Member 1, by the Design-Builder if the disqualified Board Member was Member 2 or by Member 1 and Member 2, from the pre-qualified list described above, if the disqualified Board Member was Member 3.

9. DDC AND DESIGN-BUILDER RESPONSIBILITIES

(a) Generally

- (i) Except for their respective participation in the Disputes Review Board's activities as provided in the Disputes Review Board Agreement, neither Party will solicit advice or consultation from the Disputes Review Board or any Board Member on matters dealing in any way with the Project, the conduct of the Work or the resolution of problems.
- (ii) Both Parties must furnish to the Disputes Review Board a set of all documents deemed pertinent by each Party and which become necessary or relevant for the Disputes Review Board to perform its function. Pertinent documents are any drawings or sketches, calculations, procedures, schedules, estimates, or other documents used in the performance of the Work or in justifying or substantiating the relevant Party's position regarding a Dispute. Both Parties must furnish a copy of such documents to each other. Both Parties, in cooperation with each other, will coordinate the operations of the Disputes Review Board.

(b) DDC's Responsibilities

The DDC must furnish the following services and items:

- (i) **Contract-Related Documents:** The DDC will furnish the Disputes Review Board and the Design-Builder a copy of all Contract Documents and all written instructions issued by the DDC to the Design-Builder.
- (ii) **Coordination and Services:** The DDC may arrange or provide conference facilities at or near the Project Site (in a mutually agreed location), provide any Disputes Review Board training course, for the Project, and provide secretarial and copying services for the Disputes Review Board.

(c) Reports to the Disputes Review Board

The DDC and the Design-Builder will provide the Board Members with quarterly progress reports in order to keep the Disputes Review Board informed of Project-related activities and other developments.

10. BASIS OF PAYMENT

The Design-Builder will be responsible to pay the fees and expenses of the DRB, after approval by both parties, and the Design-Builder will then invoice the DDC for 50% of the payment it made to DRB Members in accordance with the payment provisions for any Monthly Payment under the Agreement.

The DDC will prepare and distribute minutes and progress reports, will provide administrative services, such as conference facilities and secretarial services for meetings with the Disputes Review Board for any Dispute hearing, and will bear the cost of these services. If the Disputes Review Board desires special services, such as, but not limited to, legal or technical consultation, accounting, and data research, both Parties must agree, and the costs will be shared by them as mutually agreed.

PART C**DISPUTE NOTIFICATION**

Any Dispute Notification must include, at least the following:

1. the names of any individuals who are said to have knowledge about the Dispute;
2. the descriptions of any documentary evidence of the Dispute (or, alternatively, the source of such evidence);
3. the date of the act, inaction or omission giving rise to the Dispute;
4. an explanation of the Dispute, including a description of its nature, circumstances and cause;
5. references to any relevant provisions from the Contract Documents;
6. if applicable, the estimated dollar value of any damages incurred or to be incurred, and how that estimate was determined (including any cost and revenue element that has been, or may be, affected);
7. if applicable, an analysis of the Project Schedule and Completion Milestones showing any changes or disruptions to critical path items (including an impacted delay analysis reflecting the disruption in the manner and sequence of performance that has been, or will, cause delays in the Project Schedule, staging, and adjusted Completion Milestones);
8. if applicable, the disputing Party's plan for mitigating the damages suffered and the length of any delay claimed;
9. certification by the disputing Party that the Dispute is being made in good faith, that to the best knowledge of the disputing Party, all matters stated in the Dispute are reasonably believed to be accurate and complete and that the representative signing the certification is duly authorized to execute and deliver such certification;
10. the disputing Party's proposed resolution of the Dispute; and
11. any other information the disputing Party considers relevant.

EXHIBIT 6
Completion Certificate

CERTIFICATE FOR FINAL COMPLETION

This certificate is given in accordance with the Design-Build Agreement for the [Project Name ([Project ID])], between the DDC and the Design-Builder, dated [●] (the “**DB Agreement**”).

Capitalized terms used and undefined in this certificate have the meanings given to such terms in the DB Agreement.

CONFIRMATIONS AND CERTIFICATIONS

1. This Section to be completed by the Design-Builder

In accordance with Section 16.1(c) of the DB Agreement, I confirm that all of the Work (including all Punch List Items) has been completed in accordance with the requirements of the Contract Documents (including all applicable Submittals, Final Design Documents, and Construction Documents).

SIGNED for the Design-Builder

Name:

Company:

Date:

Signed:

2. This Section to be completed by the Engineer of Record and the Architect of Record

In accordance with Section 16.1 of the DB Agreement, I certify that:

- all Design Work has been prepared in accordance with the Contract Documents and all design review comments have been resolved;
- I have identified all of the special inspections and tests required for compliance with the applicable codes and certify that the special inspections and approved agencies engaged to supervise the Work specified above are acceptable;
- I have reviewed the Design-Builder's documentation and all inspection reports, and as far as deemed it necessary conducted periodic inspections and have found no discrepancy between the approved construction documentation and the Work as designed;
- based upon the statements by Design-Builder and the Quality Assurance Manager as set forth herein and our review of inspection reports, all the Work has been witnessed and inspected by all responsible parties, including my office, in accordance with the Contract Documents;
- based on these inspections, our periodic inspections, and our review of inspection reports, all special inspection and test reports have been completed and accepted by my office and, to the best of my knowledge, information and belief, all Work has been completed in compliance with the Applicable Law, as well as the requirements of the Contract Documents (including all applicable Submittals and Release for Construction Documents); and
- all applicable fire protection systems and devices have been properly installed and tested, and their associated alarms have been successfully transmitted to the approved central monitoring station.

SIGNED AND SEALED by the Engineer of Record

Name:

Company:

Date:

Signed and Sealed:

SIGNED AND SEALED by the Architect of Record

Name:

Company:

Date:

Signed and Sealed:

3. This Section to be completed by the Quality Assurance Manager

In accordance with Section 16.1 of the DB Agreement, I confirm that all Quality Assurance and Quality Control, testing and inspection procedures have been carried out in accordance with the Contract Documents.

SIGNED by the Quality Assurance Manager

Name:

Company:

Date:

Signed:

COUNTERSIGNED BY THE DDC CERTIFYING FINAL COMPLETION HAS OCCURRED AS OF THE FOLLOWING DATE: _____

THE CITY OF NEW YORK,
By and through **THE DDC,**

By: _____

Name: _____

Title: _____

EXHIBIT 7**M/WBE Requirements****1. M/WBE UTILIZATION****1.1 Statutory Requirements**

Pursuant to the Rikers Island Jail Complex Replacement Act and New York City Public Works Investment Act, as applicable, the Design-Builder must comply with the objectives and goals of the City Administrative Code Section 6-129 (the “**NYC M/WBE Law**”). The requirements, process and procedures under the NYC M/WBE Law will not apply to this Agreement or the Design-Builder unless expressly provided in this Exhibit 7 (*M/WBE Requirements*). The Design-Builder will satisfy the Rikers Island Jail Complex Replacement Act or New York City Public Works Investment Act, as applicable, and comply with the objectives and goals of the NYC M/WBE Law by satisfying and complying with the requirements set out in this Exhibit 7 (*M/WBE Requirements*).

1.2 Objectives and Goals

A Minority or Women Owned Business Enterprise (“**M/WBE**”) is a for-profit, small business concern certified by either or both of the Empire State Development’s, Division of Minority and Women’s Business Development (“**DMWBD**”) in accordance with Article 15-A of the New York State Executive Law or by the New York City Department of Small Business Services (“**NYCSBS**”) in accordance with Section 1304 of the City Charter. DDC and the Design-Builder will work to:

- (a) ensure nondiscrimination in award and administration of this Agreement;
- (b) ensure that only firms that fully meet M/WBE eligibility standards are permitted to participate in DDC’s M/WBE programs;
- (c) help remove barriers to the participation of M/WBEs in the performance of the Agreement;
- (d) create a level playing field on which M/WBEs can fairly compete for DDC’s agreements.

The Parties must, collectively, and as a team, take all necessary and reasonable steps in accordance with the Applicable Laws described in this Exhibit 7 (*M/WBE Requirements*) to promote the objectives outlined above. The Design-Builder must not use the requirements of these specifications to discriminate against any qualified company or group of companies. These requirements must be included in all of the Design-Builder’s Subcontracts.

1.3 M/WBE Collaboration & M/WBE Coordinators**(a) Collaboration / Partnering Approach**

- (i) In accordance with the Project Requirements, the Parties will have a collaborative process for delivering the Project and satisfying the M/WBE requirements in this Exhibit. The M/WBE collaboration process will seek to foster an environment where communication, coordination, and cooperation are the norm, and develop a mutual understanding and culture among the Parties such that they will work collectively, as a team, to exhaust all Good Faith Efforts to meet the M/WBE Goals for this Project. Part of this process will be participation in M/WBE collaboration workshops every 8-16 weeks throughout the Project’s implementation (“**M/WBE Workshops**”)

- (ii) This section does not supersede or modify any other provisions of the Agreement, nor does it reduce or limit the respective rights and duties of the DDC and Design-Builder under the Agreement, nor supersede contractual procedures for the resolution of claims and disputes described in the Agreement.

(b) **M/WBE Coordinators**

Each Party will appoint a qualified coordinator for the implementation of the Design-Builder's M/WBE Achievement and Utilization Plan (each an "**M/WBE Coordinator**" and collectively, the "**M/WBE Coordinators**"). The M/WBE Coordinators will jointly lead any M/WBE Workshops and will be in communication at least daily on the Project's overall attainment of the M/WBE Goals. The M/WBE Coordinators must routinely review the M/WBE Achievement and Utilization Plan for improvements and adjustments and will work as a team to perform the Good Faith Efforts required in this Exhibit 7 (*M/WBE Requirements*). While the Design-Builder retains legal and contractual responsibility for achieving the M/WBE Goals, the M/WBE Coordinators should view their relationship as a partnership driven by constant, open and transparent communication where both are taking significant effort to ensure the M/WBE Goals are achieved.

1.4 **M/WBE Goals and Monitoring**

(a) **M/WBE Goals**

This is a City-funded Agreement with the "**M/WBE Goals**" of [30%]² of the Lump Sum Amount designated for the performance of Construction Work and [30%]³ of the portion of the Lump Sum Amount designated in the Schedule of Values for Design Work. The Design-Builder will meet the M/WBE Goals in its performance of the Work. The Parties will, on a weekly basis document the Parties' collective Good Faith Efforts being taken to achieve the M/WBE Goals. DDC will continually monitor efforts by the Design-Builder to provide opportunities for M/WBE participation, undertake solicitations for M/WBE participation, document commitments for M/WBE utilization and verify attainments accomplished by M/WBE firms. DDC will review the Design-Builder's documentation of Good Faith Efforts to ensure that maximum opportunities are acted upon towards meeting the M/WBE Goals.

(b) **M/WBE Achievement and Utilization Plan**

- (i) The Design-Builder must submit to the DDC, within thirty days of the NTP Date, a more detailed and updated version of the M/WBE Achievement and Utilization Plan included with its Proposal, which in each case will reflect the M/WBE Goals above.⁴ The detailed M/WBE Achievement and Utilization Plan will be finalized and agreed by the Parties as part of the M/WBE Workshops within the first one-hundred and eighty days following the NTP Date. The M/WBE Achievement and Utilization Plan will thereafter be updated annually in a manner as agreed between the Parties and will be reviewed by the M/WBE Coordinators (as described in Section 1.3(b) below). Any modifications to the M/WBE Achievement and Utilization Plan should reflect adjustments necessary to represent actual results from the prior twelve months of M/WBE performance. Except as provided in Section 1.4(b)(ii) below, in

² Draft Goal to be reviewed with Proposers in the RFP phase. Final Goal inserted via Addendum to the RFP prior to the Proposal Due Date.

³ Draft Goal to be reviewed with Proposers in the RFP phase. Final Goal inserted via Addendum to the RFP prior to the Proposal Due Date.

⁴ **Note:** The M/WBE Achievement and Utilization Plan must be based on the Final Goal set by DDC during the RFP Process. The Final goal will be imported into this Agreement and will become the M/WBE Goal for purposes of this Agreement. The Achievement and Utilization Plan, along with any other commitments made by the Design-Builder, will become part of Exhibit 3 (Design-Builder Proposal Commitments).

no case will the M/WBE Achievement and Utilization Plan not comply with the M/WBE Goal.

- (ii) At any time following the NTP Date, the Design-Builder, after meaningful coordination and collaboration with the DDC's M/WBE Coordinator, may seek such "modification" in accordance with the procedures for a post-agreement "modification" described under the NYC M/WBE Law. The City may grant such request if it determines that the Design-Builder has established, with appropriate documentary and other evidence, that the Design-Builder made all Good Faith Efforts to meet the M/WBE Goals in accordance with Section 6 (*Good Faith Efforts*). To the extent any such "modification" is granted by the City in accordance with the NYC M/WBE Law, the Parties will still continue to exhaust all Good Faith Efforts to achieve the unmodified M/WBE Goals; however, for purposes of satisfying the M/WBE Goals the "modified" M/WBE Goals will be what is used as the basis for exercising any remedies or defaults under this Agreement.

2. ELIGIBILITY

M/WBEs that are certified by the DMWBD or by NYCSBS are the only firms eligible to be used for goal attainment on this Agreement.

M/WBE certification is simply an acknowledgment of the firm's status as a M/WBE and is not an endorsement of the quality or performance of the business.

- 3. **PAYROLL RECORDS** No less than once per month, the Design-Builder must furnish DDC with its payroll records and statement of compliance with the M/WBE Goals in connection with the wages paid each of its employees and each Subcontractor employee (including apprentices, trainees, watch persons, and guards) engaged on the Work during the preceding weekly payroll period. Certified payrolls must contain work class, daily and weekly number of hours worked, wage rate, deductions made and actual wages paid.
- 4. **COUNTING M/WBE PARTICIPATION** The value of the Work performed by an M/WBE, including that of a M/WBE Design-Builder, with its own equipment, with its own forces, and under its own supervision will be counted toward the goal, provided the utilization is a Commercially Useful Function as described further in Section 5(b) (*Commercially Useful Function*) below. A M/WBE Design-Builder (or M/WBE joint venture) must still provide opportunities for participation by other M/WBEs. Work performed by M/WBEs working for the Design-Builder will be counted as set forth below. If DDC determines that some or all of the M/WBE's work does not constitute a Commercially Useful Function, only the portion of the work considered to be a Commercially Useful Function will be credited toward the goal.
 - (a) **Subcontractors** 100% of the value of the Work to be performed by a M/WBE Subcontractor will be counted toward the M/WBE Goal. The value of such Work includes the cost of materials and supplies purchased by the M/WBE, except the cost of supplies or equipment leased from the Design-Builder or its affiliates will not be counted. Any tier subcontracting will be permitted. In instances where a first-tier Subcontractor is not a M/WBE, but any other tier Subcontractor is a M/WBE, the amount of the other tier Subcontract to the M/WBE will be counted toward the M/WBE Goal.
 - (b) **Manufacturers/Fabricators** 100% of the expenditure to a M/WBE manufacturer or fabricator will be counted towards the M/WBE Goal. Manufacturers or fabricators may provide materials to any Design-Builder Party.
 - (c) **Material Suppliers** 60% of the expenditure to a M/WBE material supplier will be counted toward the M/WBE Goals. Packagers, brokers, manufacturer's representatives, or other

persons who arrange or expedite transactions are not material suppliers. Material suppliers may provide materials to any Design-Builder Party.

- (d) **Brokers/Manufacturer's Representatives** 100% of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees for transportation charges for the delivery of materials or supplies provided by a M/WBE broker/manufacturer's representative will be counted toward the M/WBE Goal, provided they are determined by DDC to be reasonable and not excessive as compared with fees customarily allowed for similar services. Brokers may supply materials to any Design-Builder Party. The monetary value for fees, or the markup percentage, will be credited when a M/WBE broker is used (industry standards typically reflect a brokerage fee of 5-7% from the total contract amount). The cost of materials and supplies purchased by a M/WBE Subcontractor will count toward the M/WBE Goals, but such costs will not be double-counted if purchased from M/WBE material suppliers.
- (e) **Services** 100% of commissions charged by a M/WBE for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of this Agreement will be counted toward the M/WBE Goal, provided the fee is reasonable and not excessive as compared with fees customarily allowed for similar services.
- (f) **Trucking Operations** The M/WBE trucking firm of record is the firm that is listed on the M/WBE Achievement and Utilization Plan. The M/WBE must own and operate at least one registered, insured, and fully operational truck for use related to this Agreement and must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular Subcontract, and there cannot be a contrived arrangement for the purpose of meeting the M/WBE Goal, for example the M/WBE trucking firm of record should control the day-to-day M/WBE trucking operations relating to this Agreement and will be responsible for (1) negotiating and executing rental/leasing agreements; (2) hiring and terminating the work force; (3) coordinating the daily trucking needs with the Design-Builder; and (4) scheduling and dispatching trucks.
 - (i) **M/WBE Owned/Leased Trucks.** 100% of the value of the trucking operations the M/WBE provides on the Agreement using trucks it owns or leases on a long-term basis that are registered, insured, and operated by the M/WBE using drivers it employs, will be counted toward the M/WBE Goal(s). A lease must indicate that the M/WBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the M/WBE, so long as the lease gives the M/WBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the M/WBE.
 - (ii) **Other M/WBE Trucks.** The M/WBE may obtain trucks from another M/WBE including a M/WBE owner/operator. 100% of the value of the trucking operations that the other M/WBE provides will also be counted toward the M/WBE Goal.
 - (iii) **Non-M/WBE Trucks.** The M/WBE may obtain trucks from a non-M/WBE including an owner-operator. Only the value of the fee or commission that the M/WBE receives as a result of the arrangement with the non-M/WBE will be counted toward the M/WBE Goal.
- (g) **Joint Venture** Joint ventures between M/WBEs and non-M/WBEs will be counted toward the M/WBE Goals in proportion to the total dollar value of the distinct and clearly defined portion of the Work that the M/WBE joint venture member performs with its own forces. To obtain M/WBE credit for any such joint venture arrangement, the Design-Builder must

disclose its joint venture agreement to DDC for purposes of verifying the M/WBE participation by the M/WBE joint venture member.

- (h) **Equipment Rental.** 100% of the expenditure for a M/WBE for equipment rental will be counted toward the M/WBE Goal. The Design-Builder must have a written rental agreement with the firm that rents the equipment.

5. **CONDITIONS OF PARTICIPATION** M/WBE participation will be counted toward meeting the M/WBE Goal, subject to all of the following conditions:

(a) **Commercially Useful Function.**

(i) **Generally**

A M/WBE performs a commercially useful function when it is responsible for execution of the work of its applicable contract and is carrying out its responsibilities by actually performing, managing, or supervising the work involved. To perform a commercially useful function, a M/WBE may, where applicable and in accordance with any DDC specifications, also be responsible, with respect to materials and supplies used on the contract, for ordering and negotiating price, determining quality and quantity and installing. A M/WBE does not perform a commercially useful function if its role adds no substantive value and is limited to that of an extra participant in a transaction, contract, or Project through which funds are passed in order to obtain the appearance of participation. Factors to be used in assessing whether a M/WBE is performing a commercially useful function include:

- (A) the amount of Work subcontracted;
- (B) Industry practices;
- (C) whether the amount the M/WBE is to be paid is commensurate with the Work it performs;
- (D) the credit claimed towards the M/WBE Goals for the performance of the Work by the M/WBE; and
- (E) any other relevant factors (collectively, a **“Commercially Useful Function”**).

(ii) **Crediting Commercially Useful Function**

- (A) Regardless of whether an arrangement between the Design-Builder and the M/WBE represents standard industry practice, if the arrangement erodes the ownership, control or independence of the M/WBE or in any other way does not meet the Commercially Useful Function requirement, that firm will not be included in determining whether the M/WBE Goals is met and must not be included in M/WBE reports. If this occurs with respect to a firm identified as a M/WBE, the Design-Builder will receive no credit toward the M/WBE Goals and may be required to backfill the participation.
- (B) If at any time the Parties disagree as to whether a M/WBE is providing a Commercially Useful Function, an M/WBE or the Design-Builder may present evidence to rebut a determination by DDC that the M/WBE is not performing a Commercially Useful Function. Commercially Useful

Function determinations by DDC are subject to review under the Dispute Resolution Clause.

- (b) **Work Force.** The M/WBE must employ a work force (including administrative and clerical staff) separate and apart from that employed by the Design-Builder, other Subcontractors on this Agreement, or their affiliates. This does not preclude the employment by the M/WBE of an individual that has been previously employed by another firm involved in this Agreement, provided that the individual was independently recruited by the M/WBE in accordance with customary industry practice. The routine transfer of work crews from another employer to the M/WBE will not be allowed.
- (c) **Supervision.** All Work performed by the M/WBE must be controlled and supervised by the M/WBE without unnecessary duplication of supervisory personnel from the Design-Builder, other Subcontractors on this Agreement, or their affiliates. This does not preclude routine communication between the supervisory personnel of the M/WBE and other supervisors necessary to coordinate the Work.
- (d) **Equipment.** M/WBE Subcontractors may supplement their equipment by renting or leasing additional equipment in accordance with customary industry practice. The M/WBE must obtain approval of DDC prior to renting equipment from the Design-Builder or its affiliates and must provide documentation to DDC demonstrating that similar equipment and terms could not be obtained at a lower cost from other customary sources of equipment. The required documentation may include, copies of the rental or leasing agreements, and the names, addresses, and terms quoted by other sources of equipment.

6. **Good Faith Efforts.**

6.1 **Defined Term**

“**Good Faith Efforts**” will be determined, and defined, as described further in Section 6.2 (*Good Faith Efforts Requirements*) below. Efforts to obtain M/WBE participation that are merely pro forma are not good faith efforts, nor are efforts that, even if they are sincerely motivated, given all relevant circumstances, they could not reasonably be expected to produce a level of M/WBE participation sufficient to meet the goal.

6.2 **Good Faith Efforts Requirements**

(a) **General Requirement**

The Design-Builder and the DDC must exercise Good Faith Efforts to ensure that the Work is performed in a manner that meets the M/WBE Goals for the Project. Where an M/WBE’s pricing is reasonable, the potential that additional costs are involved in finding and using M/WBEs is not a sufficient reason for a Design-Builder’s failure to meet the M/WBE Goals. The ability or desire of the Design-Builder to perform the Work with its own organization does not relieve the Design-Builder of the responsibility to make Good Faith Efforts. The Design-Builder is not, however, required to accept higher quotes from M/WBEs if the price difference is excessive or unreasonable.

(b) **Good Faith Efforts Explained**

In order to exercise Good Faith Efforts, in addition to the requirements in Sections 1.3 (*M/WBE Collaboration & M/WBE Coordinators*) and 1.4 (*M/WBE Goals and Monitoring*), the following, which is not intended to be a mandatory, exhaustive or exclusive list, provides

a basis for determining whether Good Faith Efforts have been exercised as required under this Exhibit 7 (*M/WBE Requirements*) whether:

- (i) there have been advertised opportunities to participate in the Agreement, where appropriate, in general circulation media, trade and professional association publications and small business media, and publications of M/WBE organizations;
- (ii) notices of specific opportunities to participate in the Agreement, in a timely manner, have been provided to M/WBEs. The Design-Builder should solicit this interest within sufficient time to allow the M/WBEs to respond to the solicitation. The Parties should verify that M/WBEs received the solicitation by following up on the initial solicitation with at least one additional solicitation via a different media. The Parties must keep records of efforts to solicit and negotiate with M/WBEs as evidence of good-faith efforts, using a solicitation log as a continuing record;
- (iii) written notices have been sent, by certified mail, fax, e-mail or other electronic format, in a timely manner, to advise M/WBEs that their interest in the Agreement was solicited;
- (iv) selecting or substituting portions of the Work to be performed by M/WBEs in order to increase the likelihood that the M/WBE Goal(s) will be achieved. This includes, where appropriate, either breaking down operations or combining like or related operations into logistically and economically feasible units to facilitate M/WBE participation, even when the Design-Builder might prefer to perform these work items with its own forces;
- (v) the Design-Builder held meetings with M/WBEs prior to and following the NTP Date, for the purpose of explaining in detail the scope and requirements of the Work;
- (vi) the Design-Builder made efforts to negotiate with M/WBEs as relevant to perform as specific Subcontractors, or act as suppliers, manufacturers or service providers;
- (vii) the Design-Builder made timely written requests for assistance to the DDC's M/WBE Coordinators for the Project;
- (viii) whether any recommendations made by the DDC's M/WBE Coordinator were acted upon and an explanation of why action upon such recommendations did not lead to the desired level of participation of M/WBEs;
- (ix) the Parties have periodically reviewed items that are available for M/WBE participation, typically before the beginning of a new construction season and when significant new items of work are added to the Agreement, and conducted additional M/WBE solicitations and outreach;
- (x) the Design-Builder made a portion of the Work available to M/WBEs and selected those portions of the Work or material needs consistent with the available M/WBEs and material suppliers, so as to facilitate M/WBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of M/WBEs that were considered; a description of the information provided regarding the plans and specifications for the Work selected for Subcontracting; and evidence as to why additional agreements could not be reached for M/WBEs to perform the Work;
- (xi) any M/WBEs were deemed unqualified without sound reasons based on a thorough investigation of their capabilities;

- (xii) the Design-Builder made efforts to assist interested M/WBEs in obtaining bonding, lines of credit or insurance; and
- (xiii) the Design-Builder made efforts to assist interested M/WBEs in obtaining necessary equipment, supplies, materials, or related assistance.

(c) **Failure to Exercise Good Faith Efforts**

If at any time DDC or the City determines that the Design-Builder has failed to undertake Good Faith Efforts to meet the M/WBE Goal, DDC will, before exercising any remedies available for such failure, provide the Design-Builder an opportunity to implement a Remedial Plan in accordance with Section 34.3 (*Remedial Plan for Design-Builder Default or Early Warning Trigger*) of the Agreement solely for the purpose of rectifying its failure to perform Good Faith Efforts under this Exhibit 7 (*M/WBE Requirements*). Any failure to deliver a Remedial Plan or perform in accordance with such Remedial Plan will be governed by Section 34.3(b) (*Remedial Plan for Design-Builder Default or Early Warning Trigger*) of the Agreement.

7. **Changes to M/WBE Achievement and Utilization Plan.**

(a) **DDC Approval**

In addition to any periodic reviews of the M/WBE Achievement and Utilization Plan described in Section 1.3(b) above, the Design-Builder may modify its utilization of a specific M/WBE identified in the M/WBE Achievement and Utilization Plan if it obtains DDC's prior written approval for such changes in either M/WBE or an M/WBE's Work. If the reduction of a M/WBE's work or the removal of the M/WBE, including for reasons of Commercially Useful Function violations, causes the M/WBE utilization to fall below the M/WBE Goal, the Design-Builder must make Good Faith Efforts to find another M/WBE to substitute for the original M/WBE to perform at least the same amount of Work as the M/WBE that was terminated, to the extent needed to meet the M/WBE Goal. A M/WBE may be substituted if the Work committed to the M/WBE is deleted or reduced by the Design-Builder and enough Work remains to substitute an equal commitment amount to the affected M/WBE. Notwithstanding the foregoing, the following modifications will not be subject to DDC's prior written approval:

- (i) increasing the dollar value of work or adding new types(s) of work within the same core (3 digit) M/WBE work code (e.g., 606 - Guide Railing) to a M/WBE;
- (ii) substituting similar dollar values of work within a currently approved core (3 digit) M/WBE work code (e.g., 606 – Guide Railing).]
- (iii) changes in utilization due to differences between estimated quantities and actual work performed.

(b) **Good Cause M/WBE Termination**

DDC may consent to termination of an M/WBE firm if the Design-Builder has good cause to terminate the M/WBE firm. Good cause includes, at a minimum, one the following circumstances:

- (i) the listed M/WBE fails or refuses to execute a written contract;
- (ii) the listed M/WBE fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards; provided, however, that good cause

does not exist if the failure or refusal of the M/WBE Subcontractor to perform its work on the Subcontract results from the bad faith or discriminatory action of the Design-Builder;

- (iii) the listed M/WBE fails or refuses to meet the Design-Builder's reasonable, nondiscriminatory bond or insurance requirements;
- (iv) the listed M/WBE becomes bankrupt, insolvent, or exhibits credit unworthiness;
- (v) the listed M/WBE is ineligible to work on public works projects because of a suspension or debarment by a Governmental Entity;
- (vi) the DDC has determined that the listed M/WBE is not a responsible firm;
- (vii) the listed M/WBE voluntarily withdraws from the Project and provides to DDC written notice of its withdrawal;
- (viii) the listed M/WBE is ineligible to receive M/WBE credit for the type of Work required;
- (ix) the M/WBE owner dies or becomes disabled with the result that the listed M/WBE is unable to complete its work; or
- (x) any other documented good cause that the Design-Builder determines compels the termination of the M/WBE.

(c) **Notice Requirement**

Before submitting its request to terminate and/or substitute a M/WBE to DDC, the Design-Builder must give notice in writing to the M/WBE Subcontractor, with a copy to DDC, of its intent to request to terminate and/or substitute, and the reason for the request.

The Design-Builder must give the M/WBE five days to respond to the notice and advise DDC and the Design-Builder of the reasons, if any, why the M/WBE objects to the proposed termination of its Subcontract and why DDC should not approve the Design-Builder's action. If required in a particular case as a matter of public necessity (e.g., safety), DDC may approve a response period shorter than five days.

8. **M/WBE Utilization Reporting.**

(a) **Reporting Software**

The Design-Builder must use B2Gnow software or other reporting software approved by DDC to report M/WBE data to DDC under this Agreement.

- (i) As soon as practicable, but not later than the date of the first M/WBE payment, the Design-Builder must enter all current utilization data into B2Gnow software or other DDC approved reporting software from the Form M-1, Table 1 as submittal as part of the Proposal. Thereafter, data must be entered each month, not later than the 15th of the following month. Data must be current through the end of the last full payroll week for that month, or as otherwise approved by DDC to coordinate with payment submittals.
- (ii) The Design-Builder must report payments made to all firms working under this Agreement for the Design-Builder, including all M/WBEs, in order to measure goal

attainment and to gauge the effect of the M/WBE Goals on the industry. The Design-Builder must submit payment data for all firms and for all certified M/WBEs that are due a payment or have received a payment within the last month. All firms and M/WBEs must acknowledge payment not later than seven calendar days after receipt. Attainments will be measured based on payments made to M/WBEs. Attainments based on work completed by M/WBEs that are no longer certified will not be counted after the M/WBE is no longer certified.

- (iii) For each M/WBE, the Design-Builder must explain, in writing, the scope of Work to be performed by the M/WBE and expressly indicate any item or component of the scope which is not completely performed by the M/WBE. The value of each work assignment to a M/WBE must have a corresponding DDC - M/WBE work code for DDC verification of certification and payment. Each M/WBE must be identified for its type of service/material provided (examples: design, inspection, materials, trucking and construction).
- (iv) For each M/WBE trucking operation, the Design-Builder must also indicate the type of trucking operation to be performed, the number of trucks owned/leased, the number of trucks working on-site or off-site, rate per hour/ton/load/etc., duration or amount, and total dollar value of the proposed M/WBE commitment. The Design-Builder must provide copies of all lease agreements utilized by the M/WBE.

9. **Required Records.**

The Design-Builder must keep records and documents in accordance with the terms of this Agreement. These records and documents, or copies thereof, will be made available at reasonable times and places for inspection by any authorized representatives of DDC and will be submitted to DDC upon request, together with other compliance information which may be required.

10. **Reporting Violations of Program Rules.**

The Design-Builder is responsible for ensuring that the M/WBE performs a Commercially Useful Function as defined in Section 5(a) (*Commercially Useful Function*). If the Design-Builder becomes aware of any violations of this Exhibit 7 (*M/WBE Requirements*), the Design-Builder is required to promptly report the violations to DDC's M/WBE Coordinator.

11. **Breach of M/WBE Requirements**

The Design-Builder acknowledges that DDC's award of this Agreement to the Design-Builder was conditioned upon the Design-Builder's acceptance of satisfying the requirements in this Exhibit 7 (*M/WBE Requirements*). If the DDC or its M/WBE Coordinator determine at any time that the Design-Builder is not complying with the requirements under this Exhibit 7 (*M/WBE Requirements*), the DDC may choose, in its discretion, to not accept any further Submittals required for the Design-Builder to perform the Work. The Design-Builder, upon receipt of written notification of its failure to comply with this Exhibit 7 (*M/WBE Requirements*) must promptly correct such action and develop an M/WBE specific Remedial Plan in accordance with Section 34.3 (*Remedial Plan for Design-Builder Default or Early Warning Trigger*) of the Agreement. The Parties will also conduct an ad-hoc M/WBE Workshop within ten Business Days of the DDC's notice to finalize the Remedial Plan and quickly rectify any such deficiencies.

12. **City Remedies Available.**

If, notwithstanding the remedial efforts under Section 11 (Breach of M/WBE Requirements), the City determines the Design-Builder is in breach of this Exhibit 7 or any Remedial Plan or if the City determines that the Design-Builder is found to have willfully and intentionally failed to comply with

the requirements in this Exhibit 7 (M/WBE Requirements) or any Remedial Plan, then the City may exercise any action or remedy described in Section (o) (Enforcement) of the NYC M/WBE Law and the Design-Builder may be subject to liquidated damages as follows:

- (a) M/WBE Liquidated Damages
 - (i) DDC may assess liquidated damages in the amount of ten percent (10%) of the difference between the portion of the Lump Sum Amount designated for Design Work or for Construction Work in the Schedule of Values, as applicable, required to be awarded to M/WBEs to meet the M/WBE Goals for Design Work or Construction Work, as applicable, and the dollar amount the Design-Builder actually awarded and paid, and/or credited, to MWBEs for Design Work or Construction Work, as applicable.
 - (ii) In view of the difficulty of accurately ascertaining the loss that the City will suffer by reason of the Design-Builder's breach of this Exhibit 7 or any Remedial Plan or if the Design-Builder is found to have willfully and intentionally failed to comply with the requirements of this Exhibit 7 (M/WBE Requirements) or any Remedial Plan, the foregoing is fixed and agreed as liquidated damages that the City will suffer by reason of such breach or willful and intentional failure, and not as a penalty. DDC may deduct and retain out of any monies that may become due under the Agreement in the amount of such liquidated damages.
 - (iii) The Design-Builder may dispute the City's determination with respect to assessment of liquidated damages pursuant to the Dispute Resolution Procedures.

EXHIBIT 8
Performance Bond and Payment Bond

Form of Performance Bond⁵

KNOW ALL PEOPLE BY THESE PRESENTS:

That we, _____

hereinafter referred to as the "Principal," and, _____

hereinafter referred to as the "Surety" ("Sureties") are held and firmly bound to THE CITY OF NEW YORK, hereinafter referred to as the "City" or to its successors and assigns in the penal sum of _____

(\$ _____) Dollars, lawful money of the United States for the payment of which said sum of money well and truly to be made, we, and each of us, bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, The Principal is about to enter, or has entered, into a Contract in writing with the City for

a copy of which Contract is annexed to and hereby made a part of this bond as though herein set forth in full;

NOW, THEREFORE, the conditions of this obligation are such that if the Principal, his or its representatives or assigns, shall well and faithfully perform the said Contract and all modifications, amendments, additions and alterations thereto that may hereafter be made, according to its terms and its true intent and meaning, including repair and or replacement of defective work and guarantees of maintenance for the periods stated in the Contract, and shall fully indemnify and save harmless the City from all cost and damage which it may suffer by reason of the Principal's default of the Contract, and shall fully reimburse and repay the City for all outlay and expense which the City may incur in making good any such default and shall protect the said City of New York against, and pay any and all amounts, damages, cost and judgments which may or shall be recovered against said City or its officers or agents or which the said City of New York may be called upon to pay any person or corporation by reason of any damages arising or growing out of the Principal's default of the Contract, then this obligation shall be null and void, otherwise to remain in full force and effect.

The Surety (Sureties), for value received, hereby stipulates and agrees, upon written notice from the City that the City has determined that the Principal is in default of the Contract, to either (1) pay the full amount of the above penal sum in complete discharge and exoneration of this bond and of all the liabilities of the Surety

⁵ Note for Conforming the DBA: A form of each of the Payment and Performance Bonds required by the DBA are included with the draft DBA throughout the RFP process. When conforming the DBA for execution, the forms should be deleted and replaced with the executed Payment Bond and Performance Bond.

relating to this bond, or (2) fully perform and complete the Work to be performed under the Contract, pursuant to the terms, conditions, and covenants thereof. The Surety (Sureties) further agrees, at its option, either to tender the penal sum or to commence and diligently perform the Work specified in the Contract, including physical site work, within twenty-five (25) business days after written notice thereof from the City and to complete all Work within the time set forth in the Contract or such other time as agreed to between the City and Surety in accordance with the Contract. The Surety and the City reserve all rights and defenses each may have against the other; provided, however, that the Surety expressly agrees that its reservation of rights shall not provide a basis for non-performance of its obligation to commence and to complete all Work as provided herein.

The Surety (Sureties), for value received, for itself and its successors and assigns, hereby stipulates and agrees that the obligation of said Surety (Sureties) and its bond shall be in no way impaired or affected by any extension of time, modification, omission, addition, or change in or to the said Contract or the Work to be performed thereunder, or by any payment thereunder before the time required therein, or by any waiver of any provisions thereof, or by any assignment, subletting or other transfer thereof or of any Work to be performed or any moneys due or to become due thereunder; and said Surety (Sureties) does hereby waive notice of any and all of such extensions, modifications, omissions, additions, changes, payments, waivers, assignments, subcontracts and transfers, and hereby expressly stipulates and agrees that any and all things done and omitted to be done by and in relation to assignees, subcontractors, and other transferees shall have the same effect as to said Surety (Sureties) as though done or omitted to be done by or in relation to said Principal.

[SIGNATURE PAGE TO FOLLOW]

IN WITNESS WHEREOF, The Principal and the Surety (Sureties) have hereunto set their hands and seals, and such of them as are corporations have caused their corporate seals to be hereunto affixed and these presents to be signed by their proper officers, this

_____ day of _____ 20 _____.

(Seal) _____ (L.S.)
Principal

(Seal) By: _____
Surety

(Seal) By: _____
Surety

(Seal) By: _____
Surety

(Seal) By: _____
Surety

(Seal) By: _____
Surety

By: _____

Bond Premium Rate _____.

Bond Premium Cost _____.

If the Contractor (Principal) is a partnership, the bond should be signed by each of the individuals who are partners.

If the Contractor (Principal) is a corporation, the bond should be signed in its correct corporate name by a duly authorized officer, agent, or attorney-in-fact.

There should be executed an appropriate number of counterparts of the bond corresponding to the number of counterparts of the Contract.

ACKNOWLEDGMENT OF PRINCIPAL IF A CORPORATION

State of _____ County of _____ ss:

On this _____ day of _____ 20 _____ before me personally came _____,

to me known, who, being by me duly sworn did depose and say that he/she resides

at _____; that he/she is the

_____ of the corporation described in and which executed the foregoing instrument; and that he signed his name to the foregoing instrument by order of the directors of said corporation as the duly authorized and binding act thereof.

Notary Public or Commissioner of Deeds.

ACKNOWLEDGMENT OF PRINCIPAL IF A PARTNERSHIP

State of _____ County of _____ ss:

On this _____ day of _____ 20 _____ before me personally came _____

to me known, who, being by me duly sworn did depose and say that he/she resides

at _____; that he/she is

_____ partner of _____, a limited/general partnership existing

under the laws of the State of _____, the partnership described in and which executed the foregoing instrument; and that he/she signed his/her name to the foregoing instrument as the duly authorized and binding act of said partnership.

Notary Public or Commissioner of Deeds.

ACKNOWLEDGMENT OF PRINCIPAL IF AN INDIVIDUAL

State of _____ County of _____ ss:

On this _____ day of _____ 20 _____ before me personally came _____

to me known, who, being by me duly sworn did depose and say that he/she resides

at _____, and that he/she is the individual whose name is subscribed to the within instrument and acknowledged to me that by his/her signature on the instrument, said individual executed the instrument.

Notary Public or Commissioner of Deeds.

Each executed bond must be accompanied by:

- (a) Appropriate acknowledgments of the respective parties;
- (b) Appropriate duly certified copy of Power of Authority or other certificate of authority where bond is executed by agent, officer or other representative of Principal or Surety;
- (c) A duly certified extract from by-laws or resolution of Surety under which Power of Attorney or other certificate of authority of its agent, officer or representative was issued, and
- (d) A duly certified copy of latest published financial statement of assets and liabilities of Surety.

Affix Acknowledgments and justification of Sureties

FORM OF PAYMENT BOND

KNOW ALL PEOPLE BY THESE PRESENTS:

That we, _____

hereinafter referred to as the "Principal," and, _____

hereinafter referred to as the "Surety" ("Sureties") are held and firmly bound to THE CITY OF NEW YORK, hereinafter referred to as the "City" or to its successors and assigns in the penal sum of _____

(\$ _____) Dollars, lawful money of the United States for the payment of which said sum of money well and truly to be made, we, and each of us, bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, The Principal is about to enter, or has entered, into a Contract in writing with the City for

a copy of which Contract is annexed to and hereby made a part of this bond as though herein set forth in full;

NOW, THEREFORE, the conditions of this obligation are such that if the Principal, his or its representatives or assigns and other Subcontractors to whom Work under this Contract is sublet and his or their successors and assigns shall promptly pay or cause to be paid all lawful claims for:

(a) Wages and compensation for labor performed and services rendered by all persons engaged in the prosecution of the Work under said Contract, and any amendment or extension thereof or addition thereto, whether such persons be agents, servants or employees of the Principal or of any such Subcontractors, including all persons so engaged who perform the work of laborers or mechanics at or in the vicinity of the site of the Project regardless of any Contractual relationship between the Principal or such Subcontractors, or his or their successors or assigns, on the one hand and such laborers or mechanics on the other, but not including office employees not regularly stationed at the site of the Project, and

(b) Materials and supplies (whether incorporated in the permanent construction or not), as well as teams, fuels, oils, implements or machinery furnished, used or consumed by said Principal or any Subcontractors at or in the vicinity of the site of the Project in the prosecution of the Work under said Contract and any amendment or extension thereof or addition thereto; then this obligation shall be null and void; otherwise to remain in full force and effect.

This bond is subject to the following additional conditions, limitations and agreements:

(a) The Principal and Surety (Sureties) agree that this bond shall be for the benefit of any materialman or laborer having a just claim, as well as the City itself.

(b) All persons who have performed labor, rendered services or furnished materials and supplies, as aforesaid, shall have a direct right of action against the Principal and his, its or their successors and assigns, and the Surety (Sureties) herein, or against either or both or any of them and their successors and assigns. Such persons may sue in their own name, and may prosecute the suit to judgment and execution without the necessity of joining with any other person as party plaintiff.

(c) The Principal and Surety (Sureties) agree that neither of them will hold the City liable for any judgment for costs or otherwise, obtained against either or both of them by a laborer or materialman in a suit brought by either a laborer or materialman under this bond for moneys allegedly due for performing work or furnishing material.

(d) The Surety (Sureties) or its successors and assigns shall not be liable for any compensation recoverable by an employee or laborer under the Workmen's Compensation Law.

(e) In no event shall the Surety (Sureties), or its successors or assigns, be liable for a greater sum than the penalty of this bond or be subject to any suit, action or proceeding hereon that is instituted by any person, firm, or corporation hereunder later than two (2) years after the complete performance of said Contract and final settlement thereof.

The Principal, for himself and his successors and assigns, and the Surety (Sureties), for itself and its successors and assigns, do hereby expressly waive any objection that might be interposed as to the right of the City to require a bond containing the foregoing provisions, and they do hereby further expressly waive any defense which they or either of them might interpose to an action brought hereon by any person, firm or corporation, including Subcontractors, materialmen and third persons, for work, labor, services, supplies or material performed, rendered, or furnished as aforesaid upon the ground that there is no law authorizing the City to require the foregoing provisions to be placed in this bond.

And the Surety (Sureties) for value received, for itself and its successors and assigns, hereby stipulates and agrees that the obligation of said Surety (Sureties) and its bond shall be in no way impaired or affected by any extension of time, modification, omission, addition, or change in or of the said Contract or the Work to be performed thereunder, or by any payment thereunder before the time required therein, or by any waiver of any provisions thereof, or by any assignment, subletting or other transfer thereof or of any part thereof, or of any Work to be performed, or any moneys due or to become due thereunder; and said Surety (Sureties) does hereby waive notice of any and all of such extensions, modifications, omissions, additions, changes, payments, waivers, assignments, subcontracts and transfers, and hereby expressly stipulates and agrees that any and all things done and omitted to be done by and in relation to assignees, Subcontractors, and other transferees shall have the same effect as to said Surety (Sureties) as though done or omitted to be done by or in relation to said Principal.

[SIGNATURE PAGE TO FOLLOW]

IN WITNESS WHEREOF, The Principal and the Surety (Sureties) have hereunto set their hands and seals, and such of them as are corporations have caused their corporate seals to be hereunto affixed and these presents to be signed by their proper officers, this

_____ day of _____ 20 _____.

(Seal) _____ (L.S.)
Principal

(Seal) By: _____
Surety

(Seal) By: _____
Surety

(Seal) By: _____
Surety

(Seal) By: _____
Surety

(Seal) By: _____
Surety

By: _____

Bond Premium Rate _____.

Bond Premium Cost _____.

If the Contractor (Principal) is a partnership, the bond should be signed by each of the individuals who are partners.

If the Contractor (Principal) is a corporation, the bond should be signed in its correct corporate name by a duly authorized officer, agent, or attorney-in-fact.

There should be executed an appropriate number of counterparts of the bond corresponding to the number of counterparts of the Contract.

ACKNOWLEDGMENT OF PRINCIPAL IF A CORPORATION

State of _____ County of _____ ss:

On this _____ day of _____ 20 _____ before me personally came _____,

to me known, who, being by me duly sworn did depose and say that he/she resides

at _____; that he/she is

the _____ of _____ the corporation described in and which executed the foregoing instrument; and that he signed his name to the foregoing instrument by order of the directors of said corporation as the duly authorized and binding act thereof.

Notary Public or Commissioner of Deeds.

ACKNOWLEDGMENT OF PRINCIPAL IF A PARTNERSHIP

State of _____ County of _____ ss:

On this _____ day of _____ 20 _____ before me personally came _____

to me known, who, being by me duly sworn did depose and say that he/she resides

at _____; that he/she is

_____ partner of _____, a limited/general partnership existing

under the laws of the State of _____, the partnership described in and which executed the foregoing instrument; and that he/she signed his/her name to the foregoing instrument as the duly authorized and binding act of said partnership.

Notary Public or Commissioner of Deeds.

ACKNOWLEDGMENT OF PRINCIPAL IF AN INDIVIDUAL

State of _____ County of _____ ss:

On this _____ day of _____ 20 _____ before me personally came _____

to me known, who, being by me duly sworn did depose and say that he/she resides

at _____, and that he/she is the individual whose name is subscribed to the within instrument and acknowledged to me that by his/her signature on the instrument, said individual executed the instrument.

Notary Public or Commissioner of Deeds.

Each executed bond must be accompanied by:

- (e) Appropriate acknowledgments of the respective parties;
- (f) Appropriate duly certified copy of Power of Authority or other certificate of authority where bond is executed by agent, officer or other representative of Principal or Surety;
- (g) A duly certified extract from by-laws or resolution of Surety under which Power of Attorney or other certificate of authority of its agent, officer or representative was issued, and
- (h) A duly certified copy of latest published financial statement of assets and liabilities of Surety.

Affix Acknowledgments and justification of Sureties

EXHIBIT 9
Standard Legal and Public Policy Requirements

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1. LABOR PROVISIONS

1.1 Employees

(a) Prohibitions

The Design-Builder and its Subcontractors must not employ on the Work:

- (i) Any labor, materials or means whose employment, or utilization during the course of this Agreement, may tend to or in any way cause or result in strikes, Work stoppages, delays, suspension of Work or similar troubles by workers employed by the Design-Builder or its Subcontractors, or by any of the trades working in or about the buildings and premises where Work is being performed under this Agreement, or by other DDC contractors or their subcontractors pursuant to other contracts, on any other building or premises owned or operated by the DDC, its Agencies, departments, boards or authorities. Any violation by the Design-Builder of this requirement may, upon certification of the DDC, be considered as proper and sufficient cause for declaring the Design-Builder to be in default, and for the DDC to take action against it as set forth in Article 34 (*Design-Builder Default*) of this Agreement, or such other article of this Agreement as the DDC may deem proper; or
- (ii) In accordance with Section 220.3-e of the Labor Law of the State of New York (hereinafter "**Labor Law**"), the Design-Builder and its Subcontractors must not employ on the Work any apprentice, unless he/she/they is a registered individual, under a bona fide program registered with the New York State Department of Labor. The allowable ratio of apprentices to journey-level workers in any craft classification must not be greater than the ratio permitted to the Design-Builder as to its work force on any job under the registered program. Any employee listed on a payroll at an apprentice wage rate, who is not registered as above, must be paid the wage rate determined by the City Comptroller of the City for the classification of Work actually performed. The Design-Builder or Subcontractor must be required to furnish written evidence of the registration of its program and apprentices as well as all the appropriate ratios and wage rates, for the area of the construction prior to using any apprentices on the Work.

(b) Health and Safety Certification

All laborers, workers, and mechanics employed in the performance of this Agreement on the public work site, either by the Design-Builder, Subcontractor or other person doing or contracting to do the whole or a part of the Work contemplated by this Agreement, must be certified prior to performing any Work as having successfully completed a course in construction safety and health approved by the United States Department of Labor's Occupational Safety and Health Administration that is at least ten hours in duration.

1.2 Whistleblower Protection

In accordance with Local Law Nos. 30-2012 and 33-2012, codified at Sections 6-132 and 12-113 of the City Administrative Code, respectively,

(a) Retaliation

The Design-Builder must not take an adverse personnel action with respect to an officer or employee in retaliation for such officer or employee making a report of information concerning conduct which such officer or employee knows or reasonably believes to

involve corruption, criminal activity, conflict of interest, gross mismanagement or abuse of authority by any officer or employee relating to this Agreement to (a) the Commissioner of the Department of Investigation, (b) a member of the New York City Council, the Public Advocate, or the City Comptroller, or (c) the CCPO, DDC, or the DDC Commissioner.

(b) **Claims**

If any of the Design-Builder's officers or employees believes that they have been the subject of an adverse personnel action in violation of Section 1.02A, they will be entitled to bring a cause of action against the Design-Builder to recover all relief necessary to make him or her whole. Such relief may include but is not limited to: (a) an injunction to restrain continued retaliation, (b) reinstatement to the position such employee would have had but for the retaliation or to an equivalent position, (c) reinstatement of full fringe benefits and seniority rights, (d) payment of two times back pay, plus interest, and/or (e) compensation for any special damages sustained as a result of the retaliation, including litigation costs and reasonable attorney's fees.

(c) **Notice**

The Design-Builder must post a notice provided by the City in a prominent and accessible place on any site where work pursuant to this Agreement is performed that contains information about:

- (i) how its employees can report to the Department of Investigation allegations of fraud, false claims, criminality or corruption arising out of or in connection with this Agreement; and
- (ii) the rights and remedies afforded to its employees under City Administrative Code Sections 7-805 (the New York City False Claims Act) and 12-113 (the Whistleblower Protection Expansion Act) for lawful acts taken in connection with the reporting of allegations of fraud, false claims, criminality or corruption in connection with this Agreement.

(d) **Terminology**

For the purposes of this Section, "adverse personnel action" includes dismissal, demotion, suspension, disciplinary action, negative performance evaluation, any action resulting in loss of staff, office space, equipment or other benefit, failure to appoint, failure to promote, or any transfer or assignment or failure to transfer or assign against the wishes of the affected officer or employee.

(e) **Application**

This Section 1.02 is applicable to all of the Design-Builder's Subcontractors having subcontracts with a value in excess of \$100,000; accordingly, the Design-Builder must include this rider in all subcontracts with a value a value in excess of \$100,000.

1.3 HireNYC

The Design-Builder must comply with the requirements of this Section for all non-trades jobs (e.g., for an administrative position arising out of Work and located in New York City). The Design-Builder must reasonably cooperate with SBS and the City on specific outreach events, including "Hire-on-the-Spot" events, for the hiring of trades workers in connection with the Work.

(a) **Enrollment**

The Design-Builder must enroll with the HireNYC system, found at www.nyc.gov/sbs, within thirty days after the registration of this Agreement pursuant to Section 328 of the New York City Charter. The Design-Builder must provide information about the business, designate a primary contact and say whether it intends to hire for any entry to mid-level job opportunities arising from this Agreement and located in New York City, and, if so, the approximate start date of the first hire.

(b) **HireNYC Job Posting Requirements**

- (i) Once enrolled in HireNYC, the Design-Builder agrees to update the HireNYC portal with all entry to mid-level job opportunities arising from this Agreement and located in New York City, if any, which will be defined as jobs requiring no more than an associate degree, as provided by the New York State Department of Labor (see Column F of <https://labor.ny.gov/stats/2012-2022-NYS-Employment-Prospects.xls>). The information to be updated includes the types of entry and mid-level positions made available from the work arising from this Agreement and located in New York City, the number of positions, the anticipated schedule of initiating the hiring process for these positions, and the contact information for the Design-Builder's representative charged with overseeing hiring. The Design-Builder must update the HireNYC portal with any hiring needs arising from this Agreement and located in New York City, and the requirements of the jobs to be filled, no less than three weeks prior to the intended first day of employment for each new position, except with the permission of SBS, not to be unreasonably withheld, and must also update the HireNYC portal as set forth below.
- (ii) After enrollment through HireNYC and submission of relevant information, SBS will work with the Design-Builder to develop a recruitment plan which will outline the candidate screening process, and will provide clear instructions as to when, where, and how interviews will take place. HireNYC will screen applicants based on employer requirements and refer applicants whom it believes are qualified to the Design-Builder for interviews. The Design-Builder must interview referred applicants whom it believes are qualified.
- (iii) After completing an interview of a candidate referred by HireNYC, the Design-Builder must provide feedback via the portal within twenty Business Days to indicate which candidates were interviewed and hired, if any. In addition, the Design-Builder must provide the start date of new hires, and additional information reasonably related to such hires, within twenty Business Days after the start date. In the event the Design-Builder does not have any job openings covered by this Rider in any given year, the Design-Builder will be required to provide an annual update to HireNYC to that effect. For this purpose, the reporting year will run from the date of the registration of this Agreement pursuant to Charter Section 328 and each anniversary date.
- (iv) These requirements do not limit the Design-Builder's ability to assess the qualifications of prospective workers, and to make final hiring and retention decisions. No provision of this Section will be interpreted so as to require the Design-Builder to employ any particular worker.
- (v) In addition, the provisions of this Section will not apply to positions that the Design-Builder intends to fill with employees employed pursuant to the job retention provision of Section 22-505 of the City Administrative Code. The Design-Builder will not be required to report such openings with HireNYC. However, the Design-Builder must enroll with the HireNYC system pursuant to Section 1.03(a), above,

and, if such positions subsequently become open, then the remaining provisions of this Section will apply.

(c) **Breach and Liquidated Damages**

If the Design-Builder fails to comply with the terms of this Agreement and this Section (1) by not enrolling its business with HireNYC; (2) by not informing HireNYC, as required, of open positions; or (3) by failing to interview a qualified candidate, the DDC may assess liquidated damages in the amount of two- thousand five hundred dollars (\$2,500) per breach. For all other events of noncompliance with the terms of this Section, the DDC may assess liquidated damages in the amount of five hundred dollars (\$500) per breach. Furthermore, in the event the Design-Builder breaches the requirements of this Section during the term of this Agreement, the City may hold the Design-Builder in default of this Agreement.

(d) **Audit Compliance**

In addition to the auditing requirements set forth in other parts of this Agreement, the Design-Builder must permit SBS and the City to inspect any and all records concerning or relating to job openings or the hiring of individuals for work arising from this Agreement and located in New York City. The Design-Builder must permit an inspection within seven Business Days of the request.

(e) **Other Reporting Requirements**

The Design-Builder must report to the City, on a monthly basis, all information reasonably requested by the City that is necessary for the City to comply with any reporting requirements imposed by Applicable Law, including any requirement that the City maintain a publicly accessible database. In addition, the Design-Builder agrees to comply with all reporting requirements imposed by Applicable Law, or as otherwise requested by the City.

1.4 **Hours of Work**

(a) **General**

No laborer, worker, or mechanic in the employ of the Design-Builder, Subcontractor or other person doing or contracting to do the whole or a part of the Work contemplated by this Agreement will be permitted or required to work more than eight hours in any one day, or more than five days in any one week, except as provided in the Labor Law and in cases of extraordinary emergency including fire, flood, or danger to life or property, or in the case of national emergency when so proclaimed by the President of the United States of America.

(b) **Insufficient Labor**

In situations in which there are not sufficient laborers, workers, and mechanics who may be employed to carry on expeditiously the Work contemplated by this Agreement as a result of such restrictions upon the number of hours and days of labor, and the immediate commencement or prosecution or completion without undue delay of the Work is necessary for the preservation of the Project Site and/or for the protection of the life and limb of the persons using the same, such laborers, workers, and mechanics will be permitted or required to work more than eight hours in any one day; or five days in any one week; provided, however, that upon application of any Design-Builder, the DDC Commissioner must have first certified to the Commissioner of Labor of the State of New York (hereinafter "**Commissioner of Labor**") that such public Work is of an important nature and that a delay

in carrying it to completion would result in serious disadvantage to the public; and provided, further, that such Commissioner of Labor must have determined that such an emergency does in fact exist as provided in Labor Law Section 220.2.

(c) **Failure of Commissioner to Make Certification**

Failure of the DDC Commissioner to make such a certification to the Commissioner of Labor will not entitle the Design-Builder to damages for delay or for any cause whatsoever.

1.5 **Prevailing Rate of Wages**

(a) **Wage Rates**

The wage rates of workers, or mechanics employed upon the Work contemplated by this Agreement or upon any materials to be used thereon must not be less than the "prevailing rate of wage" as defined in Labor Law Section 220, and as fixed by the City Comptroller in the attached Schedule of Wage Rates⁶ and in updated schedules thereof. The prevailing wage rates and supplemental benefits to be paid are those in effect at the time the Work is being performed.

(b) **Clarifications**

Requests for interpretation or correction in this Agreement includes all requests for clarification of the classification of trades to be employed in the performance of the Work under this Agreement. In the event that a trade not listed in this Agreement is in fact employed during the performance of this Agreement, the Design-Builder will be required to obtain from the DDC the prevailing wage rates and supplementary benefits for the trades used and to complete the performance of this Agreement at the price at which this Agreement was awarded.

(c) **Enforcement**

The Design-Builder agrees to pay for all costs incurred by the City in enforcing prevailing wage requirements, including the cost of any investigation conducted by or on behalf of the DDC or the City Comptroller, where the City discovers a failure to comply with any of the requirements of this Section by the Design-Builder or its Subcontractors. The Design-Builder also agrees that, should it fail or refuse to pay for any such investigation, the DDC may deduct from a Design-Builder's account an amount equal to the cost of such investigation.

- (i) For any breach or violation of either working conditions (Section 1.07) or minimum wages (Section 1.09) provisions, the party responsible for such violation will be liable to the City for liquidated damages, which may be withheld from any amounts due on any contracts with the City of such party responsible, or may be recovered in actions brought by the City Corporation Counsel in the name of the City, in addition to damages for any other breach of this Agreement, for a sum equal to the amount of any underpayment of wages due to any employee engaged in the performance of this Agreement. In addition, DDC will have the right to cancel this Agreement and enter into other contracts for the completion of this Agreement, with or without public letting, and the original Design-Builder will be liable for any additional cost. All sums withheld or recovered as deductions, rebates, refunds, or underpayment of wages hereunder, will be held in a special deposit account and will be paid without interest, on order of the City Comptroller, directly to the

⁶Note: Schedules are included with the RFP. However, when the Agreement is conformed, these schedules will be replaced with the most up to date prevailing wage schedules, as of the Agreement Date.

employees who have been paid less than minimum rates of pay as set out in this Agreement and on whose account such sums were withheld or recovered, provided that no claims by employees for such payments will be entertained unless made within two years from the date of actual notice to the Design-Builder of the withholding or recovery of such sums by the City.

- (ii) A determination by the City Comptroller that a Design-Builder or its Subcontractors, or both, willfully violated Labor Law Section 220 must be forwarded to the City's five District Attorneys for review.
- (iii) The Design-Builder's or its Subcontractor's noncompliance with this Section and Labor Law Section 220 may result in an unsatisfactory performance evaluation and the City Comptroller may also find and determine that the Design-Builder or its Subcontractors willfully violated the New York Labor Law.
 - (a) An unsatisfactory performance evaluation for noncompliance with this Section may result in a determination that the Design-Builder is a non-responsible bidder on subsequent procurements with the City and thus a rejection of a future award of a contract with the City, as well as any other sanctions provided for by Applicable Law.

1.6 Posting Requirements

The Design-Builder and its Subcontractors must, within ten days after mailing of a notice of award or written order, post in prominent and conspicuous places in each and every plant, factory, building, and structure where employees of the Design-Builder and its Subcontractors engaged in the performance of this Agreement are employed, notices furnished by the City, in relation to prevailing wages and supplements, minimum wages, and other stipulations contained in Sections 220 and 220-h of the Labor Law, and the Design-Builder and its Subcontractors must continue to keep such notices posted in such prominent and conspicuous places until the DDC issues the Certificate of Final Completion under this Agreement.

1.7 Working Conditions

No part of the Work, labor or services will be performed or rendered by the Design-Builder in any plants, factories, buildings or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of this Agreement. Compliance with the safety, sanitary, and factory inspection Laws of the state in which the Work is to be performed will be prima facie evidence of compliance with this Section.

1.8 Other Labor Requirements

The Design-Builder must strictly comply with all of the provisions of Section 1.8(a) through Section 1.8(e), and provide for all workers, laborers or mechanics in its employ, the following:

(a) Notices Posted at Project Site

Post, in a location designated by the City, schedules of prevailing wages and supplements for this Project, a copy of all re-determinations of such schedules for the Project, the Workers' Compensation Law Section 51 notice, all other notices required by Applicable Law to be posted at the Project Site, the City notice that this Project is a public works project on which each worker is entitled to receive the prevailing wages and supplements for the occupation at which they are working, and all other notices which the City directs the Design-Builder to post. The Design-Builder must provide a surface for such notices which is satisfactory to the City. The Design-Builder must maintain and keep current such notices in a legible manner and must replace any notice or schedule which is damaged,

defaced, illegible or removed for any reason. The Design-Builder must post such notices before commencing any Work on the Project Site and must maintain such notices until all Work on the Project Site is complete;

(b) Daily Project Site Sign-in Sheets

The Design-Builder must maintain either an electronic or biometric sign-in system, and must require that Subcontractors maintain an electronic or biometric sign-in system for its employees, which must include such employee's name, job title, date started and Social Security number, the time the employee began work and the time the employee left work, until the DDC issues the Certificate of Final Completion of the supplies, materials, equipment, or Work, labor, or services to be furnished or rendered under this Agreement unless exception is granted by the City Comptroller upon application by the DDC;

(c) Individual Employee Information Notices

Distribute a notice to each worker, laborer or mechanic employed under this Agreement, in a form provided by the DDC, that this Project is a public works project on which each worker, laborer or mechanic is entitled to receive the prevailing rate of wages and supplements for the occupation at which they are working. Such notice must also include a statement that each worker, laborer or mechanic must be certified prior to performing any Work as having successfully completed a course in construction safety and health approved by the United States Department of Labor's Occupational Safety and Health Administration that is at least ten hours in duration. Such notice must be distributed to each worker before they start performing any Work of this Agreement and with the first paycheck after July first of each year. "Worker, laborer or mechanic" includes employees of the Design-Builder and its Subcontractors and all employees of suppliers entering the Project Site. At the time of distribution, the Design-Builder must have each worker, laborer or mechanic sign a statement, in a form provided by the DDC, certifying that the worker has received the notice required by this Section, which signed statement must be maintained with the payroll records required by this Agreement;

The Design-Builder and each Subcontractor must notify each worker, laborer or mechanic employed under or in connection with this Agreement in writing of the prevailing rate of wages for their particular job classification. Such notification must be given to every worker, laborer, and mechanic on their first pay stub and with every pay stub thereafter;

(d) Project Site Laminated Identification Badges

The Design-Builder must provide laminated identification badges which include a photograph of the worker's, laborer's or mechanic's face and indicate the worker's, laborer's or mechanic's name, trade, employer's name, and employment starting date (month/day/year). Further, the Design-Builder must require as a condition of employment on the Project Site, that each and every worker, laborer or mechanic wear the laminated identification badge at all times and that it may be seen by any representative of the City. DDC may grant a written waiver from the requirement that the laminated identification badge include a photograph if the Design-Builder demonstrates that the identity of an individual wearing a laminated identification badge can be easily verified by another method.

(e) Language Other Than English Used On Project Site

Provide the DDC notice when three or more employees (worker and/or laborer and/or mechanic) on the Project Site, at any time, speak a language other than English. The DDC may then provide the Design-Builder the notices described in Section 1.8(a) in that

language or languages as may be required. The Design-Builder is responsible for all distributions under this Article.

(f) **Provision of Records**

The Design-Builder and its Subcontractors must produce within five days on the Project Site of the Work and upon a written order of the City, including the DDC or the City Comptroller, such records as are required to be kept by this Section;

(g) **Payment**

The Design-Builder and its Subcontractors must pay employees by check or direct deposit. Checks issued by the Design-Builder to covered employees must be generated by a payroll service or automated payroll system (an in-house system may be used if approved by the DDC). For any Subcontract for an amount greater than seven hundred fifty thousand (\$750,000) dollars, checks issued by a Subcontractor to covered employees must be generated by a payroll service or automated payroll system (an in-house system may be used if approved by the DDC); and

(h) **Failure to Comply**

The failure of the Design-Builder or its Subcontractors to comply with the provisions of Section 1.8(a) through Section 1.8(g) may result in the DDC declaring the Design-Builder in default or the withholding of payments otherwise due under this Agreement, or both.

1.9 Minimum Wage; Living Wage

Except for those employees whose minimum wage is required to be fixed in accordance with N.Y. Labor Law §§ 220 or 230 or by Admin. Code § 6-109, all persons employed by the Design-Builder in the performance of this Agreement must be paid, without subsequent deduction or rebate, unless expressly authorized by Applicable Law, not less than the minimum wage as prescribed by Applicable Law. Any breach of this Section will be deemed a material breach of this Agreement.

1.10 Non-Discrimination in Employment

(a) **General Prohibition**

To the extent required by Applicable Law, the Design-Builder must not unlawfully discriminate against any employee or applicant for employment because of actual or perceived age, religion, religious practice, creed, sex, gender, gender identity or gender expression, sexual orientation, status as a victim of domestic violence, stalking, and sex offenses, familial status, partnership status, marital status, caregiver status, pregnancy, childbirth or related medical condition, disability, presence of a service animal, predisposing genetic characteristics, race, color, national origin (including ancestry), alienage, citizenship status, political activities or recreational activities as defined in N.Y. Labor Law 201-d, arrest or conviction record, credit history, military status, uniformed service, unemployment status, salary history, or any other protected class of individuals as defined by City, State or federal laws, rules or regulations. The Design-Builder must comply with all statutory and regulatory obligations to provide reasonable accommodations to individuals with disabilities, due to pregnancy, childbirth, or a related medical condition, due to status as a victim of domestic violence, stalking, or sex offenses, or due to religion.

(b) **N.Y. Labor Law § 220-e**

The Design-Builder agrees it will comply with N.Y. Labor Law § 220-e and that liquidated damages may be assessed in accordance with such law to the extent the Design-Builder breaches such obligation.

(c) **Admin. Code § 6-108**

The Design-Builder agrees to comply with City Admin. Code § 6-108.

Breach of any of the provisions of this Section 1.10 will be deemed a breach of a material provision of this Agreement.

(d) **E.O. 50 -- Equal Employment Opportunity**

- (i) The Design-Builder will comply with City Executive Order No. 50 (1980) (“**E.O. 50**”), as revised, and the rules set forth at 66 RCNY §§ 10-01 *et seq.* This Agreement must not be executed unless and until these requirements have been complied with in their entirety
- (ii) The Design-Builder understands that in the event of its noncompliance with the nondiscrimination clauses of this Agreement or with any of such rules, regulations, or orders, such noncompliance will constitute a material breach of this Agreement and noncompliance with E.O. 50 and the rules and regulations promulgated thereunder. After a hearing held pursuant to the rules of DLS, the Director of DLS may direct the DDC Commissioner to impose any or all of the following sanctions:
 - (a) if prior to the Agreement Date, disapproval of the Design-Builder;
 - (b) Suspension or termination of this Agreement
 - (c) Declaring the Design-Builder in default; or
 - (d) In lieu of any of the foregoing sanctions, imposition of an employment program, or any combination of (a)-(c).
- (iii) Failure to comply with E.O. 50 and the rules and regulations promulgated thereunder in one or more instances may result in the DDC declaring the Design-Builder to be non-responsible.
- (iv) The Design-Builder agrees to include the provisions of the foregoing Section 1.10(d)(i)-(iii) above in every Subcontract or purchase order in excess of \$100,000.00 to which it becomes a party unless exempted by E.O. 50 and the rules and regulations promulgated thereunder, so that such provisions will be binding upon each Subcontractor or vendor. The Design-Builder must take such action with respect to any Subcontract or purchase order as may be directed by the Director of DLS as a means of enforcing such provisions including sanctions for noncompliance. A supplier of unfinished products to the Design-Builder needed to produce the item contracted for will not be considered a Subcontractor or vendor for purposes of this Section.
- (v) The Design-Builder further agrees that it will refrain from entering into any Subcontract or modification thereof subject to E.O. 50 and the rules and regulations promulgated thereunder with a Subcontractor who is not in compliance with the requirements of E.O. 50 and the rules and regulations promulgated thereunder. A supplier of unfinished products to the Design-Builder needed to

produce the item contracted for will not be considered a Subcontractor for purposes of this Section.

- (vi) Nothing contained in this Section will be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, that is operated, supervised or controlled by or in connection with a religious organization, from lawfully limiting employment or lawfully giving preference to persons of the same religion or denomination or from lawfully making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.

1.11 Americans With Disabilities Act

(a) General Requirements

This Agreement is subject to the provisions of Subtitle A of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131 *et seq.* (“**ADA**”) and regulations promulgated pursuant thereto, see 28 CFR Part 35. The Design-Builder must not discriminate against an individual with a disability, as defined in the ADA, in providing services, programs, or activities pursuant to this Agreement. If directed to do so by the DDC to ensure the Design-Builder’s compliance with the ADA during the term of this Agreement, the Design-Builder must prepare a plan (“**Compliance Plan**”) which lists its program sites and describes in detail, how it intends to make the services, programs and activities set forth in the scope of services herein readily accessible and usable by individuals with disabilities at such sites. If the program site is not readily accessible and usable by individuals with disabilities, Design-Builder must also include in the Compliance Plan, a description of reasonable alternative means and methods that result in making the services, programs or activities provided under this Agreement, readily accessible to and usable by individuals with disabilities, including but not limited to people with visual, auditory or mobility disabilities. The Design-Builder must submit the Compliance Plan to the DDC for review within ten days after being directed to do so and must abide by the Compliance Plan and implement any action detailed in the Compliance Plan to make the services, programs, or activities accessible and usable by the disabled.

(b) Failure to Submit Compliance Plan

The Design-Builder’s failure to either submit a Compliance Plan as required herein or implement an approved Compliance Plan may be deemed a material breach of this Agreement and result in the DDC terminating this Agreement.

1.12 Paid Sick Leave Law

(a) Introduction and General Provisions

- (i) The Design-Builder must comply with the Earned Sick Time Act, also known as the Paid Sick Leave Law (“**PSLL**”), which requires covered employees who annually perform more than 80 hours of work in New York City to be provided with paid sick time. Contractors of the DDC or of other governmental entities may be required to provide sick time pursuant to the PSLL.
- (ii) The PSLL became effective on April 1, 2014, and is codified at Title 20, Chapter 8, of the Admin. Code. It is administered by the DCA. The DCA’s rules promulgated under the PSLL are codified at Chapter 7 of Title 6 of the Rules of the City of New York (“**Rules**”).

- (iii) The Design-Builder agrees to comply in all respects with the PSL and the Rules, and as amended, if applicable, in the performance of this Agreement. The Design-Builder further acknowledges that such compliance is a material term of this Agreement and that failure to comply with the PSL in performance of this Agreement may result in its termination.
- (iv) The Design-Builder must notify the DDC in writing within 10 days of receipt of a complaint (whether oral or written) regarding the PSL involving the performance of this Agreement. Additionally, the Design-Builder must cooperate with DCA's education efforts and must comply with DCA's subpoenas and other document demands as set forth in the PSL and Rules.

2. RECORDS, AUDITS, REPORTS, AND INVESTIGATIONS

2.1 Payroll Reports

(a) Collection and Submission of Payroll Reports

The Design-Builder and its Subcontractors must maintain on the Project Site during the performance of the Work the original payrolls or transcripts thereof which the Design-Builder and its Subcontractors are required to maintain and must submit such original payrolls or transcripts, subscribed and affirmed by it as true, within thirty days after issuance of its first payroll, and every thirty days thereafter, pursuant to Labor Law Section 220(3-a)(a)(iii). The Design-Builder and its Subcontractors must submit such original payrolls or transcripts along with each and every payment requisition. If payment requisitions are not submitted at least once a month, the Design-Builder and its Subcontractor must submit original payrolls and transcripts both along with its payment requisitions and independently of its payment requisitions.

(b) Maintenance of Payroll Reports

The Design-Builder must maintain payrolls or transcripts thereof for six years from the date of completion of the Work on this Agreement. If such payrolls and transcripts are maintained outside of New York City after the completion of the Work and their production is required pursuant to this Section, the Design-Builder must produce such records in New York City upon request by the City.

(c) Information Requests

The Design-Builder and its Subcontractors must comply with any written order, direction, or request made by the DDC, the City Labor Law investigators, or the City Comptroller, to provide to the requesting party any of the following information and/or records within five days of such written order, direction, or request:

- (i) Such original payrolls or transcripts thereof subscribed and affirmed by it as true and the statements signed by each worker pursuant to this Section; and/or
- (ii) Attendance sheets for each day on which any employee of the Design-Builder or its Subcontractors performed Work on the Project Site, which attendance sheet must be in a form acceptable to the DDC and must provide information acceptable to the DDC to identify each such employee; and/or
- (iii) Any other information to satisfy the DDC, the City Labor Law investigators or the City Comptroller, that this Section and the Labor Law, as to the hours of

employment and prevailing rates of wages and/or supplemental benefits, are being observed.

(d) **Failure to Comply**

The failure of the Design-Builder or its Subcontractors to comply with the provisions of Section 2.1(a) and/or Section 2.1(b) may result in the DDC declaring the Design-Builder in default and/or the withholding of payments otherwise due under this Agreement.

2.2 **Investigations Clause**

(a) **Design-Builder Cooperation**

Unrelated to any proceedings under or in connection with the Dispute Resolution Procedure, the Design-Builder agrees to cooperate fully and faithfully with any investigation, audit or inquiry conducted by a State or City agency or authority that is empowered directly or by designation to compel the attendance of witnesses and to examine witnesses under oath, or conducted by the inspector general of a governmental agency that is a party in interest to the transaction, submitted bid, submitted proposal, contract, lease, permit, or license that is the subject of the investigation, audit or inquiry.

(b) **Legal**

(i) If any person who has been advised that their statement, and any information from such statement, will not be used against them in any subsequent criminal proceeding refuses to testify before a grand jury or other governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to examine witnesses under oath concerning the award of or performance under any transaction, agreement, lease, permit, contract, or license entered into with the City, or State, or any political subdivision or public authority thereof, or the Port Authority of New York and New Jersey, or any local development corporation within the City, or any public benefit corporation organized under the Laws of the State; or

(ii) If any person refuses to testify for a reason other than the assertion of their privilege against self-incrimination in an investigation, audit or inquiry conducted by a City or State governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to take testimony under oath, or by the inspector general of the governmental agency that is a party in interest in, and is seeking testimony concerning the award of, or performance under, any transaction, agreement, lease, permit, contract, or license entered into with the City, the State, or any political subdivision thereof or any local development corporation within the City, then;

(a) The City will convene a hearing, upon not less than five days written notice to the parties involved to determine if any penalties should attach for the failure of a person to testify.

(b) If any non-governmental party to the hearing requests an adjournment, the DDC may, upon granting the adjournment, suspend any contract, lease, permit, or license pending the final determination pursuant to Section 2.2(d) below without the City incurring any penalty or damages for delay or otherwise.

(c) **Penalties**

The penalties that may attach after a final determination by the City may include but will not exceed:

- (i) The disqualification for a period not to exceed five years from the date of an adverse determination for any person, or any entity of which such person was a member at the time the testimony was sought, from submitting bids for, or transacting business with, or entering into or obtaining any contract, lease, permit or license with or from the DDC; and/or
- (ii) The cancellation or termination of any and all such existing City contracts, leases, permits or licenses that the refusal to testify concerns and that have not been assigned as permitted under this Agreement, nor the proceeds of which pledged, to an unaffiliated and unrelated institutional lender for fair value prior to the issuance of the notice scheduling the hearing, without the DDC incurring any penalty or damages on account of such cancellation or termination; monies lawfully due for goods delivered, work done, rentals, or fees accrued prior to the cancellation or termination will be paid by the DDC.

(d) **Determinations**

The City will consider and address in reaching its determination and in assessing an appropriate penalty the factors in Paragraphs (i) and (ii) below. The City may also consider, if relevant and appropriate, the criteria established in Paragraphs (iii) and (iv) below, in addition to any other information that may be relevant and appropriate:

- (i) The party's good faith endeavors or lack thereof to cooperate fully and faithfully with any governmental investigation or audit, including but not limited to the discipline, discharge, or disassociation of any person failing to testify, the production of accurate and complete books and records, and the forthcoming testimony of all other members, agents, assignees or fiduciaries whose testimony is sought;
- (ii) The relationship of the person who refused to testify to any entity that is a party to the hearing, including, but not limited to, whether the person whose testimony is sought has an ownership interest in the entity and/or the degree of authority and responsibility the person has within the entity;
- (iii) The nexus of the testimony sought to the subject entity and its contracts, leases, permits or licenses with the DDC; and
- (iv) The effect a penalty may have on an unaffiliated and unrelated party or entity that has a significant interest in an entity subject to penalties under Section 2.2(c) above, provided that the party or entity has given actual notice to the DDC Commissioner upon the acquisition of the interest, or at the hearing called for in Section 2.02(b)(ii)(a) above gives notice and proves that such interest was previously acquired. Under either circumstance, the party or entity must present evidence at the hearing demonstrating the potential adverse impact a penalty will have on such person or entity.

(e) **Definitions**

- (i) The term "license" or "permit" as used in this Section will be defined as a license, permit, franchise, or concession not granted as a matter of right.

- (ii) The term “person” as used in this Section will be defined as any natural person doing business alone or associated with another person or entity as a partner, director, officer, principal or employee.
- (iii) The term “entity” as used in this Section will be defined as any firm, partnership, corporation, association, or person that receives monies, benefits, licenses, leases, or permits from or through the DDC, or otherwise transacts business with the DDC.
- (iv) The term “member” as used in this Section will be defined as any person associated with another person or entity as a partner, director, officer, principal, or employee.

(f) **Failure to Report**

In addition to and notwithstanding any other provisions of this Agreement, the DDC may in its sole discretion terminate this Agreement upon not less than three days written notice in the event the Design-Builder fails to promptly report in writing to the Commissioner of Investigation any solicitation of money, goods, requests for future employment or other benefits or thing of value, by or on behalf of any employee of the City or other person or entity for any purpose that may be related to the procurement or obtaining of this Agreement by the Design-Builder, or affecting the performance of this Agreement.

3. **ANTITRUST**

3.1 **Antitrust**

The Design-Builder hereby assigns, sells, and transfers to the DDC all right, title, and interest in and to any claims and causes of action arising under the antitrust laws of the State or of the United States relating to the particular goods or services procured by the DDC under this Agreement.

4. **REDUCTIONS IN FUNDING**

4.1 **Reductions in Federal, State, and/or City Funding**

(a) **DDC’s Rights**

This Agreement is funded in whole or in part by funds secured from the federal, State and/or City governments. Should there be a reduction or discontinuance of such funds by action of the federal, State and/or City governments, the DDC will have, in its sole discretion, the right to terminate this Agreement in whole or in part, or to reduce the funding and/or level of services of this Agreement caused by such action by the federal, State and/or City governments, including, in the case of the reduction option, but not limited to, the reduction or elimination of programs, services or service components; the reduction or elimination of contract-reimbursable staff or staff-hours, and corresponding reductions in the budget of this Agreement and in the total amount payable under this Agreement. Any reduction in funds pursuant to this Section will be accompanied by an appropriate reduction in the services performed under this Agreement.

(b) **Notice of Reduction Option**

If DDC opts to exercise its reduction option referred to in Section 4.1(a), above, any such reduction will be effective as of the date set forth in a written notice thereof to the Design-Builder, which will be not less than 30 days from the date of such notice. Prior to sending such notice of reduction, the DDC will advise the Design-Builder that such option is being

exercised and afford the Design-Builder an opportunity to make within seven days any suggestions it may have as to which programs, services, service components, staff or staff-hours might be reduced or eliminated, provided, however, that the DDC will not be bound to utilize any of the Design-Builder's suggestions and that the DDC will have sole discretion as to how to effectuate the reductions.

(c) **Payments following Reduction Option**

If the DDC reduces funding pursuant to this Section, the following provisions apply. The DDC will pay for services provided in accordance with this Agreement prior to the reduction date. In addition, any obligation necessarily incurred by the Design-Builder on account of this Agreement prior to receipt of notice of reduction and falling due after the reduction date will be paid by the DDC in accordance with the terms of this Agreement. In no event will such obligation be construed as including any lease or other occupancy agreement, oral or written, entered into between the Design-Builder and its landlord.

(d) **Medical Assistance Funds**

To the extent that the reduction in public funds is a result of the State determining that the Design-Builder may receive medical assistance funds pursuant to title eleven of article five of the Social Services Law to fund the services contained within the scope of a program under this Agreement, then the notice and effective date provisions of this Section will not apply, and the DDC may reduce such public funds authorized under this Agreement by informing the Design-Builder of the amount of the reduction and revising attachments to this Agreement as appropriate.

5. **ELECTRONIC FUNDS TRANSFER**

5.1 **Electronic Funds Transfer**

(a) **General**

In accordance with Admin. Code § 6-107.1, the Design-Builder agrees to accept payments under this Agreement from the DDC by electronic funds transfer. An electronic funds transfer is any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Prior to the first payment made under this Agreement, the Design-Builder must designate one financial institution or other authorized payment agent and must complete the "EFT Vendor Payment Enrollment Form" available from the DDC in order to provide the commissioner of the Department of Finance with information necessary for the Design-Builder to receive electronic funds transfer payments through the designated financial institution or authorized payment agent. The crediting of the amount of a payment to the appropriate account on the books of a financial institution or other authorized payment agent designated by the Design-Builder will constitute full satisfaction by the DDC for the amount of the payment under this Agreement. The account information supplied by the Design-Builder to facilitate the electronic funds transfer will remain confidential to the fullest extent provided by Applicable Law.

(b) **Waiver**

The DDC may waive the application of the requirements of this Section to payments on contracts entered into pursuant to Charter § 315. In addition, the commissioner of the Department of Finance and the City Comptroller may jointly issue standards pursuant to which the DDC may waive the requirements of this Section for payments in the following

circumstances: (i) for individuals or classes of individuals for whom compliance imposes a hardship; (ii) for classifications or types of checks; or (iii) in other circumstances as may be necessary in the best interest of the DDC.

6. CLAIMS

6.1 No Claim Against Officials, Agents, or Employees

No claim will be made by the Design-Builder against any official, agent, or employee of the City in their personal capacity for, or on account of, anything done or omitted in connection with this Agreement.

7. APPLICABLE LAW

7.1 All Legal Provisions Deemed Included

Each and every provision required by Applicable Law to be inserted in this Agreement is hereby deemed to be a part of this Agreement, whether actually inserted or not.

7.2 Political Activity

The Design-Builder's provision of services under this Agreement must not include any partisan political activity or any activity to further the election or defeat of any candidate for public, political, or party office, nor may any of the funds provided under this Agreement be used for such purposes.

7.3 Religious Activity

There must be no religious worship, instruction, or proselytizing as part of or in connection with the Design-Builder's provision of services under this Agreement, nor may any of the funds provided under this Agreement be used for such purposes.

7.4 Participation in an International Boycott

(a) Prohibition

The Design-Builder agrees that neither the Design-Builder nor any substantially-owned affiliated company is participating or will participate in an international boycott in violation of the provisions of the federal Export Administration Act of 1979, as amended by the Export Controls Reform Act of 2018, Public Law No: 115-232, or the regulations of the United States Department of Commerce promulgated thereunder.

(b) Determination of Violation

Upon the final determination by the Commerce Department or any other agency of the United States as to, or conviction of, the Design-Builder or a substantially-owned affiliated company thereof, of participation in an international boycott in violation of the provisions of the federal Export Administration Act of 1979 by the Export Controls Reform Act of 2018, Public Law No: 115-232, the City Comptroller may, at their option, render forfeit and void this Agreement.

(c) Compliance

The Design-Builder must comply in all respects, with the provisions of Admin. Code § 6-114 and the rules issued by the City Comptroller thereunder.

7.5 Electronic Filing / NYC Development Hub

New York City Department of Design and Construction
Exhibit 9 (Standard Legal and Public Policy Requirements)

Design-Build Agreement

The Design-Builder will electronically file all alteration type-2 and alteration type-3 applications via the New York City Development Hub Web site, except applications for minor alterations. All such filings must be professionally certified. Information about electronic filing via the New York City Development Hub is available on the City Department of Buildings Web site at www.nyc.gov/buildings.

7.6 Environmentally Preferable Purchasing

The Design-Builder will ensure that products purchased or leased by the Design-Builder or any Subcontractor for the Work that are not specified by the City or are submitted as equivalents to a product specified by the City comply with the requirements of the New York City Environmentally Preferable Purchasing Program contained in Chapter 11 of Title 43 of the RCNY, pursuant to Chapter 3 of Title 6 of the City Administrative Code.

7.7 Fair Chance Act

The City encourages the Design-Builder to provide job opportunities to justice involved persons (e.g., formerly incarcerated individuals). The Design-Builder is directed to the Fair Chance Act, which amended the New York City Human Rights Law by making it an unlawful discriminatory practice for most employers to inquire or consider a job applicant's criminal history until after extending a conditional offer of employment and requires an employer to take specific steps if the employer subsequently decides to withdraw the job offer. Information about the Fair Chance Act and its legal requirements can be found here: <https://www1.nyc.gov/site/cchr/law/fair-chance-act.page>.

7.8 MacBride Principles

(a) Notice To All Prospective Design-Builders

- (i) Local Law No. 34 of 1991 became effective on September 10, 1991 and added Section 6-115.1 of the City Administrative Code. The Local Law provides for certain restrictions on City Contracts to express the opposition of the people of the City to employment discrimination practices in Northern Ireland to promote freedom of work-place opportunity.
- (ii) Pursuant to Section 6-115.1, the Design-Builder must sign a rider in which they covenant and represent, as a material condition of this Agreement, that any business operations in Northern Ireland conducted by the Design-Builder and any individual or legal entity in which the Design-Builder holds a ten percent or greater ownership interest in the Design-Builder must be conducted in accordance with the MacBride Principles of nondiscrimination in employment.
- (iii) Prospective Design-Builders are not required to agree to these conditions. However, in the case of contracts let by competitive sealed bidding, whenever the lowest responsible bidder has not agreed to stipulate to the conditions set forth in this notice and another bidder who has agreed to stipulate to such conditions has submitted a bid within five (5%) percent of the lowest responsible bid for a contract to supply goods, services or contraction of comparable quality, the DDC will refer such bids to the Mayor or other officials, as appropriate, who may determine, in accordance with Applicable Law, that it is in the best interest of the City that the agreement be awarded to other than the lowest responsible pursuant to Section 313(b)(2) of the City Charter.

In the case of contracts let by other than competitive sealed bidding, if a prospective Design-Builder does not agree to these conditions, no agency, elected official or the City Council will award the Agreement to that bidder unless the agency seeking to use the goods, services or construction certifies in writing that the Agreement is necessary for the

Agency to perform its functions and there is no other responsible Design-Builder who will supply goods, services or construction of comparable quality at a comparable price.

In accordance with and to the extent required by Admin. Code § 6-115.1, the Design-Builder stipulates that the Design-Builder and any individual or legal entity in which the Design-Builder holds a ten percent or greater ownership interest and any individual or legal entity that holds a ten percent or greater ownership interest in the Design-Builder either (a) have no business operations in Northern Ireland, or (b) will take lawful steps in good faith to conduct any business operations they have in Northern Ireland in accordance with the MacBride Principles, and will permit independent monitoring of their compliance with such principles.

(b) **Definition**

For purposes of this Article, the “MacBride Principles” will mean those principles relating to nondiscrimination in employment and freedom of work-place opportunity which require employers doing business in Northern Ireland to:

- (i) increase the representation of individuals from under-represented religious groups in the workforce, including managerial, supervisory, administrative, clerical and technical jobs;
- (ii) take steps to promote adequate security for the protection of employees from under-represented religious groups both at the work-place and while traveling to and from Work;
- (iii) ban provocative religious or political emblems from the workplace;
- (iv) publicly advertise all job openings and make special recruitment efforts to attract applicants from under-represented religious groups;
- (v) establish layoff, recall, and termination procedures which do not in practice favor a particular religious group;
- (vi) abolish all job reservations, apprenticeship restrictions and different employment criteria which discriminate on the basis of religion;
- (vii) develop training programs that will prepare substantial numbers of current employees from under-represented religious groups for skilled jobs, including the expansion of existing programs and the creation of new programs to train, upgrade, and improve the skills of workers from under-represented religious groups;
- (viii) establish procedures to assess, identify, and actively recruit employees from under-represented religious groups with potential for further advancement; and
- (ix) appoint a senior management staff member to oversee affirmative action efforts and develop a timetable to ensure their full implementation.

(c) **Design-Builder Violation**

The Design-Builder agrees that the covenants and representations in 7.8(a) are material conditions to this Agreement. In the event the DDC receives information that the Design-Builder is in violation thereof, the DDC will review such information and give the Design-Builder an opportunity to respond. If the DDC finds that a violation has occurred, the DDC

will have the right to declare the Design-Builder in default in default and/or terminate this Agreement for cause and procure supplies, services or Work from another source in the manner the DDC deems proper. The rights and remedies of the DDC hereunder will be in addition to, and not in lieu of, any rights and remedies the DDC has pursuant to this Agreement or by operation of Applicable Law.

ATTACHMENT 1
Whistleblower Protection Act Poster



**REPORT
CORRUPTION, FRAUD, UNETHICAL CONDUCT
RELATING TO A NYC-FUNDED CONTRACT
OR PROJECT
CALL THE NYC DEPARTMENT OF INVESTIGATION
212-825-5959**

DOI CAN ALSO BE REACHED BY MAIL

OR IN PERSON AT:

**New York City Department of
Investigation (DOI)
80 Maiden Lane, 17th floor
New York, New York 10038**

Attention: COMPLAINT BUREAU

OR FILE A COMPLAINT ON-LINE AT:

www.nyc.gov/doi

All communications are confidential



**Or scan the QR Code above to make a
complaint**

**THE LAW PROTECTS EMPLOYEES OF
CITY CONTRACTORS WHO REPORT CORRUPTION**

- Any employee of a City contractor, or subcontractor of the City, or a City contractor with a contract valued at more than \$100,000 is protected under the law from retaliation by their employer if the employee reports wrongdoing related to the contract to the DOI.
- **To be protected by this law**, an employee must report to DOI – or to certain other specified government officials – information about fraud, false claims, corruption, criminality, conflict of interest, gross mismanagement, or abuse of authority relating to a City contract valued at more than \$100,000.
- Any employee who makes such a report and who believes they have been dismissed, demoted, suspended, or otherwise subject to an adverse personnel action because of that report is entitled to bring a lawsuit against the contractor and recover damages.

EXHIBIT 10

MINOR WAIVER REQUEST FORM

MWR No. Description: **[Include Description of Request]**
MWR-XXX

Contract No. Contract Name: **[Include Contract Name]**
XXX-XXX-XXX

Requirements and Provisions for Work Reference:

Reason for Waiver Request:

Description of Alternate Proposed (attach additional information as required):

Is MWR Time-Sensitive Yes No **Requested Response Date:**

Design-Builder confirmed there will be no time or cost impact to the City as a result of this Request
A/EoR confirms they endorse this waiver request with due regard to responsibilities as A/EoR for Design Work

Approval Status: **Approved:** **Conditions:**

Name/Signature Design-Builder A/EOR]: **Date:**

Authorized by: **Title:** **Date:**
[Name/Signature Design-Builder]

Approval Status: **Approved** **Rejected** **Submit More Information** **Submit Change Proposal**

Authorized by: **Title:** **Date:**
[Name/Signature DDC]

Schedule A.



A

Schedule A

Contract Information

PART I. REQUIRED INFORMATION

This Part I includes project-specific information applicable to the Contract Documents. Throughout the Contract Documents, wherever a reference is made to Schedule A, information applicable to that section of the Contract Documents has been inserted into the right-hand column below.

Abbreviations for purposes of this Schedule A:

- DBA = Agreement
- GPR = General Project Requirements
- SPR = Specific Project Requirements
- CCDs = Consecutive Calendar Days

All other capitalized terms have the meaning set forth in Exhibit 1 of the Agreement.

| CONTRACT DOCUMENT REFERENCE | INFORMATION APPLICABLE TO REFERENCE |
|--|---|
| <p align="center"><u>IDENTIFICATION OF DESIGN-BUILDER</u></p> <p>Name of the Design-Builder and, if Design-Builder is a joint venture or partnership, each Principal Participant.</p> | |
| <p align="center"><u>DBA 4.1</u></p> <p align="center"><u>IDENTIFICATION OF GUARANTOR(S)</u></p> <p align="center">(If applicable.)</p> | |
| <p align="center"><u>DBA 4.2</u></p> <p align="center"><u>PERFORMANCE AND PAYMENT BONDS</u></p> | <ul style="list-style-type: none"> • Performance: <u>100%</u> of the Contract Price • Payment: <u>100%</u> of the Contract Price <p>Design-Builder’s executed bonds are attached to the DBA as Exhibit 8.</p> |
| <p align="center"><u>DBA 10.2</u></p> <p align="center"><u>SCOPE VALIDATION PERIOD</u></p> <p>Measured from the NTP Date.</p> | <p>[] <u>CCDs</u></p> |
| <p align="center"><u>DBA 11.2</u></p> <p align="center"><u>CITY GOVERNMENTAL APPROVALS</u></p> | <ul style="list-style-type: none"> • Project approval under the Uniform Land Use Review Procedure (ULURP) • Changes to the City map, zoning amendments |

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|--|---|
| | <ul style="list-style-type: none"> Any approval from the State Commission on Correction |
| <p align="center"><u>DBA 14</u></p> <p align="center"><u>GUARANTEED COMPLETION DATE FOR SUBSTANTIAL COMPLETION</u></p> <p>Measured from the NTP Date.</p> | <p><u>[] CCDs</u></p> |
| <p align="center"><u>DBA 14</u></p> <p align="center"><u>GUARANTEED COMPLETION DATE FOR FINAL COMPLETION</u></p> <p>Measured from the actual date of Substantial Completion.</p> | <p><u>[] CCDs</u></p> |
| <p align="center"><u>DBA 34.1</u></p> <p align="center"><u>SUBSTANTIAL COMPLETION LONG STOP DATE</u></p> <p>Measured from the Guaranteed Completion Date for Substantial Completion.</p> | <p><u>[] CCDs</u></p> |
| <p align="center"><u>DBA 14.3</u></p> <p align="center"><u>LIQUIDATED DAMAGES FOR DELAY – SUBSTANTIAL COMPLETION</u></p> | <p><u>\$ [] / CCD</u></p> |
| <p align="center"><u>DBA 14.7(a)</u></p> <p align="center"><u>LD CAP</u></p> | <p>10% of Contract Price</p> |
| <p align="center"><u>DBA 14.7(b)</u></p> <p align="center"><u>AGGREGATE LIMITATION ON LIABILITY</u></p> | <p><u>100 %</u> of the Contract Price Subject to Section 14.7(c) (<i>Exclusions from Limitations on Liability</i>).</p> |
| <p align="center"><u>DBA 19.2</u></p> <p align="center"><u>KEY SUBCONTRACTS</u></p> | <ol style="list-style-type: none"> Design Subcontract [other Key Subcontracts, if applicable] <p>Key Subcontractors for each Key Subcontract must be identified in the Design-Builder Proposal Commitments.</p> |
| <p align="center"><u>DBA 22.8</u></p> <p align="center"><u>RETAINAGE</u></p> | <p><u>5 %</u> of the value of the Work</p> |
| <p align="center"><u>DBA 24.2(h)</u></p> <p align="center"><u>SHARED SAVINGS FOR VEPs</u></p> | <p><u>City 50%: Design-Builder 50%</u></p> |
| <p align="center"><u>DBA 26.2EXTRA WORK & ALLOWANCE WORK COSTS: DESIGN WORK</u></p> | <p>Direct Salary Rate x Multiplier The Multiplier is set forth in Schedule B.</p> |

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| <p style="text-align: center;"><u>DBA 29</u> <u>WARRANTY PERIOD</u></p> | <ul style="list-style-type: none"> • For all Work completed on or prior to Substantial Completion, <u>one (1) year</u> from the date of Substantial Completion, and • For all Work completed from the date of Substantial Completion to Final Completion, <u>one (1) year</u> from the date of Final Completion <p>Longer periods of warranty for specific elements of the Work may be set forth in the Project Requirements or required by any Standards of Performance.</p> |
| <p style="text-align: center;"><u>DBA 38</u> <u>IDENTIFICATION OF DESIGN-BUILDER REPRESENTATIVE</u></p> | <ul style="list-style-type: none"> • [name] • [email/phone] |
| <p style="text-align: center;"><u>DBA 42</u> <u>DDC'S ADDRESS(ES)/EMAIL FOR NOTICES</u></p> | <p>Department of Design and Construction 3030 Thomson Avenue Long Island City, NY 11101 DDC will designate its DDC Representative and other project management personal for receipt of notices in the NTP.</p> <p>Any notice to the DDC invoking the Dispute Resolution Procedure must also be copied to:</p> <p>Department of Design and Construction 3030 Thomson Avenue Long Island City, NY 11101 Attn: General Counsel's Office Telephone: 718-391-2030 Email: DisputeResolution@ddc.nyc.gov</p> <p>And to the DDC Representative identified in the NTP via email and regular mail to 3030 Thomson Avenue, Long Island City, NY 11101.</p> |
| <p style="text-align: center;"><u>DBA 42</u> <u>DESIGN-BUILDER'S ADDRESS(ES)/EMAIL FOR NOTICES</u></p> | <p>[Mailing address of Design-Builder +email address]</p> <p>Cc:</p> <p>[CC Mailing address of Design-Builder + CC email address]</p> |
| <p style="text-align: center;"><u>DBA EXHIBIT 7</u> <u>PARTICIPATION BY MINORITY-OWNED AND WOMEN-OWNED BUSINESS ENTERPRISES</u></p> | <p>MWBE Goals</p> <ul style="list-style-type: none"> • Construction Work: [DRAFT] 30% • Design Work: [DRAFT] 30% |

| | |
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| | <p>Design-Builder's Utilization Plan is incorporated in DBA Exhibit 3 (<i>Design-Builder Proposal Commitments</i>)</p> <p>For purposes of calculating MWBE participation goals, the following will be excluded from the Contract Price:</p> <ul style="list-style-type: none">• Insurance Policies• Bonds |
|--|--|

PART II. INDEMNIFIED PARTIES, TYPES OF INSURANCE, MINIMUM LIMITS AND SPECIAL CONDITIONS

Note: All certificate(s) of insurance submitted must be accompanied by a Certification by Broker consistent with Part III below and include the following information:

- For each insurance policy, the name and NAIC number of issuing company, number of policy, and effective dates;
- Policy limits consistent with the requirements listed below;
- Additional insureds or loss payees consistent with the requirements listed below; and
- The project number assigned to the Contract by the City (in the “Description of Operations” field).

Insurance indicated by a blackened box (■) or by X in a □ to left will be required under this contract

| INDEMNIFIED PARTIES | |
|---|---|
| Indemnified Parties DBA 31 | <ul style="list-style-type: none"> • City of New York, its employees and officials |
| TYPES OF INSURANCE, MINIMUM LIMITS AND SPECIAL CONDITIONS | |
| Types of Insurance (per DBA 33 in its entirety, including listed paragraph) | Minimum Limits and Special Conditions |
| <ul style="list-style-type: none"> ■ Workers’ Compensation DBA 32.1(a) ■ Disability Benefits Insurance DBA 32.1(a) ■ Employers’ Liability DBA 32.1(a) ■ Jones Act DBA 32.1(h) ■ U.S. Longshoremen’s and Harbor Workers Compensation Act DBA 32.1(h) | <p>Workers’ Compensation, Employers’ Liability, and Disability Benefits Insurance: Statutory per New York State law without regard to jurisdiction.</p> <p>Note: The following forms are acceptable: (1) New York State Workers’ Compensation Board Form No. C-105.2, (2) State Insurance Fund Form No. U-26.3, (3) New York State Workers’ Compensation Board Form No. DB-120.1 and (4) Request for WC/DB Exemption Form No. CE-200.</p> <p>The City will not accept an ACORD form as proof of Workers’ Compensation or Disability Insurance.</p> <p>Jones Act and U.S. Longshoremen’s and Harbor Workers’ Compensation Act: Statutory per U.S. Law.</p> <p>□ Additional Requirements:</p> |

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|---|--|
| <p>■ Commercial General Liability DBA 32.1(b)</p> | <p>If DOB permits are required, the amounts set forth below or required under RCNY 101-08, whichever is greater.</p> <p><u>\$2,000,000</u> per occurrence and <u>\$4,000,000</u> per project aggregate.</p> <p>■ Per project aggregate/project specific coverage.</p> <p>The City must be listed as an Additional Insured, as follows:</p> <p>1. “City of New York, including its officials and employees”, with coverage at least as broad as ISO Form CG 20 10 and CG 20 37.</p> <p>In addition, all Persons, if any, listed below must be named as Additional Insureds, with coverage at least as broad as ISO Form CG 20. The Additional Insured endorsement shall either specify the entity’s name, if known, or the entity’s title (e.g., Project Manager):</p> <p>2. []</p> <p>■ Additional Requirements: Maximum Deductible/Retention: \$250,000</p> |
| <p>■ Professional Liability DBA32.1(e)</p> | <p>Minimum for the Design-Builder: <u>\$2,000,000</u> per claim</p> <p>□ Per project aggregate/project specific coverage.</p> <p>The Design-Builder must be listed as named insured.</p> <p>■ Additional Requirements:</p> <ul style="list-style-type: none"> • Maximum Deductible/Retention: \$1,000,000 • Rectification coverage requirements limited to new construction scope. |

| | |
|---|---|
| <p>■ Builders' Risk DBA 32.1(c)</p> | <p>□ Required: 100% of total Contract Price ■ Required: 100 % of total amount for the following item(s) of Work listed in the Schedule of Values: Sallyport and other temporary new construction.</p> <p>■ Per project aggregate/project specific coverage.</p> <p>Design-Builder as the named insured; the "City of New York, including its officials and employees" both an Additional Insured and one of the loss payees as its interests may appear.</p> <p>If the Work does not involve construction of a new building or gut renovation work, the Design-Builder may provide an installation floater in lieu of Builders Risk insurance.</p> <p>■ Additional Requirements: Maximum Deductible/Retention: \$250,000 AOP/\$500,000 for flood, earthquake</p> |
| <p>■ Commercial Auto Liability DBA 32.1(d)</p> | <p><u>\$2,000,000</u> per accident combined single limit</p> <p>If vehicles are used for transporting hazardous materials, the Design-Builder must provide pollution liability broadened coverage for covered vehicles (endorsement CA 99 48) as well as proof of MCS 90</p> <p>Additional Insureds: 1. "City of New York, including its officials and employees", and 2. _____ 3. _____</p> <p>□ Additional Requirements:</p> |
| <p>■ Contractors Pollution Liability DBA 32.1(i)</p> | <p><u>\$10,000,000</u> each occurrence <u>\$10,000,000</u> aggregate</p> <p>■ Per project aggregate/project specific coverage.</p> <p>Additional Insureds: 1. "City of New York, including its officials and employees", and 2. _____ 3. _____</p> <p>■ Additional Requirements: Maximum Deductible/Retention: \$250,000</p> |

| | |
|--|---|
| <p>■ Railroad Protection Liability Policy DBA 32.1(k)</p> | <p><u>\$25,000,000</u> each occurrence <u>\$25,000,000</u> aggregate</p> <p>Named Insureds:</p> <ol style="list-style-type: none"> 1. [List railroad: New York City Transit Authority (NYCTA), the Manhattan and Bronx Surface Transit Operation Authority (MaBSTOA), the Staten Island Rapid Transit Operation Authority (SIRTOA), MTA Capital Construction Co., the Metropolitan Transportation Authority (MTA) including its subsidiaries and affiliates], and 2. the "City of New York, including its officials and employees" <p>■ Additional Requirements:</p> <p>(ISO-RIMA or equivalent form) approved by Permitter covering the work to be performed at the designated site and affording protection for damages arising out of bodily injury or death, physical damage to or destruction of property, including damage to the Insured's own property and conforming to the following:</p> <ul style="list-style-type: none"> • Policy Endorsement CG 28 31 - Pollution Exclusion Amendment is required to be endorsed onto the policy when environmental-related work and/or exposures exist. • Indicate the Name and address of the Design-Builder to perform the work, the contract # and the name of the railroad property where the work is being performed and the Agency Permit. • Evidence of Railroad Protective Liability Insurance must be provided in the form of the Original Policy. A detailed Insurance Binder (ACORD or Manuscript Form) will be accepted pending issuance of the Original Policy, which must be provided within 30 days of the Binder Approval. |
|--|---|

| | |
|---|--|
| <p>■ Umbrella/Excess Liability Insurance DBA 32.1(k)</p> | <p><u>\$50,000,000</u> each occurrence <u>\$50,000,000</u> aggregate</p> <p>■ Per project aggregate/project specific coverage.</p> <p>The policy terms and conditions must be at least as broad as the underlying policies. The underlying policies must comply with the insurance provision as outlined by the Agreement. Defense cost must be in addition to the limit of liability.</p> <p>The City must be listed as an Additional Insured, as follows:</p> <p>1. "City of New York, including its officials and employees", with coverage at least as broad as ISO Form CG 20 10 and CG 20 37.</p> <p>In addition, all Persons, if any, listed below must be named as Additional Insureds, with coverage at least as broad as ISO Form CG 20. The Additional Insured endorsement shall either specify the entity's name, if known, or the entity's title (e.g., Project Manager):</p> <p>2. [list any additional Persons]</p> <p>■ Additional Requirements:</p> <p>Maximum Deductible/Retention: No deductible or retention should apply.</p> |
| <p>□ Marine Protection and Indemnity DBA 32.1(j)</p> | <p>\$ _____ each occurrence \$ _____ aggregate</p> <p>Additional Insureds:</p> <p>1. "City of New York, including its officials and employees", and</p> <p>2. _____</p> <p>3. _____</p> |
| <p>□ Marine Pollution Liability DBA 32.1(j)</p> | <p>\$ _____ each occurrence \$ _____ aggregate</p> <p>Additional Insureds:</p> <p>1. "City of New York, including its officials and employees", and</p> <p>2. _____</p> <p>3. _____</p> |

| | |
|---|---|
| <p>■ Crime Insurance DBA 32.1(f)</p> | <p><u>\$1,000,000</u> each occurrence</p> <p>The Design-Builder must be listed as named insured, except where Design-builder is a joint venture or partnership, in which case coverage may be provided listing each Principal Participant as named insured.</p> <p>The City must be named as loss payee as its interests may appear.</p> |
| <p>■ Cyber Liability Insurance DBA 32.1(g)</p> | <p><u>\$1,000,000</u> each occurrence</p> <p>If additional insured status is commercially available under the Design-Builder's cyber liability insurance, the Design-Builder must list the "City of New York, including its officials and employees" as an additional insured.</p> |

SCHEDULE A**PART III. CERTIFICATES OF INSURANCE**

All certificates of insurance (except certificates of insurance solely evidencing Workers' Compensation Insurance, Employer's Liability Insurance, and/or Disability Benefits Insurance) must be accompanied by one of the following:

- (1) the Certification by Insurance Broker or Agent on the following page setting forth the required information and signatures;

-- OR --

- (2) copies of all policies as certified by an authorized representative of the issuing insurance carrier that are referenced in such certificate of insurance. If any policy is not available at the time of submission, certified binders may be submitted until such time as the policy is available, at which time a certified copy of the policy shall be submitted.

CITY OF NEW YORK
CERTIFICATION BY INSURANCE BROKER OR AGENT

The undersigned insurance broker represents to the City of New York that the attached Certificate of Insurance is accurate in all material respects.

[Name of broker or agent (typewritten)]

[Address of broker or agent (typewritten)]

[Email address of broker or agent (typewritten)]

[Phone number/Fax number of broker or agent (typewritten)]

[Signature of authorized official, broker, or agent]

[Name and title of authorized official, broker, or agent (typewritten)]

State of)

) ss.:

County of)

Sworn to before me this _____ day of _____, 20____

NOTARY PUBLIC FOR THE STATE OF _____

Schedule B.



B

Schedule B

Contract Price and Schedule of Values

Details about the Contract Price, including the types and values of Allowances and Unit Prices, if any, and the Schedule of Values are set forth on the following page

Notes for Contract Price Template (J-1) - DDC BBJ Manhattan Dismantle and Swing Space

This file is for information only and is provided as an Available Document.

The Proposer is responsible for the content and use of this document

J-1 form is intended to convey the desired presentation format to the Proposer. No formulas are implied or included.

The information to be submitted in Form J-1 of the Proposal should reflect the cost for the Manhattan Dismantle and Swing Space including any approved PTCs.

There are two (2) separate tabs:

Tab 1) Notes - J-1

Tab 2) Contract Price - J-1

Rows are provided for:

- 1) Lump Sum Amount** - Proposer should enter the Lump Sum Amount proposed for the Project. This will be the amount that the Proposer will bill DDC for design and construction of the Project.
- 1.1-1.9) Proposer shall provide a breakdown of the Lump Sum Amount (1) and shall ensure that all items 1.1-1.9 total to the Lump Sum Amount. This will only be used for Proposal evaluation and will not be used during contract administration.
- 1.1) Includes all DB cost for the portion of the above ground demolition. This subtotal will exclude any other amount subtotals included in 1)
- 1.2) Includes all DB costs for the portion of the below ground demolition. This subtotal will exclude any other amount subtotals included in 1)
- 1.3) Includes all DB costs associated with the Swing Space / Sally Port. This subtotal will exclude any other amount subtotals included in 1)
- 1.4) Includes all DB costs associated with excavation. This subtotal will exclude any other amount subtotals included in 1)
- 1.5) Includes all DB costs associated with Environmental Remediation Work. This subtotal will exclude any other amount subtotals included in 1)
- 1.6) Includes all Design-related costs for all design disciplines for the BK Dismantle and Swing Space / Sally Port. This subtotal will exclude any other amount subtotals included in 1)
- 1.7) Includes all DB costs related to QA/QC. This subtotal will exclude any other amount subtotals included in 1)
- 1.8) Includes all DB costs related to General Conditions. This subtotal will exclude any other amount subtotals included in 1)
- 1.9) Includes all DB costs related to insurance. This subtotal will exclude any other amount subtotals included in 1)
- 1.10) Multiplier for Extra Design Work: Proposer must provide a Multiplier for overhead and profit for Extra Design Work as specified in DBA Section 26.2.

2 B) Unit Price Work - Proposer must provide the following unit prices for Extra Work as specified in GPR Section 26.

B-2) Dewatering Unit Price. The Proposer must populate (i) in Column D (Unit Price) its unit price per day of dewatering Work required for the Project and (ii) the minimum number of days the Proposer priced in its Lump Sum Amount for performing dewatering Work in accordance with the GPR Section 26.3.

B-3) Hazardous Material Abatement Unit Price. The Proposer must populate (i) in Column D (Unit Price) its unit price per (appropriate unit) for disposal of hazardous material/asbestos and abatement required for the Project and (ii) the minimum number of (appropriate unit) the Proposer priced in its Lump Sum Amount for performing hazardous material/asbestos abatement and disposal Work in accordance with GPR Sections 26.3.1 through 26.3.9.

B-4) Backfill Unit Price. The Proposer must populate (i) in Column D (Unit Price) its unit price per cubic yard of backfill Work required for the Project and (ii) the minimum number of cubic yards the Proposer priced in its Lump Sum Amount for performing backfill Work in accordance with the GPR Section 26.3.

B-5) Extended Temporary Maintenance of Site Unit Price. The Proposer must populate (i) in Column D (Unit Price) its unit price per day of maintaining the site (including all site security, dewatering of the site, and any temporary shoring needed, the Work) required for the Project and (ii) the minimum number of days the Proposer priced in its Lump Sum Amount for performing the Work in accordance with the GPR Section 26.3.

General

Enter only the information requested in the non-shaded areas.

Borough Based Jail Program

Contract Price - Form J-1

NYC Department of Design and Construction

Manhattan Dismantle and Swing Space

DATE
<Proposer Name>

| CONTRACT PRICE | | TBD | Includes Allowance Amount | | |
|---|----------|------------|--------------------------------------|-------------|---|
| LUMP SUM AMOUNT | 1 | TBD | Not to Exceed \$TBD | | |
| Dismantle - Above Street level | 1.1 | | to be filled by DB. See Instructions | | |
| Dismantle - Below Street level | 1.2 | | to be filled by DB. See Instructions | | |
| Swing Space + Sally Port | 1.3 | | to be filled by DB. See Instructions | | |
| Excavation | 1.4 | | to be filled by DB. See Instructions | | |
| Environmental | 1.5 | | to be filled by DB. See Instructions | | |
| Design | 1.6 | | to be filled by DB. See Instructions | | |
| QAQC | 1.7 | | to be filled by DB. See Instructions | | |
| General Conditions | 1.8 | | to be filled by DB. See Instructions | | |
| Insurance | 1.9 | | to be filled by DB. See Instructions | | |
| Multiplier for Extra Design Work | | | | | |
| Multiplier for Overhead and Profit for Extra Design Work | 1.10 | | | | |
| ALLOWANCES | 2 | TBD | A+B+C+D+E+F+G+H | | |
| Compensable Relief Event | A | TBD | | | |
| Unit Price Work (GPR Section 26.3) | B | TBD | Unit Price | Unit | Base Quantity included in Lump Sum Amount (Part 1) |
| Boulder Rock Excavation Unit Price | B1 | | | Tons | |
| Dewatering Unit Price | B2 | | | Days | |
| Hazardous Material Abatement Unit Price | B3 | | | | |
| Asbestos Containing Material Abatement Unit Price (acoustical plaster) | B3.1 | | | SF | |
| Asbestos Containing Material Abatement Unit Price (pipe insulation) | B3.2 | | | LF | |
| Asbestos Containing Material Abatement Unit Price (ductwork insulation) | B3.3 | | | SF | |
| Asbestos Containing Material Abatement Unit Price (floor covering & mastic) | B3.4 | | | SF | |
| Asbestos Containing Material Abatement Unit Price (sealant at window and doors) | B3.5 | | | LF | |
| Asbestos Containing Material Abatement Unit Price (tar on walls, parapet, roof, etc) | B3.6 | | | SF | |
| Asbestos Containing Material Abatement Unit Price (roofing materials) | B3.7 | | | SF | |
| Asbestos Containing Material Abatement Unit Price (roofing flashing and expansion joints) | B3.8 | | | LF | |
| Backfill Unit Price | B4 | | | CY | |
| Extended Temporary Maintenance of Site | B5 | | | Days | |
| Escalation Items (GPR Section 26.4) | C | TBD | | | |
| Early Completion Incentive (GPR Section 26.5) | D | TBD | | | |
| CFIA Furniture, Fixtures and Equipment (GPR Section 26.6) | E | TBD | | | |
| License Fee for Access to Adjacent Properties (GPR Section 26.7) | F | TBD | | | |
| Percent for Art (GPR Section 25) | G | TBD | | | |
| Archeological Survey (GPR Section 26.8) | H | TBD | | | |

*[] Bracketed Budgets shown for information only, subject to change

Notes for Schedule of Values Template (J-2) - DDC BBJ Manhattan Dismantle and Swing Space

Tab 2 is intended to convey the desired presentation format to the Proposer. No formulas are included.

The information to be submitted in Form J-2 of the Proposal should reflect the costs for the Manhattan Dismantle and Swing Space, including approved Alternative Technical Concepts.

There are two (2) separate tabs:

Tab 1) Notes - J-2

Tab 2) Schedule of Values - J-2

The 'Schedule of Values' tab contains columns for each of the Project Elements/Sub-Elements

The Descriptions of construction items are organized by Unifomat codes

The 'Schedule of Values' tab contains line items for Design and Construction for each of the Project Elements/Sub-Elements

Rows are provided for:

- A) Subtotal Construction for Project Elements/Sub-Elements
- B) General Requirements
- C) Subtotal Direct
- D) Bonds (e.g. Performance and Payment)
- E) Insurance (e.g. General Liability and Builder's Risk)
- F) Total Construction
- G) Total Design (including Engineering)
- H) Total Design and Construction

The "Schedule of Values - J-2" format corresponds to Exhibit E-3, Form J-2

General

Describe the basis for the Schedule of Values and any estimates used in its preparation

Describe assumptions and basis for allowances utilized

Describe additional detail regarding Design (including Engineering and Architecture) components - i.e. including the periods prior to contract award and separately, through completion of construction

Describe additional detail regarding Other Design and Construction Related Items

Provide additional detail on backup sheets as necessary to fully describe the content of the Schedule of Values

Provide Direct cost information in 2022 Dollars.

| | | | |
|--|--|--|------------------------------|
| Borough-Based Jails Program | | | DATE |
| Schedule of Values - Form J-2 | | | <Proposer Name> |
| NYC Department of Design and Construction | | | |
| Manhattan Dismantle & Swing Space | | | |

| |
|---|
| TOTAL LUMP SUM AMOUNT Summary by Project Elements (Using UniFormat Classification) |
|---|

| DESCRIPTION | VALUE (\$) |
|--|------------|
| A- SUBSTRUCTURE | |
| A20 BASEMENT CONSTRUCTION | |
| A2010 Basement Excavation | |
| A2020.1 Construction Dewatering | |
| A2020.2 Excavation Support | |
| C- INTERIORS | |
| C10 INTERIOR CONSTRUCTION | |
| C1020 Interior Doors | |
| C1020.1 Doors and Door Frames | |
| C1020.2 Door Hardware | |
| C1020.4 Electric Doors | |
| D- SERVICES | |
| D50 ELECTRICAL | |
| D5010 Electrical Service and Distribution | |
| D5010.2 Service and Distribution | |
| D5010.3 Basic Materials and Methods | |
| D5020 Lighting and Branch Wiring | |
| D5020.1 Branch Wiring System | |
| D5030 Communications & Security | |
| D5030.1 General Requirements | |
| D5030.2 Identification for Data Transmission Systems | |
| D5030.3 Telecommunications Rooms and Spaces | |
| D5030.4 Copper Backbone Cabling | |
| D5030.5 Fiber Backbone Cabling | |
| D5030.6 Copper Horizontal Cabling | |
| D5030.7 Faceplates and Connectors | |
| D5030.8 Pathways for Communications Systems | |
| D5030.9 Electronic Security Systems - General Requirements | |
| D5030.10 Electronic Security Systems - Monitoring and Control | |
| D5030.11 Electronic Security Systems - Video Surveillance System | |
| D5030.13 Electronic Security Systems - Access Control System | |
| D5090 Other Electrical Systems | |
| D5090.1 Lighting Controls | |
| D5090.2 Exterior Area Lighting | |
| F- SPECIAL CONSTRUCTION & DEMOLITION | |
| F20 SELECTIVE BUILDING DEMOLITION | |
| F2010 Building Elements Demolition | |
| F2010.1 General Requirements | |
| G- BUILDING SITEWORK | |
| G10 SITE PREPARATION | |
| G1020 Site Demolition and Relocations | |
| G1020.1 General Requirements | |
| G1030 Site Earthwork | |

| | | | |
|--|--|--|------------------------------|
| Borough-Based Jails Program | | | DATE |
| Schedule of Values - Form J-2 | | | <Proposer Name> |
| NYC Department of Design and Construction | | | |
| Manhattan Dismantle & Swing Space | | | |

| |
|---|
| TOTAL LUMP SUM AMOUNT Summary by Project Elements (Using UniFormat Classification) |
|---|

| DESCRIPTION | VALUE (\$) |
|--|-----------------------|
| G1030.1 General Requirements | |
| G20 SITE IMPROVEMENTS | |
| G2010 Roadways | |
| G2010.03 Asphalt Paving | |
| G2010.05 Reflectorized Pavements Markings | |
| G2040 Site Development | |
| G2040.04 Site Structures | |
| G2040.1 Exterior Identification Devices | |
| G40 SITE ELECTRICAL UTILITIES | |
| G4090 Other Site Electrical Utilities | |
| G4090.1 Ice Melting System | |
| SUBTOTAL | A = SUM(ABOVE) |
| Z GENERAL REQUIREMENTS (except as itemized below) | B |
| SUBTOTAL DIRECT (2021 Dollars) | C = A + B |
| Z1070 Mobilization (except Bonds and Insurance as itemized below) | D |
| Z70 Bonds - e.g. Performance and Payment | E |
| Z70 Insurance - e.g. General Liability and Builder's Risk | F |
| TOTAL MOBILIZATION | G = D + E + F |
| TOTAL CONSTRUCTION | H = C + G |
| Design (includes Engineering, Architecture, and Overhead) | |
| TOTAL DESIGN | I |
| TOTAL DESIGN AND CONSTRUCTION COST (LUMP SUM AMOUNT) | J = H + I |

APPENDIX I

Form Stipend Agreement

Stipend Agreement

This Stipend Agreement (this "**Agreement**") is entered into as of *[insert date]*:

Between:

- (1) The City of New York, a municipal corporation organized under the Laws of the State of New York (the "**City**") acting by and through the City's Department of Design and Construction (the "**DDC**"), a department of the City of New York, a political subdivision of the State of New York; and
 - (2) [●] (the "**Proposer**"),
- (each a "**Party**" and, together, the "**Parties**").

Recitals:

- (A) The Proposer is one of the Shortlisted Respondents eligible to submit a Proposal for the Manhattan Dismantle and Swing Space (the "**Project**").
- (B) The Proposer is concurrently submitting a Proposal in response to the Request for Proposals for the Project issued by the DDC on *[insert RFP release date]*: (as amended, the "**RFP**") in accordance with the Instructions to Proposers included as Volume 0 of the RFP (the "**ITP**").
- (C) The ITP provides for the execution and delivery of this Stipend Agreement between the DDC and the Proposer.

The Parties agree as follows:

1. **Defined Terms**

Capitalized terms not otherwise defined in this Agreement have the meanings given to those terms in the ITP.

2. **Services and Performance**

- 2.1 By executing this Agreement, and subject to invoicing the DDC in accordance with Section 3.3 (*Compensation and Payment*), the Proposer has irrevocably elected to accept payment of a Stipend, subject to the terms of this Agreement and the ITP.
- 2.2 The DDC retains the Proposer to actively participate in good faith in the RFP Process and to prepare a responsive Proposal in response to the RFP. The DDC will determine the Proposal's responsiveness pursuant to the ITP.
- 2.3 All Work Product, including Proposals, submitted by the Proposer will become the property of the City upon the Work Product's delivery to the DDC.

The City will have, without any further action required by any Person, an unrestricted fully paid-up, royalty-free, non-exclusive, irrevocable, perpetual license (with the right to sub-license) to use all Work Product submitted by the Proposer in the performance of any of the City's functions, including (i) to disclose to the Selected Proposer the Proposer's Work Product and (ii) incorporating any

Work Product or related concepts into the Contract Documents or any subsequent procurement by the City.

- 2.4 The Proposer must deliver its Work Product to the DDC no later than the earlier date of:
- (a) the Proposal Due Date; or
 - (b) 15 days after the DDC notifies the Proposer in writing of the cancellation of the procurement, if the procurement is cancelled prior to the Proposal Due Date.

3. Compensation and Payment

3.1 Subject to the requirements expressly provided in this Agreement and the ITP, including Section 2.9 (*Stipend*) of the ITP, if:

- (a) the DDC cancels the procurement after the issuance of the draft RFP (Version 1), but on or before the Proposal Due Date; or
- (b) the DDC cancels the procurement after the Proposal Due Date without selecting a Selected Proposer; or
- (c) the DDC selects another "Proposer" as the Selected Proposer and:
 - (i) the Closing Date occurs; or
 - (ii) the Closing Date does not occur and the DDC cancels the procurement; or
- (d) the DDC selects the Proposer as the Selected Proposer and either:
 - (i) subsequently cancels the procurement prior to the Closing Date (for any reason not caused by the Selected Proposer); or
 - (ii) revokes the status of the Selected Proposer in accordance with Section 7.8 (*General Right of Revocation*) of the ITP,

the Proposer, will be eligible to receive a Stipend in an amount equal to the Proposer's Eligible Costs, up to a maximum aggregate amount of either (i) the lump sum amount specified in Section 3.2, below, if the procurement is canceled in accordance with Section 3.1(a) or (ii) \$TBD for all reasons described in Sections 3.1(b) through 3.1(d) (the "**Stipend Amount**").

3.2 If the procurement is canceled in accordance with Section 3.1(a) above, the following stipend payment schedule applies:

| Schedule of Cancellation Dates | Maximum Stipend Amount |
|--|------------------------|
| Procurement cancellation occurs after CDM #2 but before Interim Design Submittal | \$50,000 |
| Procurement cancellation occurs after Interim Design Submittal but before CDM #3 | \$100,000 |
| Procurement cancellation occurs after CDM #3 | \$133,000 |

- 3.3 To receive a Stipend payment under Section 3.1:
- (a) the Proposer must execute and return this Agreement to the DDC on or prior to the Proposal Due Date as part of the Administrative Proposal;
 - (b) the Proposer must register and create an account in the City's Payee Information Portal (PIP), available at www.nyc.gov/pip¹; and
 - (c) the conditions and requirements in Section 2.9 (*Stipend*) of the ITP must first be satisfied;
 - (d) the Proposer must not be in violation of the terms of the ITP; and
 - (e) the Proposer must timely submit the following to the DDC:
 - (i) an invoice in the form of (Annex 1) to this Agreement; and
 - (ii) copies of documentation evidencing the Proposer's Eligible Costs claimed for reasonable review and approval by the DDC, all of which to be submitted to the DDC within ninety days after receiving notice from the DDC of the applicable circumstance referred to in Section 3.1.
- 3.4 Any Stipend Amount payable pursuant to this Agreement will become due and payable no later than ninety days after the date the Proposer submits to the DDC the invoice and other documentation complying with the requirements of this Agreement and the DDC has approved such invoice and documentation as compliant with the requirements under this Agreement and the ITP.
- 3.5 Except as otherwise expressly provided in this Agreement and Section 2.9 (*Stipend*) of the ITP, the Proposer will not be entitled to reimbursement of any of its costs in connection with the RFP.
- 3.6 If the DDC selects the Proposer as the Selected Proposer and the Closing Date occurs or the Proposer's status as the Selected Proposer is revoked in accordance with Section 7.9 (*Revocation of Selected Proposer Status for Non-Compliance*) of the ITP, the Proposer will not be entitled to a Stipend or other compensation under this Agreement or the ITP.
- 3.7 Failure to deliver the invoice within the time period specified above will be deemed a rejection of the Stipend.
- 3.8 The Stipend is subject to registration of this Stipend Agreement pursuant to section 328 of the City Charter and appropriation of funds for any payment of the Stipend under Applicable Law.
- 3.9 The DDC retains the right to unilaterally deduct from the Stipend Amount any costs incurred by the DDC that may arise from a claim, dispute or denied protest by the Proposer in respect of this RFP or the RFP Process.

¹ In order to use the PIP system, a PIP account will be required. Detailed instructions on creating a PIP account and using the PIP system are also available at www.nyc.gov/pip. Additional assistance with PIP may be obtained by completing and submitting the Contact Form to the City's Mayor's Office Contract Services, available at <https://www1.nyc.gov/site/mocs/legal-forms/payee-information-portal-pip.page>

4. **Intentionally Omitted**

5. **Indemnities**

5.1 Subject to Section 5.2, the Proposer must indemnify, defend, and hold harmless the City, its officials, employees, agents and authorized representatives in connection with this Project (the “**Indemnified Parties**”) from all claims, losses, damages, costs, judgments, fees, penalties, charges, or expenses (including reasonable and documented attorneys' fees and costs) asserted, incurred, suffered or awarded as a result of any third party claims, suits, actions or allegations of infringement, confidential information, domestic or foreign patent rights, copyrights, intellectual property rights, moral rights, trade secrets, proprietary rights, licensing rights and unauthorized use relating to the Work Product and arising out of or caused by any acts or omissions, negligence, fault, intentional tortious act, violation of law or breach of the ITP or this Agreement by the Proposer or any Person on its DB Team.

5.2 The Proposer will not be liable under Section 5.1 for damages arising out of injury or damage to persons or property directly caused by or resulting from the sole negligence or intentional tortious act of an Indemnified Party.

6. **Assignment**

6.1 The Proposer cannot assign, transfer, pledge, sell, or otherwise convey this Agreement without the DDC's prior written consent, in its sole discretion. Any assignment without the required consent of the DDC will be null and void and may, in the DDC's sole discretion, disqualify the Proposer from further consideration for the RFP Process and the Project.

6.2 The DDC may assign, transfer, pledge, or otherwise convey this Agreement:

- (a) without the Proposer's consent, to any Person that succeeds to the governmental powers and authority of the DDC; and
- (b) to others, with the Proposer's prior written consent.

Where consent is required but not given, any assignment of this Agreement will be void.

7. **Miscellaneous**

7.1 **No Agent or Employee**

The Proposer and the DDC agree that the Proposer and the members of its DB Team and their respective employees are not employees, agents or representatives of the DDC or its Associates as a result of this Agreement.

7.2 **Entire Agreement**

This Agreement, together with the ITP, embodies the entire agreement of the Parties with respect to the subject matter of this Agreement and supersedes all prior agreements, understandings, statements, representations and negotiations between the Parties with respect to their subject matter.

7.3 Severability

The invalidity or unenforceability of any clause, provision, Article, Section, subsection or part will not affect the validity or enforceability of the balance of this Agreement, which will be construed and enforced as if this Agreement did not contain the invalid or unenforceable clause, provision, Article, Section, subsection or part.

7.4 Interpretation

The words "including", "includes" and "include" mean "including, without limitation", "includes, without limitation" and "include, without limitation", respectively. In this Agreement, a reference to a singular word includes the plural and vice versa (as the context may require). All words used in any gender will extend to and include all genders.

7.5 Governing Law

This Agreement will be governed by and construed in accordance with the laws of the State of New York, without regard to its choice of law provisions.

7.6 Submission to Jurisdiction and Litigation

The Proposer consents to the exclusive jurisdiction and venue of any court of competent jurisdiction sitting in the City and County of New York, and any appellate court thereof, waiving any claim or defense that this forum is not convenient or proper. The Proposer agrees that any of these courts will have personal jurisdiction over it, and consents to service of process in any manner authorized by Applicable Law.

7.7 Jury Waiver

EACH PARTY WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, ANY RIGHT THAT IT MAY HAVE TO A JURY TRIAL IN RESPECT OF ANY CLAIM, CAUSE OF ACTION OR OTHER PROCEEDING IN CONNECTION WITH THIS AGREEMENT OR ANY TRANSACTION CONTEMPLATED BY THIS AGREEMENT.

7.8 Survival

Sections 5.1, 7.5, 7.6, 7.7, and 7.8 will survive the expiration or termination of this Agreement.

7.9 Counterparts

This Agreement may be executed in one or more counterparts, each of which will be deemed an original, but all of which will constitute one and the same instrument.

[SIGNATURE PAGE FOLLOWS]

The Parties have signed this Agreement on the date stated in the introductory clause.

[PROPOSER]

By: _____

Name: _____

Title: _____

**THE NEW YORK CITY DEPARTMENT OF
DESIGN AND CONSTRUCTION**

By: _____

Name: _____

Title: _____

Annex 1

Form of Invoice for Payment of Stipend Amount

Reference is made to the Instructions to Proposers (the "**ITP**") related to the Request for Proposals for the Manhattan Dismantle and Swing Space (the "**Project**") issued on [DATE] by the New York City Department of Design and Construction (the "**DDC**").

Reference is also made to the Stipend Agreement (the "**Stipend Agreement**") dated [●], 2020, between the DDC and [●] (the "**Proposer**").

Capitalized terms not otherwise defined in this invoice will have the meanings set out in the Stipend Agreement.

Pursuant to Section 2.9 (*Stipend*) of the ITP and the Stipend Agreement, the Proposer requests payment of [●] U.S. dollars (\$[●]), reflecting the lesser of (a) the Stipend Amount and (b) the Proposer's Eligible Costs.

Attached to this invoice is supporting documentation for the Proposer's Eligible Costs.

The Proposer represents and warrants to the DDC that the Proposer is eligible for payment pursuant to Section 2.9 (*Stipend*) of the ITP and the Stipend Agreement.

The Proposer acknowledges that submission of this invoice, and payment by the DDC of any amount in response to this invoice, is in all respects subject to the terms and conditions of the ITP and the Stipend Agreement.

CERTIFICATION

The Proposer certifies that:

(a) the Proposer is entitled to payment of the Stipend pursuant to the terms of the ITP and the Stipend Agreement; and

(b) this entire invoice and all other supporting documentation are each, and collectively, true, correct and complete.

Proposer: _____

By: _____

Name: _____

Title: _____