

SEPTEMBER 2023
PROJECT ID: BBJ-MFAC



Department of
Design and
Construction



Request for Qualification

NYC Borough-Based Jails Program
A Design-Build Program

MN

Manhattan Facility

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1. Introduction To the Borough-Based Jails Program

1.1 Purpose

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. This Request for Qualifications (“**RFQ**”), the first step in the procurement process, will shortlist Design-Build firms who will receive the RFP for the Manhattan Facility. This facility is one of four jails being implemented by the City of New York in four Boroughs as the Borough-Based Jails Program (the “**BBJ Program**”). The Brooklyn Facility has been awarded while the Queens and the Bronx Facilities are now in the in-market and advancing toward selection and award. The project description for the Manhattan Facility is enclosed at Appendix C (*Project Description*) and includes the Design-Builder’s responsibilities. The Request for Proposal (“**RFP**”) that is the second step in the procurement process, will ask the shortlisted firms to propose a design, schedule, and initial target price consistent with the requirement documents. The City will select the proposer based on these parameters that in combination provide the Best Value.

This RFQ is issued by the Department of Design and Construction (“**DDC**”) on behalf of the sponsor agencies including the Mayor’s Office of Criminal Justice (“**MOCJ**”), the Department of Correction (“**DOC**”) and NYC Health + Hospitals/Correctional Health Services (“**CHS**”) 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*).

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 weight, is provided in Section 5. Submissions will be evaluated based on overall best value. Detailed submission instructions for Proposers submitting statements of qualifications (“**Statements of Qualifications**” or “**SOQs**”) are set forth in Section 4.

1.2 BBJ Program Goals

Consistent with DDC’s general goals and objectives for the BBJ Program, the goals and objectives for the Manhattan Facility are listed below (the “**Program Goals**”).

- (a) The design and construction of the new Facilities must be grounded in dignity and respect through offering spaces dedicated to promoting better connections to families, attorneys, courts, medical and mental health care, education, therapeutic programming, and service providers. These Facilities must enable effective and tailored programming, provide appropriate housing for those with medical and mental health needs, and facilitate enhanced opportunities for stable reentry into the community.
- (b) The design and construction of the new Facilities and related projects of the BBJ Program must provide a safe, humane, secure, and efficient environment for all those who work, visit, or are in custody within these Facilities.

- (c) The design and construction of the new Facilities and related projects must be beacons of exemplary public architecture that thoughtfully respond to the urban context, contribute positively to the character of the surrounding neighborhood and streetscape, and serve as civic assets for all New Yorkers.
- (d) The design and construction of the new Facilities must strive to relate to the city it is in and create a sense of place for the citizens it serves. As good civic architecture, the Facilities must be welcoming and inclusive, serving all regardless of ability, race, creed, or gender. The Facilities must embody a generative spirit that does not stagnate on a fixed identity and is uplifting rather than authoritative, empowering the people and community it serves.
- (e) The provision of exceptional design based on the thoughtful engagement with City agencies and community partners.
- (f) The construction and related operations must minimize impacts to neighboring properties and facilities and the community at large; achieve dust and noise mitigation standards that exceed minimum regulatory thresholds.
- (g) The provision of site safety in and around all project sites.
- (h) The optimization of overall operations and maintenance efficiency.
- (i) Completion of all projects is within budget and on schedule.
- (j) Innovative solutions are proactively implemented to accelerate the Project schedule while controlling cost and maintaining quality and safety.
- (k) The provision of robust minority- and women-owned business enterprise participation.
- (l) The exemplification of the City's principles of Design and Construction Excellence, including excellence in design, construction, and project delivery.

1.3 Role of MOCJ, DOC and CHS

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. 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 be the long-term operator and will manage the Borough-Based Jails. 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.

1.4 Form of Design-Build Agreement

- (a) GMP Design-Build Agreement

The Design-Build Agreement for the Facility will be a not to exceed GMP agreement and will reflect best industry practices. A draft of the GMP Design-Build Agreement is provided with this RFQ attached as Appendix H (*Form of Design-Build Agreement*).

(b) Form of Design-Build Agreement Subject to Change

The draft form of Design-Build Agreement included with this RFQ may be revised by DDC at any time. It is DDC's intention to discuss the Design-Build Agreement with each Shortlisted Proposer through collaborative dialogue meetings and written requests for information throughout the RFP period. However, DDC does not anticipate making substantive changes to the draft Design-Build Agreement as a result of any written requests or collaboration dialogue meetings.

(c) Insurance and Bonding

Preliminary information regarding insurance and bonding that will be required for the Facility is set forth in Appendix H (*Form of Design-Build Agreement*). Detailed requirements will be set forth in the RFP. DDC will require the Selected Proposer to provide evidence of insurance by certified copy of complete policy or policies endorsed, or certificates of such insurance.

1.5 Project Information

A high-level description of the Facility is set forth in Appendix C (*Project Description*).

This RFQ is being issued concurrently with finalization of the Scope of Work for the Facility. 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 Facilities, please visit: [City of New York: Rikers](#)

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: [NYC Office of Environmental Coordination: Project Information](#)

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*).

1.6 Other BBJ Design-Build Procurements

Proposers or Persons participating in the procurements for other Facilities projects under the BBJ are not precluded from participating in this solicitation.

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2. Procurement Process

2.1 Purpose & Overview

- (a) DDC seeks Proposers who are qualified to undertake the complete design and construction work for the Project. As described further below, SOQs will only be accepted from Proposers intending to provide all required services for the Project.
- (b) RFQ schedule for the Project is set out in Section 2.5 (*RFQ Procurement Schedule*). Additionally, a high-level procurement schedule is included in Appendix F (*Draft Request for Proposals Information*).

2.2 RFQ

- (a) SOQ Submission

Qualified Proposers that wish to be Shortlisted under this RFQ, must submit their SOQ by the SOQ Due Date (see section 2.5) in order to be eligible for shortlisting.

- (b) Shortlist

DDC intends to issue the Shortlist for the Project in accordance with the procurement schedule described in Section 2.1(b) (*Purpose & Overview*). DDC intends to shortlist up to the three most highly qualified Proposers.

2.3 RFP

- (a) RFP Participation

DDC will issue the RFP to the Shortlisted Proposers only.

- (b) Collaborative Dialogue Meetings (CDM)

Shortlisted Proposers will have the opportunity to engage in collaborative dialogue meetings with the City to discuss comments and innovations to the RFP throughout the RFP process.

- (c) Specific Project Requirements

As part of the RFP, the City intends to issue Specific Project Requirements which include Design Guidelines, the building program, basis of design, room data sheets, and specifications.

Indicative Documents, as defined in Appendix A (*Abbreviations and Definitions*), will be provided in the available documents. These documents shall provide a schematic concept that addresses the Sponsor Agencies' operational and programmatic scope for the original 886 bed program.

While the documents are intended to address the goals noted above, the Design-Builder shall bring creativity and innovation into developing their own solution and will be fully responsible for their proposal's design and construction. The Indicative Documents' schematic concept when described using traditional design phases will vary between schematic design and design development.

- (d) Selected Proposer

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

(e) Additional RFP Information

Additional information pertaining to the RFP process is described in Appendix F (*Draft Request for Proposals 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

A stipend amount of not more than \$6,000,000.00 (Six Million Dollars) will be available to responsive and responsible Proposers that do not enter into the Design-Build Agreement solely at the RFP stage. Submission of a responsible and 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 RFQ Procurement Schedule

Pre-Submission Conference (via Teams) ¹	September 27, 2023
RFQ RFIs Due	November 13, 2023
Register w/ PASSPort No Later	November 15, 2023
Final Response to RFIs	November 30, 2023
Statements of Qualification Due	December 15, 2023
Shortlisted Teams Announced	1 st Quarter 2024
Issue RFP	1 st Quarter 2024

¹

Please visit the following Teams Link to attend the Pre-submission Conference. RSVP is not required:
Conference link: [Click here to join the meeting](#)

3. RFQ General Instructions

3.1 Conflicts of Interest

(a) Conflicts of Interest

DB Teams are required to disclose all known or potential Conflicts of Interest in their SOQs in accordance with Section 4.5(a)(xii) (*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 Design-Build Teams

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

(c) Communication Between Design-Build Teams

After the Shortlist is announced, neither a Proposer nor any of its DB Team members or participants may communicate with another Proposer or members or participants of another DB Team with regard to this procurement. Notwithstanding such general prohibition, where a DB Team 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 DB Teams or share any information as it pertains to either DB Team, then:

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

3.2 Rules of Contact

The following rules of contact shall apply during the procurement process, which began upon public issuance of this RFQ and will be completed with the execution of the Design-Build Agreement. The rules are designed to promote a fair, unbiased, legally defensible procurement process for the BBJ Program. 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, Kimberly Anne Acham, at:

NYCBBJ@DDC.NYC.gov

Questions must be submitted via the link below:

[\[https://tinyurl.com/MN-FAC-RFQ-RFI\]](https://tinyurl.com/MN-FAC-RFQ-RFI)

(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 RFQ and RFP periods (the "**Proposer's Designated Representative**").

(c) Meetings Exception

Communications between a DB Team and DDC's team or staff and the Consultant Support Team is allowed during any CDM, joint workshops and/or meetings organized by DDC during RFQ and RFP periods.

(d) No Contact or Lobbying Permitted

Except as expressly provided in Section 3.1(b) (*Conflicts Between Design-Build Teams*) and 3.1(c) (*Communication Between Design-Build Teams*) above, neither a Proposer nor its DB Team members or participants, 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 participants and their respective representatives, advisors and agents must refrain from any and all lobbying of any governmental official related to the BBJ during RFQ or RFP periods.

(e) Improper Communication

Any contact by a Proposer or DB Team member, a participant or their respective representatives, advisors or agents 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 RFQ Phase of this procurement will be posted on DDC's website: <https://www.nyc.gov/site/ddc/contracts/designbuild.page>.

<https://ddcanywhere.nyc/>

DB Teams 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 Requests for Information (RFIs)

- (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 DB Team'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 to this procurement) will be considered.
- (c) Deadline

DDC is under no obligation to address or respond to any RFIs received after 12:00 P.M. (Noon) Eastern Time (ET) on the deadline for RFIs specified in Section 2.5 (*RFQ Procurement Schedule*).
- (d) Responses

Responses to RFIs 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 no later than the date indicated in Section 2.5 (RFQ *Procurement Schedule*).

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 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.

3.7 Notification of Firms on the Shortlist

Each DB Team will be notified officially in writing whether it has been selected for the Shortlist. The Shortlist will be posted on DDC's website after all Shortlisted Proposers have been notified. Shortlist notifications may be expected no later than the date specified in Section 2.5 (RFQ *Procurement Schedule*).

A DB Team's shortlisting does not represent a finding of responsibility with respect to the Proposer or any member of its DB Team. Between the time of shortlisting and award of the Design-Build Agreement, ACCO may determine that a Shortlisted Proposer is not

responsible, and as such, should be removed from the Shortlist 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 Design-Build Agreement.

3.8 Changes in Design-Build Team

(a) DB Team to Remain Intact

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 the procurement and the resulting Design-Build Agreement. Any changes in Major Participants or Key Personnel during the RFP process of the Procurement must be requested in accordance with Section 3.8(b).

(b) RFP DB Team Changes

A Shortlisted 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 Design-Build Agreement.

During the RFP process, requests for changes to the Proposer's DB Team must be made in writing no later than the date listed in the procurement schedule in the applicable RFP. Requests by Shortlisted 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.

3.9 Exclusivity

Due to the limited number of qualified firms in each of the following categories of providers, Subcontractors or suppliers, no DB Team may have an exclusive arrangement with any firm within each of the following categories:

- (a) Physical and detention security suppliers and installers; and
- (b) Concrete Subcontractors, including suppliers of concrete materials.

This Section 3.9 does not apply to Subcontractors providing design services.

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4. SOQ Submission Requirements

4.1 Submittal Requirements

(a) Deadline

All SOQs must be received electronically at the location, set forth in Section 4.2 (*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, DB Team name, designated representative, and date of submittal, as set forth below.

(c) Contents of Proposal Submission

The proposer's submissions must consist of the following two files and must be labeled in accordance with Section 4.3 (*Page Limit and Format*).

(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://www.nyc.gov/site/mocs/passport/about-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 Shortlisted Proposers will be required to submit the online disclosure application as a joint venture.

4.2 Submission Portal

SOQs shall be submitted electronically at the link below.

Upload Link: <https://ddcnyc.app.box.com/f/ace7c2535bcc4e6b9fda113dbfa56417>

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

(a) DDC's Designated Representative

Kimberly Anne Acham (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.

4.3 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 be 1) (i) an Adobe Acrobat PDF file format, (ii) readable and not corrupt and (iii) combined in one file and bookmarked, and 2) labeled as follows:

[Proposer's Name] SOQ [MM.DD.YY of due date] for NYC BBJ Manhattan Facility

(c) Format of Materials

Except as permitted in Section 4.7(b)(i), 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, EIN, contact person's name, telephone number, e-mail, and fax number, if applicable, and contact information of person able to contractually bind Proposer. 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 bookmarked 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.

4.4 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.

4.5 Fundamental Qualifications (Pass/Fail)

The purpose of Pass/Fail evaluation is to establish the fundamental qualifications of each Proposer, including team structure, level of commitment to the Program Goals, workforce/resource capacity, insurance, and bonding capacity to meet the expected requirements for the Manhattan Facility, employment practices, and teaming agreements. Satisfaction of these fundamental qualifications are necessary to meet the pass/fail criteria described in Section 5.4 (*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:
 - 1) Identification and full contact information for the person(s) authorized to contractually bind the Proposer;
 - 2) E-mail addresses for the Proposer's Designated Representative and up to two additional points of contact. Correspondence related to the RFQ will be delivered to these e-mail addresses only.
 - 3) 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 Shortlist announcement on its website.
- (ii) **Acknowledgment of receipt of Addenda.** List the Addendum number and date issued and attach each Addendum cover page signed by the Proposer, using the form provided in Appendix E-12 (*Acknowledgement of Addenda Form*). The entire Addendum should not 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) **Letter from Surety.** Submit a letter from the Proposer's surety, acknowledging the surety's awareness of the Proposer's participation in the solicitation for the Project and identifying the Proposer's or each Principal Participant's available bonding capacity. The letter should also acknowledge the surety's willingness to participate in discussion, if any, relating to bonding requirements for the Projects and surety's willingness to provide the bonds for the Proposer in connection with the Project as agreed to during the RFP period. If available, the Proposer should provide a potential solution to meet the anticipated bond requirements as stated in Appendix H (*Form of Design-Build Agreement*) the provides the best protection for the City. DDC recognizes that large, unique design-build projects, such as the BBJ Facilities may require creative solutions to meet bonding coverage requirements. DDC is considering all options, including phased bonding, and will discuss specific solutions with the ShortListed Proposers. Surety requirements include:
 - 1) the surety company or companies providing the 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
 - 2) 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.
- (viii) **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 DDC to determine whether the future organization will be legally capable of entering into a Design-Build Agreement and to meet applicable requirements once it is formed. Prior to the 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.
- (ix) **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.

- (x) **Safety Questionnaire.** Provide a completed Safety Questionnaire. Use the form provided in Appendix E-4 (*Safety Questionnaire*). Any Experience Modification Rate greater than 1.1 may be considered non-responsive.
- (xi) **Financial Questionnaire.** Provide a completed Financial Questionnaire. Minimum requirements for gross revenue and working capital are noted in the Financial Questionnaire. Use the form provided in Appendix E-5 (*Financial Questionnaire*).
- (xii) **Conflicts of Interest.** Provide a description of any known or potential Conflicts of Interest.

4.6 Project Past Performance/Experience (Tab 1)

The following information is to be provided in Tab 1 and will be evaluated by the section committee.

(a) Project Past Performance/Experience Evaluation Criteria

(i) Recent and Relevant Project Experience

“Relevant Projects” are defined as those projects included in the SOQ Tab 1 which satisfy each of the “Required Experience” from Section 4.6(b)(i) plus at least one of the “Desirable Experience” criteria established in Section 4.6(b)(ii) below and which help demonstrate the Proposer’s and its DB Team member’s capability of delivering the Program 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 or Justice Design 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 within the past 10 years. 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.

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

Proposers must only describe five (5) projects to demonstrate satisfactory Required Experience and Desirable Experience using the Project Profile Form found in Appendix E-6 (*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 Builder must show prior experience in successfully completing at least one DB project and at least one urban, High-Rise project. The Designer of Record (Firm) must show prior experience of successful participation in at least one DB project and at least one urban, High-Rise project. Projects identified for Required Experience must also show:

- a contract value of at least \$500 Million or at least 300,000 GSF;
- interface with multiple stakeholders, including the community and regulatory agencies and/or significant third parties operating in and around the applicable facility’s site.

(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 have one or more:

- excellence in design, construction and project delivery;
- a secure facility, demonstrating innovative and modern design consistent with the Program Goals;
- a complex mission critical institutional facility;

- a mixed-use urban, High-Rise construction (greater than 10 stories);
- complex construction on a severely constrained project site;
- environmental sustainability with durable and innovative construction and LEED Gold rating;
- use of GMP contract form;
- experience working in New York City

(c) Project Evaluation Forms

For every Project Profile Form (Appendix E-6 (*Project Profile Form*)) included in Tab 1, Proposers must include a Project Evaluation Form (Appendix E-7 (*Vendor Evaluation Form*)) following the Project Profile Form (Appendix E-6 (*Project Profile Form*)).

Include only one form for each project. 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-8 (*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-9 (*Project Relevancy Form*), which demonstrate that the project profiles included in the submission are relevant to the Program Goals and that each project profiled satisfies the "Required Experience" and "Desirable Experience" criteria.

4.7 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.

(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, Appendix E-11, will be viewed more favorably, than those with less.

(b) Submission Requirements

(i) Team Introduction and Organization Chart

Provide a narrative clearly identifying Major Participants and introducing Key Personnel and provide an organization chart showing the team structure and relationship. There is no role requirement for the leadership of the team. The organizational chart may be presented on one (1) 11"x17" page.

(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-10 (*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, Women in Architecture, 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-11 (*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 on the Facility 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 for committing all necessary resources and resolving potential conflicts. Identify percentage of time devoted to this Project.	N/A	Twenty (20) years of design or construction experience, including Design-Build projects.
2	Design Lead (Individual)	The Design Lead is directly responsible for the oversight, quality, creativity, and delivery of the Project. The Design Lead may also serve as the Designer of Record 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").	Twenty (20) years of experience in construction projects, including complex multistory buildings in urban environments.
3	Designer of Record	The architect who collaborates with the Design Lead to provide Construction Documents necessary to obtain building permits and whose name appears on said permits. The Designer of Record may also serve as the Design Lead, if they meet the qualification for both.	Registered Architect	Twenty (20) years of experience in Relevant Projects. Experience in complex construction 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 Design-Builder and the City.	Degree in Construction Management, Construction Science or Architecture / Engineering	Twenty (20) years of experience in construction and construction management projects with Relevant Projects. Demonstrate satisfactory experience to manage and control the design and construction.

Number	Title	Role	Education/ Certification	Preferred Experience
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. Also responsible for organizing multi-disciplinary and integrated design and construction task forces to coordinate the work.	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").	Fifteen (15) years of experience in design, construction, and construction management projects with Relevant Projects. Must have experience on a large design-build project.
6	Chief Estimator	Responsible for providing open book estimates in concert with DDC.	N/A	Ten (10) years of relevant experience.
7	Project Scheduler	Responsible for maintaining the Project design and construction schedule and generating earned value progress reports.	N/A	Ten (10) years of relevant experience.
8	Detention Specialist	This individual must have technical expertise in and will be responsible for ensuring that the layout, and design of the detention facility comply with applicable security requirements.	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 planning and design of detention facilities. In addition, experience in planning or design of medical and mental health facilities or programs. Experience with innovative and modern facilities consistent with the Program Goals will be given greater weight than traditional detention facilities.
9	Structural Engineer	This individual will be responsible for structural engineering.	New York Licensed Professional Engineer	Ten (10) years of experience designing structural systems for Relevant Projects. Experience with High Rise building standards is required.

Number	Title	Role	Education/ Certification	Preferred Experience
10	MEP Engineer	This individual will be responsible for MEP Engineering	New York Licensed Professional Engineer	Ten (10) years of experience designing MEP systems for Relevant Projects. Experience with High Rise building, and medium/low voltage systems is required.
11	Design-Build Construction 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.
12	Design-Build Safety Officer	Responsible for site wide health and safety of the workers as well as the surrounding community. Must report directly to the Design-Build Project Executive and be given sufficient authority to oversee and implement health and safety.	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.
13	Design-Build 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 <https://www.op.nysed.gov/corporate/introduction>. 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 the Design-Build 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 <https://www.op.nysed.gov/professions-index>.
- (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>

4.8 Design Philosophy 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:

(a) Evaluation Criteria

The City will evaluate how well the Proposer’s SOQ Tab 3 satisfies the submittal requirements in Section 4.8(b) (*Submission Requirements*) below, including the following:

(i) Design Philosophy and Design and Construction Excellence

The Proposer’s design philosophy and approach to achieving Design and Construction Excellence, as defined in Appendix B (*Design and Construction Excellence*), in the context of the Program Goals is fundamental and critical to the success of the BBJ Program.

By providing environments that foster safety and well-being, the Facility must acknowledge and support the humanity of all who work, are detained, visit, or provide services there. The Facility must be dignified and safe, encourage and facilitate interactions characterized by respect. The Facility must offer dedicated spaces and better connections to families, attorneys, courts, medical and mental health care, education, therapeutic programming, and service providers. The design of the Facility must enable effective and tailored

programming, appropriate housing for those with medical, and mental health needs, and an opportunity for a more stable reentry to the community.

For these reasons, the City will evaluate the Proposer's design philosophy and approach to achieving Design and Construction Excellence in design, construction, and project delivery, including with respect to environmental sustainability, and durable and innovative construction, all as further described in Appendix B (*Design and Construction Excellence*).

(ii) Design-Build Management Approach

The City will evaluate the clarity and strength of the overall DB management approach including the organizational structure and execution strategy that achieves the open book approach required to develop the GMP. Explain the DB Team's co-location strategy (if any) during design and how best to have the Design Integrator co-located with the Designers during performance of the Work and operation of the DB Teams and in coordination with DDC and other approval agencies. 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) Design Philosophy and Design and Construction Excellence

Submit a detailed narrative describing the Proposer's overall design philosophy with respect to the BBJ and identifying opportunities for the Proposer to achieve Design and Construction Excellence, as described in Appendix B (*Design and Construction Excellence*), in design, construction and project delivery. The proposer's design philosophy should demonstrate its understanding of the Program Goals, as described in Section 1.2 (*BBJ Program Goals*). The Proposer should describe how its design philosophy is incorporated throughout the design development process and how its design philosophy will be manifested in the final project.

(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 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), Design Lead (Individual), and Detention Specialist 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 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.

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5. SOQ Evaluation Process

5.1 Evaluation Objectives

The objective of this RFQ is to create a Shortlist of the most highly qualified DB Teams 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 DB Teams who demonstrate the capability to complete the Work in its entirety for the Project will be considered eligible to be included on a Shortlist. The Design-Builder for the Facility will have primary responsibility to perform all Work necessary to plan, design, construct, manage, control, and commission a fully functional detention facility and to complete the Work for the Facility on, or ahead of, schedule and within the Contract Price. DDC's aspiration for Design and Construction Excellence including its expectations from the Design-Builder is reflected in the qualitative evaluation factors of this RFQ and will also be reflected in the subsequent RFP and the Design-Build Agreement.

5.2 Selection Committee

DDC has established a selection committee, which will be responsible for evaluating the SOQs, shortlisting Proposers, and subsequently evaluating Proposals 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.

5.3 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 5.4 (*Pass/Fail SOQ Evaluation Factors*) and (ii) subsequently evaluating an SOQ against the qualitative evaluation factors in Section 5.5 (*Qualitative Evaluation Factors*). The pass/fail evaluation factors in Section 5.4 (*Pass/Fail SOQ Evaluation Factors*) and the qualitative evaluation factors in Section 5.5 (*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 the City.

(c) Self-Contained SOQ

DB Teams 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 DB Team's SOQ. DB

Teams should not assume that any SOQ reviewer will have previous knowledge of the DB Team, its Major Participants, or its Key Personnel.

5.4 Pass/Fail SOQ Evaluation Factors

Only if a DB Team passes all the following pass/fail evaluations, will it's SOQ be further evaluated using the qualitative evaluation factors detailed in Section 5.5 (*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 DB Team's legal capability to enter into a contractual relationship with DDC and a declaration of willingness to do so;
- (b) Financial
Demonstration of the DB Team's and each Principal Participant's capability to have a sufficient balance sheet to satisfy contingent liabilities under a market-standard Design-Build 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, considering current, committed and potential workload.
 - (i) Any design-builder participating in the other Facility procurements (or if awarded a Facility DBA), must describe its plan to simultaneously perform multiple projects of this size;
- (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 4.5 (*Fundamental Qualifications (Pass/Fail)*) and any "Required Experience" identified in Section 4 (*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 Rules.
- (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 DDC's disqualification of any Proposers.

5.5 Qualitative Evaluation Factors

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

RFQ Weighted Criteria		
Tab	Item Description	Weighting
1	Project Past Performance/Experience	40 percent
2	Design-Build Team Key Personnel Resumes	30 percent
3	Design Philosophy and DB Management Approach	30 percent
	Total	100 percent

5.6 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 the RFQ shortlisting period but reserves the right to do so. If DDC elects to conduct interviews, the Proposers will be notified by e-mail.

5.7 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.
- (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.

5.8 Shortlist Protest

DDC's decision regarding which DB Teams will be included on the Shortlist will be final, 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.

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 Design-Build 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 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 Shortlisted 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 Shortlist. 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 its 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 the 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.

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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 Shortlisted 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 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 RFP Phase or enter into a Design-Build Agreement, nor does it obligate DDC to pay for any costs incurred in preparation and submission of the SOQs or in anticipation of the Design-Build 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 the Design-Build 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 Shortlist any Proposer, issue a subsequent RFP, award, or execute a Design-Build Agreement pursuant to a subsequent RFP; and
- (b) Any obligation to reimburse 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.

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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 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, 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**"); Both Construction and Design Work M/WBE Goals are further broken down as follows: Black American: 10%, Hispanic American: 10%, and Unspecified: 10%
- (v) **Reporting** – similar to the State, DDC anticipates utilizing a digital 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** – DDC plans to utilize the City M/WBE Law for the 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 Design-Build 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 Design-Build Agreement, the City expects 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, 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. 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 Design-Build 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 Program will be subject to a Project Labor Agreement ("PLA"). A copy of the 2021 Design-Build Buildings PLA may be obtained here:

<https://www.nyc.gov/site/mocs/regulations/project-labor-agreements.page>.

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 the Design-Build Agreement execution, all Persons participating in the Design-Build 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 Design-Build 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 RFQ Phase and any subsequent RFP Phase.

9. **Compliance With Applicable Laws**

In connection with this RFQ and the Design-Build 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 Design-Build Agreement.

9.1 **Governing Law**

- (a) The subsequent RFP and the resulting Design-Build Agreements, if any, unless otherwise stated or except as otherwise required to carry-out the requirements in this RFQ, the subsequent RFP or any Design-Build 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://www.nyc.gov/assets/mocs/downloads/Regulations/PPB/PPBRules.pdf>.
- (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. Such modifications and alternative processes are set forth in the Design-Build Agreement, refer to Appendix H (*Form of Design-Build Agreement*).

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 the Design-Build 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 E-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 visit <https://ogs.ny.gov/iran-divestment-act-2012> for additional information concerning the list of entities.

A Proposer will not be Shortlisted if the Proposer fails to submit a signed and verified Bidders Certification. A certification form included in Appendix E-3 (*Iranian Divestment Act*) must be included with the SOQ.

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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.

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Appendix A: Abbreviations and Definitions

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“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 Program”** 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.

“Chief Estimator” is the role and person to fill such role identified in number 6 of the table in Section 4.7(c) (*Description of Key Personnel Roles*).

“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 (*Purpose*).

“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*).

“Collaborative Dialogue Meetings (CDMs)” - an interactive discussion amongst the Design-Builder, DDC and its consultants and the Project stakeholders, who are working together to achieve the BBJ Program goals. These meetings serve to share a sense of purpose amongst team members and inform each individual on what needs to be worked on next, to achieve collective success.

“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 Design-Build Agreement, including all performance security instruments, the Design-Builder Proposal, the final design documents, and provisions required by law to be inserted in the Design-Build Agreement whether actually inserted or not.

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

“CPSD” is defined in Section 1.5 (*Project Information*).

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

“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 Agreement” or **“DBA”** 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 Design-Build Agreement whether actually inserted or not.

“Design-Build Construction Manager” is the role and person to fill such role identified in number 11 of the table in Section 4.7(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 4.7(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 4.7(c) (*Description of Key Personnel Roles*).

“Design-Build Safety Officer” is the role and person to fill such role identified in number 12 of the table in Section 4.7(c) (*Description of Key Personnel Roles*).

“Design-Builder” means the Person selected pursuant to the RFP that enters into the Design-Build Agreement with DDC to conduct the Work for the Project, including the design, construction, and other required services identified in the Project Requirements for the Manhattan Facility.

“Design-Build QA & QC Project Manager” is the role and person to fill such role identified in number 13 of the table in Section 4.7(c) (*Description of Key Personnel Roles*).

“Design and Construction Excellence” is defined in Appendix B (*Design and Construction Excellence*).

“Design Integrator” is the role and person to fill such role identified in number 5 of the table in Section 4.7(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 4.7(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 Release 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) or the Design-Lead (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 Release for Construction Documents, as further described in number 3 of the table in Section 4.7(c) (*Description of Key Personnel Roles*).

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

“Detention Specialist” is the role and person to fill such role identified in number 8 of the table in Section 4.7(c) (*Description of Key Personnel Roles*).

“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 the purposes of this RFQ.

“Draft Goal” is defined in Section 8.1(b)(iv) (*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 Facility.

“Equity Participant” means any Person holding (directly or indirectly) a 15% or greater interest in the Proposer. **“Final Proposal”** is defined in Appendix H (*Form of Design Build Agreement*).

“GMP” means a guaranteed maximum price.

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

“Indicative Documents” means documents that serve as an indication of a concept that addresses the operational and programmatic goals of the Project, square footage, and budget; and complies with requirements of local building and zoning codes.

“Initial Target Price” is defined in Appendix H (*Form of Design Build Agreement*).

“Key Personnel” means the individuals identified in the table in Section 4.7(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 the purposes of this RFQ.

“MEP Engineer” is the role and person to fill such role identified in number 10 of the table in Section 4.7(c) (*Description of Key Personnel Roles*).

“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 1 Design Work” is defined in Appendix H (*Form of Design Build Agreement*).

“Phase 1 Work” is defined in Appendix H (*Form of Design Build Agreement*).

“Phase 2” is defined in Appendix H (*Form of Design Build Agreement*).

“Phase 2 Work” is defined in Appendix H (*Form of Design Build 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:

1. The Proposer;
2. 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
3. Any Equity Participant.

“Procurement Policy Board” or **“PPB”** means the board established pursuant to City of New York City 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 1.2 (*BBJ Program Goals*).

“Project” or **“Manhattan Facility”** or **“Facility”** 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. It also refers to the new detention facility to be constructed at 125 White Street, New York, NY.

“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.

“Project Scheduler” is the role and person to fill such role identified in number 7 of the table in Section 4.7(c) (*Description of Key Personnel Roles*).

“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 4.6(a)(i) (*Recent and Relevant Project Experience*).

“Request for Proposals” or **“RFP”** means a written solicitation, including all Addenda thereto, seeking Proposals 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 Shortlist for the Project.

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

“Scope of Work” the work to be performed issued with the RFP with respect to each Facility.

“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.

“Shortlist” 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.

“Shortlisted Proposers” means the Proposers that have been Shortlisted.

“SOQ Due Date” is defined in Section 2 (*Procurement Process*).

“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 1.1 (*Purpose*).

“Structural Engineer” is the role and person to fill such role identified in number 9 of the table in Section 4.7(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.

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Appendix B: Design and Construction Excellence

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Design and Construction 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, DDC's Design and Construction 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.

Design and Construction 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 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 Design and Construction 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 Design and Construction Excellence in the public realm as characterized by the following overarching concepts.

Design and Construction Excellence utilizes the power of design and construction to positively transform our public space, inspiring pride in the people and the City of New York. The design of public buildings and infrastructure must be guided by 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.

Design and Construction 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.

Design and Construction 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.

Design and Construction 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.

Design and Construction 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 Design and Construction 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

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Manhattan Facility (BBJ-MN-FAC)**Project Description**

The Manhattan Facility project consists of complete Design-Build services for a fully functional, operational, and easily maintainable Facility to meet all programmatic requirements, including space for future community needs and other related activities. Demolition of the existing Manhattan Detention Complex located at the site will be performed by others.

The Manhattan Facility will include 1040 beds for people in detention and space for onsite services and programming, staff facilities, and 20,000 square feet of publicly accessible commercial and community space. The approved maximum building height is 295 feet and up to 4.67 floor area ratio or approximately 697,675 zoning square feet of floor area. The Facility will include space for food service, recreational, educational, and related services, staff offices and amenities, and a sally port. The scope also includes removal of the interim sally port and restoration of the site to its original condition, and building systems such as mechanical, electrical, plumbing, life safety, structural, security, IT, telecom, and BMS. A bridge connection must be provided from the Facility to the Manhattan Criminal Court.

The Facility will provide 125 accessory parking spaces including EV charging stations below grade for staff. The current approved vehicular entrance for DOC below-grade parking will be on Centre Street.

As part of the Work, the DB Team will be required to establish an office with a meeting room near the Project Site to provide site and project information to the public, including information about job opportunities that may become available in connection with the project, and to serve as a location to receive community comments and concerns. The office will be staffed by a Community Construction Liaison provided by DDC.

The DB Team will be required to provide innovative design and construction services. Accordingly, the Design-Builder, through itself or others (and in accordance with all applicable laws), must provide professional engineering and architectural services as well as technical, expediting, subprofessional, clerical, scheduling, and cost estimating services. The Design-Builder must also furnish all labor, equipment, materials, project management, quality control/quality assurance, and architecture and engineering services required for the design, permitting, construction, commissioning, and close-out of the Project, all in accordance with the requirements of the Design-Build Agreement.

The Facility design and construction must comply with all applicable rules and laws, including but not limited to zoning, building, and fire/life safety code requirements, and be fully coordinated with all authorities having jurisdiction, including but not limited to the New York City Public Design Commission and the New York State Commission of Correction. Additionally, there are active court operations at 100 Centre Street. The Design-Builder will be required to coordinate construction activities so as not to interfere with court operations.



Figure C-1 BBJ-MN-FAC Location

Site Location

The Manhattan Facility will be located at 124-125 White Street (Block 167, Lot 1) between Chinatown and the Civic Center neighborhoods of Manhattan Community District 1 (see Figures C-1 and C-2). The site is bounded by Centre Street, Hogan Place (the extension of Leonard Street), Walker Street, and Baxter Street (see Figure C-3). The roughly 149,549 sf site is within a C6-4 zoning district.

The work must include the following:

1. Site Work:

- Site preparation including the dismantle of existing basement foundation walls in both towers, tunnel between North and South Towers, foundation slab, and piles, which may be left in place by the Dismantle Design-Builder.
- Excavation of site, which may include previously installed backfill materials currently being used for temporary SOE.
- Provision of permanent SOE for all new excavation work and support to MTA tunnels and adjacent properties.
- Maintenance of temporary site drainage including dewatering.
- Noise remediation goals that exceed regulatory requirements.

- Dust Mitigation.
- Vibration and crack monitoring for MTA tunnels and adjacent properties.
- Dismantling of the temporary sally port, including but not limited to foundation/pile, structure, etc.
- Patching and restoration of the Courthouse facade and reinstallation of the stored Courthouse exterior doors, planter bed, Siamese connections, stair railing and steps, and sidewalk impacted by the temporary sally port dismantling.
- Patching and restoration of planting bed stone prior to reinstallation.
- Courthouse bronze door restoration and hardware upgrade prior to reinstallation.
- Removal of helical pile to minimum 2'-0" below the pile cap.

2. Artwork:

- Removal of existing artwork from storage at Rikers Island and potential reinstallation in locations at the Facility site.
- Cleaning, patching, and restoration of the artwork prior to installation.
- Incorporation and installation of new artwork as part of the NYC Percent for Art program.

3. Utility Work:

- Surveying and investigation of existing private and public utilities.
- Protection and maintenance of utilities to remain.
- All necessary or required utility services for the Facility, including potential street work.
- Restoration of DEP sewer manhole currently temporary capped to sidewalk grade.
- Removal of the High Voltage Oil-O-Static (OOS) Line. Con Ed has decommissioned the OOS; however, oil residual still remains in the line which will need to be drained prior to removal.

4. Structures:

- Construction of a new Facility
- Connections to Courthouse

5. Mechanical, Electrical, Plumbing, Drainage:

- Mechanical, electrical, fire alarm, fire protection and plumbing for the Facility with required redundancy in accordance with the RFP Scope of Work and in compliance with the requirements of applicable regulatory agencies and agencies having jurisdiction.
- Emergency Power backup and standby systems.
- Exterior connection to emergency water supply or installation of water tanks, as required.
- Permanent Facility site drainage.
- Steam connection from Courthouse for new Facility.
- MEP infrastructure work for the commercial space.

6. Conveyances:

- Vertical transportation for the Facility.

7. Systems:

- Security
- Fire Protection
- Life Safety
- Building Monitoring System (BMS)
- Telecommunications and IT
- Building Asset Management

8. Site Design:

- Public plaza design, including covered pedestrian walkway.
- Construction Transportation Monitoring Plan.
- Repair/restoration and installation of road and sidewalks.
- Provision of landscaping.

9. Furniture, Fixtures and Equipment**10. Agencies Having Jurisdiction Engagement:**

- Obtain design approval, permits, and other relevant approvals from agencies including but not limited to the NYC Public Design Commission, New York State Commission of Correction, NYC Department of Buildings, NYC Fire Department, and Metropolitan Transit Authority
- Coordinate with DDC and Sponsor Agencies to manage operational issues that arise with agencies including but not limited to the New York Police Department and Office of Court Administration

11. USGBC:

- A minimum of LEED Gold Certification (the City will have an independent commissioning agent). All LEED required documentation must be submitted by the Design-Builder.

Anticipated Work to Be Performed By Others

- Relocation of people in custody from the existing Manhattan Detention Complex and demolition of the same will be performed by others.
- Decoupling and re-routing of shared building services between the existing Manhattan Detention Complex and existing Courthouse, including the dismantling of temporary connections and the design and construction of permanent service connections for the courthouse, will be performed by others except the steam line.
- Swing space for criminal justice operations (interim sally port and similar for facilitating court appearances) constructed under a prior contract will be protected and maintained by the Design-Builder.
- Relocation of utilities outside the work limits of the site and fit-out of the community space(s) and commercial space(s) will be performed by others.



Figure C-2 BBJ-MN-FAC Location

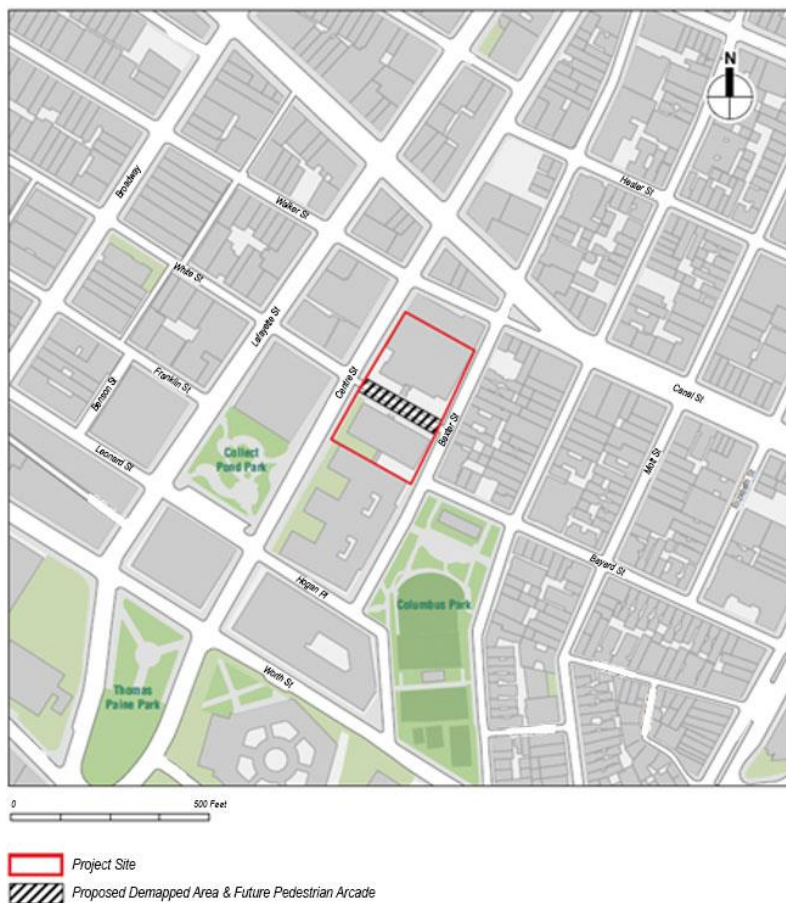


Figure C-3 BBJ-MN-FAC Map Location

Preliminary Project Schedule, Preliminary Budget, And Proposal Stipend for the Manhattan Facility

- **Preliminary Project Schedule for the Manhattan Facility**

DDC anticipates that a notice to proceed (NTP) will be issued to the Design-Builder in or around February 2025.

- **Preliminary Budget for the Manhattan Facility**

Approximately \$3B

Appendix D: Format and Organization for Statement of Qualifications

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RFQ Response Table of Contents		
Tab	Category	Page Limitation
0	Fundamental Qualifications	Up To 18 Pages Total
	Cover Letter	2 pages
	Acknowledgment of Addenda Form (Appendix E-12)	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)	As Required**
	Iran Divestment Act Form (Appendix E-3)	1 page
	Letter from Surety	1 page
	Legal Structure	1 page***
	Teaming Agreement	1 page***
	Safety Questionnaire (Appendix E-4)	1 page
	Financial Questionnaire (Appendix E-5)	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-6)	15 pages
	Vendor Evaluation Forms (Appendix E-7)	5 pages
	Prior Experience Working Together Form (Appendix E-8)	1 page
	Project Relevancy Form (Appendix E-9)	2 pages
2	Design-Build Team Key Personnel Resumes	Up To 20 Pages Total
	Team Introduction and Organization Chart	2 pages
	Design-Build Project Executive (Appendix E-10)	1 page
	Design Lead (Appendix E-10)	1 page
	Designer of Record (Appendix E-10)	1 page
	Design-Build Project Manager (Appendix E-10)	1 page
	Design Integrator (Appendix E-10)	1 page
	Chief Estimator (Appendix E-10)	1 page
	Project Scheduler (Appendix E-10)	1 page
	Detention Specialist (Appendix E-10)	1 page
	Structural Engineer (Appendix E-10)	1 page
	MEP Engineer (Appendix E-10)	1 page
	Design-Build Construction Manager (Appendix E-10)	1 page
	Design-Build Safety Officer (Appendix E-10)	1 page
	Design-Build QA & QC Project Manager (Appendix E-10)	1 page

	Resume Compliance Matrix (Appendix E-11)	4 pages
3	Design and Construction Excellence and DB Management Approach	Up To 13 Pages
	Design and Construction 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 or teaming structure and does not include any copies of executed agreements, letters of intent, or teaming agreements, as required by the RFQ.

Appendix E: SOQ Forms

- Appendix E-1: Construction Employment Report
- Appendix E-2: Doing Business Data Form
- Appendix E-3: Iran Divestment Act
- Appendix E-4: Safety Questionnaire
- Appendix E-5: Financial Questionnaire
- Appendix E-6: Project Profile Form
- Appendix E-7: Vendor Evaluation Form
- Appendix E-8: Prior Experience Working Together Form
- Appendix E-9: Project Relevancy Form
- Appendix E-10: Resume Form
- Appendix E-11: Resume Compliance Matrix
- Appendix E-12: Acknowledgement of Addenda Form

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Appendix E-1: Construction Employment Report

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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://www.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://www.nyc.gov/assets/mocs/downloads/PASSPort/learning-to-use-passport/User_Manual_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.

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Appendix E-2: Doing Business Data Form

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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 ☐ NoEntity 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 _____

1/2018

For information or assistance, please contact the Doing Business Accountability Project at DoingBusiness@mocs.nyc.gov or 212-788-8104.

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

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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:

- (a) 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
- (b) 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: Safety Questionnaire

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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.)

2022:

2021:

2020:

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):

2022:

2021:

2020:

If your TCIR for any of these three (3) years is 3.00 or higher, you must attach a one (1) page explanation.

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

2022:

2021:

2020:

If your DART for any of these three (3) years is 1.7 or higher, you must attach a one (1) page explanation.

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Appendix E-5: Financial Questionnaire

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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 Owner

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 Venture/ Partnership/ LLC/Other Association	% Ownership Interest

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.)

☐ Yes ☐ No

If "yes", please explain on a separate page.

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 (must exceed \$500M per year for each of the past 3 years):

2022: \$

2021: \$

2020: \$

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.

Please provide annual audited financial reports for each of the past 3 years for the Design Builder and its Major Participants. Include the most recent Form 10-K and Form 10-Q filed with the Securities and Exchange Commission (SEC). If any of the parties identified above are not regulated by the SEC, then provide their most recent quarterly audited financial report.

HISTORY OF PERFORMANCE (PAST PERFORMANCE)

1. 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.

2. 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).

3. 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).

4. 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.

5. 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.

6. 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.

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Appendix E-6: Project Profile Form

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[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 E-7

** 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-7: Vendor Evaluation Form

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Vendor Evaluation

Project Name: _____

(Contractor - Construction Manager - Builder)

(Project Manager)

(Superintendent)

(Consultant - Designer)

(Project Manager)

(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:

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Appendix E-8: Prior Experience Working Together Form

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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					
Chief Estimator					
Project Scheduler					
Detention Specialist					
Structural Engineer					
MEP Engineer					
Design-Build Construction Manager					
Design-Build Safety Officer					
Design-Build QA & QC Project Manager					

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Appendix E-9: Project Relevancy Form

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Project Relevancy		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)					
	Mixed-use urban, High-Rise construction (greater than 10 stories), which may include, without limitation, dormitory, and short or long-term rooming/hotel facilities					
	Contract value of \$100 Million or more					
	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)					
	Secure facility, demonstrating innovative and modern design					
	Complex mission critical institutional facility					
	Interface with multiple stakeholders, including the community and regulatory agencies and/or significant third parties operating in and around the applicable project's site					
	Environmental sustainability with durable and innovative construction and LEED Gold rating					
	Contract Form (GMP, Lump Sum, etc.)					

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Appendix E-10: Resume Form

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RESUME FORM

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

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Appendix E-11: Resume Compliance Matrix

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Proposed Design-Build Team Note: Fill in only unshaded cells.			Name		Qualifications					Design - Build Project Executive			Design Lead		Designer of Record				Design-Build Project Manager			Design Integrator			Chief Estimator			Project Scheduler			Detention Specialist																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																

														X	New York Professional Engineer License	Structural Engineer
														10	Experience in construction and/or construction management projects with relevant experience (Insert years)	
														X	Experience in administration of City, Municipal or Federal projects	
														X	Ability to manage, control, administer, and execute the integrated design and construction operations, safety, quality control program and subcontracts	
														X	New York Professional Engineer License	MEP Engineer
														10	Experience in Design, Const and Const Management with Relevant Projects (Insert Years)	
														X	Experience in administration of City, Municipal or Federal projects	
														X	Experience designing MEP systems for a high-rise building, and medium/low voltage systems is required.	
														X	Degree in Construction Management, Construction Science, Eng, or Arch	Design-Build Construction Manager
														10	Experience in Const and Const Management with Relevant Projects (Insert Years)	
														X	Experience in Administration of City, Municipal, or Federal Projects	
														X	Ability to effectively manage, control, administer and execute integrated design and construction operations, safety, quality control program and subcontracts	
														X	Licensed NYC DOB Site Safety Manager with a Bachelor's degree or higher	Design-Build Safety Officer
														15	Safety work experience in similar projects (Insert Years)	
														X	CSP or CIH certification	
														X	Ability to maintain site wide health and safety of workers and surrounding community	
														X	Degree in Construction Management, Construction Science or Architecture/Engineering or equivalent experience	Design-Build QA & QC Project Manager
														10	Experience in design, construction, and construction management of similar projects (Insert Years)	
														X	Ability to maintain overall Quality Assurance and Quality Control for design and construction of the Project	

Appendix E-12: Acknowledgement of Addenda Form

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Acknowledgement of Addenda**TITLE OF THE REQUEST FOR QUALIFICATIONS:**

[REQUEST FOR QUALIFICATIONS FOR THE MANHATTAN FACILITY (BBJ-MFAC)
A PROJECT OF THE NEW YORK CITY DESIGN-BUILD BOROUGH-BASED JAILS

Instructions: The submitting firm is to complete Part I or Part II of this form (CHECK ONE), 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.

☐ Part I

Listed below are the dates of issue for each Addendum received in connection with this RFQ.

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 _____

All addenda must be signed and included behind this attachment.

☐ Part II

No Addendum was received in connection with this RFQ.

Submitting Firm Name:

Submitting firm's Authorized Representative:

Name: _____

Title: _____

Signature: _____

Date: _____

Appendix F: Draft Request for Proposal Information

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Draft Request For Proposal 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 solicitation. Clarifications and questions will NOT be addressed concerning these documents until after the start of the RFP process.

2. RFP - Draft Procurement Schedule

DDC intends to conduct the RFP 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 Shortlisted Proposers for the Project when the RFP is issued.

Manhattan Facility	
Issue RFP	1 st Quarter 2024
Collaborative Dialog Meetings and Site Visits	TBD
Final RFP	3 rd Quarter 2024
Proposals Due	3 rd Quarter 2024
Notification of Selection of Best Value Proposal	4 th Quarter 2024
Design-Build Agreement Award	4 th Quarter 2024

3. RFP - Preliminary Information

Complete RFP documents will be provided to the Shortlisted Proposers. Below is a summary of information to be expected during the RFP process. As part of the RFP, Indicative Documents will include vignette and narratives, as well as schematic drawings, to assist the Proposers to understand program requirements, adjacencies, approximate area requirements, and one possible approach to addressing technical concerns as related to architecture, structure, and mechanical/electrical/plumbing building systems. While the indicative documents show one possible solution, the DB Teams are encouraged to bring additional creativity and innovation to the program by developing their own solution that addresses the Project Requirements described in the RFP.

DDC will provide an overall budgeted project cost for the Facility which can be utilized by the Proposers to form the basis for their Initial Target Price and pricing assumptions.

Proposers will be required to submit the following:

- (a) A Technical Proposal demonstrating the Proposer's understanding of the Project, approach to providing design solutions, approach to managing and implementing the project, and team quality and strength to accomplish the Project.
- (b) A Price Proposal consisting of two parts:

- (i) A fixed-price lump sum for Phase 1 - Design and Enabling Work that will enable the Proposer to analyze and develop designs in order to prepare an Initial Target Price
- (ii) An Initial Target Price – Confirmation that the initial Project Concept can be completed at or below the budgeted project cost provided by DDC.

At the end of the RFP process, DDC team will evaluate each Proposer's technical proposal and Price Proposal, determine the apparent best value Proposal for the Facility and enter into a GMP Design-Build Agreement for the Facility as included in the Appendix H (*Form of Design Build Agreement*).

4. RFP -Table of Contents for The Solicitation

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

- (a) Scope of Work - The Scope of Work will be a key part of the RFP and will include the following information: Program – The program will describe the needed spaces within the facility, required adjacencies, and expected populations. Information will be provided about the program objective, site, aesthetic requirements, desired innovation, and iterative design. 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 Facility.
- (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 Shortlisted 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 agency review, design agency review, 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) Design-Builder 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, property asset management database, and final cleaning.

5. RFP Overview

- (a) RFP Participation – During the RFP process, the Shortlisted Proposers will then participate in an RFP process during which the Shortlisted Proposers will (1) analyze and develop limited design concepts in order to express their understanding of the design criteria and to assist in preparation of an Initial Target Price for the Facility, (2) review and comment on DDC form of GMP Design-Build Agreement and (3) submit a total Phase 1 work amount which will be a lump-sum fixed price comprised of the all-in cost to perform the following during Phase 1 a) fee for performing the Enabling Work; b) a fee for performing the Phase 1 Design Work; and c) a fee for performing the Phase 1 construction management services. A binding GMP for Phase 2 will then be negotiated by the selected Design-Builder and DDC during Phase 1 as part of the Final Proposal process.
 - (i) With release of the RFP, DDC will provide an overall budget for the Facility which can be used by the Proposers to assist with forming the basis for their Initial Target Price and its line-item distribution in accordance with a format to be provided by DDC in the RFP.
- (b) Collaborative Dialogue Meetings (CDM) – Shortlisted Proposers will have the opportunity to engage in CDMs with the City to clarify requirements of and propose innovations to the Design-Build Agreement and will also have the opportunity to discuss alternative technical concepts than DDC requirements.
- (c) Specific Project Requirements – As part of the RFP, the City intends to issue Specific Project Requirements as well as Indicative Documents. The Proposer is not permitted to vary from the Specific Project Requirements unless it has submitted and obtained DDC approval for an alternative technical concept.

The Indicative Documents are not requirements but rather one possible solution that may satisfy the Project's goals. They range in completeness from a schematic level to a design development level. The Indicative Documents, address the Sponsor Agencies' operational and programmatic scope, square footage and budget; address the NYC Uniform Land Use Review Procedure (ULURP) and the New York City Zoning Resolution; have undergone Independent Peer Review; and have been informally reviewed and commented upon by City agencies having jurisdiction, including: the Public Design

Commission (PDC), Landmarks Preservation Commission (LPC), Department of City Planning (DCP), Department of Buildings (DOB) and the Fire Department (FDNY). While documents have been reviewed by these agencies for general compliance with their expectations, the Design-Builder remains responsible for obtaining approval of its own design.

While the documents are intended to address the goals noted above, the Design-Builder is encouraged to bring creativity and innovation to the Project by developing its own solution for which it bears full design and construction responsibility.

Detailed instructions and requirements for submission of a Proposal will be set forth in the RFP.

Appendix G: List of Consultant Support Team

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Name
AECOM/Hill Joint Venture
Airtek Environmental Group
Architectural Intelligence D.P.C
Building Consultants Associates (BCA)
Burtis Consulting Group (iDEKOgov)
CareerPoint Staffing
Caso & Associates
Core Environmental Consultants Inc
CSA Group
Deborah Bradley
Donnelly & Moore
DRPILLA
Falcon
Front Inc
Global Editorial Services
Group PMX
Haas Media
Haydan Consultant
Hirani Group
Horton Lees Brogden
Infinite Consulting Corp.
Karp Stategies
Kheops
Local Office Landscaping and Architects
Marsh*
McKissack
Moody Nolan
M-TO-Pros Development
Obra Architects
Ota Ade Oni
Pena-Alcantera Inc

PMA
PTG
S1 Food Service
Shen Milsom & Wilke, LLC
Simulinea
Spectrum Communications
SSA
Stellar Services
Synergy Business Development
Thinc Design
TRC *
T-Squared Design Inc
Velez
Voorhis Robertson Justice Services, LLC
Watts Architecture and Engineering DPC
ZE Communications

* Firms have been engaged by the City to provide advisory services for the BBJ. However, these firms are eligible to assist or participate as a DB Team member with any Proposer for the Facility.

Appendix H: Form of Design-Build Agreement

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Manhattan Facility (BBJ-MN-FAC)

A form of guaranteed maximum price Design-Build Agreement (DBA) for the Project is being released with this RFQ. The form of DBA is substantially consistent with the DBAs for other projects that are part of the Borough-Based Jail program. Therefore, while it is the intent of DDC to request written comments on the DBA from shortlisted design-build teams as part of the RFP process for the Project, DDC does not anticipate making any substantive changes to the DBA for this procurement as a result of any such written comments. DDC will allocate portions of the collaborative dialogue meetings to be scheduled during the RFP process to discuss any questions that the shortlisted design-build teams may have with respect to the DBA, if required.

DRAFT-CONFIDENTIAL NOT SUBJECT TO FOIL DURING PROCUREMENT



BBJ DESIGN-BUILD AGREEMENT (GMP)

between

THE CITY OF NEW YORK

and

[DESIGN-BUILDER LEGAL NAME]	
FMS NO.:	BBJ-FAC
REGISTRATION NO.:	
E-PIN:	
AGREEMENT DATE:	

RFQ Phase

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Design-Build Agreement

This Design-Build Agreement (“**Agreement**”) is entered as of the date indicated on the cover page to this Agreement (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 Schedule A (*Contract Information*) attached to this Agreement,
- (each a “**Party**” and together the “**Parties**”).

BACKGROUND:

- (A) DDC issued a “Request for Proposals” for the Project (including a form of this Agreement) (collectively, with all subsequently issued addenda, the “**RFP**”) to proposers.
- (B) 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, DDC selected the Design-Builder as the preferred proposer under the RFP. DDC’s decision was based on its evaluation of all responsive proposals received and 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) Without limiting any Party’s rights under Section 26.2 (*Changes in Applicable Standards*), 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, Change Order or Final Proposal Change Order, Minor Waiver, Allowance Approval or Time Extension;
 - (ii) the provisions of the main body of this Agreement;
 - (iii) the provisions of (i) the Exhibits, excluding both Exhibit 2 (*Project Requirements*) and Exhibit 3 (*Design-Builder Proposal Commitments*) and (ii) each of the Schedules included in the Specific Project Requirements (the "**Project Specific Schedules**");
 - (iv) the provisions of Exhibit 2 (*Project Requirements*), excluding the Project Specific Schedules;
 - (v) the Final Design Documents and final Construction Documents; and
 - (vi) During Phase 1 only, Exhibit 3 (*Design-Builder Proposal Commitments*) and during Phase 2, the Design-Builder's Final Proposal accepted by DDC, in each case excluding the Project Requirement Deviations which are part of the Schedules in the Specific Project Requirements.
- (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 Project Specific Schedules;
 - (ii) the Specific Project Requirements (excluding the Project Specific Schedules);
 - (iii) the General Project Requirements; and

- (iv) 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 (“**Higher Quality Provisions**”), will prevail unless the provisions with which the Higher Quality Provisions are in conflict with directly modify the specific Higher Quality Provisions and are contained in a Contract Document which (i) is a Contract Document listed in Section 1.3(a)(i) and (ii) was executed by both Parties or issued by DDC to the Design-Builder on a later date than the Contract Document containing the Higher Quality Provisions.
- (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 (i) during Phase 1, the Design-Builder Proposal Commitments or (ii) during Phase 2, the Final Proposal accepted by DDC includes 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, final Construction Documents 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 Proposal Commitments or Final Proposal accepted by DDC, as applicable.
- (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(c)-(f) (*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(c)-(f) (*Order of Precedence*); or the Parties disagree with respect to any conflict, ambiguity or inconsistency between the provisions of this Agreement, DDC will promptly issue a written determination to the Design-Builder, regarding the conflict, ambiguity or inconsistency.

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 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. **PHASE 1 PROCESS**

The Parties agree to work diligently, reasonably and in Good Faith in accordance with the following process and protocols for the performance and implementation of the Phase 1 Services:

2.1 **Phase 1 Services**

(a) **Collaboration & Partnering**

The Phase 1 Services must be performed by the Design-Builder in close consultation and coordination with DDC, in a collaborative, iterative and interactive manner and on an Open Book Basis in accordance with Section 25.5 (*Open Book Basis*).

(b) **Phase 1 Services Generally**

In exchange solely for the Phase 1 Fixed Price, the Design-Builder must develop and provide the following Phase 1 Services detailed further in the Project Requirements by the applicable Phase 1 Milestone Deadlines:

- (i) achieving the Phase 1 Milestones in accordance with Section 2.2 (*Phase 1 Milestones*);
- (ii) where applicable in Schedule J-1 (*Enabling Work*), the Enabling Work in accordance with Section 2.3 (*Enabling Work*);
- (iii) the Phase 1 Design Work in accordance with Section 2.4 (*Phase 1 Design Work*);
- (iv) Project Site investigation and diligence work in accordance with Section 9.1 (*Inspection of Site Conditions*);
- (v) development and timely delivery of the Final Proposal;
- (vi) Phase 1 Construction Management Services in accordance with the Project Requirements; and
- (vii) any other specified Phase 1 deliverables, plans, obligations or requirements set out in further detail in the Project Requirements,

each in accordance with Best Industry Practice, the Project Requirements and the standards set out in Section 6.1 (*Scope of Work and General Obligations*).

(c) **Phase 1 Fixed Price**

- (i) The Phase 1 Fixed Price is the full and complete compensation for all the Design-Builder's costs and risks for the Phase 1 Services (including preparing and negotiating the Final Proposal) and any other costs related to the Work performed up to the date of the Final Proposal Change Order or the termination of this Agreement, as applicable.
- (ii) The Design-Builder will not be entitled to any increase in the Phase 1 Fixed Price for any costs, expenses, liabilities or other obligations arising from the performance

of the Phase 1 Services, unless DDC issues an Allowance Approval, Change Order or an Extra Work Directive relating to any of the Phase 1 Services.

- (iii) The Design-Builder will be paid the Phase 1 Fixed Price in accordance with Article 21 (*Payment Provisions*).

(d) **Key Personnel & Commencement of Phase 1 Services**

- (i) In performing any Phase 1 Services, the Design-Builder must make available the Key Personnel as required for the performance of such activity in accordance with the relevant Enabling Work Activity Project Requirements. The terms of Article 17 (*Personnel*) will apply in respect any Key Personnel performing Phase 1 Services.
- (ii) The Design-Builder may commence the Phase 1 Services in accordance with the Project Requirements and may access the Project Site to perform the Phase 1 Services in accordance with Section 6.1(d) (*Notice to Proceed*), Section 6.3 (*Access to Project Site*) and Section 6.4 (*Commencement of Construction Work*). The Design-Builder may not commence any Construction Work, other than any Enabling Work or any Early Phase 2 Work During Phase 1, until Phase 2 has commenced.

(e) **Phase 1 Project Requirement Changes**

- (i) Without limiting any other right of DDC under the Agreement, including under Section 23.3 (*Modification Proposals*), at any time during Phase 1, DDC may notify the Design-Builder of a change to the Project Requirements in accordance with this Section 2.1(e) ("**Phase 1 Project Requirement Change**").
- (ii) Subject to Section 2.1(e)(iii), if DDC notifies the Design-Builder of a Phase 1 Project Requirement Change under Section 2.1(e)(i):
 - (A) the Design-Builder must incorporate the Phase 1 Project Requirement Change in the performance of the Phase 1 Services; and
 - (B) the Parties will incorporate the Phase 1 Project Requirement Change into the Final Proposal Change Order.
- (iii) Section 2.1(e)(ii) will not apply if, within 10 Business Days of receiving notice of a Phase 1 Project Requirement Change under 2.1(e)(i) (or such other timeframe as DDC may reasonably agree), the Design-Builder submits an objection together with supporting information to DDC that certifies and demonstrates to DDC's satisfaction (acting reasonably) that incorporating the Phase 1 Project Requirement Change in the performance of the Phase 1 Services will have either or both of the following impacts:
 - (A) adversely affect the Design-Builder's ability to deliver the Phase 1 Milestones by the relevant Phase 1 Milestone Deadlines (after all available float for Phase 1 Services has been exhausted); or
 - (B) cause the Design-Builder to incur additional costs or expenses in performing the Phase 1 Services (after all amounts included within the Phase 1 Services Fee for design contingencies have been exhausted).

- (iv) If Section 2.1(e)(iii) applies (as determined by DDC, acting reasonably) and DDC wishes to proceed with the relevant change to the Project Requirements, DDC may exercise its rights under Section 23.3 (*Modification Proposals*) or Section 23.5 (*Extra Work Directive*).

2.2 Phase 1 Milestones

The Design-Builder must deliver each Phase 1 Milestone by the relevant Phase 1 Milestone Deadline set out in Schedule J-2 (*Phase 1 Milestones*).

2.3 Enabling Work / Early Phase 2 Work During Phase 1

- (a) To the extent Phase 1 includes Enabling Work, the Parties must comply with the terms of Schedule J-1 (*Enabling Work*) in respect of Enabling Work performed by the Design-Builder.
- (b) In connection with the Design-Builder's completion of Design Work for any Early Phase 2 Work package, DDC may, in its sole discretion, permit the Design-Builder to perform Early Phase 2 Work (in addition to Enabling Work) during Phase 1 by providing written notice to the Design-Builder ("**Early Phase 2 Work During Phase 1**"). Any Early Phase 2 Work performed during Phase 1 or Phase 2 will be subject to all requirements for the performance of Work generally under this Agreement.
- (c) The Design-Builder must achieve completion of each Enabling Work Activity in accordance with Schedule J-1 (*Enabling Work*) by the relevant Phase 1 Milestone Deadline.
- (d) The Design-Builder must not perform any Enabling Work or Early Phase 2 Work, as applicable, until the Design-Builder has satisfied the applicable requirements under Section 6.3 (*Access to Project Site*) and Section 6.4 (*Commencement of Construction Work*).
- (e) The Design-Builder must provide all information, certifications and additional or supporting information reasonably requested by DDC in relation to final payment for such Enabling Work.

2.4 Phase 1 Design Work

- (a) The Phase 1 Design Work will include the Design-Builder advancing its Proposal Design Documents in accordance with the Project Requirements for submission of its Final Proposal.
- (b) The Parties acknowledge and agree that:
 - (i) any Phase 1 Design Work performed by the Design-Builder will form part of the Design Work (except where expressly stated otherwise); and
 - (ii) notwithstanding the completion of any Phase 1 Design Work in accordance with the Project Requirements, all terms of this Agreement applicable to Design Work will apply in respect of the relevant Phase 1 Design Work, unless otherwise expressly stated by DCC in writing.
- (c) The Design-Builder must deliver all the Phase 1 Design Work in accordance with the Project Requirements by the Final Proposal Submission Date.

- (d) As a condition to acceptance of its Final Proposal, the Design-Builder must comply with the PDC approval requirements for its Design Work in accordance with, and subject to, Section 6.2(b) (*PDC Approval*).

2.5 Final Proposal Process

(a) Final Proposal Requirements

The Design-Builder must develop in Good Faith and in accordance with Best Industry Practice a binding proposal on an Open Book Basis to be submitted to DDC comprising each of the following requirements, each of which are described in further detail in the Project Requirements (together the “**Final Proposal**”):

- (i) **Design** - Design Documents meeting at least the minimum level required by the Project Requirements;
- (ii) **Price** - either a DBA GMP or where the Parties agree under Section 2.6 (*DBA Lump Sum Price Conversion*), a DBA Lump Sum Price, which includes each of the required components set out in Schedule B (*Contract Price*), including as applicable, the binding:
 - (A) Schedule of Values;
 - (B) Allowances; and
 - (C) for the DBA GMP, the Design-Builder Construction Allowance Total and each Design-Builder Construction Allowance and Design-Builder Construction Allowance Assumption;
- (iii) **Schedule** - the binding Project Schedule, including the binding Guaranteed Completion Dates for Substantial Completion, Final Completion and any other Completion Milestone;
- (iv) **Reports** - all Project site condition reports and environmental studies conducted during Phase 1 as specified in the Project Requirements;
- (v) **Approvals** - a copy of all required Government Approvals obtained by the Design-Builder required for commencement of the Phase 2 Work;
- (vi) **Plans** - all Project plans and Schedule of Submittals required by the Project Requirements;
- (vii) **Change Order** - a draft of the Final Proposal Change Order;
- (viii) **Early Phase 2 Work** – details of any Early Phase 2 Work During Phase 1 that Design-Builder plans to commence at the start of Phase 2 (or Phase 1, if permitted by DDC in accordance with Section 2.3(b)), prior to completion of all Design Documents and Construction Documents; and
- (ix) **General** - any other specified Final Proposal deliverables or requirements set out in further detail in the Project Requirements,

each in accordance with the standards set out in Section 6.1 (*Scope of Work and General Obligations*).

(b) **Final Proposal Submission and Form**

- (i) Throughout Phase 1 the Design-Builder must prepare the Final Proposal in accordance with the submission requirements set out in the Project Requirements and must submit iterative drafts of its Final Proposal to DDC in accordance with the Phase 1 Milestone Deadlines set out in Schedule J-2 (*Phase 1 Milestones*).
- (ii) The Final Proposal must include a written description of how each major component was derived by identifying clarifications and assumptions made by the Design-Builder in preparation of the Final Proposal, including, where applicable, the monetary amounts attributable to them.

(c) **Design-Builder's Representations and Requirements for a Final Proposal**

(i) **Initial Target Price**

The Parties acknowledge that the Initial Target Price may be adjusted in accordance with this Section 2.5 (*Final Proposal Process*) or Section 2.7 (*Negotiation of Final Proposal*). The Parties will collaboratively work together during Phase 1 to meet such Initial Target Price and the Design-Builder will keep DDC apprised of changes in pricing pursuant to the processes identified in this Article 2 (*Phase 1 Process*).

(ii) **Good Faith Efforts**

The Design-Builder will perform the Phase 1 Services and exhaust all Good Faith efforts in accordance with Best Industry Practice to prepare a Final Proposal that delivers best value (considering time, quality, capability, experience and cost) to the City and for the Project.

(iii) **Adjustment to the Initial Target Price**

Subject to Section 2.5(c)(vii)(A) below in connection with Escalation Early Phase 1 Notices, during Phase 1, the Design-Builder represents that it will promptly inform DDC (an "**Early Phase 1 Notice**") at the earliest possible date in which the Design-Builder becomes aware of any event or circumstance (whether or not such event is a Compensable Relief Event or a Relief Event) which (A) was (i) unknown to the Design-Builder as of the Setting Date, (ii) not reasonably foreseeable to the Design-Builder as of the Setting Date, or (iii) is reasonably beyond the control of the Design-Builder since the Setting Date, in each case exercising reasonable mitigation and diligence, as applicable, in accordance with Best Industry Practice and (B) was not otherwise caused by any act or omission of the Design-Builder, which requires the Final Proposal to include (i) an increase to the Initial Target Price, (ii) a delay to any Guaranteed Completion Date or (iii) a modification to any Project Requirements (an "**Early Phase 1 Event**"). The Early Phase 1 Notice will include an equivalent level of detail as an Initial Relief Event Notice. To the extent DDC receives an Early Phase 1 Notice, DDC and the Design-Builder will promptly meet to determine whether any Modifications, including a Modification to the Project Schedule, Initial Target Price or any Project Requirements (each a "**Final**

Proposal Adjustment”), may be reasonably necessary to include in the Design-Builder’s Final Proposal to address the Early Phase 1 Event. In submitting any request or approving any Modification to be included in the Design-Builder’s Final Proposal due to an Early Phase 1 Event, the Parties must comply with the protocols for approving a Modification under Article 23 (*Allowance Approvals, Change Orders and Extra Work Directives*). Protocols set forth in Article 24 (*Relief Events*) do not apply to Early Phase 1 Events and requests for Final Proposal Adjustments; however, if a Relief Event or Compensable Relief Event occurs during Phase 1, which solely impacts the performance of the Phase 1 Services the Design-Builder may only seek relief from the performance of Phase 1 Services pursuant to Article 24 (*Relief Events*). The Design-Builder’s percentages for general conditions, mark-ups or overhead and profit may not be modified through a Final Proposal Adjustment due to an Early Phase 1 Event.

(iv) **Mitigation**

The Design-Builder must act promptly and use Reasonable Efforts in accordance with Best Industry Practice to mitigate the delay and any other adverse impact of the Early Phase 1 Event (including incurring Net Costs), including by re-sequencing, reallocating, or redeploying its forces to other portions of the Work.

(v) **Final Proposal Adjustment**

(A) The Design-Builder is responsible for clearly stating and demonstrating the facts and justification for any proposed Final Proposal Adjustment. The Design-Builder will be entitled to a Final Proposal Adjustment if it has demonstrated to DDC’s reasonable satisfaction that (i) an Early Phase 1 Event has occurred, (ii) in the case of a Final Proposal Adjustment which includes an increase to the Initial Target Price, in full or in part, due to Escalation (an “**Escalation Final Proposal Adjustment**”), such Escalation is an Approved Escalation claim and the Design-Builder has otherwise complied with Section 2.5(c)(vii) below, and (iii) the Design-Builder has complied with its obligations under Section 2.5(c)(iv). The Design-Builder acknowledges DDC will consider the following when determining whether to approve a Final Proposal Adjustment:

- (1) steps the Design-Builder has taken, or will take, to mitigate the necessity for such Modification, including reallocation, resequencing, value-engineering, and proactive partnering workshops;
- (2) evidence reasonably satisfactory to DDC demonstrating that the Design-Builder will suffer a delay to one or more Critical Path activities or, where applicable, incur Net Costs beyond the Initial Target Price, despite the Design-Builder complying with its obligation to take steps to mitigate the necessity for the requested Modification; and
- (3) evidence that any such Modification was (i) unknown to the Design-Builder as of the Setting Date, (ii) was not reasonably foreseeable to the Design-Builder as of the Setting Date or (iii) was reasonably beyond the control of the Design-Builder since the

Setting Date, in each case, in accordance with Best Industry Practice, and is not being requested due to any breach, failure or non-conformance by the Design-Builder.

- (B) Subject to Section 2.5(c)(v)(E), once the Parties have exhausted all efforts under Section 2.5(c)(iv) above and have otherwise complied with the protocols for approving a Modification under Article 23 (*Allowance Approvals, Change Orders and Extra Work Directives*), DDC will inform the Design-Builder whether it approves a Final Proposal Adjustment.
- (C) In the event that the Design-Builder fails to take mitigation measures as required by Section 2.5(c)(iv), any Time Extension or Initial Target Price adjustment in any Final Proposal Adjustment will be reduced to the extent that such mitigation measures, if taken, would have reduced the impact of such Early Phase 1 Event.
- (D) All other Modifications that do not impact the Initial Target Price or Guaranteed Completion Dates may also be included for DDC's consideration as part of the Final Proposal, where such Modifications provide an equal or better standard of performance relative to those included in the Project Requirements.
- (E) The Design-Builder must promptly notify DDC (including in the Final Proposal) if the conditions or events underlying any Early Phase 1 Event and its related approved Final Proposal Adjustments have reduced or mitigated the necessity for the Final Proposal Adjustment at any time prior to submission of the Final Proposal. In such case, the relevant Final Proposal Adjustment will be equitably and proportionally modified to reflect any such reduction or mitigation in the effects of the Early Phase 1 Event.
- (F) Subject to Section 2.5(c)(v)(G) below, the Design-Builder will only be entitled to include in its Final Proposal those Final Proposal Adjustments where (i) a Final Proposal Adjustment has been approved by DDC (acting reasonably) and (ii) the effects of the relevant Early Phase 1 Event on the Design-Builder (exercising mitigation efforts in accordance with Best Industry Practice) is still continuing from the time the Final Proposal Adjustment was approved or was otherwise adjusted under Section 2.5(c)(v)(E) above (a **"Final Proposal Adjustment Approval"**).
- (G) The Design-Builder may include a Final Proposal Adjustment in its Final Proposal which is not subject to a Final Proposal Adjustment Approval; provided that (i) the Final Proposal Adjustment is not an Escalation Final Proposal Adjustment and (ii) the Early Phase 1 Event related to such Final Proposal Adjustment was not reasonably foreseeable by the Design-Builder within the fifteen (15) day-period immediately prior to the Final Proposal Submission Date. In such case, DDC will inform the Design-Builder of the approval of any such Final Proposal Adjustment prior to, or in connection with, DDC making its decision under Section 2.7(b)(ii), and the Design-Builder must make any revisions to the Final Proposal which are necessary as a result of any denial of or modification to such Final Proposal Adjustment within the time required by DDC.

- (H) No Modification will be binding on the Parties unless it is documented in the Final Proposal Change Order in accordance with Section 2.8 (*Execution of Final Proposal Change Order*) and approved and agreed under Section 23.3(h) (*Allowance Approval or Change Order Agreement*).

(vi) **Final Proposal Representations**

- (A) In submitting the Final Proposal, the Design-Builder represents that it will provide every item, system or element of Work that is identified, shown or specified in the Final Proposal or the supporting documents, along with all necessary or ancillary materials and equipment necessary to achieve Substantial Completion and Final Completion under this Agreement.
- (B) In connection with the Final Proposal, the Design-Builder represents that (i) its Final Proposal has been prepared and submitted on an Open-Book Basis and in accordance with Best Industry Practice, and (ii) it has transparently disclosed all information required for DDC to assess the feasibility, accuracy and appropriateness of the Final Proposal. The Design-Builder acknowledges that a breach of this representation will serve as a basis for DDC to reject any Final Proposal and terminate this Agreement for a Design-Builder Default.

(vii) **Escalation**

- (A) The Design-Builder must not submit an Early Phase 1 Notice in connection with an Early Phase 1 Event for any Escalation, except in connection with a Fluctuating Commodity Increase in accordance with General Project Requirements Section 26.4 (*Economic Price Adjustment*) (an “**Escalation Early Phase 1 Notice**”). DDC will not approve, and the Design-Builder must not include in its Final Proposal, any Escalation Final Proposal Adjustments as the result of Escalation which is not Approved Escalation.
- (B) The Design-Builder must submit Escalation Early Phase 1 Notices no less than 10 days prior to the anticipated award of any Fluctuating Commodity Trade Buyout.
- (C) For all Escalation Final Proposal Adjustments, the Design-Builder must at all times comply with General Project Requirements Section 26.4 (*Economic Price Adjustments*).
- (D) The Design-Builder will have the burden of proof that any Final Proposal Adjustment is not an Escalation Final Proposal Adjustment and shall be responsible for all costs associated with such burden of proof. Any final determination regarding whether a Final Proposal Adjustment is an Escalation Final Proposal Adjustment shall be made by DDC, in its reasonable discretion.

2.6 **DBA Lump Sum Price Conversion**

- (a) The Parties at any time during Phase 1 may agree that the Design-Builder will submit a DBA Lump Sum Price instead of a DBA GMP as part of the Final Proposal. Following such agreement by the Parties, the Design-Builder will submit a DBA Lump Sum Price with its

Final Proposal in accordance with Best Industry Practice and Section 2.5(c) (*Design-Builder's Representations and Requirement for Final Proposal*) in an amount that does not exceed the Initial Target Price.

- (b) The Parties' agreement under Section 2.6(a) will not relieve the Design-Builder of any of its obligations under this Agreement, including this Article 2 (*Phase 1 Process*).

2.7 **Negotiation of the Final Proposal**

(a) **Drafts and Development**

- (i) Prior to, and in connection with, submitting the Final Proposal by the Final Proposal Submission Date, the Design-Builder must:
 - (A) share and review development of the Final Proposal with DDC on an ongoing and Open Book Basis as required under the Project Requirements;
 - (B) address clarifications of scope and pricing, distribution of contingencies, schedule, assumptions, exclusions, DDC requests and other matters relevant to the establishment of the Final Proposal; and
 - (C) inform DDC whether it is substantially likely that the Final Proposal is expected to include a Contract Price that will be less than the Initial Target Price ("**Initial Savings**").
- (ii) Upon receipt of any Initial Savings notice the Parties will meet to mutually agree on any additional scope or Project improvements which are not expressly included in the base scope for the Project (a "**Project Improvement**") and can be funded with Initial Savings. Once a Project Improvement is accepted by DDC under the Final Proposal the Project Improvement will become part of the Work and the Project.
- (iii) By the relevant Phase 1 Milestone Deadline, the Design-Builder must submit to DDC a draft Final Proposal complying with this Article 2 (*Phase 1 Process*) and the other requirements of this Agreement. The Design-Builder must work with DDC collaboratively, in Good Faith and on an Open Book Basis to address any questions or concerns DDC has on the draft Final Proposal and to update the draft Final Proposal for any comments from DDC.

(b) **Final Proposal**

- (i) By the relevant Phase 1 Milestone Deadline, the Design-Builder must submit to DDC the Final Proposal which complies with this Article 2 (*Phase 1 Process*) and the other requirements of this Agreement (including the Project Requirements) and includes any Final Proposal Adjustment Approvals.
- (ii) Within the time period indicated in the Project Requirements following DDC's receipt of the Final Proposal, DDC will either:
 - (A) accept such Final Proposal as submitted;

- (B) reject such Final Proposal; or
- (C) seek to negotiate the terms of the Final Proposal with the Design-Builder, and DDC may also require a modification to any Final Proposal Adjustment Approval to the extent the conditions under Section 2.5(c)(v)(E) apply prior to DDC's approval of a Final Proposal.
- (iii) The Design-Builder must work with DDC collaboratively, on an Open Book Basis, to negotiate the terms of the Final Proposal in Good Faith when requested by DDC. The Parties may negotiate a Final Proposal Change Order for up to sixty (60) days (or any longer-period as agreed between the Parties), before this Agreement terminates for no-fault of either Party, and the provisions under Section 2.9(a) (*Final Proposal Termination Grounds*) will apply.

2.8 Execution of Final Proposal Change Order

(a) Requirements of the Final Proposal Change Order or Allowance Approval

Where DDC has accepted a Final Proposal or negotiated and agreed on a Final Proposal, as applicable, the Parties must execute a Final Proposal Change Order substantially in the form attached as Schedule J-4 (*Form of Final Proposal Change Order*) and the Design-Builder must execute any other documents as requested by DDC in connection with the Final Proposal.

(b) Requirements after Execution of the Final Proposal Change Order

Following execution of the Final Proposal Change Order and such Change Order being approved and agreed in accordance with Section 23.3(h) (*Allowance Approval or Change Order Agreement*), the Design-Builder must:

- (i) subject to the terms of this Agreement, immediately commence the Phase 2 Work;
- (ii) continue to implement the development of the Design Documents and Construction Documents so that, when complete, the Design Documents and Construction Documents adequately incorporate and resolve all qualifications, assumptions, clarifications, exclusions and value engineering issues identified in the accepted Final Proposal or the negotiated form of Final Proposal, as applicable; and
- (iii) deliver a status report required under the Project Requirements to DDC describing the progress on the incorporation of all qualifications, assumptions, clarifications, exclusions, value engineering issues and all other matters relevant to the establishment of the Final Proposal into the Construction Documents.

2.9 Final Proposal Termination Grounds

- (a) If DDC rejects a Final Proposal that satisfies the requirements under this Agreement or the Parties are unable after negotiating in Good Faith to agree on a Final Proposal that satisfies the requirements under this Agreement, DDC may by written notice to the Design-Builder,

terminate this Agreement by Termination Notice and the provisions for a no-fault termination under Section 33.8 (*Termination on Final Proposal Grounds*) will apply.

- (b) Subject to DDC's withholding rights under Section 21.9 (*Withholding*), if the Agreement is terminated pursuant to Section 2.9(a) (*Final Proposal Termination Grounds*) above, the Design-Builder will only be paid for (i) the percentage of Enabling Work and Phase 1 Design Work, as applicable, actually completed prior to delivery by DDC of a Termination Notice, (ii) the percentage of the Early Phase 2 Work During Phase 1 actually completed prior to delivery by DDC of a Termination Notice, (iii) the Phase 1 Construction Management Services Fee reduced proportionately for the actual Phase 1 Services completed and (iv) the reasonable and properly documented out-of-pocket costs and expenses directly incurred by the Design-Builder (excluding overhead) due to demobilization.
- (c) If the Design-Builder fails to submit a Final Proposal that satisfies the requirements under this Agreement or any other applicable Design-Builder Default under Section 33.1 has occurred, DDC may terminate this Agreement for a Design-Builder Default under Section 33.2 (*Notice of Design-Builder Default and Cure Periods*) and will be entitled to enforce its rights under such provision and the Design-Builder will not be entitled to any losses, damages or further compensation.

3. AVAILABLE DOCUMENTS AND DUE DILIGENCE

3.1 No Representation by the City

(a) General Disclaimer

Except as otherwise expressly provided in Section (b) with respect to claims for Unknown Site Conditions and any other provision 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; and
- (ii) the Available Documents are for informational purposes only and are not mandatory or binding on the Design-Builder or the City.

(b) Reliance of Available Documents for Pricing Purposes Only

Without prejudice to the Design-Builder's right to draw on any Allowance in Section 20.6 (*Allowances*), or the right to rely on Available Documents solely for purposes of claiming a Relief Event in accordance with Article 24 (*Relief Events*), in each case, in connection with any Unknown Site Conditions, the Design-Builder is not entitled to rely on the Available Documents for any other purpose, 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. When requesting an Allowance draw or claiming a Relief Event, the Design-Builder may refer to the Available Documents as basis for any such draw or claim in connection with any Unknown Site Condition.

(c) **Design-Builder Diligence Notwithstanding Available Documents**

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.

(d) **Indicative Design Disclaimer**

The Design-Builder acknowledges and agrees that to the extent an Indicative Design for any component of the Work is included as part of the Available Documents, such Indicative Design is provided to the Design-Builder for informational purposes only and the following will apply:

- (i) the Design-Builder cannot rely on the Indicative Design;
- (ii) DDC or the City will not be responsible for the accuracy or completeness of the Indicative Design;
- (iii) the Design-Builder is not required to adopt concepts shown in the Indicative Design;
- (iv) the Design-Builder, in its discretion, may submit as part of its Design Documents portions of the Indicative Design, however, the Design-Builder must be aware that the Indicative Design has certain elements that may not comply with the Project Requirements and the Design-Builder's use of the Indicative Design in its Design Documents will not relieve the Design-Builder of its obligation to comply with the Project Requirements;
- (v) the Design-Builder will be solely responsible for its design and to the extent that the Design-Builder incorporates any aspect of the Indicative Design into its design, it does so at its risk and neither DDC or the City accepts responsibility in the event that any such aspect of the Indicative Design does not comply with the requirements of the Contract Documents; and
- (vi) the Indicative Designs may not be used as a basis for a Compensable Relief Event claim by the Design-Builder.

3.2 **Purpose of Available Documents**

Except as otherwise expressly provided in Section 3.1(b) with respect to claims for Unknown Site Conditions:

- (a) the Design-Builder will not in any way be relieved from any obligation under this Agreement to perform its own independent analysis, due diligence or investigations before performing the Work;
- (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 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 DDC on the basis set out in Sections 3.1 (*No Representation by the City*) and 3.2 (*Purpose of Available Documents*);
 - (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 Industry 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 DDC, and other available public and private records;
 - (C) during Phase 1 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); and
- (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 in accordance with the Design Documents and Construction Documents within the conditions, constraints and physical requirements.

4. **PERFORMANCE SECURITY, DIRECT AGREEMENT AND JOINT AND SEVERAL LIABILITY**

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 DDC with one or more executed Guarantees in a form substantially consistent with Exhibit 4 (*Form of Guarantee*), in which the applicable 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 substantially consistent with Exhibit 4 (*Form of Guarantee*).

4.2 Performance Bond and Payment Bond

The Design-Builder must provide DDC with:

- (a) one or more performance and payment bonds in the amount and at the time set forth in Schedule A (*Contract Information*), issued by a Qualified Surety, in a form that is substantially consistent with Part A of Exhibit 8 (*Performance Bond, Payment Bond and Warranty 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;
- (b) on or prior to execution of this Agreement, a closing bond in the amount set forth in Schedule A (*Contract Information*), issued by the Design Builder and the Qualified Surety, in a form that is substantially consistent with Exhibit 11 (*Form of Closing Bond*) (the "**Closing Bond**"), and under which the City will be entitled to claim in accordance with Section 4.5 (*Closing Bond*); and
- (c) where the Design-Builder is providing payment bonds and performance bonds from Key Subcontractors in accordance with the Option 2 Phase 2 Bonding Requirements in Schedule A, evidence that the City has been named as a dual obligee under all Key Subcontractor's performance bonds and payment bonds in accordance with the requirements of Section 18.4.

4.3 City Payment Guarantee

- (a) This Section 4.3 (*City Payment Guarantee*) does not apply where Schedule A (*Contract Information*) indicates that the Design-Builder is required to provide a Payment Bond with a value equal to 100% of the value of the Construction Work for Phase 2 or 100% of the value of the Enabling Work, as applicable.
- (b) In the event that the terms of this Agreement do not require the Design-Builder to provide a Payment Bond with a value equal to 100% of the value of the Construction Work for Phase 2 or 100% of the value of the Enabling Work, as applicable, the City will, in accordance with the terms of this Section 4.3 (*City Payment Guarantee*), guarantee payment of all lawful claims for:
 - (i) wages and compensation for labor performed and/or services rendered; and
 - (ii) materials, equipment and supplies provided, whether incorporated into the Work or not, when demands have been filed with the City as provided by this Section 4.3 (*City Payment Guarantee*) by any Person that furnished labor, material, equipment or any combination of the same in connection with the Construction Work performed pursuant to this Agreement (each Person, a "**Beneficiary**") at the direction of the City or the Design-Builder.
- (c) The provisions of Section 4.3(b) are subject to the following limitations and conditions:
 - (i) Notwithstanding anything to the contrary, if the Design-Builder is required to provide a Payment Bond for a value of less than 100% of the value of Construction Work, the City's guarantee provided under this Section 4.3 will not be (i) available to Beneficiaries or (ii) become effective until after the Payment Bond provided by the Design-Builder, which will be primary and non-contributing to the payment

guarantee provided under this Section 4.3 (*City Payment Guarantee*) is fully exhausted.

- (ii) The City's guarantee is made for the benefit of all Beneficiaries provided that those Beneficiaries strictly adhere to the terms of this Section 4.3 (*City Payment Guarantee*).
- (iii) Nothing in this Section 4.3 (*City Payment Guarantee*) will be deemed to prevent a Beneficiary from asserting Claims directly against the Design-Builder for any amounts due and owing the Beneficiary by the Design-Builder.
- (iv) Each Beneficiary that has not been paid in full before the expiration of ninety (90) days after the date on which the last of the labor was performed or material was furnished by the Beneficiary for which the Claim is made, will have the right to sue on this payment guarantee in their own name for the amount, or the balance owed, unpaid at the time of the commencement of the action; provided, however, that a person having a direct contractual relationship with the Subcontractor of the Design-Builder, but not contractual relationship express or implied with the Design-Builder, shall not have a right of action upon the guarantee unless the Beneficiary has previously given written notice to the Design-Builder within one hundred twenty (120) days from the date on which the last of the labor was performed or the last of the material was furnished, for which the Claim is made, stating with substantial accuracy the amount claimed and the party to whom the material was furnished or for whom the labor was performed. The notice must be served by delivering the same personally to the Design-Builder or by mailing the same by registered mail, postage prepaid, in an envelope addressed to the Design-Builder at any place where it maintains an office or conducts its business; provided, however, that where such notice is actually received by the Design-Builder by other means, such notice will be deemed sufficient.
- (v) Except as provided in Labor Law Section 220-g, no action on this payment guarantee may be commenced after the expiration of the one-year limitations period set forth in Section 137(4)(b) of the State Finance Law.
- (vi) The Design-Builder must promptly forward to the City at the address for notices provided in accordance with Article 41 any notice received pursuant to subsection (iv) above. The Design-Builder must inform the City of any defenses and must provide the City with copies of all documents the City requests concerning the notice.
- (vii) Whenever the City receives notice of a Claim from a Beneficiary pursuant to this Section 4.3 (*City Payment Guarantee*), the City will inform the Design-Builder of the same. The Design-Builder must inform the City of any defenses and must provide the City with copies of all documents the City requests concerning the Claim.
- (viii) All Claims made against the City by a Beneficiary will be presented to the DDC Representative along with all written documentation concerning the Claim that the DDC Representative deems reasonably appropriate or necessary for their review, which may include, but not be limited to, copies of Subcontracts, invoices presented to the Design-Builder or Subcontractor for payment, the notarized statement of the Beneficiary that the demand is due and payable, that a request

for payment has been made of the Design-Builder and that the demand has not been paid by the Design-Builder within the time allowed for such payment by the Subcontract, and any correspondence between the Beneficiary and the Design-Builder or its Subcontractors concerning such demand.

- (ix) The City will make payment only if, after considering all defenses presented by the Design-Builder, it determines that the payment is due and owing to the Beneficiary making the demand.
 - (x) No Beneficiary will be entitled to interest from the City, or to any other costs, including, but not limited to, attorneys' fees, except to the extent required by State Finance Law 137.
- (d) Upon receipt by the City of a Claim pursuant to this Section 4.3 (*City Payment Guarantee*) the City may withhold from any payment otherwise due and owing to the Design-Builder under this Agreement in an amount sufficient to satisfy the Claim.
- (i) In the event the City determines that the Claim is valid, the City will notify the Design-Builder of such determination and the amount thereof and direct the Design-Builder to immediately pay such amount to the beneficiary. In the event the Design-Builder, within seven (7) days of receipt of such notification from the City, fails to pay the Beneficiary, such failure shall constitute an automatic and irrevocable assignment of payment by the Design-Builder to the beneficiary for the amount of the demand determined by the City to be valid. The Design-Builder, without further notification or other process, hereby gives its unconditional consent to such assignment of payment to the Beneficiary and authorizes the City, on its behalf, to take all necessary actions to implement such assignment of payment, including without limitation the execution of any instrument or documentation necessary to effectuate such assignment.
 - (ii) In the event that the amount otherwise due and owing to the Design-Builder by the City is insufficient to satisfy such Claim, the City may, at its option, require payment from the Design-Builder of an amount sufficient to cover such Claim and exercise any other right to require or recover payment which the City may have under Law or Contract.
 - (iii) In the event the City determines that the demand is invalid, any amount withheld pending the City's review of such demand will be paid to the Design-Builder with the next Payment Request in accordance with Article 21 (*Payment Provisions*); provided, however, no lien or lawsuit has been filed or Claim filed with the Comptroller. In the event that a lawsuit has been commenced on the Claim, or lien filed or the Claim has been filed with the Comptroller, amounts withheld may continue to be withheld, without interest to the Design-Builder, until resolution of the lien or the lien has otherwise been sufficiently bonded in accordance with the Lien Law of the State of New York or the Claim is resolved, as applicable.
- (e) The provisions of this Section 4.3 (*City Payment Guarantee*) shall not prevent the City and the Design-Builder from resolving disputes in accordance with this Agreement.
- (f) In the event the City determines that the Beneficiary is entitled to payment pursuant to this Section 4.3 (*City Payment Guarantee*), such determination and any defenses and

counterclaims raised by the Design-Builder will be taken into account in evaluating the Design-Builder's performance.

- (g) Nothing in this Section 4.3 (*City Payment Guarantee*) will relieve the Design-Builder of the obligation to pay all valid and lawful Claims against the Design-Builder relating to the Work.
- (h) The Design-Builder will not require any performance, payment or other bonds of any Subcontractor if this Agreement does not require such bonds of the Design-Builder. This provision does not intend to limit the Design-Builder from requiring performance and payment bonds up to 100% of the Subcontractor's Subcontract value or requiring Subguard Insurance; provided that, the collective penal sum amount provided by all Subcontractors does not exceed the penal sum requirement for Performance Bond and Payment Bond under this Agreement.
- (i) The payment guarantee made pursuant to this Section 4.3 (*City Payment Guarantee*) will be construed in a manner consistent with Section 137 of the State Finance Law and will afford to persons furnishing labor or materials to the Design-Builder or its Subcontractors in the prosecution of the Construction Work under this Contract all of the rights and remedies afforded to such persons by such section, including but not limited to, the right to commence an action against the City on the payment guarantee provided by this Section 4.3 (*City Payment Guarantee*) within the one-year limitations period set forth in State Finance Law Section 137(4)(b).

4.4 Direct Agreements

- (a) Prior to NTP issuance, or at any other time as required by DDC, the Design-Builder will provide DDC with one or more executed Direct Agreements for each Key Subcontract in a form substantially consistent with Schedule J-3 (*Form of Direct Agreement*) executed by the Design-Builder and each Key Subcontractor.
- (b) For the purpose of obtaining additional Direct Agreements, DDC may designate any Subcontract important to the delivery of the Project as a Key Subcontract. Upon such designation, the Design-Builder shall provide DDC with an executed Direct Agreement in a form substantially consistent with Schedule J-3 (*Form of Direct Agreement*) executed by the Design-Builder and any such designated Key Subcontractor within the time reasonably requested by DDC.

4.5 Closing Bond

- (a) Without limiting DDC's rights under Section 2.9 (*Final Proposal Termination Grounds*), if the Design-Builder is terminated by DDC prior to Phase 2 under this Agreement due to a Design-Builder Default, then the City will be entitled to draw and retain the full amount of the Closing Bond as the sole monetary remedy of the City against the Design-Builder under this Agreement in respect of such Design-Builder Default, unless such Design-Builder Default is directly caused by any DDC breach of this Agreement.
- (b) The Parties, as sophisticated and experienced parties, acknowledge that:
 - (i) it is difficult or impossible to determine with precision the amount of damages and Losses that would or might be incurred by the City as a result forgoing alternative opportunities and for other costs incurred by the City in reliance upon the Design-

Builder's obligation to deliver, negotiate and agree on a Final Proposal by the applicable Phase 1 Milestone Deadlines and to progress to Phase 2;

- (ii) the sums that are payable under the Closing Bond 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 failure to deliver, negotiate and agree on a Final Proposal by the applicable Phase 1 Milestone Deadlines and progress to Phase 2, including the City's additional or increased costs and Losses; and
- (iii) the additional costs and Losses associated with each of the items referred to in clause (ii) increase and compound as time passes and also become substantially more complex to ascertain as time passes.

4.6 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.

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) The Parties have an obligation to coordinate and interface with third-parties, including as specified in the Project Requirements.
- (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 and agrees 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 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) DDC may direct the Design-Builder to take such steps as 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 DDC under Section 5.3(b)(i).
- (c) Subject to Section 5.3(d), any direction given by DDC under Section 5.3(b)(i) must be in writing and signed or given by DDC Representative or their designee.
- (d) In the case of an Emergency, DDC may issue an oral direction under Section 5.3(b)(i), which will be confirmed in writing by DDC within a reasonable time thereafter.
- (e) If the Design-Builder fails to promptly take the steps required by DDC under Section 5.3(b)(i):
 - (i) 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 DDC for all costs, that 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 DDC under this Section 5.3 will not entitle the Design-Builder to claim a Relief Event.

5.4 **DDC Reasonable Assistance**

- (a) Subject to Section 5.4(b), DDC will provide reasonable assistance to the Design-Builder in connection with the Design-Builder's obligations in connection with:
 - (i) the delivery of any Phase 1 Services that require information or access from DDC or require reasonable coordination by DDC;
 - (ii) 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;

- (iii) 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; and
 - (iv) Governmental Approvals required from non-City entities including, as appropriate, executing permit applications, attending public hearings and meetings, and providing the Design-Builder with existing relevant data and documents that are within DDC's custody or control or are reasonably obtainable by DDC and which are reasonably required for such purpose; provided, however, that DDC's obligation to provide such reasonable assistance will not limit the Design-Builder's obligation under Article 10 (*Governmental Approvals*), including the Design-Builder's primary obligation to obtain all required Governmental Approvals for the Project, and DDC's obligation to provide assistance will be limited to only those actions legally required by DDC as permittee or co-permittee or that involve providing information in the possession of, or reasonably obtainable by, DDC.
- (b) Any such assistance will be provided by DDC only when DDC can do so without incurring any additional cost to DDC, and only upon the reasonable written request of the Design-Builder made directly to DDC, and DDC will have no affirmative obligation independently to initiate or to provide such assistance. This covenant will also not obligate 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.

5.5 MTA Coordination and Force Account

- (a) This Section applies only where performance of the Work requires DDC to enter into a force account with the MTA.
- (b) If notified by DDC, the Design-Builder will be required to comply, and proactively fulfil any MTA requirements and obligations that DDC or the Design-Builder is required to comply with in connection with the Project or the performance of the Work within the vicinity of any MTA asset. To the extent necessary to perform the Work or as otherwise notified by DDC, the Design-Builder is obligated to understand any and all MTA rules, regulations and force account support requirements and must (i) comply, on DDC's behalf, with any such MTA requirements on a fully back-to-back basis to the same extent and to the level required by DDC and (ii) proactively coordinate with DDC to ensure the Design-Builder understands and possesses all information relevant to MTA necessary to perform the Work or otherwise comply with its obligations under this Section 5.5.
- (c) Without limiting Section 5.5(b), DDC and the Design-Builder must work to agree on terms with the MTA regarding, at a minimum, the time, location, number of force account personnel, cost and other terms and conditions usual and customary for force account work ("**MTA Force Account T&Cs**"). Once any MTA Force Account T&Cs are agreed to in writing between MTA and DDC, the Design-Builder must comply with the terms of the MTA Force Account T&Cs at all times including on a fully back-to-back basis to the same extent and to the level required by DDC (where applicable) and keep DDC regularly and timely informed in writing of any requests for MTA force account work under such MTA Force Account T&Cs.

PART B – THE WORK

6. PERFORMANCE OF THE WORK

6.1 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 Contract Documents, so as to achieve completion of each Phase 1 Milestone by the relevant Phase 1 Milestone Deadline and 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 Industry Practice;
- (iii) the Applicable Standards;
- (iv) all Applicable Laws, including Sections 200, 240, 241 and 242 of the New York Labor Law;
- (v) the requirements of all Governmental Approvals; and
- (vi) the orders, directions and requirements of 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 to Proceed (the “**NTP Date**” and “**NTP**”, respectively) issued by DDC. The NTP Date is the date the Design-Builder is authorized, subject to Section 6.3 (*Access to Project Site*) and Section 6.4 (*Commencement of Construction Work*), to commence all Phase 1 Services. 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 in accordance with this Agreement.

(e) PPB Rules

Unless otherwise expressly stated in this Agreement and to the greatest extent permitted under Applicable Law, the PPB Rules do not apply where the PPB Rules conflict with or modify the terms of this Agreement.

6.2 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 submitting its Final Proposal DDC may first require the Design-Builder to obtain preliminary PDC approval of the Design-Builder's Design Documents in accordance with Applicable Law and PDC's policies.
- (ii) Where a PDC approval is required, the Phase 1 Services and the Phase 2 Work include, without limitation, the 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, DDC may direct the Design-Builder in writing to implement such changes either (i) in accordance with this Agreement, (ii) during Phase 1, as part of its Final Proposal or (iii) issue a DDC Modification Request to the Design-Builder in accordance with Section 23.3 (*Modification Proposals*).
- (iv) If such PDC changes causes a material delay to the Critical Path or increases Net Costs to the Design-Builder relative to its Proposal Commitments or the Final Proposal, as applicable and in each case, is not otherwise required by this Agreement or covered by a Change Order following a DDC Modification Request under Section 6.2(b)(iii) above, DDC's written direction will entitle the Design-Builder to either (i) during Phase 1, include such Modification as part of its Final Proposal under Section 2.5(c)(v) (*Final Proposal Adjustment*) or (ii) during Phase 2, seek relief in accordance with Section 23.5 (*Extra Work Directive*).

(c) Design Document Completion

The Final Design Documents, Release for Construction Documents and Record Drawings must:

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

6.3 Access to Project Site

(a) **Project Site Access**

Subject to the Design-Builder satisfying each of the requirements below, 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 6.4 (*Commencement of Construction Work*) for the sole purpose of performing the Work until Final Completion:

- (i) the Design-Builder has provided 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 DDC to gain access to the Project Site, and, where approval is required, 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) **Phase 1 Site Access**

During Phase 1 the Design-Builder will only be entitled to a limited grant of access to the Project Site as provided in the Project Requirements solely for the purpose of carrying-out any Enabling Work or Project Site investigations and will not be entitled to full and complete uninterrupted access to the Project Site unless otherwise provided in the Project Requirements for certain Enabling Work. The Design-Builder acknowledges that the City may continue to have access to the Project Site and any structures on the Project Site for the duration of Phase 1 and as provided under the Project Requirements, in connection with any termination of this Agreement under Section 2.9 (*Final Proposal Termination Grounds*), the Design-Builder may be required to restore the Project Site to its original condition prior to such Project Site investigations or Enabling Work, as applicable.

(c) **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.

(d) **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 in writing to the Design-Builder areas outside of 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 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 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 sole discretion. Such grant, failure to grant, revocation or denial of an extension will not be deemed a Relief Event.
- (v) 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 DDC's discretion, are not required for the Design-Builder's performance of the Work.

6.4 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.) including any applicable Enabling Work, 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) Early Phase 2 Work and any other portion of the Construction Work until:
 - (i) Phase 2 has commenced or DDC, in its sole discretion, permits all or portions of Early Phase 2 Work to commence during Phase 1 by providing written notice to the Design-Builder in accordance with Section 2.3(b);
 - (ii) the Design-Builder's 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;
 - (iii) all applicable Governmental Approvals necessary to commence such Early Phase 2 Work or Construction Work have been obtained;
 - (iv) any other requirements and conditions identified in this Agreement and Project Requirements necessary to commence performance of the Early Phase 2 Work or any other applicable Construction Work have been satisfied; and
 - (v) the Design-Builder has submitted a certification in writing that it has satisfied all of the above.

6.5 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 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 Design-Builder Proposal Commitments or Final Proposal 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. Without the City’s prior written consent, Design-Builder will not use Work Product for any purpose other than in connection with its performance under this Agreement. The City may grant the Design-Builder a license to use the Work Product on such terms as determined by 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 expressly provided by DDC and 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 may not use duplicates or originals of Licensed Work Product describing or depicting, where applicable, 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 DDC.
- (d) If requested by DDC, the Design-Builder must (at no cost to DDC) promptly execute all documents and perform all other acts that 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 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 6.5, 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 DDC upon execution of this Agreement.

- (h) In no case will this Section 6.5 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.

6.6 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 DDC, the Design-Builder must (at no cost to DDC) promptly execute all documents and perform all other acts that 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 6.6(a).

6.7 Minor Waiver Requests

- (a) The Design-Builder may make a written request to DDC in the form attached as Exhibit 10 (*Minor Waiver Request/Directive Form*) to make Minor Waivers to, and consistent with the intent of, the Contract Documents. Any such Minor Waiver request by the Design-Builder may only be implemented by the Design-Builder if such Minor Waiver request form attached as Exhibit 10 (*Minor Waiver Request/Directive Form*) is signed in writing by DDC. All Minor Waiver requests by the Design-Builder must certify that such Minor Waiver (i) will not impair or diminish any Contract Document, (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 requested by the Design-Builder 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 requested by the Design-Builder is compliant with the terms of this Section 6.7. All such approved Minor Waiver requests are deemed part of the Contract Documents.
- (b) DDC may make Minor Waivers to the Contract Documents by issuing to the Design-Builder a Minor Waiver directive signed in writing by DDC in a form substantially consistent with the form attached as Exhibit 10 (*Minor Waiver Request/Directive Form*). Without prejudice to DDC's rights under Article 23 (*Allowance Approvals, Change Orders and Extra Work Directives*), DDC may not issue a Minor Waiver directive that (i) will cause a delay to achieving any Guaranteed Completion Date or (ii) will cause the Design-Builder or the City to incur any additional cost or expense to complete the Project. Upon receipt of a Minor Waiver directive, the Design-Builder must promptly implement and perform the Work as directed by DDC in such Minor Waiver directive. The Design-Builder will be responsible

for all costs associated with the burden of proof that any Minor Waiver directive by DDC violates the terms of this Section 6.7(b). All such Minor Waiver directives are deemed part of the Contract Documents.

7. 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 the Project Requirements. 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 DDC.

8. SAFETY

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 Industry Practices. The Design-Builder is required to comply with all safety compliance orders issued by the City.

9. SITE VALIDATION

9.1 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 DDC promptly with copies of all reports or analyses generated by the Design-Builder's tests, inspections and investigations of the Project Site.

9.2 Site Validation Period

(a) Generally

Subject to satisfying the requirements in Section 6.4(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) The Design-Builder will be entitled to request a Relief Event or Compensable Relief Event for any Unknown Site Conditions at any time, except the Design-Builder will be limited to claiming a Relief Event or Compensable Relief Event prior to the expiration of the Site Validation Period for those Unknown Site Conditions identified in Schedule A (*Contract Information*).

- (ii) The Design-Builder will not be entitled to a Relief Event or Compensable Relief Event on the basis of the Unknown Site Conditions at the Project Site described in Section 9.2(b)(i) that are identified or discovered after the Site Validation Period.

(c) **Extension to Claim Relief for Undisclosed Site Conditions**

The Parties recognize that the Design-Builder may be unable to conduct the investigations contemplated by this Section 9.2 because it will not (without any fault of the Design-Builder) be permitted by DDC to have access to certain areas or portions of the Project Site within the Site Validation Period to perform reasonable and necessary investigations on, or within, portions of the Project Site ("**Inaccessible Locations**"). The Design-Builder must notify DDC of any Inaccessible Locations during the Site Validation Period, and must provide for appropriate contingencies or allowances in its Final Proposal to account for any anticipated Unknown Site Conditions connected with such Inaccessible Locations. The Design-Builder must notify DDC within sixty (60) days (except where discovery of such unavailability was impossible during such 60-day period) of commencement of Phase 1 of all non-accessible areas and the dates upon which these areas are expected to become accessible. If 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 Site Validation Period will be extended for the period of time such areas were inaccessible, not to exceed the amount of time notified by DDC Representative to the Design-Builder in writing. If DDC, acting reasonably, does not agree that these areas are non-accessible, then the Site Validation Period will not be extended.

9.3 **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 (2) days) notify 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 24 (*Relief Events*) or otherwise adversely impact the Work, promptly notify 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 24 (*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.

10. **GOVERNMENTAL APPROVALS**

10.1 **Design-Builder Responsibility for Governmental Approvals**

- (a) Except with respect to DDC's responsibility for City Obtained Governmental Approvals set forth in Section 10.2 (*City Obtained 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 Industry 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 DDC for such application, submission or filing; provided, however, that if such Governmental Approval may only be held in the name of DDC or other City department or entity (a "**City Name Only Governmental Approval**"), and DDC has approved such action in advance, in writing, then any application or information may lawfully be submitted by the Design-Builder in 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 10.1(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 DDC (and not directly) and 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.

10.2 **City Obtained Governmental Approvals**

- (a) The City is responsible for obtaining and maintaining any City Obtained Governmental Approvals required for the Project. The Design-Builder will provide reasonable assistance to DDC in maintaining and obtaining any such City Obtained Governmental Approvals, including providing to DDC information and documentation required to obtain any City Obtained Governmental Approvals reasonably requested by DDC in connection with the applications for such City Obtained Governmental Approvals.
- (b) Subject to first receiving 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 Obtained 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 10.2(b) are not permitted by the applicable Governmental Entity issuing such City Obtained Governmental Approvals, the Design-Builder must, at its own risk of delay and cost and subject to 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 Obtained Governmental Approvals as directed by the Governmental Entity issuing such approval.

- (d) To the extent required as part of the Phase 1 Services, the Design-Builder must use its best efforts to perform its obligations under this Section 10.2(b) and Section 10.2(c) during Phase 1 and prior to the Final Proposal Submission Date.
- (e) The Design-Builder must afford adequate time for DDC to review any required amendments described in this Section.

10.3 Copies of Applications, Governmental Approvals & Log of Governmental Approvals

- (a) Within five (5) 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 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.

11. ENVIRONMENTAL COMPLIANCE

11.1 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.

11.2 Hazardous Materials

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 to be in full compliance with all Standards of Performance and the Contract Documents.

12. SUBMITTALS

12.1 General

The terms and procedures in this Article 12 and the Project Requirements govern Submittals protocols to DDC under this Agreement.

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

Nothing in this Article 12 or the Project Requirements (including any act or omission of DDC under these provisions or any approval of or any comment to any Submittal by 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 DDC that the Work satisfies the requirements of this Agreement;
- (c) subject or cause 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 DDC from subsequently raising an objection or comment on a Submittal if the same objection or comment was not made by DDC on a previous Submittal and the objection or comment is necessary to ensure compliance with this Agreement.

13. TIME FOR COMPLETION & LIQUIDATED DAMAGES

13.1 Times for Completion

The Design-Builder must achieve each of the Completion Milestones set forth in Schedule A (*Contract Information*) on or before the corresponding Guaranteed Completion Dates.

13.2 Delays

Upon the earlier of either the Design-Builder or DDC becoming aware that there will be, or is likely to be, a delay in achieving any Guaranteed Completion Date (an “**Early Warning Trigger**”), the Design-Builder must and DDC may:

- (a) promptly (and in any event within fifteen (15) days) after becoming aware of the delay or likely delay, notify DDC in writing of the delay or likely delay;
- (b) if required by DDC, the Design-Builder must prepare a Remedial Plan in accordance with Section 33.3 (*Remedial Plan for Design-Builder Default or Early Warning Trigger*); and
- (c) if requested by DDC, the Parties must convene a meeting between DDC, the Design-Builder, Principal Participants, relevant Subcontractors and other parties requested by 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.

13.3 Liquidated Damages for Delays

If the Design-Builder fails to achieve Substantial Completion for any Completion Milestone by the applicable Guaranteed Completion Date set forth in Schedule A (*Contract Information*), the Design-Builder must pay daily liquidated damages to DDC (“**Delay Liquidated Damages**”), at the applicable daily rates set forth in Schedule A (*Contract Information*).

13.4 Accrual and Payment of Delay Liquidated Damages

- (a) Liquidated damages payable under this Article 13 will accrue daily. Such amounts will be payable monthly or may be set off by the City against any amounts due and payable to the Design-Builder as provided further in Article 21 (*Payment Provisions*).
- (b) The Design-Builder must continue to pay any Delay Liquidated Damages until the applicable delayed Completion Milestone has achieved Substantial Completion. 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.

13.5 **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 DDC as a result of the Design-Builder's delay in completing the Work on or before the applicable Guaranteed Completion Date;
- (b) the sums that are payable under this Article 13 (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 the City's 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.

13.6 **Exclusive Remedy**

The Delay Liquidated Damages payable under this Article 13 are 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, but will not excuse the Design-Builder from liability for any other breach of its obligations under this Agreement and will not preclude DDC from exercising any other rights it has under this Agreement (including under Article 33 (*Design-Builder Default*)). The Delay Liquidated Damages are also the exclusive remedy for any indemnity obligations under Article 30 (*Indemnity from the Design-Builder*) for Third Party Claims directly and solely caused by the Design-Builder's delay, but in no case does it include Third Party Claims for any physical harm, including bodily injury or property damage caused by a Design-Builder Party.

13.7 **Limitation on Liability**

(a) **LD Cap**

The maximum aggregate liability of the Design-Builder to the City for Delay Liquidated Damages under this Article 13 (the "**LD Cap**") is set forth in Schedule A (*Contract Information*).

(b) **Aggregate Limitation on Liability**

Subject to Section 13.7(c) (*Exclusions from Limitations on Liability*), the total, maximum aggregate liability of the Design-Builder to DDC arising out of this Agreement will be limited to the amount set forth in Schedule A (*Contract Information*) (the "**Aggregate Liability Cap**"). While a

Surety that is performing the Design-Builder's obligations under this Agreement will have an equivalent right as the Design-Builder to assert the Aggregate Liability Cap for liabilities to DDC the Design-Builder otherwise is responsible for under this Agreement, the Aggregate Liability Cap will not impact the City's right to claim amounts or require the Surety's performance for those liabilities or obligations which are not otherwise covered by the Aggregate Liability Cap and are in excess of the Aggregate Liability Cap up to the full penal sum under the Performance Bond and Payment Bond.

(c) Exclusions from Limitation on Liability

The limitation of liability in Section 13.7(b) (*Aggregate Limitation on Liability*) will not apply to the following, and none of the following will be taken into account in determining whether the Aggregate Liability Cap has been reached:

- (i) any liabilities or obligations to the extent that:
 - (A) the amount of such liabilities or obligations previously paid to DDC are actually recovered by the Design-Builder from the proceeds of insurance maintained by 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 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;
 - (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; or
 - (v) any cost overruns, including amounts incurred by the Design-Builder in remedying any breach, noncompliance, or default under this Agreement.
- (d) Nothing in this Section 13.7 will be deemed to limit any amounts recoverable by the City under and in accordance with any performance bonds or payment bonds furnished by any Key Subcontractor naming the City as dual obligee.

14. SUBSTANTIAL COMPLETION

14.1 Conditions to Substantial Completion

Substantial Completion will occur when all conditions to Substantial Completion (“**Substantial Completion Conditions**”) have been achieved for the applicable Completion Milestone as set out in the Project Requirements and a Punch List has been approved by DDC. DDC will issue a written determination indicating the date in which each Completion Milestone or the Project, as applicable, has satisfied such Substantial Completion Conditions.

14.2 Substantial Completion Process

- (a) The Design-Builder must provide written notice to DDC of the anticipated date for satisfying all the Substantial Completion Conditions for each Completion Milestone no later than ninety (90) days prior to the anticipated date. The notice must include a list of all the applicable Substantial Completion Conditions that will be satisfied to allow DDC to issue a determination of Substantial Completion for such Completion Milestone.
- (b) No later than sixty (60) days prior to satisfying all of the Substantial Completion Conditions for each Completion Milestone, the Design-Builder must meet and confer with DDC to confirm that the list of requirements provided under Section 14.2(a) is in accordance with this Agreement. Following the initial meeting, the Design-Builder and DDC will meet, confer and exchange information on a regular basis to allow 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 DDC promptly after it has satisfied all the Substantial Completion Conditions for any Completion Milestone, together with all supporting documents and a Punch List, specifying all items of Work to be completed and proposing dates for the completion of each specified item of Work.
- (d) In connection with and prior to its determination of Substantial Completion for the Project or Substantial Completion of any other Completion Milestone, DDC may add or remove items to or from the Punch List.

14.3 Partial Substantial Completion & Warranty Period

- (a) In DDC’s sole discretion, the Design-Builder may seek, and DDC may determine, that Substantial Completion has occurred for any Completion Milestone. All terms and conditions of Substantial Completion in this Agreement will apply to the applicable Completion Milestone, except risk of loss will not transfer to the City under Section 31.18 (*No-Fault Restoration Obligations*) until Substantial Completion of the Project, except where 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 Completion Milestone.
- (b) Where a Completion Milestone has achieved Substantial Completion and there are areas or equipment, including heating, ventilation and cooling systems and elevators, that will be used by the Design-Builder in connection with its remaining Work, including, areas used for ingress and egress to the areas where Work remains to be performed, then the Warranty Period required under Article 27 (*Warranties*) for such Work will commence upon

the date of its Substantial Completion and will extend through the end of the Warranty Period for Substantial Completion for the Project.

14.4 **Effect of Determination of Substantial Completion**

Determination of Substantial Completion for any Completion Milestone will not:

- (a) relieve the Design-Builder of its obligation to complete the remaining Work;
- (b) cause 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; or
- (d) release the Design-Builder from any obligations under this Agreement, including its obligations with respect to insurance coverage.

15. **FINAL COMPLETION**

15.1 **Conditions to Final Completion**

Subject to the certification to be countersigned by DDC under Section 16.2(a), Final Completion for the Project or to the extent permitted by DDC, any other Completion Milestone, as applicable, will occur when all the following conditions ("**Final Completion Conditions**") have been satisfied:

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

15.2 **Final Completion Process**

- (a) The Design-Builder must provide written notice to DDC of the anticipated date for Final Completion of the Project, or if permitted by DDC, any other Completion Milestone no later than twenty (20) days prior to the anticipated date for satisfying all the applicable Final

Completion Conditions. The notice must include a list of all Final Completion Conditions that will be satisfied to allow DDC to countersign the Certificate of Final Completion.

- (b) No later than ten (10) days prior to satisfying all Final Completion Conditions for any Completion Milestone, the Design-Builder must meet and confer with DDC to confirm that the list of requirements provided under Section 15.2(a) is in accordance with this Agreement and provide a draft Certificate of Final Completion to DDC. Following the initial meeting, the Design-Builder and DDC will follow the Completion Protocols as set forth in Section 16.2(a) until the Design-Builder signs and DDC countersigns the Certificate of Final Completion.

15.3 **Cost Savings at Final Completion**

If the Contract Price is a GMP Contract Price as provided under any approved Final Proposal Change Order, upon Final Completion occurring pursuant to Section 15.1 (*Conditions to Final Completion*), DDC will determine whether the sum of all payments made to the Design-Builder for the Phase 2 Work is less than the Contract Price, and if this is the case, the Parties will share the difference between the Total Phase 1 and Phase 2 Contract Price and the sum of all payments to the Design-Builder for the performance of the Work under this Agreement during Phase 1 and Phase 2 (the “**Final Savings**”) in the percentage specified in Schedule A (*Contract Information*), in each case, excluding amounts either: (i) paid from Allowances or Change Orders to the Design-Builder and (ii) retained by DDC for unallocated Allowances under Section 20.7 (Allowance Contract Price Adjustment).

16. **COMPLETION PROTOCOLS**

16.1 **Inspection and Review**

After receiving any Design-Builder notice under any of the following, as applicable: 14.2(c) (*Substantial Completion Process*) or 15.2(a) (*Final Completion Process*) (each a “**Completion Notice**”), 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**”).

16.2 **Certification**

Following each inspection referred to in Section 16.1 (*Inspection and Review*):

- (a) if DDC determines that all of the applicable Completion Conditions have been satisfied, DDC will, for Substantial Completion of a Completion Milestone or other discrete portion of the Work deemed substantially complete, issue a written determination of Substantial Completion within ten (10) Business Days of making its determination and, for Final Completion, countersign, the Certificate of Final Completion delivered to DDC by the Design-Builder under Section 15.2(b) within ten (10) Business Days of making its determination; or
- (b) if DDC determines that any applicable Completion Condition has not been satisfied, DDC will notify the Design-Builder in writing of the applicable Completion Conditions that have not been satisfied within ten (10) Business Days of making its determination.

16.3 Disputes

- (a) The Design-Builder must notify DDC if it disputes DDC's determination under Section 16.2(b) within ten (10) days of receiving DDC's determination. If the Design-Builder does not notify DDC of a dispute within that ten-day period, the Design-Builder will be deemed to have accepted DDC's determination.
- (b) If the Design-Builder accepts or is deemed to have accepted DDC's determination under Section 16.2(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 16.1 (*Inspection and Review*) will apply to that resubmission).
- (c) If the Design-Builder issues a notice under Section 16.3 (*Disputes*) and the Parties fail to resolve the dispute within a further fourteen (14) days of that notice, the matter will be resolved in accordance with Article 39 (*Dispute Resolution Procedure*).

PART C – CONTRACTING PRACTICES AND PERSONNEL

17. 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 Schedule G (*Key Personnel & Key Subcontracts*) or 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) Replacement of such Key Personnel will only be permitted if approved in advance in writing by DDC. Such approval will only be granted in the case of extenuating circumstances (e.g. death, disability, incapacity, retirement, or voluntary or involuntary termination of employment). Any proposed replacement for an individual identified as Key Personnel must meet the minimum requirements for that title and possess qualifications substantially similar to those of the individual being replaced. Failure by the Design-Builder to provide the individuals specifically listed as Key Personnel in Schedule G (*Key Personnel & Key Subcontracts*) or Exhibit 3 (*Design-Builder Proposal Commitments*) will serve as the basis for DDC to issue a notice of Design-Builder Default, following DDC granting the Design-Builder a reasonable cure period to cure such breach.
- (c) 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 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, DDC will provide the Design-Builder an opportunity to be heard on no less than five (5) days' written notice. DDC may direct the Design-Builder to prohibit the individual from performing work under the Agreement pending the opportunity to be heard and DDC's determination.

18. SUBCONTRACTING

18.1 Subcontracting

- (a) For each proposed Subcontractor at any-tier, the Design-Builder must:
- (i) excluding any Subcontractor listed in Schedule G (*Key Personnel & Key Subcontracts*) or where waived by DDC in writing, under a GMP Contract Price, prior to selecting a Subcontractor, the Design-Builder must obtain at least three bids from Subcontractors to ensure DDC is receiving best value (considering time, quality, capability, experience and cost) for the Project;
 - (ii) notwithstanding the exclusion for multiple bids pertaining to Subcontractors in Schedule G (*Key Personnel & Key Subcontracts*) in Section 18.1(a)(i) above, for those Subcontractors selected by the Design-Builder without multiple bids, the Design-Builder must still perform a market evaluation on an Open Book Basis in accordance with Best Industry Practice to determine current market pricing data for the relevant trades or suppliers and ensure DDC has relevant data to confirm any pricing received from the Design-Builder;
 - (iii) 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
 - (iv) 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 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 forty five (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 18.1 (*Subcontracting*). The Design-Builder must provide a copy of any draft or executed Subcontract at any-tier upon request by 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 ten (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 Industry 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) 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).

18.2 Key Subcontracts

Excluding any Subcontracts designated by DDC as Key Subcontracts pursuant to Section 4.4(b), the Design-Builder must not, without the prior written consent of DDC (not to be unreasonably delayed, conditioned, or withheld):

- (a) terminate or agree to terminate all or any part of a Key Subcontract;
- (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.

18.3 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 the Work performed by the Subcontractor;
- (b) a covenant to maintain all Governmental Approvals for the performance of the applicable Work (other than City Obtained 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 Industry 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 Industry Practice for work of similar scope and scale) and to comply with all applicable insurance requirements under Article 31 (*Insurance & Restoration*);
- (e) a requirement that any Subcontractor participate in meetings between the Design-Builder and DDC (if participation is required by this Agreement or as otherwise requested or approved by 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 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 DDC or the Design-Builder request the Subcontractor's participation;
- (g) a provision that expressly permits assignment to DDC without cost to DDC, or its successor, assignee or designee of: (i) all Design-Builder's rights under the Subcontract contingent only upon delivery of a written request from DDC in accordance with this Agreement, and (ii) the ability 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 DDC, or its successor, assignee or designee, will not operate to make 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 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 DDC or its successor, assignee or designee a new contract between the Subcontractor and 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) DDC delivers to the Subcontractor written request for the new contract within sixty (60) days following termination or expiration of this Agreement;
- (i) a requirement that the Subcontractor will comply with the applicable provisions of Article 40 (*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 DDC for the Subcontractor's lost profits or business opportunity, but subject to the right of DDC to request a new contract as provided above;
- (m) a requirement that nothing contained in the Subcontract will impair the rights of DDC;
- (n) a requirement that nothing contained in the Subcontract or this Agreement will create any contractual relationship between the Subcontractor and DDC;
- (o) (A) a requirement that the Subcontractor comply, and cause its Subcontractors to comply, with the Project Labor Agreement (where applicable) and (B) compliance, monitoring and enforcement provisions consistent with the Project Labor Agreement (where applicable);
- (p) provisions naming 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 New York Labor Law Section 220 and the Subcontractor comply with Sections 200, 240, 241 and 242 of the New York Labor Law;
- (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 DDC will be void ab initio and of no force and effect.

18.4 **Key Subcontractor Performance Bond and Payment Bond**

- (a) If the Design-Builder is providing payment bonds and performance bonds from Key Subcontractors in accordance with the Option 2 Phase 2 Bonding Requirements in Schedule A, subject to the terms and conditions of this Article 18 generally and Section 18.4(b) below, the Design-Builder will require and will cause each Key Subcontractor performing Construction Work whose total value of all Key Subcontracts with the Design-Builder exceeds \$1,000,000 (either individually or in the aggregate) to furnish one or more performance and payment bonds in an amount equal to 100% of the subcontract value for each such Key Subcontract prior to such Key Subcontractor performing Construction Work under any such Key Subcontract. Each performance and payment bond must be (i) in the form attached to this Agreement as Exhibit 12 (*Form of Key Subcontractor Performance Bond and Payment Bond*), (ii) issued by a Qualified Surety and (iii) include the City as a dual obligee. The City will be entitled to claim on such performance and payment bonds in accordance with the terms of such bonds following any default of the applicable Key Subcontract.
- (b) The Design-Builder may provide to DDC prior to the commencement of Construction Work, in lieu of Key Subcontractors providing performance and payment bonds as required in Section 18.4(a) above, proof of the procurement by the Design-Builder of subcontractor default insurance ("**Subguard Insurance**") which (i) is approved by DDC in its reasonable discretion, (ii) is in an amount that covers the full value of the applicable Key Subcontract, (iii) is procured from a Qualified Surety and (iv) names the City of New York, including its officials and employees as an additional insured.

18.5 **No Liability**

Notwithstanding the incorporation in any Subcontract of any of the above, and notwithstanding any rights the City may have reserved to itself, the City or any of its officials or employees 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 and any of its officials or employees of, and from, any and all such liability and obligations.

18.6 **No Prohibition on Self-Performance**

This Agreement does not prohibit the Design-Builder from self-performing any portions of the Work, provided the Design-Builder is qualified and, if applicable, licensed to perform the Work, and complies with Applicable Law and the requirements of this Agreement, including, without limitation, the M/WBE Requirements.

18.7 **Specified Providers**

- (a) Notwithstanding DDC identifying or specifying vendors or suppliers for certain portions of the Work ("**Specified Providers**"), to the greatest extent permissible under Applicable Law, the Design-Builder acknowledges and agrees to the following notwithstanding the Design-Builder utilizing a Specified Provider for the Project:

- (i) the Designer-Builder waives and releases DDC for the performance or non-performance of any Specified Provider; and
 - (ii) the Design-Builder must independently test, certify, validate, diligence, approve and accept any supply or services provided by a Specified Provider to the same extent as any other supplier or Subcontractor and, unless the Design-Builder notifies DDC of a defect in such Specified Provider's performance or supply, the Design-Builder takes full responsibility for the Specified Provider's supply or services to the same extent as any other Design-Builder Subcontractor or supplier.
- (b) To the extent the Design-Builder notifies DDC of a Specified Provider's defective performance, then the Parties will work to agree to resolve such issue within a reasonable time following the Design-Builder's notification to DDC.

19. **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 (iii) 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 Applicable Law, the Project and all applicable Work performed under this Agreement is subject to the Project Labor Agreement included with the Reference Documents. The Design-Builder must comply with the Project Labor Agreement and submit reasonable proof of compliance with each Payment Request and upon request of the City. Without limiting the requirements of the Project Labor Agreement, the Design-Builder must reasonably cooperate with NYCSBS and the City on specific outreach events, including "Hire-on-the-Spot" events, for the hiring of trades workers in connection with the Work.

(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, 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

20. CONTRACT PRICE

20.1 Phase 1 Fixed Price

During Phase 1, the Design-Builder's sole compensation for the Phase 1 Services will be the Phase 1 Fixed Price paid in accordance with Section 21.1(a) (*Phase 1 Compensation*).

20.2 Fixed Contract Price Option

- (a) If the Final Proposal Change Order provides for a Fixed Contract Price, then as consideration to the Design-Builder for the full and complete performance of the Phase 2 Work, DDC will pay, and the Design-Builder will accept, payments of the Contract Price as follows:
 - (i) one or more firm, fixed-price, lump sum amounts equal to the amounts indicated as "Lump Sum Amounts" in Schedule J-4 (*Form of Final Proposal Change Order*) (the "**Lump Sum Amount(s)**") to be paid in accordance with Article 21 (*Payment Provisions*); and
 - (ii) Allowances identified in this Agreement, amounts for which are identified in J-4 (*Form of Final Proposal Change Order*), subject to, and in accordance with Section 20.6 (*Allowances*), to be paid in accordance with Article 21 (*Payment Provisions*).
- (b) DDC may identify multiple Lump Sum Amounts in Schedule J-4 (*Form of Final Proposal Change Order*) where DDC, in its discretion, will pay the Design-Builder for discrete components or elements of the Project (a "**Project Component**"). Each Lump Sum Amount will have its own Schedule of Values and DDC will pay the Design-Builder for each Project Component solely the Lump Sum Amount indicated in Schedule J-4 (*Form of Final Proposal Change Order*) for such Project Component.

20.3 GMP Contract Price Option

If the Final Proposal Change Order provides for a GMP Contract Price, then as consideration to the Design-Builder for the full and complete performance of the Phase 2 Work, DDC will pay, and the Design-Builder will accept, payments not to exceed the GMP Contract Price, which will include the following:

- (a) the Phase 2 Work Costs paid in accordance with Section 21.1(c)(ii)(A)(1); plus
- (b) the Phase 2 Work fixed price amounts paid in accordance with Section 21.1(c)(ii)(B); plus
- (c) the Allowances identified in this Agreement, amounts for which are identified in Schedule B (*Contract Price*), subject to, and in accordance with Section 20.6 (*Allowances*), to be paid in accordance with Section 23.1 (*Allowance Approvals*); plus
- (d) each Design-Builder Construction Allowance to be paid in accordance with Section 20.8 (*Design-Builder Construction Allowance*).

20.4 Total Compensation

The Total Phase 1 and Phase 2 Contract Price is the total compensation for all of the Design-Builder's costs and risks for managing and performing the Phase 1 Services and the Phase 2 Work, including all costs for:

- (a) all Design Work;
- (b) all Enabling Work and Early Phase 2 Work;
- (c) all Allowance Work, subject to, and in accordance with Section 20.6 (*Allowances*) and Article 21 (*Payment Provisions*);
- (d) all mobilization payments as set out in the Project Requirements;
- (e) Subcontractors, equipment, materials, labor, transportation and services;
- (f) any royalties or licensing or other fees with respect to any Intellectual Property rights;
- (g) obtaining, maintaining and complying with Governmental Approvals;
- (h) taxes and any increase in taxes, including corporate taxes, sales taxes, use taxes, taxes on all equipment, materials, labor and services;
- (i) any duties, fees and royalties imposed with respect to any equipment, materials, labor or services;
- (j) subject to payment for any Approved Materials, completion of the Work as required in this Agreement; and
- (k) all the Design-Builder's performance of any Work during the Warranty Period or to correct any latent defects or non-conforming Work

20.5 **No Adjustments to the Contract Price**

Except for any adjustment to the Total Phase 1 and Phase 2 Contract Price in accordance with Articles 23 (*Allowance Approvals, Change Orders and Extra Work Directives*) and 24 (*Relief Events*):

- (a) the Total Phase 1 and Phase 2 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 Total Phase 1 and Phase 2 Contract Price.

20.6 **Allowances**

The Contract Price may include Allowances identified in Schedule B (*Contract Price*), 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 may include a “**Compensable Relief Event Allowance**” in an amount set forth in Schedule B (*Contract Price*), which may be disbursed by 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 23 (*Allowance Approvals, Change Orders and Extra Work Directives*); and
 - (ii) to reimburse the Design-Builder for: 1) DDC's share of the fees and expenses required to be paid to any mediator or the Disputes Review Board for performing its services under and in accordance with this Agreement; and 2) DDC's share of Design-Builder's out-of-pocket expenses for any independent third-party partnering facilitator contracted for the Project.
- (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 (*Contract Price*).
 - (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 23.1 (*Allowance Approvals*).

20.7 Allowance Contract Price Adjustment

- (a) Whenever amounts due for any Allowance Work or Compensable Relief Event exceeds the applicable Allowance funding, the Design-Builder will cooperate with DDC to execute a Change Order and adjust the Contract Price in accordance with Section 23.2 (*Change Orders*).
- (b) If at the date of DDC's issuance of a written determination of Final Completion of the Project, there are unallocated amounts for any Allowance for which Allowance Work has not been performed, these unallocated amounts will be retained entirely by DDC.

20.8 Design-Builder Construction Allowance

- (a) The Design-Builder may at any time during Phase 2, in connection with a Payment Request for a GMP Contract Price, request that funds be paid to the Design-Builder from a Design Builder Construction Allowance, subject to the terms and conditions of such Design-Builder Construction Allowance and this Section 20.8 (*Design-Builder Construction Allowance*) and DDC's issuance of a Design-Builder Construction Allowance approval.
- (b) Notwithstanding anything to the contrary in this Agreement: (i) the Design-Builder is not entitled to any amount which exceeds the aggregate of the Design-Builder Construction Allowance Total for Design-Builder Construction Allowance Work, and (ii) except for adjustments made because of a Change Order increasing the scope of the Project, the Design-Builder Construction Allowance Total cannot be increased for any reason and it may not be replenished in a manner described under Section 20.7(a) (*Allowance Contract Price Adjustment*).
- (c) Any Design-Builder Construction 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 Design-Builder Construction Allowance Work at risk and seek DDC's approval for the same during or after performance, subject to the terms and conditions of this Section 20.8 (*Design-Builder Construction Allowance*), including requirements for record keeping and documentation.

- (d) Subject to clause 20.8(b), DDC may grant approval of Design-Builder Construction Allowance Work and the Design-Builder Construction Allowance specified in the relevant Payment Request, subject to the following terms and conditions, in which case the Design-Builder's performance of the Design-Builder Construction Allowance Work, up to the not-to-exceed amount set forth in Schedule B (*Contract Price*) and approved by DDC will not be considered at the Design-Builder's risk of non-payment from DDC. DDC will grant approval of the Design-Builder Construction Allowance Work where the following conditions are satisfied:
 - (i) the Design-Builder provides evidence reasonably satisfactory to DDC to establish that the relevant Design-Builder Construction Allowance Assumption is no longer correct; and
 - (ii) where the amount being claimed for the Design-Builder Construction Allowance does not exceed the not-to-exceed amount specified in Schedule B (*Contract Price*) and approved by DDC.

21. PAYMENT PROVISIONS

21.1 Payment for Work Performed

(a) Phase 1 Compensation

During Phase 1, subject to the Design-Builder satisfying the requirements in this Agreement, DDC will pay the Phase 1 Fixed Price to the Design-Builder by making progress payments based on the applicable percentage of Work completed, and in the manner, as set out in Schedule B (*Contract Price*). The Design-Builder must submit an accurate and complete Payment Request in writing to DDC that satisfies the requirements in Section 21.2 (*Payment Request*) by the time required in the General Project Requirements, in an amount corresponding to:

- (i) any Enabling Work Cost, where applicable, due and payable for Enabling Work performed; plus
- (ii) any Phase 1 Design Work Fee due and payable for Phase 1 Design Work performed; plus
- (iii) any Phase 1 Construction Management Services Fee due and payable for Phase 1 Construction Management Services performed; plus
- (iv) any mobilization payments permitted under the Project Requirements; plus
- (v) any amounts due and payable for Early Phase 2 Work During Phase 1 in accordance with Section 2.3(b) as described by Section 21.1(f); plus
- (vi) any Allowance Approvals issued by DDC in accordance with Section 23.1 (*Allowance Approvals*); plus
- (vii) any other amounts owed by DDC under this Agreement, less
- (viii) any undisputed amounts owed by the Design-Builder under this Agreement to DDC.

(b) **Phase 2 Progress Payments**

During Phase 2, subject to the Design-Builder satisfying the requirements in this Agreement, 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 DDC that satisfies the requirements in Section 21.2 (*Payment Request*) by the time required in the General Project Requirements, in each case in accordance with clause (c) below, in an amount corresponding to:

- (i) Progress Payments for Work performed by the Design-Builder; plus
- (ii) any Allowance Approvals issued by DDC in accordance with Section 23.1 (*Allowance Approvals*); plus
- (iii) solely for a GMP Contract Price, any Design-Builder Construction Allowance approvals issued by DDC in accordance with Section 20.8 (*Design-Builder Construction Allowance*); plus
- (iv) any other amounts owed by DDC under this Agreement (including a mobilization payment provided in the Project Requirements), less
- (v) any undisputed amounts owed by the Design-Builder under this Agreement to DDC.

(c) **Phase 2 Progress Payment Options**

Based on the type of Contract Price selected in the Final Proposal Change Order, subject to the Design-Builder satisfying the requirements in this Agreement, DDC will pay Progress Payments to the Design-Builder based on the following:

- (i) **Fixed Price** - if the Contract Price is a Fixed Contract Price:
 - (A) an amount equal to the Design-Builder's percentage completion of each item listed in the Schedule of Values;
 - (B) each unit of Unit Price Work actually performed in accordance with the Contract Documents;
 - (C) all Allowances identified in Schedule B (*Contract Price*) will be paid for Allowance Work actually performed in accordance with Section 20.6 (*Allowances*) and Section 23.1 (*Allowance Approvals*);
- (ii) **Guaranteed Maximum Price** - if the Contract Price is a GMP Contract Price:
 - (A) **Guaranteed Maximum Amounts** – the following will be paid up to the applicable guaranteed maximum amount in Schedule B (*Contract Price*):
 - (1) **Phase 2 Work Costs** - the costs reasonably and actually incurred by the Design-Builder in the proper performance of the Phase 2 Work calculated and documented in accordance with Section 25.2 (*Design Work*) and Section 25.3 (*Construction Work*), excluding

mobilization payments, overhead, profit, each Design-Builder Construction Allowance, Allowances and General Conditions (the “**Phase 2 Work Costs**”);

- (2) each Design-Builder Construction Allowance to be paid in accordance with Section 20.8 (*Design-Builder Construction Allowance*); and

(B) **Fixed Price Amounts** – the following will be paid based on a percentage of the Phase 2 Work completed by the Design-Builder up to the applicable amount indicated in the Schedule of Values:

- (1) the Phase 2 Design-Builder Fee;
- (2) the General Conditions Amount, and
- (3) any other Phase 2 Work specified as being paid on a fixed-price in accordance with Schedule B (*Contract Price*); and

(C) **Allowances** – all Allowances identified in Schedule B (*Contract Price*) will be paid for Allowance Work actually performed in accordance with Section 20.6 (*Allowances*) and Section 23.1 (*Allowance Approvals*),

and in each case, any other amounts expressly approved by DDC in writing which are due and payable to the Design-Builder (including any mobilization payments permitted under the Project Requirements).

(d) **Mobilization Payment**

Within 30-days of the commencement of Phase 1 and Phase 2, respectively, 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**” for Phase 1 or Phase 2, as applicable. Subject to registration of the Agreement as set forth above, DDC will review and pay the Mobilization Payment without taking any Retainage Amount in accordance with Section 21.2 (Payment Request).

(e) **Stored Materials**

Except as permitted in accordance with Section 21.3 (*Payment for Stored Materials*) or by DDC in writing in limited short-term circumstances where necessary for Project efficiency, 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.

(f) **Early Phase 2 Work During Phase 1**

For any Early Phase 2 Work During Phase 1, the Design-Builder may submit a Payment Request and will be paid monthly (i) if a fixed price, for a percentage of the Early Phase 2 Work During Phase 1 completed or (ii) if a guaranteed maximum price, the amounts described in Sections 21.1(c)(ii) for Early Phase 2 Work During Phase 1 actually performed and completed by the Design-Builder, in each case, in accordance with Section 21.2 (*Payment Request*).

21.2 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 DDC to reasonably determine that the Design-Builder's performance has occurred, and payment is due;
- (d) in the case of a GMP Contract Price:
 - (i) sufficient details, calculations, invoices, subcontractor-bidding documentation, subcontracts and supporting documentation and any other information required or reasonably requested by DDC in respect of all amounts claimed by the Design-Builder and its subcontractors to enable DDC to fully and accurately (without needing to refer to any other documentation or information) determine the actual cost and expense for performing the Phase 2 Work, in each case documented in accordance with Section 25.10 (*Records*);
 - (ii) all executed Design-Builder Construction Allowance approvals, as applicable and an accounting of the cumulative amounts of any Design-Builder Construction Allowance expended to date;
 - (iii) a certification by the Design-Builder that the Design-Builder has, for each portion of the Phase 2 Work or Early Phase 2 Work During Phase 1 subcontracted to a Subcontractor, complied with Section 18.1(a)(i) and Section 18.1(a)(ii) and that the Subcontractor and its proposal and pricing selected represents the best-value (considering time, quality, capability, experience and cost) to the City and the Project and was selected on an arms-length basis;
- (e) all executed Allowance Approvals, as applicable and an accounting of the cumulative amounts of any Allowances expended to date;
- (f) all executed Change Orders relevant to the applicable Payment Request;
- (g) 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 that, to the best of the Design-Builder's knowledge, information and belief after making all reasonable enquiries:
 - (A) all items, services and prices of Work shown in the Payment Request are correct;
 - (B) all Work has been performed in compliance with the Agreement; and

- (C) the amounts stated in the Payment Request are a true and correct statement of the amounts due and payable under this Agreement 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 to the best of the Designer of Record's knowledge, information and belief after making all reasonable enquiries, the following for Work covered by the Payment Request:
 - (A) the undersigned certifies that, to the best of their knowledge, all Design Work has been prepared in accordance with the Contract Documents, 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 Request has been witnessed and inspected by all appropriate and responsible parties 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, to the best of their knowledge, Work covered by the Payment Request, 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, to the best of their knowledge, the quality assurance and quality control measures and procedures required under the Agreement have been followed, except as specifically noted;
- (h) the Monthly Progress Report for the immediately preceding month;
- (i) a verified statement in the form prescribed by the City Comptroller setting forth the information required under Labor Law Section 220-a;
- (j) a statement of any back charges and credits that DDC is entitled;
- (k) statement of payments to Subcontractors;
- (l) statement of compliance with the M/WBE Goals;
- (m) certified payroll forms for the immediately preceding month; and
- (n) any other certifications or additional or supporting information as may be reasonably requested by DDC.

21.3 **Payments for Stored Materials**

- (a) The Design-Builder may, as approved by 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 21.3 (*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 \$50,000, unless (i) the payment is to be made for Approved Materials procured by or related to a M/WBE Subcontractor (in which case no such minimum cost will apply) or (ii) otherwise as approved by DDC in writing;
 - (ii) the Approved Materials must be in a condition ready for installation into the Project without further fabrication or processing;
 - (iii) the Approved Materials must be materials that will be stored for a minimum of thirty (30) days;
 - (iv) 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 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;
 - (v) 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;

- (vi) 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 [_____]”;
- (vii) the Approved Materials must be available for DDC to inspect at the Warehouse, at any time, as reasonably requested by DDC;
- (viii) the Design-Builder must submit to 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 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 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;
- (ix) the Design-Builder must provide DDC all documents necessary and requested by DDC to evidence the transfer of title to the Approved Materials to DDC, including bills of sale and the affidavits of title in forms acceptable to DDC;
- (x) the Design-Builder must submit a certification that all off-site Approved Materials have been inspected in accordance with the Project Requirements; and
- (xi) the Design-Builder must deliver to DDC a material delivery and storage plan (a “**MDS Plan**”) for 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, DDC will advise the Design-Builder of any requirements for 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 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 DDC of those Approved Materials, nor will it relieve the Design-Builder of its responsibility for those Approved Materials.

21.4 Parties Review, Confirmation and Acceptance of Payment Request

(a) Payment Request Completeness Determination

- (i) Within fifteen (15) days of DDC's receipt of any Payment Request, DDC will advise the Design-Builder in writing whether the Payment Request is complete or if any aspects are incomplete or non-conforming to the requirements in this Agreement. DDC may reject all, or any portion of, any Payment Request if DDC determines that the Payment Request is incomplete, non-conforming or disputes that such amount is payable and owing to Design-Builder pursuant to the terms of this Agreement.
- (ii) To the extent DDC determines under Section 21.4(a)(i) that any portion of a Payment Request is incomplete, non-conforming or not otherwise due and payable under this Agreement, the Design-Builder must promptly (but no later than three (3) days, unless a longer period is agreed between the Parties) resubmit such Payment Request. This process will continue until DDC's Project Manager or any other DDC Representative certifies that the Payment Request is complete and the applicable Work under such Payment Request has been accepted for payment purposes. Once a Payment Request is accepted by DDC as complete, the Payment Request will then be approved for payment or rejected under Section 21.4(b) (*DDC Approval or Rejection of a Payment Request*).

(b) DDC Approval or Rejection of a Payment Request

Once a DDC Representative (including, the DDC Project Manager) accepts in writing a Payment Request as complete under Section 21.4(a) (*Payment Request Completeness Determination*) the Payment Request will be subject to engineering audit by the EAO and review by DDC's Chief Financial Officer, or their designees and DDC may either:

- (i) approve all, or any portion of the Payment Request; or.
- (ii) reject all, or any portion of, any Payment Request, if DDC disputes that such amount is payable and owing to the Design-Builder pursuant to the terms of this Agreement.

If DDC rejects any portion of a Payment Request the Design-Builder must promptly (but no later than five (5) days, unless a longer period is agreed between the Parties) resubmit such Payment Request. Following DDC's rejection of all, or any portion of, the Design-Builder's second submission of the same Payment Request, such payment dispute must be resolved in accordance with Section 21.6 (*Payment Disputes*).

21.5 DDC Payment of Payment Requests

- (a) Within thirty (30) days of a DDC Representative (including, the DDC Project Manager) accepting in writing any portion of a Payment Request under Section 21.4(a) (*Payment Request Completeness Determination*), 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 portion of a Payment Request DDC (i) has rejected under Section 21.4(b) (*DDC Approval or Rejection of a Payment Request*) or (ii) is otherwise entitled to withhold under Sections 21.7 (*DDC's Right to Setoff*) and 21.9 (*Withholding*).

- (b) The thirty-day period for DDC's payment of Payment Requests will begin when the DDC Project Manager or other authorized DDC Representative accepts a Payment Request as completed and certifies on the Payment Request that the Work has been accepted for payment purposes under Section 21.4(a) (*Payment Request Completeness Determination*).
- (c) No Progress Payment or other payment to the Design-Builder or any use of the Project by 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.

21.6 Payment Disputes

- (a) Within seven (7) days of receiving DDC's rejection of all or a portion of any Payment Request under Section 21.4(b) (*DDC Approval or Rejection of a Payment Request*) the Design-Builder must notify DDC if it disputes any determination by DDC to reject all or any portion of a Payment Request. If the Design-Builder does not notify DDC of a dispute within that seven-day period, the Design-Builder will be deemed to have accepted DDC's determination, including without limitation any amounts deducted.
- (b) If the Design-Builder notifies DDC of a dispute in accordance with Section 21.6(a), the Design-Builder and DDC will meet to seek to resolve the dispute. If DDC and Design-Builder agree that all or a portion of the previously rejected Payment Request is payable, the Design-Builder must request payment for such amounts in the next month's 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 21.8 (*Retainage*) and any other amounts DDC is entitled to withhold or deduct under this Agreement.
- (c) If DDC and the Design-Builder fail to resolve the dispute within twenty (20) days of the Design-Builder's notice of dispute under Section 21.6(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 DDC, then within thirty (30) days following receipt by DDC of a Payment Request (together with all supporting documentation) for such amounts, DDC will pay the determined amount to the Design-Builder minus an amount equal to the Retainage Percentage of that determined amount and any other amounts DDC is entitled to withhold or deduct under this Agreement.

21.7 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 13 (*Time for Completion*

& *Liquidated Damages*), DDC may deduct and set-off against any payment due and payable from DDC to the Design-Builder under this Agreement.

21.8 Retainage

(a) Retainage Percentage

As security for the Design-Builder's performance of the Construction Work 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 in writing by DDC in an amount equal to the percentage identified in Schedule A (*Contract Information*) (the "**Retainage Percentage**") or (ii) DDC will retain the applicable Retainage Percentage from each Progress Payment in accordance with the terms of this Section 21.8, in each case for Enabling Work and Early Phase 2 Work During Phase 1 and Construction Work for Phase 2, as applicable.

(b) Application of Retainage Amounts

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 21.9 (*Withholding*).

(c) Early Release of Retainage

- (i) **Smaller Subcontractors** – Subject to Section 21.8(e), upon completion of all Construction 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 five percent (5%) or less of the Contract Price, in each case, not to exceed \$1,000,000 or any Subcontract for Enabling Work (a "**Small Value Subcontract**"), 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 the Construction Work under such Small Value Subcontract.
- (ii) **Payment of Retainage** - Upon receipt of a written request for release of Retainage Amounts under Section 21.8(c)(i), DDC, in its sole discretion, may agree to release such Retainage Amounts (or portion of such amounts). Upon DDC's agreement, the Design-Builder may submit a Payment Request for such Retainage Amounts in accordance with Article 21 (*Payment Provisions*). Upon receipt of such released Retainage Amounts, the Design-Builder must promptly remit such released Retainage Amount to the Small Value Subcontract Subcontractor that performed such applicable Work.

Any payment or release, as applicable, of such Retainage Amounts should not include any Retainage Amounts (A) deemed reasonably necessary by DDC to secure any ongoing obligations of any Persons performing ongoing Construction Work or (B) that DDC has applied, or on the day of such release, that DDC determines that it may be entitled to apply against Retainage Amounts.

(d) Release Upon Substantial Completion

- (i) Subject to Sections 21.8(d)(ii), (iii) and (iv), following DDC's issuance of a written determination of Substantial Completion of the Project, and within thirty (30) days

of receipt by DDC of the Payment Request following Substantial Completion of the Project requesting the release of the Retainage Amounts (together with all supporting documentation reasonably acceptable to DDC), 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 all Retainage Amounts previously retained or maintained for DDC's benefit, up to the date of Substantial Completion of the Project, minus:

- (A) two hundred (200) percent of the amount reasonably estimated by DDC, after consultation with the Design-Builder, necessary to cover the costs of completing the remaining items required to achieve Final Completion for the Project; and
 - (B) any amounts that DDC has applied, or on the day of such payment or release, as applicable, that DDC determines that it may be entitled to apply, against Retainage Amounts in accordance with Section 21.9 (*Withholding*) for various reasons, including, unresolved claims by Subcontractors and the estimate of possible audit adjustments.
- (ii) DDC, in its sole discretion, may also release Retainage Amounts, upon the reasonable request of the Design-Builder in connection with the Design-Builder's achievement of Substantial Completion of any Completion Milestone, by any applicable Guaranteed Completion Date or any no-fault termination under Section 2.9(a).
 - (iii) 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 21.8 (*Retainage*), until such time that the Design-Builder Default has been cured.
 - (iv) The Design-Builder acknowledges and agrees that the provision of a Warranty Bond to the City in accordance with Section 27.2 (*Warranty Bond*) and the acceptance of such bond by the City is a condition precedent to Substantial Completion and the release and return of any Retainage Amount under this Section 21.8 (*Retainage*).

(e) **Final Release**

Any remaining Retainage Amounts retained or held, as applicable, for the benefit of DDC following Substantial Completion of the Project will be released by DDC to the Design-Builder with each Progress Payment, in an amount equal to the percentage of Construction Work completed between Substantial Completion of the Project and Final Completion, with the final balance paid to the Design-Builder at the final payment under Section 21.10 (*Final Payment*).

21.9 **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 DDC);

- (ii) without limiting the generality of Section 21.9(a)(i), the Design-Builder fails to:
 - (A) rectify any defect or nonconforming Work within thirty (30) days of 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) 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 DDC and the Design-Builder;

DDC may, in its sole discretion, withhold out of any payment (final or otherwise and even though a Payment Request has already been accepted by DDC) an amount as DDC may deem reasonably sufficient to protect itself and apply that amount in the manner as 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 DDC under this Section 21.9 will be deemed to be payments for the Design-Builder's account under this Agreement. The Design-Builder will resubmit its Payment Request for any portion of a Progress Payment withheld under this Section 21.9 with the next monthly Payment Request if, and once, the cause for such withholding has been removed or resolved by the Design-Builder, as agreed in writing by DDC.
- (c) If DDC does not withhold out of any payment (final or otherwise) a sum for any of the circumstances described in Section 21.9(a), even though the circumstance has occurred at the time of DDC's payment to the Design-Builder, 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 21.8 (*Retainage*) and this Section 21.9) will create any obligation of 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 accepted by DDC or determined as due) will be subject to and subordinate to the rights of DDC under this Section 21.9.
- (f) Without limiting any other provision of this Section 21.9 or any other rights of DDC under this Agreement, if 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 DDC an amount equal to DDC's reasonable cost of conducting that investigation, within fourteen (14) days of receiving a demand from 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, 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 DDC, an amount equal to the cost of such investigations plus a fifteen percent administrative charge.

All amounts withheld by DDC under this Section 21.9(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 22 (*Prompt Payment of Subcontractors*). All amounts withheld and paid by DDC to any of the Design-Builder's Subcontractor under Article 22 (*Prompt Payment of Subcontractors*), will be deemed to be payments made to the Design-Builder under this Agreement on account of the Contract Price.
- (h) Except as required by Applicable Law (e.g., liens filed or asserted in accordance with Applicable Law) and subject to the following conditions and exceptions, DDC will provide the Design-Builder with a reasonable opportunity to promptly cure or remedy Third Party Claims prior to withholding any amounts from the Design-Builder solely with respect to such Third Party Claim if:
 - (i) DDC is satisfied, in its sole discretion, that the City's interests or rights under this Agreement or Applicable Law will not be prejudiced;
 - (ii) the Design-Builder will only have thirty (30) days to remedy or cure such Third Party Claim pursuant to this subsection (h) from the date DDC notifies the Design-Builder of a potential withholding by DDC for such Third Party Claim; and
 - (iii) the remaining value of the Contract Price yet to be paid to the Design-Builder is more than 200% of the potential withholding.
- (i) Subsection (h) will only apply to Third Party Claims and will not apply to any other basis under this Agreement for DDC's withholding amounts from any Payment Request.

21.10 Final Payment

- (a) After receiving the Certificate of Final Completion for the Project, the Design-Builder must submit to 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 21.9(f), all future Claims against the City (not already noticed and 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 (*Final Completion Certificate*), certifying to 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) The final Payment Request will be accepted and paid, or rejected, by DDC in accordance with Section 21.4 (*Parties Review, Confirmation and Acceptance of Payment Request*) and Section 21.5 (*DDC Payment of Payment Requests*).

21.11 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).

21.12 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 21.12 may result in 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 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 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 21.12 will be deemed a breach or violation of a material provision of this Agreement, and grounds for a Design-Builder Default and termination by DDC.

22. 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 (7) days of receiving any sum from 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 22(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 DDC and will end on the date on which payment is made; and
 - (ii) DDC may withhold payment and directly pay Subcontractors as set forth in Sections 21.9(f) and 21.9(g).
- (d) Any payment made by DDC to a Subcontractor under this Article 22 will be deemed to be a payment to the Design-Builder under this Agreement.
- (e) Nothing in this Article 22 will create any obligation of any kind from 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 (30) days of making the payment. If any of the information provided in accordance with Section 18.1(a)(iii) 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 DDC to declare the Design-Builder in default under this Agreement thirty (30) days following the Design-Builder's receipt of 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, DDC may not declare a Design-Builder Default for any such breach.

PART E – ALLOWANCE APPROVALS, CHANGE ORDERS AND RELIEF EVENTS

23. ALLOWANCE APPROVALS, CHANGE ORDERS AND EXTRA WORK DIRECTIVES

23.1 Allowance Approvals

- (a) Approvals for payment of funds from any Design-Builder Construction Allowance is governed by Section 20.8 (*Design-Builder Construction Allowance*).
- (b) The Design-Builder may at any time, in connection with a Payment Request, request that funds be paid to the Design-Builder from an Allowance, subject to the terms and conditions of such Allowance and this Article 23 and DDC's issuance of an Allowance Approval. If the request for an Allowance Approval is in connection with a Compensable Relief Event, the Design-Builder must first obtain DDC's written approval of any such entitlement to a Compensable Relief Event in accordance with, and subject to, Article 24 (*Relief Events*).
- (c) Any Allowance Work performed prior to DDC's final 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 DDC's approval for the same during or after performance, subject to the terms and conditions of this Article 23, including requirements for record keeping and documentation.
- (d) The price to be paid for Allowance Work will be determined in accordance with Article 25 (*Calculating GMP Work, Allowance Work, Extra Work and Net Costs*) and the terms of such Allowance.
- (e) DDC may grant preliminary approval of Allowance Work (excluding in connection with a Compensable Relief Event), 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 preliminary approval, will not be considered at the Design-Builder's risk. DDC's approval of the Allowance Work will be deemed "preliminary", notwithstanding anything to the contrary in such approval, and subject to final review and approval by 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.
- (f) To the extent the Parties cannot come to a final agreement on payment for any Allowance Work, DDC may unilaterally issue final approval of the same, which final approval will set forth, in 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 39 (*Dispute Resolution Procedure*).
- (g) To the extent any Allowance is depleted prior to Final Completion, the Design-Builder may make a DB Modification Request for any additional funding needed for such Allowance Work in accordance with Section 23.3(a).

23.2 Change Orders

(a) **Generally**

- (i) Either Party may request modifications or changes to the Work, the Contract Price, the Project Schedule, the Project or this Agreement ("**Modifications**") through a Change Order in accordance with Section 23.3 (*Modification Proposals*).
- (ii) Modifications will only be effective and binding on the Parties when in writing as set forth in a duly executed Change Order.
- (iii) 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.
- (iv) Changes reflected in a Change Order may include non-material changes to the Work or time for performance and may be at no cost. Notwithstanding the foregoing, Minor Waiver requests under Section 6.7 (*Minor Waiver Requests*) will not be considered changes to this Agreement within the meaning of this Section 23.2 and will not require a Change Order.

(b) **Extra Work Costs**

Costs for Extra Work under a Change Order will be calculated in accordance with Article 25 (*Calculating GMP Work, Allowance Work, Extra Work and Net Costs*)

(c) **Time Extensions**

- (i) The Parties may agree to a Time Extension or reduction in the time for performance, either through:
 - (A) a Relief Event under Section 24.6(b) (*Entitlement to Applicable Relief*); or
 - (B) a Change Order under Section 23.3 (*Modification Proposals*),and in each case, will be subject to the approval of the ACCO.

(d) **Reductions in the Contract Price**

When changes to this Agreement result in a reduction in the Contract Price 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 DDC, except where:

- (i) the Project Requirements expressly permit the Design-Builder to submit value engineering change proposals; and
- (ii) the Contract Price reduction is the result of a DB Modification Request that qualifies as a value engineering change proposal in accordance with the Project Requirements.

(e) **Compensable Relief Events**

As provided in Section 24.6(b)(iii), any Compensable Relief Event granted by DDC requiring funding not otherwise available under an Allowance, must be funded through a Change Order. The Design-Builder's submission and DDC's approval of a Detailed Relief

Event Notice will satisfy any requirement in Section 23.3 (*Modification Proposals*) for a DB Modification Request or Modification Proposal.

23.3 **Modification Proposals**

(a) **DB Modification Request**

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 (d) (a “**Modification Proposal**”).

(b) **DDC Modification Request**

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 as follows:

- (i) the Design-Builder’s estimate of the cost of Design Work necessary to prepare its Modification Proposal must comply with Section 25.2 (*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 an hourly rate using the rates set forth in Section 25.2 (*Design Work*), subject to a not to exceed amount, or lump sum, as determined by 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 Modification Proposal costs in connection with a DB Modification Request; and
- (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 in writing by DDC and the Design-Builder has been directed to proceed with preparation of the Modification Proposal.

(c) **Preliminary Review**

Any DDC preliminary review and feedback on a Modification Proposal will not be binding on DDC in any way, except as otherwise provided in Section 23.3(h).

(d) **Contents of a Modification Proposal**

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 25 (*Calculating GMP Work, Allowance Work, Extra Work and Net Costs*), such costs must be determined in accordance with Article 25 (*Calculating GMP Work, 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 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 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 DDC.
- (e) **EAO Review**
- 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.
- (f) **Withdrawal**
- At any time, DDC may (in its sole discretion) withdraw a DDC Modification Request or reject a DB Modification Request or Modification Proposal. DDC is not required to give reasons for any rejection.
- (g) **Design-Builder Breach**
- Without limiting DDC's rights to reject any Change Order for any reason otherwise provided under this Agreement, if there is any change to the Contract Documents, data, documents, deliverables or other Work to be provided under this Agreement because of any breach, negligence or error on the part of the Design-Builder or any Design-Builder Party, 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.
- (h) **Allowance Approval or Change Order Agreement**

- (i) If a Modification Proposal is accepted and agreed between the Parties, or a Relief Event is granted by DDC under Section 24.6(b) (*Entitlement to Applicable Relief*), the Parties must:
 - (A) execute an Allowance Approval where the costs can be funded by an Allowance; or
 - (B) execute a Change Order where no Allowance is available, there is an Allowance that is insufficiently funded or Modifications to this Agreement are required;
 or any combination thereof.
- (ii) Any Change Order or Allowance Approval may include a Time Extension, subject to ACCO's approval as provided in Section 23.2(c) (*Time Extensions*).
- (iii) Once the Allowance Approval or Change Order, as applicable, is signed by the DDC Representative and the Design-Builder Representative and for a Change Order (approval by ACCO), it will represent the final agreement among the Parties regarding such Modification or Relief Event, as applicable.
- (iv) Change Orders are subject to registration in accordance with City Charter Section 328.
- (v) The Design-Builder must effect such Modifications as approved or directed by DDC under a Change Order.

23.4 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 34 (*Design-Builder Suspension Rights*).
- (b) Except in the event of an Emergency or under Section 23.3(b)(ii), the Design-Builder will not commence any Extra Work described in a DDC Modification Request or a DB Modification Request until DDC has issued an Allowance Approval, Change Order or an Extra Work Directive as described in Section 23.5 (*Extra Work Directive*).

23.5 Extra Work Directive

- (a) An "**Extra Work Directive**" is a written directive prepared and signed by 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) 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 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 24 (*Relief Events*) and Article 25 (*Calculating GMP Work, 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, except in circumstances requiring immediate modification to the Work or the Project, DDC will only issue Extra Work Directives after reasonably exhausting efforts to agree on Modifications under Section 23.3 (*Modification Proposals*). To the extent that DDC fails to issue an Allowance Approval, Change Order and/or Time Extension under Section 23.5(e), the Design-Builder may make a claim for a Compensable Relief Event and Relief Event in accordance with Article 24 (*Relief Events*) and Article 25 (*Calculating GMP Work, Allowance Work, Extra Work and Net Costs*).

24. RELIEF EVENTS

24.1 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 24 (the “**Applicable Relief**”):
 - (i) During Phase 1, an extension to a Phase 1 Milestone Deadline pursuant to a Time Extension;
 - (ii) During Phase 2, an extension to the Guaranteed Completion Dates for one or more Completion Milestones pursuant to a Time Extension;
 - (iii) relief from a Design-Builder Default under this Agreement;
 - (iv) 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 23 (*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; or
- (b) Applicable Relief may be granted through one or more of the following “**Relief Authorizations**”:
 - (i) an extension to any Phase 1 Milestone Deadline or Guaranteed Completion Date may only be granted pursuant to a Time Extension approved by DDC in accordance with Section 24.6(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 24.6(b)(ii);
 - (iii) to receive compensation for any Compensable Relief Event in accordance with Section 23.1 (*Allowance Approvals*) or through a Change Order, in accordance with Section 23.2 (*Change Orders*), as applicable; or

24.2 Process for Requesting Applicable Relief

- (a) The Design-Builder must comply with the procedures in this Section 24.2 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 24.2(c) (an “**Initial Relief Event Notice**”) to DDC within fifteen (15) 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 24, 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 24.2(e) (a “**Detailed Relief Event Notice**”) to DDC promptly, but no later than forty-five (45) 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 (90) additional days (one hundred and thirty-five (135) total days) to submit the Design-Builder’s Detailed Relief Event Notice.
- (e) A Detailed Relief Event Notice must include the applicable information required for a Modification Proposal under Section 23.3 (*Modification Proposal*) and (without duplication) each of the following:
 - (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 24;
 - (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 24.3 (*Mitigation*);
 - (v) evidence reasonably satisfactory to 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 24.3 (*Mitigation*) and to provide evidence of no concurrent delay in accordance with Best Industry 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 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.

24.3 **Mitigation**

The Design-Builder must act promptly and use Reasonable Efforts in accordance with Best Industry 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 24.2 (*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.

24.4 **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 DDC in accordance with the requirements of Section 24.2 (*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 applicable notice requirement in Sections 24.2(b) and 24.2(d) until the Design-Builder submits the written notice of a Relief Event to DDC; and
- (b) following one-hundred twenty (120) days after the date the Design-Builder was required to submit a notice under Sections 24.2(b) and 24.2(d), as applicable, 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.

24.5 **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 DDC in accordance with Section 24.6 (*Entitlement to Extension of Time and Compensation*), irrespective of the number of causes contributing to produce such delay.
- (ii) To the extent that any delay caused by a Relief Event is also concurrently caused by any act, fault or omission of any Design-Builder Party (a "**DB Fault**"), the Design-Builder will (A) be entitled to claim a Time Extension only for the incremental portion of the delay caused directly by a Relief Event in excess of the period of delay caused by the DB Fault, in each case, as determined by utilizing a Time Impact Analysis as described in the Project Requirements and in accordance with Best Industry Practice and (B) will not be entitled to compensation for any concurrent Compensable Relief Event.

24.6 **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 24.6(b), only if the Design-Builder has:

- (i) complied with its applicable obligations under this Agreement, including Section 24.2 (*Process for Requesting Applicable Relief*), Section 24.3 (*Mitigation*) and Section 24.5 (*Demonstration of Facts & Concurrent Delay*);
- (ii) demonstrated, to the reasonable satisfaction of DDC, that a Relief Event has occurred or will occur;
- (iii) demonstrated, to the reasonable satisfaction of 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 or Phase 1 Milestone Deadline;
 - (B) in the case of a Compensable Relief Event only, the Design-Builder incurring Net Costs; and
- (iv) demonstrated, where applicable, to DDC, including through a Time Impact Analysis, that 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 or Phase 1 Milestone Deadline.

(b) **Entitlement to Applicable Relief**

Within sixty (60) days (or any such longer time period reasonably necessary for DDC to make its determination) of receipt of a complete and final Detailed Relief Event Notice for any Relief Event, DDC will notify the Design-Builder of its determination as to whether the Design-Builder is entitled to Applicable Relief as set forth below:

- (i) in the case of any Relief Event where the Design-Builder has satisfied the requirements in Section 24.6(a) (*Pre-Requisites for Applicable Relief*), the applicable Guaranteed Completion Date or Phase 1 Milestone Deadline will be extended through a Time Extension by the time DDC determines to be reasonable based on the evidence provided to 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 DDC for the time DDC determines to be reasonable for the applicable Relief Event based on the information satisfying the requirements in Section 24.6(a) (*Pre-Requisites for Applicable Relief*); or
- (iii) in the case of a Compensable Relief Event only, where the Design-Builder has satisfied the requirements in Section 24.6(a) (*Pre-Requisites for Applicable Relief*), the Design-Builder will be entitled to an amount that 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 23.1 (*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 through a Change Order under Section 23.3(h) (*Allowance Approval or Change Order Agreement*).

The Design-Builder will only be compensated for Net Costs, (unless otherwise expressly agreed as part of a lump sum under Article 25 (Calculating *GMP Work*, *Allowance Work*, *Extra Work and Net Costs*)), as and when such Net Costs are actually incurred.

24.7 **Disputes**

If the Design-Builder disputes any determination by DDC regarding any Design-Builder request for relief under this Article 24, then the Design-Builder must notify DDC within ten (10) days of DDC's determination and if the Parties fail to resolve the dispute within a further twenty (20) days of that notice, the matter will be resolved in accordance with Article 39 (*Dispute Resolution Procedure*).

24.8 **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 DDC in writing or to the extent the suspension is otherwise expressly permitted under Article 34 (*Design-Builder Suspension Rights*).

24.9 **Sole Remedy**

The Design-Builder's sole remedy in relation to any Relief Event will be the operation of this Article 24.

25. **CALCULATING GMP WORK, ALLOWANCE WORK, EXTRA WORK AND NET COSTS**

25.1 **Generally**

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

Where DDC is required to pay the Design-Builder for either (i) Phase 2 Work under a GMP Contract Price, excluding in connection with a Compensable Relief Event ("**GMP Work**") or (ii) 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) any combination of (i)-(iv).

(b) **Negotiating Fixed Price or Lump Sum**

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 25 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 25.2 (*Design Work*) and 25.3 (*Construction Work*).

(c) **Unit Price**

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.

(d) **No Additional General Conditions, Profit, Margin or Mark-up for GMP Work**

The Design-Builder's only payment for General Conditions, profit, margin or mark-up that its entitled to in connection with GMP Work (including Allowance Work performed as a sub-component of GMP Work), are the General Conditions Amounts and the Phase 2 Design-Builder Fee, and none of the provisions in this Article 25 that allow for a multiplier, margin, profit or mark-up will apply to any calculations for the performance of GMP Work.

25.2 **Design Work**

(a) **Calculation**

Notwithstanding anything to the contrary in Section 25.3 (*Construction Work*) below, the cost for GMP Work, Net Costs, Extra Work or Allowance Work, as applicable, consisting of Design Work will not exceed an amount equal to the time spent by professional personnel multiplied by hourly rates for such professional personnel, calculated using the Direct Salary Rate for each individual multiplied by the Design Work Multiplier (subject to Section 25.2(d) below).

(b) **Generally**

As agreed by the Parties, the cost for GMP Work, 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 professional personnel, or on a time card basis, based upon the time actually spent by professional personnel in accordance with Section 25.2(g). 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 professional employees in excess of the maximum price.

(c) **Approval of Assigned Personnel**

(i) Subject to subsection (iii), below, prior to performing Extra Work or Allowance Work consisting of Design Work in Phase 2, the Design-Builder will submit for DDC's approval a staffing plan, consisting of the following ("**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 25.2(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 professional 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 25.
- (iii) Subject to compliance with Article 24 (*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 25, 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 (15) days) after the start of such Extra Work and, at the completion of such Extra Work, provides all records and supporting documentation required where:
 - (A) there is an Emergency affecting the safety of persons or property;
 - (B) the Design-Builder is expressly directed or permitted in writing by DDC to proceed with Allowance Work or Extra Work consisting of Design Work in the absence of an approved Staffing Plan; or
 - (C) subject to compliance with Section 18.1 (*Subcontracting*), a disagreement has arisen between the Parties as to whether Work performed or to be performed is Extra Work or Allowance Work and it is agreed or determined after the fact that such Work performed was Extra Work or Allowance Work.
- (d) **Design Work Multiplier**

A Design Work Multiplier for overhead and profit is set forth in Schedule B (*Contract Price*) and will apply for the duration of the Agreement. Except as set forth in Section 25.2(h) below, the Design Work 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 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 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 DDC to verify such calculations, including, without limitation, copies of payroll registers for the prior twelve months for any Assigned Personnel.

(f) **Business Hours**

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 or other non-regular pay for 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 following:

- (i) the Design-Builder submitting a copy of its company overtime policies and will only be reimbursed additional costs reflected in such policy;
- (ii) the maximum premium entitlement for night differential is 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) proof of the additional costs in the form of a payroll register or other documentation acceptable to DDC has been submitted; and
- (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 Design Work Multiplier.

(g) **Time Card Basis**

Where GMP Work, 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 GMP Work, 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;
- (iii) time spent performing administrative tasks;
- (iv) time spent during non-regular business hours as set out in subparagraph (f) above, unless expressly authorized in writing by DDC;
- (v) time allocable to an employee's paid time off, including without limitation vacation time, sick time and personal time off; or
- (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 Design Work Multiplier.

(h) **Reimbursable Expenses**

The following expenses incurred by the Design-Builder in the performance of the GMP Work, Extra Work or Allowance Work consisting of Design Work are not included in the Design Work 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 professional personnel performing the GMP Work, 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; and
- (ii) where expressly requested in writing by DDC, printing costs for excessive copies or originals of Design Documents.

25.3 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 (*Contract Price*) for the applicable Unit Price Work up to one hundred twenty-five percent of the estimated quantity of Unit Price Items for any individual Unit Price Item Category. If during the progress of the Unit Price Work (i) the actual quantity of Unit Price Items in a Unit Price Item Category required to complete the Unit Price Work approaches the estimated quantity for

such Unit Price Items in the applicable Unit Price Item Category or (ii) for any other reason it is reasonably determined by the Design-Builder that the actual quantity of Unit Price Items in a Unit Price Item Category necessary to complete the Unit Price Work will exceed the estimated quantity of Unit Price Items for the applicable Unit Price Item Category by twenty-five percent or more (in each case of (i) and (ii) above, a “**Unit Price Excess Cost**”), then the Design-Builder must promptly notify 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 for the applicable Unit Price Item, as may be appropriate (in DDC’s discretion) at such time.
- (iii) If the Parties cannot agree on a new Unit Price for such Unit Price Item, then 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 for such Unit Price Item included in Schedule B (*Contract Price*).

(b) **Construction Work Net Costs**

- (i) **Time & Materials** - For GMP Work, 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 self-performed GMP Work, 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), with a determination of the reasonable cost of these materials to include consideration of the prevailing market rates for and availability of those materials; 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 GMP Work or 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 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.), 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, 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 DDC for the performance of the GMP

Work, Extra Work or Allowance Work (excluding Unit Price Work) that is different or additional than the types of insurance required by Article 31 (*Insurance & Restoration*) or additional premiums and costs for any Insurance Policies required by this Agreement that are incurred as a result of the GMP Work, 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** – any 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** – with the exception of any calculation for GMP Work, twelve percent of the total of items in Sections 25.3(b)(i)(A) through 25.3(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** – with the exception of any calculation for GMP Work, ten percent of the total of items in Sections 25.3(b)(i)(A) through 25.3(b)(i)(F), plus the items in Section 25.3(b)(i)(L), as compensation for profit, except that no percentage for profit will be allowed on payroll taxes, governmental fees or on the premium portion of overtime pay or on sales and personal property taxes; plus
- (N) **Overhead & Profit** – with the exception of any calculation for GMP Work, five percent of the total of items in Sections 25.3(b)(i)(H) through 25.3(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) **Subcontract Overhead & Profit** - 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 25.3(b) (*Construction Work Net Costs*), the Design-Builder must be paid, subject to pre-audit by DDC, the cost of such Subcontractor's Work (excluding the cost of any Subcontractor performance bond or payment bond, except where such bonds are required to be provided by a Key Subcontractor pursuant to Section 18.4 (*Key Subcontractor Performance and Payment Bond*)) computed in accordance with Section 25.3(b)(i) above including any additional amounts under Sections

25.3(b)(i)(L) through 25.3(b)(i)(N) solely as part of the Subtractor's cost of such Work.

25.4 **Net Costs for Compensable Relief Events**

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

(a) **Extra Work or Allowance Work**

To the extent:

- (i) 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 25.1 (*Generally*) through 25.3 (*Construction Work*) above; or
- (ii) no Extra Work or Allowance Work is performed by the Design-Builder and the Design-Builder is granted a Compensable Relief Event causing a delay in the performance of the Work, the Design-Builder may claim actual incurred home-office expenses to the extent described in Schedule A (*Contract Information*).

(b) **Delay Damages**

To the extent the Design-Builder incurs or will incur Net Costs in connection with a DDC authorized Time Extension caused by a Compensable Relief Event and such amounts are not otherwise covered under Section 25.4(a) above, any such Net Costs under a Change Order or Allowance Approval with respect to the following categories will be calculated utilizing the following:

- (i) all costs under Sections 25.3(b)(i)(A) (*Materials*), 25.3(b)(i)(B) (*Labor*), 25.3(b)(i)(D) (*Rental Value DB Owned Equipment*), 25.3(b)(i)(E) (*Standby Equipment*), 25.3(b)(i)(F) (*Installation & Dismantling*), 25.3(b)(i)(I) (*Rental Value of Non-DB Owned Equipment*) and 25.3(b)(i)(J) (*Insurance*);
- (ii) additional actual material and equipment storage costs based on actual documented costs and additional costs necessitated by extended manufacturer warranty periods;
- (iii) fees paid to service providers for required field office rental, utility charges, potable water, sanitation, cleaning, and other related charges; and
- (iv) documented additional 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 (iii), above.

25.5 **Open Book Basis**

All invoicing, pricing, estimating and negotiations of any GMP Work, Final Proposal, Allowance Work, Extra Work costs, Net Costs or Change Orders under this Agreement will be done in a manner allowing DDC to review all underlying assumptions and data associated with each request for compensation in accordance with any GMP Work, Compensable Relief Event or in connection

with an Allowance Approval, Final Proposal, or Change Order, including assumptions as to costs of the applicable Work, profit, mark-up, margin, 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, Time Impact Analysis, and other items reasonably required by DDC to satisfy itself as to the reasonableness and accuracy of the amount (collectively, "**Open Book Basis**").

25.6 **No Double Counting**

- (a) No double-counting of any amounts, profits or overhead amounts will be permitted as between:
 - (i) the application of any provision in this Article 25, including Sections 25.2 (*Design Work*), 25.3 (*Construction Work*), and 25.4 (*Net Costs for Compensable Relief Events*), including any additional Design-Builder amounts under Sections 25.3(b)(i)(L) through 25.3(b)(i)(N) for Subcontracted Work performed under Section 25.3(b)(iii) and in each case except as otherwise provided in General Project Requirements Section 30.3. Subcontractor overhead and profit paid under Section 25.3(b)(iii) is not double counting when also paid in connection with Design-Builder overhead and profit prescribed under Section 25.3(b)(i)(L), (M) or (N);
 - (ii) the application of any provision in this Article 25, including Sections 25.2 (*Design Work*), 25.3 (*Construction Work*), and 25.4 (*Net Costs for Compensable Relief Events*), and any provision relating to the Phase 1 Services or the GMP Work; and
 - (iii) the application of any provisions relating to the Phase 1 Services, Enabling Work, Phase 1 Design Work, Phase 1 Milestones or Phase 1 Construction Management Services.
- (b) The Design-Builder will not be entitled to any compensation for any delay or Extra Work, Allowance Work, Design-Builder Construction Allowance Work or any Net Costs not expressly contemplated or provided for in this Article 25, including costs, losses or damages which it might otherwise be entitled to claim under Applicable Law.

25.7 **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 25.3(b)(i)(M), 25.3(b)(i)(N), 25.3(b)(iii), and 25.4(b)(iii);
- (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; or
- (c) attorneys' fees or other costs in connection with dispute and claims preparation expenses.

25.8 **Omitted Work & Reduction in the Contract Price**

- (a) **Contract Price**

If any Work is omitted by DDC pursuant to a Change Order or Extra Work Directive, the Contract Price or any Allowance, as applicable, subject to audit by the EAO, will be reduced by a pro rata portion of the Contract Price or Allowance, as applicable, based upon the percent of Work omitted, subject to Section 25.8(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 25.8(c) and 25.8(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 32.3(a)(i)(B) 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 DDC.

(d) **Lost Overhead or Profit**

- (i) Except as stated in Section 25.8(d)(ii), the Design-Builder agrees to make no claim for damages or for loss of overhead and profit with regard to any omitted Work.
- (ii) During Phase 2 and subject to submission of a compliant Payment Request in accordance with Article 21 (*Payment Provisions*), the Design-Builder will be entitled to payment for overhead on omitted Work solely to the extent that, notwithstanding the omission, such overhead cost is:
 - (A) actually and reasonably unavoidably incurred; and
 - (B) not otherwise payable through an Allowance.
- (iii) DDC will not be obligated to pay overhead costs under Section 25.8(d)(ii) in excess of 3% of the value of Work omitted from the Contract Price.

25.9 Restrictions on Compensation

The Design-Builder's compensation under this Article 25 will not include 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 25; and
- (c) any other costs or expenses otherwise impermissible under the City Comptroller's Directive #2.

25.10 Records

- (a) Unless otherwise directed in writing by the DDC Representative, whenever any (i) GMP Work or (ii) 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, or where approved by DDC, at the end of each week, submit to DDC (for verification by DDC):
 - (i) daily time slips showing the name and number of each worker employed on the GMP Work, Extra Work or Allowance Work, the number of hours that the worker is employed on the GMP Work, 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 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 GMP Work, 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) 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 DDC to determine the amounts to be paid by DDC under this Article 25 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 GMP Work, Extra Work or Allowance Work and will constitute a waiver by the Design-Builder of claims for payment for such Work until it is otherwise provided.

26. FORCE MAJEURE & CHANGES IN APPLICABLE STANDARDS

26.1 Force Majeure

(a) Effect of Force Majeure on Obligations

Without limiting Article 24 (*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 Time Extension with respect to a Force Majeure Event in accordance with, and subject to, Article 24 (*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 ninety (90) 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 for such ninety (90) day period (an "**Extended Force Majeure Event**"), the Design-Builder may request that this Agreement be terminated, and/or DDC may terminate this Agreement in accordance with Article 35 (*Termination for Extended Force Majeure Event*).

26.2 **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 (an "**Applicable Standard Change**"), the Design-Builder will be required to implement such Applicable Standard Change, unless otherwise determined by DDC under this Section 26.2 (*Change in Applicable Standards*). An Applicable Standard Change does not constitute a Change in Law.
- (b) To the extent the Design-Builder becomes aware of any Applicable Standard Change, the Design-Builder must promptly, but no later than within thirty (30) days following the date the Design-Builder knew, or should have known, of such Applicable Standard Change, notify DDC of such Applicable Standard Change. Any such notification must explain the Applicable Standard Change in sufficient detail to allow DDC to objectively assess any schedule or cost implications associated with implementing such Applicable Standard Change. DDC may request additional or supplemental information, at least as detailed as a Detailed Relief Event Notice.
- (c) Promptly following DDC's receipt of such notice of an Applicable Standard Change, the Parties will meet and confer, and DDC will determine, in its discretion, whether:
 - (i) the Applicable Standard Change is necessary and appropriate for the Project;
 - (ii) a Time Extension will be necessary to implement the Applicable 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 Applicable Standard Change, in which case the Design-Builder may be eligible for a Compensable Relief Event.

- (d) If DDC determines that the Applicable Standard Change is necessary and appropriate for the Project, and
 - (i) DDC determines that either subsection (c)(ii) or (c)(iii) above apply, then the Design-Builder will be entitled to request a Change Order in accordance with Section 23.3 (*Modification Proposals*); or
 - (ii) DDC determines that neither subsection (c)(ii) or (c)(iii) above apply, then the Design-Builder must implement such Applicable Standard Change at its own cost and expense.
- (e) Within seven (7) days of receiving DDC's written determination under subsection (d), above, the Design-Builder must notify DDC if it disputes any part of DDC's determination. If the Design-Builder does not notify DDC of a dispute within that seven-day period, the Design-Builder will be deemed to have accepted DDC's determination.
 - (i) If the Design-Builder notifies DDC of a dispute in accordance with this subsection (e), the Design-Builder and DDC will meet to seek to resolve the dispute.
 - (ii) If DDC and the Design-Builder fail to resolve the dispute within twenty (20) days of the Design-Builder's notice of dispute, the matter will be referred to the Dispute Resolution Procedures.
- (f) If DDC does not determine an Applicable Standard Change is necessary and appropriate for the Project or for any other reason as determined by DDC, DDC may issue a written waiver to the Design-Builder regarding its implementation of such Applicable Standard Change and the Design-Builder will not be required to implement any such Applicable Standard Change.

PART F – WARRANTIES, DEFECTS AND LIABILITY

27. WARRANTIES

27.1 General Warranties

- (a) The Design-Builder:
 - (i) agrees that 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 in a manner that is consistent with the standard of care, skill and diligence as would be provided by an engineering or architecture firm experienced in supplying similar services in the New York metropolitan area to entities owning projects of technology, complexity and size similar to that of the Project (the "**Designer Performance Standard**");
 - (ii) warrants to the City that 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) completed to enable the Project to 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) subject to the Designer Performance Standard, accurate and complete in accordance and conformance with the Contract Documents; and
 - (B) with respect to Record Drawings only, 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, except where the Agreement expressly requires the Design-Builder to perform, for particular areas of Work identified, maintenance as part of 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 27 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 (including without limitation Schedule C (*Manufacturer's Warranties*)) 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.

27.2 Warranty Bond

- (a) As security for its full and faithful performance of its warranty obligations under this Agreement, the Design-Builder, upon notifying DDC of its achievement of Substantial Completion, will deliver to the City a warranty bond issued by a Qualified Surety in a form that is substantially consistent with Part B of Exhibit 8 (*Performance Bond, Payment Bond and Warranty Bond*) (the "**Warranty Bond**").
- (b) The City will be entitled to claim under the Warranty Bond at any-time during the Warranty Period (as it may be extended in accordance with Section 28.3 (*Extension of Warranty Period*)) following any failure by the Design-Builder to comply with its warranty obligations under this Agreement, including any failure to correct defects or nonconforming Work

during the Warranty Period in accordance with Section 28.2 (*Rectification of Defects at Any Time*).

- (c) If the Design-Builder has fully and faithfully performed all of its warranty obligations, the City will release the Warranty Bond to the Design-Builder within thirty (30) days after such certification by the City that the Design-Builder has fully and faithfully performed all of its obligations during the Warranty Period.

27.3 Manufacturer Certification

- (a) Where the Project Requirements (including without limitation Schedule C (*Manufacturer's Warranties*)) 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) DDC may reject any certification under Section 27.3(a) if it reasonably determines that it is incorrect, improper or otherwise unsatisfactory by notifying the Design-Builder thereof, within thirty (30) days after the receipt of such certification, setting forth in reasonable detail its reasons for such rejection.

27.4 Extension of Subcontractors Warranties to DDC

- (a) Where warranty standards are not specifically designated in the Project Requirements (including without limitation Schedule C (*Manufacturer's Warranties*)) 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 Industry 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 DDC.
- (b) The requirements of Section 27.4(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.

27.5 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 of the Project must be refurbished or replaced to the required standard indicated in Section 27.1 (*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 of any Completion Milestone.

28. RECTIFICATION OF DEFECTS DURING WARRANTY PERIOD

28.1 Warranty Period

- (a) Subject to any extension under Section 28.3 (*Extension of Warranty Period*), the “**Warranty Period**” is for the applicable periods set out in Schedule A (Contract Information).
- (b) The Warranty Period is in addition to, not in lieu of, 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 28.2 (*Rectification of Defects and Nonconforming Work at Any Time*) and is not intended to constitute a period of limitations for any other rights or remedies DDC may have regarding the Design-Builder’s performance under this Agreement and will not impair or limit DDC’s statutory rights available under Applicable Law.
- (c) The Design-Builder must also obtain, procure and provide any manufacturer’s warranty required for any element of the Work where the Project Requirements (including without limitation Schedule C (*Manufacturer’s Warranties*)) specify a warranty period that would expire after the Warranty Period.

28.2 Rectification of Defects and Nonconforming Work at Any Time

- (a) Where 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. Notice by DDC to the Design-Builder of defective or nonconforming Work will be deemed timely if given not later than ten (10) days subsequent to the expiration of the Warranty Period.
- (b) The Design-Builder must within fifteen (15) days of receipt of written notice from 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 28.2(b), 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 (14) days of receiving a demand from the City.
- (e) If, in DDC’s judgment, any defective or nonconforming Work (as applicable) creates an Emergency, the seven-day periods identified in Sections 28.2(b) and 28.2(c) will not apply.
- (f) DDC’s and the City’s rights under this Section 28.2 are in addition to, and do not qualify, any other rights and remedies available to DDC under this Agreement or Applicable Law, including for latent defects.

28.3 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 28.2 (*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 Section 28.3.

29. CONSEQUENTIAL LOSS

- (a) Subject to Section 29(b) and the rights offered to DDC under Article 30 (*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 29(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 proceeds received by the Design-Builder from its insurance policies, regardless of whether such coverage is required by Article 31 (*Insurance & Restoration*) or to the extent the Design-Builder is deemed to have self-insured against the Loss in accordance with Article 31 (*Insurance & Restoration*);
 - (ii) Losses arising out of fraud, corruption, or other criminal activity on the part of the relevant Party;
 - (iii) liquidated damages payable by the Design-Builder to DDC under Article 13 (*Time for Completion and Liquidated Damages*) and under Exhibit 7 (*M/WBE Requirements*); or
 - (iv) amounts payable by the Design-Builder to DDC under any indemnity in this Agreement in respect of Third Party Claims.

PART G – INDEMNITIES AND INSURANCE

30. INDEMNITY FROM THE DESIGN-BUILDER

30.1 General Indemnity

- (a) 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:
 - (i) 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:
 - (A) death, sickness and bodily injury; or

- (B) loss of, or damage to, tangible property;
- (ii) 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 DDC has paid the Design-Builder all applicable undisputed amounts then due and payable from DDC to the Design-Builder;
- (iii) failure of the Design-Builder to comply with Applicable Law, Applicable Standards or a Governmental Approval; or
- (iv) 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.
- (b) The Designer Performance Standard will apply to any indemnity claim for errors or omissions solely in the Design Work (not the Construction Work) made pursuant to Section 30.1(a)(iv).

30.2 Indemnity with respect to Hazardous Materials and Intellectual Property

Without limiting the generality of Section 30.1 (*General Indemnity*), to the fullest extent permitted by Applicable Law, the Design-Builder must release, defend, indemnify and hold harmless the Indemnified Parties 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; or
- (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 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.

30.3 Intellectual Property

Without limiting any other rights of DDC under this Agreement, if as a result of a Claim referred to in Section 30.2(d) an injunction is granted preventing the Design-Builder or DDC from using any portion of the Work, the Design-Builder must, without cost or expense to 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 DDC has already paid amounts on account of the Contract Price with respect to that Work, refund these amounts to DDC;
- (ii) promptly modify the Work or take any other steps necessary to ensure compliance by the Design-Builder and DDC with the injunction, all to the satisfaction of 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.

30.4 Exclusions from Indemnity

The Design-Builder will not be responsible or be obliged to indemnify 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.

30.5 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 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 in the event of any actual negligence on the part of the 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.

30.6 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 DDC and the Design-Builder, the Design-Builder must diligently render to DDC without additional compensation all assistance that DDC may reasonably require of the Design-Builder in connection with such claim or action.

- (b) The Design-Builder must report to DDC in writing within five (5) Business Days of the initiation by or against the Design-Builder of any legal action or proceeding relating to this Agreement.

31. **INSURANCE & RESTORATION**

31.1 **Types of Insurance Required**

The Design-Builder must obtain, pay all premiums and maintain, or cause to be obtained, paid and maintained, the following types of insurance policies to the extent indicated, and with the minimum limits and special conditions specified, in Schedule A (*Contract Information*) (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 31.8 (*Verification of Coverage*) through the date of Final Completion, unless otherwise noted in Schedule A (*Contract Information*). All Insurance Policies must meet the requirements set forth in this Article 31 and Schedule A (*Contract Information*).

(a) **Workers’ Compensation Insurance, Employers’ Liability Insurance, and Disability Benefits Insurance**

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 31.1(b) below).

(b) **United States Longshoremen’s and Harbor Workers Act and/or Jones Act Insurance**

If specified in Schedule A (*Contract Information*) 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.

(c) **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 performance or 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 DDC in accordance with Schedule A (*Contract Information*). If the Construction Work does not require such a permit, the minimum limits will be those provided for in Schedule A (*Contract Information*).
- (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.

(d) **Builders Risk Insurance**

- (i) If specified in Schedule A (*Contract Information*), the Design-Builder must provide Builders Risk Insurance on a completed value form for the total value of the cost to perform 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 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 31.1(d).

(e) **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.

(f) **Professional Liability Insurance**

- (i) The Design-Builder must maintain, and cause all Subcontractors performing professional services for which professional liability insurance or errors and omissions insurance is reasonably commercially available to maintain, professional liability insurance or errors and omissions insurance appropriate to the type(s) of such services to be provided under this Agreement. Each 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) where applicable, for Work consisting of major rehabilitation or new construction, include rectification coverage;
 - (C) not include any exclusion for faulty workmanship resulting from professional services rendered;
 - (D) not contain a deductible or self-insured retention that is more than that set forth in Schedule A (*Contract Information*), except as approved in writing by DDC; and
 - (E) 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) Where Schedule A (*Contract Information*) indicates that project-specific professional liability or errors and omissions coverage must be maintained, the Design-Builder may rely on separate insurance to cover professional services performed by its employees and, to the extent approved by DDC in writing, Subcontractors, in lieu of being named an insured on the project-specific policy, provided that the form and amount of such insurance otherwise complies with this Section 31.1(f).
- (iii) 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 contractors 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 31.1(f)(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 DDC, evidence of such professional liability insurance on a form acceptable to DDC.
- (iv) 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.

(g) **Contractors Pollution Liability Insurance**

- (i) If specified in Schedule A (*Contract Information*), 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 (*Contract Information*). 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

(h) **Marine Insurance**

- (i) Marine Protection and Indemnity Insurance: If specified in Schedule A (*Contract Information*) 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 (*Contract Information*) 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 (*Contract Information*) 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) Marine Pollution Liability Insurance: If specified in Schedule A (*Contract Information*) 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 (*Contract Information*) 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.

(i) **Crime Insurance**

If indicated in Schedule A (*Contract Information*), the Design-Builder must maintain crime insurance during the term of the Agreement in the minimum amounts listed in Schedule A (*Contract Information*). 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.

(j) **Cyber Liability Insurance**

If indicated in Schedule A (*Contract Information*), the Design-Builder must maintain cyber liability insurance covering losses arising from operations under this Agreement in the amounts listed in Schedule A (*Contract Information*). 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.

(k) **Other Types of Insurance**

The Design-Builder must provide such other types of insurance, at such minimum limits and with such conditions, as are specified in Schedule A (*Contract Information*).

31.2 **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 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 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 and the Design-Builder will have no recourse against DDC for payment of any premiums or expenses.

- (b) Except where the Design-Builder is not providing any wrap-up policies, all policies must contain no wrap-up exclusion. 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) Any Insurance Policies obtained by the Design-Builder or any of its Subcontractors with respect to the Project in excess of, or broader than, the minimum required coverage or minimum required limits, or both, must be available to the City and will be available to respond to any claim asserted against the additional insureds that may arise out of or is in any way connected with this Agreement.
- (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.

31.3 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 31.3(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 (30) days), and at its own cost and expense, secure alternative coverage in compliance with the insurance requirements in this Agreement and Schedule A (*Contract Information*) in order to avoid a default under this Agreement.

31.4 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.

31.5 General Insurance Requirements

(a) Deductibles and Self-Insured Retentions

- (i) The Design-Builder will be responsible for paying all Insurance Policy deductibles and self-insured retentions and 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.

(b) 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;
- (iii) each Insurance Policy does not include any exclusions for "action over claims"; and

- (iv) each CGL Insurance Policy does not include any cross-suit exclusions for “insured vs. insured” claims.

(c) **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.

31.6 Named Insureds, Additional Insureds and Loss Payees

- (a) Each Insurance Policy (except Insurance Policies required under Sections 31.1(a), 31.1(f), 31.1(i), if not commercially available 31.1(j), and 31.1(b)) must name “The City of New York, including its officials and employees” as an additional insured.
- (b) Schedule A (*Contract Information*) 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 (*Contract Information*).

31.7 Per Project and Project-Specific Insurance and Limits

- (a) Wherever indicated in Schedule A (*Contract Information*), 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) If the Design-Builder or its Subcontractors (or both) obtains or maintains insurance in an amount greater than the minimum limits required under this Agreement, the full limits of that insurance coverage will be available to respond to any claim asserted against the additional insureds.
- (c) All Insurance Policies may be reviewed by DDC for adequacy of terms, conditions, coverages and limits of coverage at any time. 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 and are not due to the Design-Builder’s acts or omissions under this Agreement, the Design-Builder will be entitled to an Allowance Approval or Change Order, as applicable, with costs for the same calculated in accordance with Article 25. DDC will not require changes or modifications to Insurance Policies, or require new policies, that are not commercially available.
- (d) Notwithstanding anything to the contrary above or indicated on Schedule A (*Contract Information*), 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.

31.8 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 (*Contract Information*): (i) within a time specified in Schedule A (*Contract Information*) (ii) 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 (15) Business Days prior to the expiration date of each Insurance Policy, and (iv) upon written request by 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 (*Contract Information*)) 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 (90) days) after the effectiveness of each Insurance Policy, the Design-Builder must deliver to DDC a true and complete certified copy of each Project-specific Insurance Policy or modification, or renewal or replacement Insurance Policy and all endorsements.
- (c) Without limiting (a) and (b) above, the Design-Builder must deliver to DDC a true and complete certified copy of each Insurance Policy applicable to the Work within seven (7) Business Days of receiving a written request from DDC.
- (d) If the Design-Builder:
 - (i) does not provide DDC with a certificate of insurance and proof of payment within seven (7) Business Days after receiving a written request from DDC; or
 - (ii) fails or refuses to obtain or maintain in force the Insurance Policies required by this Agreement, including as described in Schedule A (*Contract Information*),

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 33 (*Design-Builder Default*) of this Agreement, for a Design-Builder Default under Section 33.1(n) (*Insurance Default*) of this Agreement.

- (e) The Design-Builder indemnifies the City and DDC for Losses incurred in connection with any Design-Builder Default under Section 33.1(n) (*Insurance Default*) of this Agreement, including any Losses incurred during any cure period prescribed for such Design-Builder Default in Section 33.2 (*Notice of Design-Builder Default and Cure Periods*) and to cure any such default any replacement insurance must apply retroactively to the date of lapse to ensure no gap of insurance has occurred.
- (f) 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 (*Contract Information*), 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 DDC from exercising any rights or taking such other actions available to it under any other provisions of this Agreement or Applicable Law.

31.9 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 (*Contract Information*), 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 31.9(a)(i), 31.9(a)(ii), 31.9(a)(iii), and 31.9(a)(iv)(A) and 31.9(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 (30) 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 obtained and proof of the same has been accepted by DDC. Any such suspension will not constitute a Relief Event.

31.10 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 (*Contract Information*) (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.

31.11 Defense Costs

Unless otherwise agreed in writing by 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.

31.12 Contesting Denial of Coverage

If any insurer under an Insurance Policy described in this Agreement and Schedule A (*Contract Information*) 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.

31.13 Subcontractor Insurance Requirements

- (a) To the extent that any Insurance Policy required by this Agreement and Schedule A (*Contract Information*) 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 (*Contract Information*);
 - (iii) the Design-Builder must ensure that no Subcontractor's policy includes any exclusions for "action over claims" ; 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 (*Contract Information*).
- (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 DDC, the Design-Builder must promptly (and in any event within five (5) Business Days) provide certificates of insurance evidencing coverage for each Subcontractor.

31.14 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 (*Contract Information*), 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.

31.15 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.

31.16 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 DDC within three (3) 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

(20) days after such event and again no later than twenty (20) 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 is an Additional Insured, 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 (5) 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 (30) days prior to any cancellation, termination, non-renewal or reduction of coverage, or any modification to an Insurance Policy that materially affects the City or any additional insured's coverage, the Design-Builder must provide notice to DDC, at the address in Schedule A (*Contract Information*) 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, 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.

31.17 Protection of City Property and Restoration of the Project

- (a) During the performance of the Work and up to the date of 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 31.18 (*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 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 DDC, 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.

31.18 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. Notwithstanding the risk of loss shifting to the City at Substantial Completion, if the Project or the Work suffers damage or destruction following Substantial Completion, but prior to Final Completion, subject to the terms and conditions under this Agreement, the Design-Builder must:

- (a) promptly repair and restore the Project and the Work at no cost to the City and where such damage or destruction is not due to the Design-Builder's acts or omissions, the Design-Builder's liability for performing such repair or restoration work will not exceed an amount equal to the insurance proceeds that the Design-Builder is entitled to receive under any applicable insurance policies required under this Agreement (the "**Insurance Liability Limit**");
- (b) where the cost to repair or replace such damage or destruction is reasonably expected to exceed the Insurance Liability Limit, as soon as practicable and in any event within ten (10) 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 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 (ii) and the Parties will comply with the following protocols;

- (i) as soon as reasonably practicable and in any event within fifteen (15) days after the delivery of the Draft Reinstatement Plan, the Parties will meet and confer on the feasibility of the Draft Reinstatement Plan;
- (ii) as soon as reasonably practicable and in any event within ten (10) days after the Parties have met and discussed the Draft Reinstatement Plan, the Design-Builder must deliver to 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; and
- (iii) once approved by DDC, the Design-Builder will promptly implement such Reinstatement Works in accordance with the Reinstatement Plan and will be subject to payment in excess of the Insurance Liability Limit 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 24 (*Relief Events*).

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 DDC.

31.19 Prosecution of Claims

- (a) Unless otherwise directed by 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 performed 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 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 Industry 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) DDC must:
 - (i) promptly notify the Design-Builder of 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 29 (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 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

32. TERMINATION BY DDC WITHOUT CAUSE

32.1 Right to Terminate Without Cause

- (a) DDC may terminate this Agreement at any time without cause by delivering a Termination Notice to the Design-Builder stating:
 - (i) that 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 (10) 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 32.1(a).

32.2 Design-Builder's Obligations Upon Termination

- (a) If 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 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 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) where DDC has exercised its rights to have a Key Subcontract assigned to the City through a Direct Agreement, satisfy all of its obligations under the applicable Subcontractor Direct Agreement;
 - (vii) to the extent requested by DDC, assign to 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 Section 18.3(g);
 - (viii) provide 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 DDC may determine to be necessary in order to decide whether to accept assignment of any such Subcontracts, purchase order or contract;
 - (ix) cancel, on the most favorable terms reasonably possible, any Subcontract, purchase order or contract, or portion thereof, that DDC does not elect to accept by assignment and if requested by DDC, settle, with the prior written approval of DDC of the terms of settlement, outstanding liabilities to Subcontractors with respect to the Work terminated or discontinued;

- (x) transfer and deliver to DDC or its nominee possession and control of the Project and return the Project Site in a safe and hazard-free condition;
 - (xi) transfer and deliver to 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 manufacturers' certifications produced or acquired for the Work;
 - (D) any completed or partially completed Design Documents, Construction Documents, Final Design Documents and Record Drawings;
 - (E) all Intellectual Property and Work Product developed for the Project; and
 - (F) any other Submittals, records, Intellectual Property, Design Work, documents, drawings, plans, specifications and other materials in connection with the Phase 1 Services;
 - (xii) take all action that may be necessary, or that 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 DDC has or may acquire an interest; and
 - (xiii) as authorized by 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 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 DDC. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by DDC under the Contract Documents or paid in any other manner directed by DDC.
- (b) The Design-Builder will only be liable for any warranties with respect to the Work that has been substantially completed, including such Work that is substantially completed by a Subcontractor before 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 of the Project.
- (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 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, DDC will look only to, and hold liable, the applicable Subcontractor, and not the Design-Builder, for defective or incomplete Work.

32.3 Termination Without Cause Payments

- (a) If this Agreement is terminated in accordance with this Article, DDC must pay the Design-Builder an amount equal to the following ("**Termination Without Cause Payment**"):
 - (i) the sum of the following:
 - (A) either:
 - (1) if during Phase 1, the Phase 1 Fixed Price for Phase 1 Services and any amounts due and payable for Phase 2 Early Work Performed During Phase 1, in each case, actually performed and due and payable in accordance with Section 21.1(a) (*Phase 1 Compensation*); or
 - (2) if during Phase 2, the portion of the Contract Price (excluding any Allowances or Contingencies) and any approved Allowance Approval Requests or Change Orders that is due and payable by 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
 - (B) 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
 - (C) any properly documented cancellation and breakage fees incurred by the Design-Builder in terminating Subcontracts that are not acceded or transferred to DDC; plus

- (D) the amount of any resolved or outstanding Claims to which the Design-Builder is entitled as at the termination date under this Agreement; plus
- (E) if during Phase 2, either of the following:
 - (1) if the Agreement is terminated within ninety (90) days following registration of the Final Proposal Change Order pursuant to section 328 of the City Charter, one percent of the difference between the Contract Price and the total of all Progress Payments made by DDC prior to the notice of termination (less amounts received from Allowances); or
 - (2) if the Agreement is terminated on, or after, ninety (90) days following registration of the Final Proposal Change Order pursuant to section 328 of the City Charter, an amount equal to the difference between the Contract Price 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:
 - (i) five percent of the first five million dollars; plus
 - (ii) three percent of any amount between five million dollars and fifteen million dollars; plus
 - (iii) one percent of any amount over fifteen million dollars, (collectively with (i) and (ii) above), not to exceed 1% of the Contract Price,
- (ii) minus the sum of any amounts:
 - (A) due and payable by the Design-Builder under this Agreement to DDC or any Indemnified Party; plus
 - (B) 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 DDC's reasonable satisfaction; and
 - (ii) provide DDC with copies of Subcontractor invoices covering amounts claimed under this Article.
- (c) DDC's determination of any Termination Without Cause Payment amount will be final, binding, and conclusive.
- (d) If this Agreement is terminated in accordance with this Article, DDC will promptly issue a determination on any amounts that might otherwise be due and payable in connection with

a Compensable Relief Event for which Design-Builder has delivered an Initial Relief Event Notice pursuant to Section 24.2 (*Process for Requesting Applicable Relief*) prior to the issuance of a Termination Notice by DDC under this Article.

32.4 **Exclusive Remedy and Waiver**

Payment to the Design-Builder under Section 32.3 (*Termination Without Cause Payments*) constitutes the Design-Builder's sole and exclusive remedy for termination of this Agreement and any outstanding Claims, including for all claims for Extra Work for which the Design-Builder has delivered an Initial Relief Event Notice pursuant to Section 24.2 (*Process for Requesting Applicable Relief*) prior to the issuance of a Termination Notice by DDC pursuant to Section 32.1 (*Right to Terminate Without Cause*). Accordingly, upon payment of the termination payment under Section 32.3 (*Termination Without Cause Payments*) or termination of this Agreement under Article 33 (*Design-Builder Default*), the Design-Builder waives all Claims against DDC with respect to the Work or this Agreement.

32.5 **No Waiver by DDC**

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

33. **DESIGN-BUILDER DEFAULT**

33.1 **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 13.2 (*Delays*), where requested by DDC, the Design-Builder fails to (i) timely provide a Remedial Plan to DDC or (ii) timely comply with the terms of any such Remedial Plan;
- (c) the Design-Builder fails to achieve Substantial Completion of the Project by the Substantial Completion Long Stop Date;
- (d) the Design-Builder fails to pay any amount due to 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 (20) days after written notice of such non-payment;
- (e) the Design-Builder fails, for any reason other than failure of 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 (30) 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 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 delivered to 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 DDC in accordance with Section 33.4 (*Suspension Orders*);
- (i) the Design-Builder fails to comply with any safety compliance order issued by DDC in accordance with Article 8 (*Safety*);
- (j) the Design-Builder fails to allow DDC 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 44 (*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 (30) days of the relevant Insolvency Event, or within such longer period as agreed with 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 DDC; or
 - (ii) in the absence of replacing such Principal Participant, the Design-Builder demonstrates to the satisfaction of 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, Performance Bond, Payment Bond, Warranty Bond or Closing Bond when required under this Agreement or any such Guarantee, Performance Bond, Payment Bond, Warranty Bond or Closing 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 DDC that possesses the technical and financial capability to perform all remaining applicable portion of the Work, within thirty (30) days of the termination of such Guarantee, or within such longer period as agreed with 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 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) a material failure by the Design-Builder or its Subcontractors to cooperate with the representatives of the Department of Investigation, including any failure to allow the representatives of the Department of Investment to inspect the Project Site, the Work or any materials or documents, where required under this Agreement;
- (p) 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;
- (q) 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;
- (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 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;
- (s) the Design-Builder fails to achieve a Phase 1 Milestone, and fails to cure such breach within ten (10) days of the relevant Phase 1 Milestone Deadline or where the Design-Builder is diligently curing or working toward curing such failure, in such reasonable

additional time as the circumstances may require, as determined by DDC in its sole discretion;

- (t) the Design-Builder fails to comply in any material respect with Article 2 (*Phase 1 Process*), including the obligation of the Design-Builder to act in Good Faith and on an Open Book Basis to deliver the Phase 1 Services or the Final Proposal, and any such material breach continues for ten (10) days following DDC's notice to the Design-Builder of such material breach or where the Design-Builder is diligently curing or working toward curing such breach, in such reasonable additional time as the circumstances may require, as determined by DDC in its sole discretion;
- (u) (i) the Design-Builder's aggregate liability for liquidated damages assessed by DDC under this Agreement exceeds the LD Cap or (ii) the Design-Builder's overall liabilities due to DDC under this Agreement exceeds the Aggregate Liability Cap; or
- (v) without limiting 33.1(a) through (u), 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.

33.2 Notice of Design-Builder Default and Cure Periods

(a) Notice

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 33.1(a) (*Abandonment or Repudiation*), 33.1(b) (*Remedial Plan Default*), 33.1(c) (*Substantial Completion Long Stop Date*), Section 33.1(h) (*Suspension Order*), 33.1(i) (*Safety Order*), 33.1(k) (*Assignment*), 33.1(l) (*Insolvency*), 33.1(p) (*Criminal Activity*) to 33.1(r) (*Fraudulent Activity*), 33.1(s) (*Phase 1 Milestone*), or 33.1(t) (*Phase 1 Services*), there is no cure period; or
- (ii) for each other Design-Builder Default, unless otherwise noted in Section 33.1 (*Design-Builder Default*) for any specific Design-Builder Default, a period of ten (10) days after the Design-Builder receives the Design-Builder Default Notice or, if DDC agrees (in its sole discretion) to grant additional time, such longer period as may be agreed by DDC (in its sole discretion), so long as the Design-Builder has (1) responded to the Design Builder Default Notice in Good Faith, (2) is diligently curing or working toward curing the Design-Builder Default, and (3) if requested by DDC in accordance with Section 33 (*Remedial Plan for Design Builder Default or Early Warning Trigger*), provided DDC with a Remedial Plan that has been accepted by DDC and thereafter is diligently implementing the Remedial Plan in accordance with its terms.

(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, DDC may, in its discretion:

- (i) require the Design-Builder to prepare and implement a Remedial Plan in accordance with Section 33.3 (*Remedial Plan for Design-Builder Default or Early Warning Trigger*); or
- (ii) terminate this Agreement in accordance with Section 33.5 (*Termination for Design-Builder Default*).

(d) **Ethical or Criminal Defaults**

For any Design-Builder Default determined to exist by DDC under Section 33.1(p) (*Criminal Activity*), Section 33.1(q) (*Antitrust Activity*) and Section 33.1(r) (*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 Procedures) as follows:

- (i) on not less than ten (10) Business Days' notice, 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 (2) Business Days prior to the date of the scheduled opportunity to be heard;
- (iii) following such opportunity to be heard (which may not exceed two (2) Business Days), 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.

33.3 Remedial Plan for Design-Builder Default or Early Warning Trigger

- (a) Without prejudice to any other right or remedy available to DDC, if a Design-Builder Default occurs (whether or not any cure period under Section 33.2 (*Notice of Design-Builder Default and Cure Periods*) has expired), DDC may require the Design-Builder to prepare and submit to DDC, within any period as DDC reasonably determines, a plan to remedy or cure the relevant Design-Builder Default ("**Remedial Plan**").
- (b) Within thirty (30) days of receiving a Remedial Plan, DDC must notify the Design-Builder as to whether DDC accepts the Remedial Plan. If DDC determines that the Remedial Plan is not acceptable, DDC may terminate this Agreement in accordance with Section 33.5 (*Termination for Design-Builder Default*).
- (c) If 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.

33.4 **Suspension Orders**

(a) **Generally**

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 DDC Representative (a **"Suspension Order"**).

(b) **Form**

In the case of an Emergency, DDC may issue a Suspension Order orally. DDC must confirm any oral Suspension Order in writing within three (3) 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, DDC may issue one combined order including the terms of both such orders.

(c) **Duty to Comply**

Subject to Section 33.4(d) (*Relief*), if 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**

DDC's issuance of a Suspension Order will constitute a Compensable Relief Event, except when 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 DDC to the Design-Builder in writing.

33.5 **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 33.2 (*Notice of Design-Builder Default and Cure Periods*);
- (b) DDC determines that the Design-Builder Default has not been cured within the relevant cure period under Section 33.2 (*Notice of Design-Builder Default and Cure Periods*); or

- (c) if DDC requires the Design-Builder to deliver a Remedial Plan under Section 33.3 (*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 DDC, or DDC rejects any Remedial Plan that is delivered within the required time, in each case in accordance with Section 33.3 (*Remedial Plan for Design-Builder Default or Early Warning Trigger*); or
 - (ii) where a Remedial Plan has been accepted by DDC, 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,

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.

33.6 Payments on Termination for Design-Builder Default

- (a) If DDC terminates this Agreement in accordance with Section 33.5 (*Termination for Design-Builder Default*):
 - (i) the Design-Builder will not be entitled to receive any further payments under this Agreement; and
 - (ii) if DDC terminates this Agreement during Phase 1 for any Design-Builder Default, then
 - (A) DDC may exercise its rights under Section 4.5(a) (*Closing Bond*) to draw and retain the full amount of the Closing Bond as the sole monetary remedy of the City against the Design-Builder, subject to Section 33.6(a)(ii)(B) below; and
 - (B) if Early Phase 2 Work During Phase 1 is performed, the Design-Builder must pay DDC, upon demand, (i) all Losses incurred by DDC associated with termination of this Agreement and the Design-Builder Default and (ii) any other claims that have accrued up to, and remain unpaid as of, the date of termination of this Agreement, in each case of (i) and (ii) in connection with such Early Phase 2 Work During Phase 1, and the Design-Builder acknowledges, without limiting the generality of this Section 33.6(a)(ii)(B), that DDC’s Losses associated with such Early Phase 2 Work During Phase 1 include DDC’s cost and expenses in completing such Early Phase 2 Work During Phase 1 as described in Section 33.6(b)(i).
 - (iii) if DDC terminates this Agreement during Phase 2:
 - (A) the Design-Builder must pay DDC, within thirty (30) days upon demand, an estimated amount equal to the aggregate of:

- (1) all Losses incurred or reasonably estimated to be incurred by DDC associated with termination of this Agreement and the Design-Builder Default (the “**Estimated DDC Damages**”); and
 - (2) any outstanding liquidated damages or other claims that have accrued up to, and remain unpaid as of, the date of termination of this Agreement.
 - (B) upon Final Completion, DDC will calculate its actual Losses incurred due to such termination of this Agreement (the “**DDC Actual Damages**”), and based on such calculation:
 - (1) if DDC Actual Damages are less than the Estimated DDC Damages, then DDC will return any Estimated DDC Damages received in excess of DDC Actual Damages; or
 - (2) if DDC Actual Damages are more than the Estimated DDC Damages, DDC may issue a demand to the Design-Builder to pay DDC, within thirty (30) days upon demand, a final amount equal to DDC Actual Damages not otherwise previously received from the Design-Builder.
- (b) Without limiting the generality of Section 33.6(a)(iii)(A)(1), DDC’s Losses associated with termination of this Agreement during Phase 2 for a Design-Builder Default will include:
 - (i) DDC’s costs and expenses in completing the Work including:
 - (A) all costs and expenses that 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 non-legal consultant fees and expenses) incurred by DDC in connection with any re-procurement of the Work; and
 - (C) all costs and expenses (including non-legal consultant fees and expenses) incurred by DDC defending claims arising from the Design-Builder’s performance or non-performance (including any Claims by the Design-Builder) only to the extent either (i) DDC is the prevailing party in such claim, or (ii) where such claim is filed by a third party, and
 - (ii) subject to Section 13.7 (*Limitation on Liability*), losses that have or will be incurred by 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.
- (c) The Design-Builder will also be required to comply with Section 32.2 (*Design-Builder’s Obligation Upon Termination*) and Article 36 (*Design-Builder Termination Obligations*) in connection with any termination for a Design-Builder Default.

33.7 Improper Termination for Design-Builder Default

If it is finally determined, pursuant to Article 39 (*Dispute Resolution Procedure*), that DDC incorrectly terminated this Agreement for a Design-Builder Default:

- (a) DDC will be deemed to have terminated this Agreement for convenience under Article 32 (*Termination by DDC 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 32.3 (*Termination Without Cause Payments*).

33.8 Termination on Final Proposal Grounds

If DDC terminates this Agreement in accordance with Section 2.9(a) (*Final Proposal Termination Grounds*):

- (a) DDC will pay the Design-Builder, subject to submission of a Payment Request in accordance with Article 21 (*Payment Provisions*) and satisfaction of the obligations under Section 33.8(b), in accordance with Section 2.9(b);
- (b) the Design-Builder will comply with all termination obligations under Section 32.2 (*Design-Builder's Obligation Upon Termination*) and Article 36 (*Design-Builder Termination Obligations*); and
- (c) the Design-Builder will not be entitled to any Termination Without Cause Payment in accordance with Section 32.3 (*Termination Without Cause Payments*).

33.9 Disputes Review Board Review of Design-Builder Defaults

With the exception of the Design-Builder Defaults described in Section 33.1(p) (*Criminal Activity*), Section 33.1(q) (*Antitrust Activity*) and Section 33.1(r) (*Fraudulent Activity*) and the Ineligible Disputes, if the Design-Builder elects to initiate the Dispute Resolution Procedures to dispute a determination that a Design-Builder Default has occurred as described under Section 33.1 (*Design-Builder Default*), DDC will not draw on the Closing Bond or make a claim under any Performance Bond, Payment Bond or Warranty Bond until the Dispute is resolved in writing between the Parties under the Dispute Resolution Procedures or the Disputes Review Board has issued a recommendation under Section 39.4(g) or an advisory opinion under Section 39.4(f), in each case whether or not either Party has accepted the recommendation or opinion of the Disputes Review Board. Notwithstanding the above, upon the occurrence of a Design-Builder Default, DDC may immediately provide notice to any or all of the Sureties of such Design-Builder Default in accordance with Section 33.2(a).

34. DESIGN-BUILDER SUSPENSION RIGHTS

34.1 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 (30) days after written notice of failure to make such payment has been received by 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 (30) days after written notice of failure to make such payment has been received by DDC from the Design-Builder.

34.2 **Suspension Notice**

For a Suspension Trigger to occur, the Design-Builder must notify DDC of the occurrence of any such Suspension Trigger once the applicable cure periods have elapsed (the "**Suspension Trigger Notice**").

34.3 **Suspension Rights**

- (a) The Design-Builder may suspend its performance of the Work no earlier than thirty (30) days after the Design-Builder delivers to 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 34.3 (*Design-Builder Suspension Rights*), the Design-Builder will not suspend or delay performance of the Work because of any other breach by 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 21.6 (*Payment Disputes*).

35. **TERMINATION FOR EXTENDED FORCE MAJEURE EVENT**

35.1 **Notice to Continue**

Subject to Section 26.1(d) (*Unable to Agree*), the Design-Builder may request termination of, or DDC may terminate, this Agreement due to an Extended Force Majeure Event on twenty (20) Business Days' notice. If the Design-Builder gives such notice prior to Final Completion, then DDC has the option, in its sole discretion, either to accept such notice or to respond in writing on or before the date falling ten (10) Business Days after the date of its receipt stating that it requires this Agreement to continue until the time DDC terminates this Agreement.

- (a) If 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 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 DDC does not accept the Design-Builder's request for 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 ninety-one (91) days from the date of commencement of the Force Majeure Event.

35.2 Termination for Extended Force Majeure Event

- (a) If either DDC terminates this Agreement for an Extended Force Majeure Event, or DDC accepts the Design-Builder's termination notice delivered in connection with Section 35.1 (*Notice to Continue*), this Agreement will terminate within twenty (20) Business Days following DDC's notification, or acceptance, of such termination.
- (b) If terminated pursuant to Section (a) above:
 - (i) during Phase 1, subject to DDC's withholding rights under Section 21.9 (*Withholding*), DDC will pay for (i) the percentage of Enabling Work and Phase 1 Design Work, as applicable, actually completed prior to delivery by DDC of a Termination Notice, (ii) the percentage of the Early Phase 2 Work actually completed prior to delivery by DDC of a Termination Notice, (iii) the Phase 1 Construction Management Services Fee reduced proportionately for the actual Phase 1 Services completed and (iv) the reasonable and properly documented out-of-pocket costs and expenses directly incurred by the Design-Builder (excluding overhead) due to demobilization, in each case; and
 - (ii) during Phase 2, 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 21 (*Payment Provisions*).
- (c) The Design-Builder will comply with all termination obligations under Section 32.2 (*Design-Builder's Obligation Upon Termination*) and Article 36 (*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 35 will not be deemed a termination without cause in accordance with Article 32 (*Termination by DDC Without Cause*) or a termination for Design-Builder default in accordance with Section 33.5 (*Termination for Design-Builder Default*).

36. DESIGN-BUILDER TERMINATION OBLIGATIONS

If this Agreement is terminated for any reason by DDC in accordance with the terms of this Agreement in addition to any other right available at law, DDC may:

- (i) take possession, for the purpose of completing the Work, of all materials, equipment, scaffolds, tools purchased for the Project with DDC's funds, 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
- (iii) without limiting the generality of the Direct Agreement, exercise its rights under the Direct Agreement,

and the Design-Builder must at no cost to DDC transfer and assign the items referred to in Section 36(i) and comply with all requirements in Section 32.2(a) (*Design-Builder's Obligations Upon Termination*), including assigning all Subcontracts to DDC as may be requested by DDC and comply with all requirements of each Direct Agreement.

PART I – ADMINISTRATION OF THIS AGREEMENT

37. AUTHORIZED REPRESENTATIVES

37.1 Authorized Representatives

- (a) Each of 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 (*Contract Information*). DDC will identify DDC Representative in the NTP.
- (c) 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 to any other person elsewhere in writing by the Commissioner.

37.2 DDC’s Project Manager or Engineer in Charge

- (a) 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 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.
- (b) 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.
- (c) The DDC Project Manager, Engineer in Charge and other representatives designated by DDC may be City employees or third-party consultants.

37.3 Delegates

An Authorized Representative may, by a notice delivered to the other Party, delegate its authority under Section 37.1 (*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.

37.4 DDC's Program and Project Management Consultant

- (a) The Design-Builder acknowledges that 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 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) 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. PARTNERING PROVISIONS

- (a) Prior to escalating a Dispute to Senior Representative Negotiations under Article 39 (*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*
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Tier 1	Five (5) Business Days
Tier 2	Five (5) 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 in connection with the Phase 1 Services or 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 39 (*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 39.3 (*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 39 (*Dispute Resolution Procedures*) below.
- (d) If within thirty (30) 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 39.3 (*Fast-Track Dispute*) to resolve such Informal Dispute not otherwise resolved under this Article 38 (*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 38 (*Partnering Provisions*) or Article 39 (*Dispute Resolution Procedures*).

39. DISPUTE RESOLUTION PROCEDURE

39.1 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 39 (the "**Dispute Resolution Procedure**").

39.2 Senior Representative Negotiations

- (a) **Notification.** Within thirty (30) 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 39.2. 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 39 (*Dispute Resolution Procedure*).

- (b) **Response.** Within ten (10) 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 (7) Business Days of receipt of the Dispute Notification Response by the disputing Party and such Senior Representative Negotiations will not exceed thirty (30) 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 39.2, until such Dispute Notification Response is provided, will result in a temporary waiver of such Party's right to participate in (i) any Senior Representative Negotiations or (ii) any subsequent DRB Process concerning the Dispute at issue.
- (d) **Rules.** To the extent a Dispute is not resolved within fifteen (15) 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 (10) Business Days following receipt of such request for a mediator (unless the Parties agree to a longer period). The thirty (30) Business Day time limit for Senior Representative Negotiations will be tolled for a maximum period of ten (10) 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 (15) 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 and the Design-Builder may include in any Payment Request up to 50% of the costs of such mediator.
- (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 any DRB Process. 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 record such agreement in a writing signed by the Senior Representatives.

39.3 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 (3) 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 in accordance with Section 39.4 (*Disputes Review Board*).
- (b) **Rejection Notice.** If upon receipt of a Fast-Track Dispute Notification, the non-disputing Party disagrees, within three (3) Business Days of its receipt of such notification, that a Fast-Track Dispute exists (the “**Disagreeing Party**”), such Party must submit (within five (5) 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 39.3.
- (c) **Notice to DRB.** Within two (2) 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 (5) 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 the DRB Process under Section 39.4 (*Disputes Review Board*). If the Disputes Review Board determines such Dispute to be a Fast-Track Dispute, then the process set out in Section 39.4 (*Disputes Review Board*) will immediately apply.

39.4 Disputes Review Board

- (a) **Dispute Statement.** Within seven (7) Business Days of either (1) the Parties being unable to reach agreement on a Dispute pursuant to Section 39.2 (*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 39.3 (*Fast-Track Dispute*) or (3) either Party seeking reconsideration of the Disputes Review Board’s recommendation in accordance with Section 39.4(h)(ii) below, then in each case, the Parties must each submit a description of their position with respect to the Dispute providing an equivalent level of detail as the Dispute Notification (the “**Dispute Statement**”) to the Disputes Review Board for its review and consideration. Failure of a Party to submit its Dispute Statement within the time period set forth in this clause (a) will:
 - (i) where that Party is the disputing Party, result in a waiver of its right to submit a Dispute Statement or make any Claim or seek any relief in connection with the Dispute, at the discretion of the Disputes Review Board; and
 - (ii) result in a waiver of its right to participate in oral arguments in any conference with 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) **Conference 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 conference; provided, that the Disputes Review Board must hold the conference within fifteen (15) 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 (7) 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 conference 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 conference, 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. Failure by the disputing Party to comply with the Disputes Review Board's request in the time required will result in a waiver of its right to make any Claim or seek any relief in connection with the Dispute.
- (e) **Conference.** The Design-Builder and 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 conferences exceed sixty (60) consecutive days from the notice of conference commencement issued by the Disputes Review Board, without the consent of both Parties. Neither DDC nor the Design-Builder may present information at the conference 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 conference. In all Disputes pertaining to a Design-Builder Default, there will be a transcript prepared by a court-reporter to document the conference for the record.
- (f) **Advisory Opinion.** Prior to commencing a conference (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 conference 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 agreement.
- (g) **Decision.** The Disputes Review Board's recommendations for resolution of the Dispute will be issued in writing to both DDC and the Design-Builder within fifteen (15) Business Days after completion of the conference. 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 (15) Business Days of receiving the Disputes Review Board's recommendations, both 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 39, 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 23.2 (*Change Order*).
- (iii) Should the Dispute remain unresolved, either Party within thirty (30) 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 (30) days of receiving the Disputes Review Board's recommendation.

39.5 **Design-Builder Default Determinations**

Notwithstanding anything to the contrary and subject to Section 33.2(d) (*Ethical or Criminal Defaults*), DDC's decision to exercise its right to terminate this Agreement due to a Design-Builder Default will only be subject to further review (i) following DDC's decision to either (a) accept a Disputes Review Board's decision upholding DDC's exercise of such rights, or (b) reject a Disputes Review Board's decision to not uphold DDC's exercise of such rights, either which DDC decision will be otherwise 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 DDC's decision to accept or reject the Disputes Review Board's opinion in connection with any such Dispute regarding a Design-Builder Default, or if DDC neither accepts nor denies the decision, upon the date the decision is deemed accepted under Section 39.4(h) (*Acceptance*).

39.6 **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).

39.7 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 39 as the Design-Builder.

39.8 Record Keeping

- (a) 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 DDC will not have to show prejudice to its interest before such denial is made.
- (b) After giving DDC notice of a Dispute, the Design-Builder must keep daily records, certified by the Design-Builder, of all labor, material, and equipment costs and hours and any other Losses incurred for the affected portion of the Project, including overhead costs. The daily records must identify each operation and the specific locations where Work is affected and must be provided to DDC for review and signature on a daily basis. Costs that are incurred on a monthly or other periodic basis, such as field office expense, shall be submitted within one week following the week of receipt of invoices pertaining thereto. On a weekly basis, beginning the week following the date of giving notice of a Dispute, the Design-Builder will meet with DDC and present the daily records for the preceding week. If DDC disagrees with the accuracy, applicability, or reasonableness of any portion of the Design-Builder's submission, they will promptly notify the Design-Builder who must correct its records. If there is a Dispute as to records, the Design-Builder must include such Dispute as part of its Dispute Notification and Dispute Statement, as applicable. Lack of compliance with the requirements to hold monthly meetings or present its records will constitute a waiver by the Design-Builder of said Dispute for the applicable non-properly documented Losses.

39.9 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 Disputes Review Board.

39.10 Governing Law

This Article 39 (*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.

39.11 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 39.4(g) (*Decision*), or (ii) in the case of any Ineligible Dispute, then in each case, either Party may file a Notice of Claim pursuant to Administrative Code § 7-201 and file a plenary action for such Dispute in a court of competent jurisdiction sitting in the City and County of New York within ninety (90) days of the occurrence of either of the following (as applicable): (A) any recommendation of the Disputes Review Board under Section 39.4(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. No litigation or claim may be brought by either Party concerning any Dispute prior to using the procedures described in this Article 39. 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 39, 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.

39.12 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 39 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.

40. RECORDS AND AUDIT

40.1 Maintenance of Records

The Design-Builder must:

- (a) in accordance with Best Industry 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 DDC) at a Project Office or, where no Project Office exists or with DDC's written approval, any other location (the "**B&R Site**");

- (b) ensure 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 DDC as and when reasonably requested by DDC; and
- (e) retain all books, records, documents, other evidence relevant to this Agreement, including those required pursuant to Section 40.1(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 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).

40.2 **Audits**

- (a) In addition to any other specific audit rights that DDC has under this Agreement, DDC and the City Comptroller may review and audit the Design-Builder, its Subcontractors and their respective books, records and documents as DDC or City Comptroller deems necessary.
- (b) 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, including in connection with the Phase 1 Services.
- (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 the Final Proposal or any audit by 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 the Final Proposal or any audit;
- (iii) include appropriate terms in each Subcontract requiring the Subcontractor to provide DDC with access and audit rights in accordance with the terms of this Article 40; and
- (iv) include in its Project Management and Execution Plan:
 - (A) internal procedures to facilitate DDC's reviews and audits; and
 - (B) quality and compliance auditing responsibilities.

40.3 **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 DDC at any time during this Agreement or after the Agreement has expired or terminated, the Design-Builder will return to DDC any City records, documents, or data that has been removed from City premises.

40.4 **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 40.1(e).

41. **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 (*Contract Information*) or as otherwise directed by the Design-Builder Representative.
- (c) All notices, correspondence and other communications to DDC must be marked as regarding the Project and must be delivered to the addresses and attention as set forth in Schedule A (*Contract Information*) or as otherwise directed by DDC Representative.

- (d) Any notice to 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 and the DDC Project Manager or Engineer in Charge, as applicable, identified in the NTP via email and via 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 one (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

42. GENERAL REPRESENTATIONS AND WARRANTIES

42.1 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 DDC or the Design-Builder's, any Principal Participant's or any Guarantor's representative authority to execute this Agreement or any other Contract Document.
 - (ii) The Design-Builder, each Principal Participant and any Guarantor have disclosed to DDC any pending and unserved or threatened action, suit, proceeding, investigation or litigation with respect to the matters referred to in Section 42.1(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 DDC, or any of its representatives or advisors, as part of or in connection with the Design-Builder Proposal Commitments and the negotiation of this Agreement or the other Contract Documents; or
 - (B) delivered by or on behalf of the Design-Builder to 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 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 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 DDC to enter into the Agreement and 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, DDC will have the right to annul this Agreement without liability, entitling 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 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 42.1(m).

(n) **Disclosures Relating to Vendor Responsibility**

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 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 DDC within seven (7) days of filing.

43. **CONFIDENTIALITY AND PUBLIC DISCLOSURE**

43.1 **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 DDC. The obligation under this Section 43.1 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 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 DDC, the Design-Builder must not disclose such reports, information, or data until 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 DDC the disclosure demand for such reports, information or data.

- (b) The Design-Builder will provide notice to DDC within three (3) 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 DDC of such steps. In the event of such breach of security, without limiting any other right of DDC, 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 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 (5) 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 43.1.
- (e) The Design-Builder agrees to, at the request of DDC, return to 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 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 DDC receives a request for public disclosure under the Freedom of Information Law of information or material marked "Confidential", 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 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 43.1 will constitute a material breach of the Agreement for which DDC may terminate the Agreement pursuant to Section 33.5 (*Termination for Design-Builder Default*). DDC reserves any and all other rights and remedies in the event of unauthorized disclosure.

43.2 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>.

44. 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 sole discretion of the other Party, except that 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, any Direct Agreement, the Project or the Project Site to any Governmental Entity.
- (b) Nothing in this Article 44 will preclude the Design-Builder from subcontracting portions of the Work in accordance with this Agreement.
- (c) Without limiting Section 44(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; or
 - (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 44(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 DDC. Any changes made without DDC's approval will be deemed a Restricted Transfer for the purposes of this Article 44.
- (g) Any Transfer made in violation of this Article 44 will be null and void ab initio and of no force and effect.
- (h) The Design-Builder and each Principal Participant must promptly notify DDC of any change to its name.

45. **AMENDMENTS AND WAIVERS**

45.1 **Amendments**

This Agreement can only be amended or replaced by a written instrument duly executed by all of the Parties.

45.2 **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) 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 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.

46. 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.

47. 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.

48. OTHER

48.1 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 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 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 DDC and the Design-Builder be construed as creating any relationship whatsoever between 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 DDC nor under contract with DDC. The Design-Builder, and not 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 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 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 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 DDC, including any department, agency, office, or unit of 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 DDC for any right or benefit applicable to an official or employee of 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 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.

48.2 **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 48.2 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.

48.3 **Successors and Assigns**

This Agreement is binding upon and will inure to the benefit of DDC and the Design-Builder and their respective successors and permitted assigns.

48.4 **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 29 (*Consequential Loss*);
- (b) Article 30 (*Indemnity from the Design-Builder*);

- (c) Article 39 (*Dispute Resolution Procedure*);
- (d) Article 42 (*General Representations and Warranties*);
- (e) Article 43 (*Confidentiality and Public Disclosure*);
- (f) Article 48 (*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.

48.5 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.

48.6 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, 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.

48.7 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.

48.8 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 (10) 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 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.

48.9 Time of Essence

Time being of the essence, the Design-Builder must perform the Work in accordance with the Project Schedule.

48.10 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.

48.11 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.

48.12 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 to the City 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), 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 DDC, will furnish to DDC such bills of sale and other instruments as may be required by DDC, properly executed, acknowledged and delivered assuring to 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 DDC.
- (d) Title to all tangible personal property to be transferred by the Design-Builder to DDC pursuant to the provisions of this Agreement will immediately vest in and become the sole property of 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 DDC, until such time as the Work covered by this Agreement is fully accepted by 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 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 48.12 will be deemed to be in conflict with any other provisions of the Agreement or create any ambiguity, then the provisions of this Section 48.12 will control.

48.13 **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.

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 thirty (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 (4) days per month wherein the Design-Builder 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

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:

- (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 13.7(b) and set forth in Schedule A (*Contract Information*).

Agreement

This Agreement (including all its Exhibits), as amended at any time.

Agreement Date

The date this Agreement is executed by the Parties, as indicated on the cover page to this Agreement.

Allowance

An amount or amounts included in the Contract Price and identified in Schedule B (*Contract Price*), 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, formulas or methodology 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 DDC after the NTP Date in accordance with Section 23.1 (*Allowance Approvals*) 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.
Annual Direct Salary	Defined in Section 25.2(e)(iii).
Applicable Law	Any of the following: <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 24.1(a) (<i>Entitlement to Request Applicable Relief</i>).
Applicable Standard Change	Defined in Section 26.2 (<i>Changes in Applicable Standards</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 Industry 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 Escalation	A Fluctuating Commodity Increase which (i) has approved in accordance with Section 26.4 of the General Project Requirements.
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 25.2(c)(ii).
Authorized Representatives	Defined in Article 37 (<i>Authorized Representatives</i>).
Available Documents	<p>All written information provided to the Design-Builder or any Design-Builder Party by 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 Volume 6 of the RFP); (b) all contents provided on any digital document portal by 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 DDC to the Design-Builder.
Best Industry 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 metropolitan area. Best Industry Practice is not static but rather will change over time; provided, however, that Best Industry Practice with respect to any particular activity will be determined at the time when such particular activity is performed.
Blue Book	Defined in Section 25.3(b)(i)(D) (<i>Construction Work Net Costs</i>).
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 DDC from time to time.
CCIP	Contractor Controlled Insurance Program.
Certificate of Final Completion	A written certificate issued by 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 Participant 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 Industry Practice, unless expressly waived by DDC,

and in either case, adversely impact the performance of the Work.

Change in Law excludes: (i) any repeal, amendment, alteration, modification or change of any Applicable Law that has been passed by at least one body of the State or Federal Legislature, passed or enacted, 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, tariffs or imposts 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. In no instance would a Change in Law that also constitutes a Force Majeure Event under clause (e) of such definition, be precluded from being claimed as a Change in Law.

Change Order

A written document executed by Authorized Representatives for DDC and the Design-Builder in accordance with Section 23.2 (*Change Orders*) 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 Name Only Governmental Approval

Defined in Section 10.1(b) (*Design-Builder Responsibility for Governmental Approvals*).

City Obtained Governmental Approvals	The “City Obtained Government Approvals” listed in Schedule A (<i>Contract Information</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.
Closing Bond	Defined in Section 4.2(b) (<i>Performance Bond and Payment Bond</i>).
Commissioner	The agency head of DDC or DDC’s agency head’s designee.
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: <ul style="list-style-type: none"> (i) failure by DDC to grant or provide access to the Project Site or a portion of the Project Site at any time, subject to the terms of this Agreement; (ii) failure by DDC to issue an NTP within fourteen (14) days of registration of the Agreement pursuant to City Charter Section 328; (iii) failure beyond thirty (30) days in the aggregate by 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 Other Contractors’ work in, or around, the Project Site, not otherwise expressly permitted or contemplated in the Project Requirements; (v) failure by DDC to timely pay any undisputed amount due and payable to the Design-Builder under this Agreement; or (vi) failure by the City to obtain or maintain any City Obtained Governmental Approval by the applicable deadline set out in Schedule A (<i>Contract Information</i>) or as otherwise required under this Agreement; (b) the issuance by DDC of an Extra Work Directive; (c) any suspension of the Work that constitutes a Compensable Relief Event in accordance with Section 33.4 (<i>Suspension Orders</i>);

- (d) the discovery of any Unknown Geotechnical Condition within the Project Site;
- (e) the discovery of any Unknown Physical Conditions within or adjacent to the Project Site;
- (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 DDC's or the Design-Builder's performance under this Agreement,
- (k) the discovery of any Unknown City Asset Latent Defect within or adjacent to the Project Site;
- (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) a Change in Law which causes material increase in the cost of performing the Work;
- (n) an Extended Force Majeure Event occurs and DDC has provided notice to the Design-Builder that it does not accept the Design-Builder's request for termination in accordance with Section 35.1(b); or
- (o) during Phase 2 only, Approved Escalation occurs,

except no Compensable Relief Event will have occurred, in each case, to the extent attributable to either or both (A) any breach by any Design-Builder Party of (i) any Contract Document, (ii) Applicable Law, (iii) any Governmental Approval or (iv) any agreement or requirements by a Utility owner or (B) any negligence, recklessness, intentional tortious act of a Design-Builder Party.

Completion Conditions

Defined in Section 16.1 (*Inspection and Review*).

Completion Milestones

Any Substantial Completion of the Project, Final Completion and any other component or discrete element of the Work identified in writing

	as a “Completion Milestone” by DDC or in Schedule A (<i>Contract Information</i>).
Completion Notice	Defined in Section 16.1 (<i>Inspection and Review</i>).
Completion Protocols	The process and protocols for certifying completion of a Completion Milestone under and in accordance with Sections 16.1 (<i>Inspection and Review</i>), 16.2 (<i>Certification</i>) and 16.3 (<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 the Enabling Work) and any other 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, Payment Bond and Warranty Bond, the executed Closing Bond, the Guarantee, the Release for Construction Documents and any Design-Builder plans for the performance of the Work approved by DDC.
Contract Price	Either the Fixed Contract Price or GMP Contract Price, as accepted or negotiated and agreed with DDC in accordance with Article 2 (<i>Phase 1 Process</i>).
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.
DBA GMP	The binding guaranteed maximum price, which except as otherwise expressly provided under this Agreement, must not exceed the Initial Target Price, submitted by the Design-Builder as part of the Final Proposal.
DBA Lump Sum Price	The binding lump sum fixed price, which except as otherwise expressly provided under this Agreement, must not exceed the Initial Target Price, submitted by the Design-Builder as part of the Final Proposal where the Parties agree under Section 2.6 (<i>DBA Lump Sum Price Conversion</i>).
DB Fault	Defined in Section 24.5(b)(ii) (<i>Concurrent Delay</i>).

DB Modification Request	Defined in Section 23.3 (<i>Modification Proposals</i>).
DDC	The New York City Department of Design and Construction.
DDC Actual Damages	Defined in Section 33.6(a)(iii)(B).
DDC Modification Request	Defined in Section 23.3 (<i>Modification Proposals</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 37 (<i>Authorized Representatives</i>).
DDC Representative	The individual designated as DDC's authorized representative in accordance with Article 37 (<i>Authorized Representatives</i>).
DDC Termination Notice	Defined in Section 33.5 (<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 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 13.3 (<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 which are expressly permitted under this Agreement, and any Person that will at any time be substituted in the place of the Design-Builder as permitted under this Agreement.
Design-Builder Construction Allowance	The amounts identified in Schedule B (<i>Contract Price</i>), the aggregate of which is not to exceed the aggregate Design-Builder Construction Allowance Total, that is intended to cover the Design-Builder Construction Allowance Work performed in connection with the relevant Design-Builder Construction Allowance Assumption in the Final Proposal and for which the Design-Builder may be paid on the basis of Section 20.8 (<i>Design-Builder Construction Allowance</i>).
Design-Builder Construction Allowance Assumption	Each assumption identified in respect of a Design-Builder Construction Allowance in Schedule B (<i>Contract Price</i>) which were included in the Final Proposal, provided each assumption would have been made by an appropriately qualified and experienced contractor, engineer or qualified professional working in that field exercising Best Industry Practice in the same or equivalent circumstances, on the Setting Date.
Design-Builder Construction Allowance Total	The amount which is included in the GMP Contract Price and identified in Schedule B (<i>Contract Price</i>), being the aggregate of each Design-Builder Construction Allowance.

Design-Builder Construction Allowance Work

Costs for the performance of Phase 2 Work that deviate from the Design-Builder Construction Allowance Assumptions, and that are not other eligible to be paid through a Compensable Relief Event or any other Allowance. Design-Builder Construction Allowance Work includes, but is not limited to: (a) trade buy-out differentials; (b) overtime or acceleration (including losses or costs related to delay); (c) correction of defective, damaged or nonconforming Work, design errors or omissions, however caused; (d) Subcontractor defaults and terminations; (e) general conditions cost overruns, or (f) to cover uninsurable Subcontractor risk for which the Design-Builder provides express protection under an applicable Subcontract, and which is not otherwise covered by a Compensable Relief Event under this Agreement.

Design-Builder Default

Defined in Section 33.1 (*Design-Builder Default*).

Design-Builder Default Notice

Defined in Section 33.2(a) (*Notice of Design-Builder Default and Cure Periods*).

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 37 (<i>Authorized Representatives</i>).
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.
Designer Performance Standard	Defined in Section 27.1(a).
Design Subcontract	The contract between the Design-Builder and the Designer of Record for performance of the Design Work.
Design Work	The Phase 1 Design Work and Phase 2 Design Work.
Design Work Multiplier	Defined in Schedule B (<i>Contract Price</i>).
Detailed Relief Event Notice	Defined in Section 24.2(d).
Direct Agreement	Any agreement substantially in the form attached as Schedule J-3 (<i>Form of Direct Agreement</i>) between DDC, the Design-Builder, and a Key Subcontractor.
Direct Salary Rate	Defined in Section 25.2(e).
Disagreeing Party	Defined in Section 39.3(b).
Disclosure Demand	Defined in Section 43.1(a) (<i>Confidentiality</i>).
Dispute	Any dispute, disagreement or controversy between 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 39.2(a).
Dispute Notification Response	Defined in Section 39.2(b).
Dispute Resolution Procedure(s)	The procedures for resolving disputes in Article 39 (<i>Dispute Resolution Procedure</i>).
Dispute Statement	Defined in Section 39.4(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 considering Disputes under and in accordance with Section 39.4 (<i>Disputes Review Board</i>) of the Agreement.
Draft Reinstatement Plan	Defined in Section 31.18(b).
DRB Agreement	The Disputes Review Board Agreement to be entered into by the Design-Builder, DDC, and the Board Members, substantially in the form attached hereto as Part A of Exhibit 5 (<i>Disputes Review Board</i>).
DRB Process	The Disputes Review Board process for resolving Disputes under Section 39.4 (<i>Disputes Review Board</i>).
Early Phase 1 Event	Defined in Section 2.5(c)(iii) (<i>Final Proposal Process</i>).
Early Phase 1 Notice	Defined in Section 2.5(c)(iii) (<i>Final Proposal Process</i>).
Early Phase 2 Work	Any Construction Work performed during Phase 2 (or during Phase 1 in accordance with Section 2.3(b)) that is performed prior to the Release for Construction Documents are completed for the entire Project.
Early Phase 2 Work During Phase 1	Defined in Section 2.3(b).
Early Warning Trigger	Defined in Section 13.2 (<i>Delays</i>).
Emergency	Any unplanned event affecting the Project or the Project Site that, in DDC's sole judgment: <ul style="list-style-type: none"> (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: <ul style="list-style-type: none"> (i) the Project or any City Asset; (ii) any third party's property or equipment; (iii) the environment,

	<ul style="list-style-type: none"> (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 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.
Enabling Work	All Work (including associated administrative work) related to any Enabling Work Activity.
Enabling Work Activity	Defined in Section 1 of Schedule J-1 (<i>Enabling Work</i>).
Enabling Work Cost	Defined in Schedule B (<i>Contract Price</i>) and referred to in section 1 of Schedule J-1 (<i>Enabling Work</i>), which amount will only be adjusted for any relevant Change Order or Extra Work Directive.
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 37.
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 DDC, concerning the environment and Hazardous Materials that are applicable to the Project Site or the Work.
Equity Participant	Any domestic Person holding (directly or indirectly) a 15% or greater interest in the Design-Builder.
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	The increase or decrease in construction costs payable by the Design-Builder as a result of changes in the cost of commodity or materials inputs which are simultaneously affecting all projects of a similar size, scope and complexity in the New York City metropolitan area.
Escalation Early Phase 1 Notice	Defined in Section 2.5(c)(vii)(A).
Escalation Final Proposal Adjustment	Defined in Section 2.5(c)(v)(A).
Escalation Resolution Ladder	Defined in Section 38(a) (<i>Escalation Resolution Ladder</i>).
Estimated DDC Damages	Defined in Section 33.6(a)(iii)(A)(1) (<i>Payments on Termination for Design-Builder Default</i>).
Extended Force Majeure Event	Defined in Section 26.1(d) (<i>Force Majeure</i>).
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 23.5(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 39.3(a).
Fast-Track Dispute Rejection Notice	Defined in Section 39.3(b).
Final Completion	Satisfaction of all of the Final Completion Conditions, as and when confirmed by DDC's issuance of a Certificate of Final Completion.
Final Completion Conditions	Those conditions listed in Section 15.1 (<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 DDC, necessary or related to the Construction Work. Defined in Section 2.5 (<i>Final Proposal Process</i>).

Final Proposal

Final Proposal Adjustment

Defined in Section 2.5(c)(iii) (*Final Proposal Process*).

Final Proposal Adjustment Approval

Defined in Section 2.5(c)(v)(F) (*Final Proposal Adjustment*).

Final Proposal Change Order

The Change Order or Allowance Approval, as applicable, substantially in the form of Schedule J-4 (*Form of Final Proposal Change Order*).

Final Proposal Submission Date

The Phase 1 Milestone date on which the Design-Builder is required to submit to DDC the Final Proposal which complies with the requirements of this Agreement.

Fixed Contract Price

The total “Fixed Contract Price” specified in and set forth in Schedule J-4 (*Form of Final Proposal Change Order*) paid in accordance with Section 20.2(a).

Fluctuating Commodity(ies)

Is defined in General Project Requirements Section 26.4 (*Economic Price Adjustment*).

Fluctuating Commodity Increase

Is defined in General Project Requirements Section 26.4 (*Economic Price Adjustment*).

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 to a pandemic, epidemic, endemic, outbreak of infectious disease or other similar public health emergency that is ordered by a Governmental Entity, 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;
- (f) power outage or power failure caused by a non-City utility's inability or failure to provide service; and
- (g) acts of God (except that "acts of God" does not include events enumerated in (a)-(f) above or elsewhere in this Agreement, including any events enumerated as Relief Events or Compensable Relief Events).

Formal Dispute

Defined in Section 38(b) (*Partnering Provisions*).

General Conditions

All of the Design-Builder's overhead, management, back-office, front-office, general and administrative conditions and expenses for the Project.

General Conditions Amount

The amount payable for General Conditions which is identified in Schedule B (*Contract Price*), to be paid in accordance with Section 21.1(c)(ii), as modified in accordance with this Agreement.

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.

GMP Contract Price

The "Total GMP Contract Price" agreed as part of the Final Proposal process and included in the Final Proposal Change Order which must not exceed the Initial Target Price, and which is paid in accordance with Section 20.3 (*GMP Contract Price Option*) or any guaranteed maximum price agreed between the Parties for any Early Phase 2 Work During Phase 1.

GMP Work

Defined in Section 25.1(a).

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 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 DDC.

Green Book

Defined in Section 25.3(b)(i)(D) (*Construction Work Net Costs*).

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 (*Form of Guarantee*).

Guaranteed Completion Date(s)

The dates in Schedule A (*Contract Information*) corresponding to achieving Substantial Completion for each Completion Milestone, as applicable or for any Completion Milestone not identified in Schedule A (*Contract Information*), the date indicated by DDC for any such Completion Milestone.

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 (*Form of Guarantee*).

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.

Higher Quality Provision

Defined in Section 1.3(c) (*Order of Precedence*).

Indemnified Parties

The City of New York, its officials and employees, and any other Persons identified as "Indemnified Parties" in Schedule A (*Contract Information*).

Indicative Design	DDC's varying levels of developed designs for certain elements of the Project, provided to the Design-Builder as part of the Available Documents and subject to the disclaimer in Section 3.1(d) (<i>Indicative Design Disclaimer</i>).
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 38(b) (<i>Partnering Provisions</i>).
Initial Relief Event Notice	Defined in Section 24.2(b) (<i>Process for Requesting Applicable Relief</i>).
Initial Savings	Defined in Section 2.7(a)(i)(C) (<i>Negotiation of Final Proposal</i>).
Initial Target Price	The total projected price specified in Schedule B (<i>Contract Price</i>), which amount will only be adjusted through an Initial Target Price Adjustment.
Initial Target Price Adjustment	An adjustment to the Initial Target Price, as agreed by the Parties or determined by DDC in accordance with Section 2.5 (<i>Final Proposal Process</i>) or Section 2.7 (<i>Negotiation of the Final Proposal</i>), as applicable.

Insolvency Event

With respect to any Person:

- (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 (60) 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.

Insurance Policies

Defined in Section 31.1 (*Types of Insurance Required*).

Insurance Proceeds

Defined in Section 31.14 (*Application of Insurance Proceeds*).

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 Schedule G (*Key Personnel & Key Subcontracts*), the Design-Builder Proposal Commitments and any Persons who replace these individuals in accordance with Article 17 (*Personnel*).

Key Subcontract

To the extent such services are not performed by Principal Participants:

- (a) the Design Subcontract for the Designer of Record;
- (b) any other Subcontract identified in Schedule A (*Contract Information*), Schedule G (*Key Personnel & Key Subcontracts*) or the Design-Builder Proposal Commitments as a Key Subcontract; and
- (c) any Subcontract designated as a Key Subcontract by DDC pursuant to Section 4.4(b).

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 13.7(a) and set forth in Schedule A (<i>Contract Information</i>).
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 Design-Builder 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 20.2(a)(i) and set forth in Schedule J-4 (<i>Form of Final Proposal Change Order</i>).
M/WBE	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.
M/WBE Achievement and Utilization Plan	Where applicable, the M/WBE Achievement and Utilization Plan initially submitted in the Design-Builder’s Proposal Commitments and updated in accordance with this Agreement.
M/WBE Goals	Defined in Exhibit 7 (<i>M/WBE Requirements</i>) of this Agreement and set forth in Schedule A (<i>Contract Information</i>).
M/WBE Requirements	Defined in Exhibit 7 (<i>M/WBE 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 DDC, in its sole 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 21.3(b)(xi).
Minor Waiver	A minor waiver or change to the Contract Documents that does not adversely impact the Project Requirements and does not involve an adjustment in the Contract Price or any Guaranteed Completion

	Date, or both, and does not materially and adversely affect the Work, including the design, quality, performance and workmanship required by the Contract Documents.
Modification	Defined in Section 23.2(a)(i) (<i>Change Orders</i>).
Modification Proposal	Defined in Section 23.3(a) (<i>Modification Proposals</i>).
MTA	The Metropolitan Transportation Authority.
MTA Force Account T&Cs	Defined in Section 5.5(c).
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, including for any Extra Work. In the case of any categories of costs that are subject to Article 25 (<i>Calculating GMP Work, Allowance Work, Extra Work and Net Costs</i>), such costs will be determined in accordance with Article 25, excluding in all cases Indirect Losses.
NTP	Any notice to proceed issued by 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 6.1(d) (<i>Notice to Proceed</i>).
Open Book Basis	Defined in Section 25.5 (<i>Open Book Basis</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.
Parties	DDC and the Design-Builder.
PASSPort	Defined in Section 18.1(a)(iv)(B).
Payee Information Portal	The City's Payee Information Portal available at www.nyc.gov/pip .
Payment Bond	Defined in Section 4.2(a) (<i>Performance Bond and Payment Bond</i>).
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(a) (<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.

Phase 1	On and from the date of this Agreement until the date which the Final Proposal Change Order becomes effective and enforceable or the early termination of this Agreement (whichever is earlier).
Phase 1 Construction Management Services	Defined in the Project Requirements.
Phase 1 Construction Management Services Fee	The lump sum fixed-price identified in Schedule B (<i>Contract Price</i>).
Phase 1 Design Work	All work related to the design, redesign, engineering or architecture for the Project required in connection with the Final Proposal, Enabling Work, or Phase 1 Milestones, including as described in the Project Requirements.
Phase 1 Design Work Fee	The lump sum fixed-price identified in Schedule B (<i>Contract Price</i>).
Phase 1 Fixed Price	Means the lump sum fixed price aggregate of the Enabling Work Cost, Phase 1 Design Work Fee, the Phase 1 Construction Management Services Fee and all mobilization payments to be paid during Phase 1 as set out in the Project Requirements.
Phase 1 Milestone	Any component or discrete element of the Work identified in writing as a "Phase 1 Milestone" by DDC or in Schedule J-2 (<i>Phase 1 Milestones</i>) or as an "Enabling Work Activity" in Schedule J-1 (<i>Enabling Work</i>).
Phase 1 Milestone Deadline	The deadline date corresponding to each Phase 1 Milestone as identified in Schedule J-1 (<i>Enabling Work</i>) or Schedule J-2 (<i>Phase 1 Milestones</i>), as applicable.
Phase 1 Project Requirement Change	Defined in Section 2.1(e)(i) (<i>Phase 1 Project Requirement Changes</i>).
Phase 1 Services	All Work related to the Enabling Work, Phase 1 Design Work, Final Proposal, Phase 1 Milestone or Phase 1 Construction Management Services.
Phase 1 Services Fee	Means the lump sum fixed price aggregate of the Phase 1 Design Work Fee and the Phase 1 Construction Management Services Fee, as referred to in Schedule B (<i>Contract Price</i>).
Phase 2	On and from the date the Final Proposal Change Order becomes effective and enforceable until the expiration or early termination of this Agreement.
Phase 2 Design Work	All work related to the design, redesign, engineering or architecture for the Project, excluding the Phase 1 Design Work.
Phase 2 Design-Builder Fee	The "Phase 2 Design-Builder Fee" identified in the GMP Contract Price section of Schedule B (<i>Contract Price</i>).
Phase 2 Work	All Work excluding the Phase 1 Services.

Phase 2 Work Costs	Defined in Section 21.1(c)(ii)(A)(1).
PPB Rule	The Procurement Policy Board Rules of the City of New York.
Principal Participant	Any of the following entities: <ul style="list-style-type: none"> 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 Improvement	Defined in Section 2.7(a)(ii).
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 Requirement Deviations	Deviations included in the Project Specific Schedule in Exhibit 2 (<i>Project Requirements</i>), which have been approved by DDC for inclusion as part of the Project Requirements.
Project Schedule	The schedule, including any amendments as permitted under this Agreement, for performance of the Work necessary to deliver the Project by the Design-Builder and approved by DDC under the terms of the Agreement.
Project Site	The area described in Project Requirements as the “Project Site” for performance of the Construction Work for the Project and for which the Design-Builder has responsibilities under this Agreement, and any revisions to that area as a result of the Phase 1 Services as notified by DDC.
Proposal	The RFP proposal submitted by the Design-Builder to DDC in response to the RFP for this Project.
Punch List	An itemized list of Work that remains to be completed, corrected, adjusted, or modified following Substantial Completion of any Completion Milestone or other discrete portion of the Work deemed substantially complete by DDC, in each case, as approved by DDC in accordance with this Agreement.

Qualified Surety

A Surety or insurance company that:

- (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 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 will confirm that (i) all Design Work is done in conformance with Best Industry Practice and the applicable professional standards required in this Agreement and Applicable Law, (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.

Railroad Owner

The Metropolitan Transportation Authority, the Port Authority of New York and New Jersey, New Jersey Transit, Amtrak or any other entity operating a rail facility.

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,

	<p>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).</p>
Record Drawings	<p>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.</p>
Reference Documents	<p>Volume 5 (<i>Reference Documents</i>) of Exhibit 2 (<i>Project Requirements</i>).</p>
Reinstatement Plan	<p>Defined in Section 31.18(b)(ii).</p>
Reinstatement Works	<p>Defined in Section 31.18(b).</p>
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, if applicable, approved by 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	<p>Defined in Section 24.1(b).</p>
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; (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 (30) days;

- (h) a supply chain disruption that has a direct, material, and adverse impact on the Design-Builder's ability to obtain materials or equipment for the Project beyond the specified dates for delivery in the Project Schedule, in each case, which is a broader market disruption not specific to the Design-Builder and that cannot be resolved by the Design-Builder by diligently seeking alternative capable suppliers for the delayed materials or equipment;
- (i) any delay attributable to (i) a Utility'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 DDC or the Design-Builder, as applicable, necessary for performance of the Work or (ii) a Utility 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 Utilities) causes one or more Critical Path activities approved by DDC to be adversely impacted for a period of fifteen (15) days in the aggregate. The computation of such 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 or a different Utility, as a single day and not as two (2) days;
- (j) any delay attributable to the MTA failing to perform its obligations under and in accordance with the MTA Force Account T&Cs, provided the Design-Builder has not caused or contributed to such failure, and where such delay causes one or more Critical Path activities approved by DDC to be adversely impacted for a period of thirty (30) days in the aggregate. The computation of such days in the aggregate will treat any day of delay that runs concurrently with another day of delay, as a single day and not as two (2) days; or,
- (k) a Change in Law,

except, in each case, no Relief Event will have occurred, in each case, to the extent attributable to either or both (A) any breach by a Design-Builder Party of (i) any Contract Document, (ii) Applicable Law, (iii) any Governmental Approval, (iv) any agreement or requirements by a Utility owner or (v) any agreement or requirements by the MTA, including the MTA Force Account T&Cs; or (B) any negligence, recklessness, intentional tortious act of a Design-Builder Party.

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 33.3(a) (<i>Remedial Plan for Design-Builder Default or Early Warning Trigger</i>).
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 44(c)(iii).
Retainage Amount	<p>The amounts retained by DDC from payments due to the Design-Builder in accordance with Section 21.8 (<i>Retainage</i>), without taking into account amounts:</p> <ul style="list-style-type: none"> (a) returned to the Design-Builder in accordance with Section 21.8 (<i>Retainage</i>); or (b) otherwise applied by DDC in accordance with Section 21.8 (<i>Retainage</i>).
Retainage Percentage	The percentage set out in Schedule A (<i>Contract Information</i>).
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 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	Defined in the General Project Requirements.
Schedule of Values	The “Schedule of Values” submitted by the Design-Builder as part of its Final Proposal, as accepted by or negotiated with DDC and incorporated with Schedule B (<i>Contract Price</i>), 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 39.2 (<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	(A) If during Phase 1, the date that is five (5) days before the date the Design-Builder submitted its proposal for the Project in response to

the RFP or (B) if during Phase 2, as of the date of any final modifications made by the Design-Builder to the Final Proposal.

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 Industry 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.

Site Validation Period

The number of days measured from the NTP Date as indicated in "Site Validation Period" of Schedule A (*Contract Information*).

Small Tools

Defined in Section 25.3(b)(ii).

Specific Project Requirements

Volume 4 (*Specific Project Requirements*) of Exhibit 2 (*Project Requirements*).

Specified Providers

Defined in Section 18.7 (*Specified Providers*).

Staffing Plan

Defined in Section 25.2(c)(i) (*Design Work*).

Standards of Performance

Defined in Section 6.1(b) (*Requirements and Standards*).

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.

Subguard Insurance

Is defined in Section 18.4(b).

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 DDC for approval, review, comment or otherwise.

Substantial Completion

The written determination by DDC that an applicable portion of the Work or a Completion Milestone under this Agreement satisfies the applicable substantial completion conditions in the Project Requirements and is substantially, but not entirely, complete and the approval of the Final Approved Punch List.

Substantial Completion Long Stop Date	The date indicated in Schedule A (<i>Contract Information</i>).
Surety	The surety companies issuing the Performance Bond, the Payment Bond and Closing Bond in connection with this Agreement.
Suspension Order	Defined in Section 33.4(a) (<i>Suspension Orders</i>).
Suspension Trigger	Defined in Section 34.1(<i>Suspension Trigger</i>).
Suspension Trigger Notice	Defined in Section 34.2 (<i>Suspension Notice</i>).
Temporary Access Areas	Defined in Section 6.3(d)(iv) (<i>Access to Project Site</i>).
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 32.2(a) (<i>Design-Builder's Obligations Upon Termination</i>).
Termination Without Cause Payment	Defined in Section 32.3 (<i>Termination Without Cause Payment</i>).
Terrorism	<p>Activities against Persons or property of any nature:</p> <ul style="list-style-type: none"> (a) that involve the following or preparation for the following: <ul style="list-style-type: none"> (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: <ul style="list-style-type: none"> (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 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.
Total Phase 1 and Phase 2 Contract Price	The total of the Phase 1 Fixed Price and the Contract Price, in each case, as modified by any City approved Change Order.
Trade Buyout	Is defined in General Project Requirements Section 26.4 (<i>Economic Price Adjustment</i>).
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 by Unit Price Item Category, as applicable, in Schedule B (<i>Contract Price</i>).
Unit Price Cost	The Design-Builder's cost and expense for performance any Unit Price Work.
Unit Price Excess Cost	Defined in Section 25.3(a)(i) (<i>Unit Price Items</i>).
Unit Price Item	Any single unit of Work done on a Unit Price basis.
Unit Price Item Category	The individual categories of Unit Price Items as identified in Schedule B (<i>Contract Price</i>).
Unit Price Work	Any Work performed by the Design-Builder that is compensated on a Unit Price basis.
Unknown Archaeological Remains	Any Archaeological Remains discovered at the Project Site that, as of the Setting Date, were neither: <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 qualified professional working in that field exercising due care and skill and Best Industry Practice in the same or equivalent circumstances, including through review and analysis of the Available Documents and any other reports or information discovered during Phase 1 that, in each case, were available to the Design-Builder as of the Setting Date.
Unknown City Asset Latent Defect	Any latent defects in any existing City Assets which cause a material adverse impact on the Design-Builder's performance of the Work, that as of the Setting Date, were neither:

(a) known to the Design-Builder; or

(b) reasonably capable of being identified by an appropriately qualified and experienced contractor, engineer or qualified professional working in that field exercising due care and skill and Best Industry Practice in the same or equivalent circumstances, including through review and analysis of the Available Documents and any other reports or information discovered during Phase 1 that, in each case, were available to the Design-Builder as of the Setting Date.

Unknown Endangered Species

Any Endangered Species discovered at the Project Site, the temporary, continual or habitual presence of which, as of the Setting Date, was neither:

(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 and any other reports or information discovered during Phase 1 that, in each case, were available to the Design-Builder as of the Setting Date.

Unknown Geotechnical Condition

Any geotechnical condition (excluding Hazardous Environmental Conditions and Unknown City Asset Latent Defect) that materially differs from the conditions described in the Geotechnical Baseline Reports or any of the Available Documents, excluding any condition that could reasonably have been anticipated, identified or discovered by an appropriately qualified and experienced contractor, engineer or qualified professional working in that field exercising due care and skill and Best Industry Practice in the same or equivalent circumstances, including through (i) the access made available to the Design-Builder 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 and any other reports or information discovered during Phase 1 that, in each case, were available to the Design-Builder as of 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 (*Project Requirements*), excluding any Hazardous Environmental Condition that could reasonably have been identified or discovered by an appropriately qualified and experienced contractor, engineer or qualified professional working in that field exercising due care and skill and Best Industry Practice in the same or equivalent circumstances,

including through (i) the access made available to the Design-Builder for inspection and investigation of the Project Site and (ii) review and analysis of the Available Documents and any other reports or information discovered during Phase 1 that, in each case, were available to the Design-Builder as of the Setting Date. Unknown Geotechnical Conditions do not constitute Unknown Hazardous Environmental Conditions.

Unknown Physical Condition

Excluding Hazardous Environmental Conditions, Unknown Geotechnical Conditions, Unknown City Asset Latent Defect 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 qualified professional working in that field exercising due care and skill and Best Industry Practice in the same or equivalent circumstances, including through (i) the access made available to the Design-Builder for inspection and investigation of the Project Site and (ii) review and analysis of the Available Documents and any other reports or information discovered during Phase 1, in each case, were available to the Design-Builder as of the Setting Date.

Unknown Site Conditions

Any Unknown Physical Condition, Unknown Archaeological Condition, Unknown Hazardous Environmental Condition, Unknown Geotechnical Condition, Unknown Endangered Species, Unknown City Asset Latent Defect or Unknown Utility.

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 qualified professional in the field exercising due care and skill and Best Industry Practice in the same or equivalent circumstances through (i) the access made available to the Design-Builder for inspection and investigation of the Project Site and (ii) review and analysis of Available Documents, and any other reports or information discovered during Phase 1 and any public information that, in each case, were available to the Design-Builder as of 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.

Warehouse

Defined in Section 21.3(b)(iv) (*Payments for Stored Materials*).

Warranty Bond

Defined in Section 27.2 (*Warranty Bond*).

Warranty Period

Defined in Section 28.1(a) (*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 the Phase 1 Services, Phase 2 Work, and demolition work, as may be necessary or foreseeable to achieve Substantial Completion of the Project and Final Completion of the Project and satisfy all DDC claims and Design-Builder obligations during the Warranty Period or latent defects period.

Work Product

All drawings, data, photographs, videos, specifications, calculations, measurements, reports, studies, surveys, notes, deliverables 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 3 – General Project Requirements

Volume 4 – Specific Project Requirements

Volume 5 – 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,

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.

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Design-Build Agreement
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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 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**

New York City Department of Design and Construction

Design-Build Agreement
GMP / BBJ

Exhibit 4 (Form of Guarantee)

- (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 42.1(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) 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 39 (*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 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 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 conference commenced within [twenty-four months] after Final Completion (unless otherwise extended or terminated in accordance with this DRB Agreement or applicable law). Any Board Member may be terminated either (i) mutually by the Design-Builder and DDC agreeing collectively in writing for any reason at the convenience of the Parties, (ii) by DDC or Design-Builder for any material breach that is not cured within a reasonable period following the applicable Party’s written notification of such breach, or (iii) by DDC or the Design-Builder, due to any fraudulent, criminal, or willful misconduct by any such Board Member at any time (whether or not related to this Agreement). Prior to DDC or the Design-Builder terminating a Board Member under (iii) for fraud, criminal or willful misconduct, the applicable Board Member will be provided with an opportunity to be heard on no less than five (5) days’ written notice. DDC may direct the Board Member to cease performing work under this DRB Agreement pending the opportunity to be heard and DDC’s determination.
- (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 Procedure*) 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 Procedure*) 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 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 DDC and the Design-Builder, and the Board Member will be disqualified from serving on the Board.

- (e) The purpose of the Board is to engage in:
 - (i) Dispute avoidance activities, which include fostering and conducting proactive discussion on Project issues through attending Board regular meetings, participating in site visits, and giving advisory opinions (if requested in accordance with the Design-Build Agreement); and
 - (ii) resolution activities, which include issuing timely and impartial recommendations for resolution of Disputes.

2. **BOARD RESPONSIBILITIES**

- (a) The Board will fairly and impartially consider and provide written decisions for resolution of Disputes in accordance with Article 39 (*Dispute Resolution Procedure*) of the Agreement and Part B (*Disputes Review Board Procedure*) 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 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. Board Members may also perform other activities, including site visits, document review and other means necessary to stay informed about the Project, subject to approval by the Parties.
- (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 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 DDC or the Design-Builder or a representative of either Party may be subject to disqualification and removal from the Board.
- (d) The Board, subject to approval by the Parties, must adopt operating procedures that supplement and are consistent with the requirements in this DRB Agreement and the Design-Build Agreement and which must be in the form of Part D (*Operating Procedures*) of Exhibit 5 to the Agreement. Any deviation from the form of operating procedures included as Part D (*Operating Procedures*) of Exhibit 5 to the Agreement must be approved by all parties to this DRB Agreement.
- (e) The Board must consider the facts and circumstances forming the basis of a referred Dispute impartially and independently, and evaluate the merits based on careful consideration of the information submitted by the Parties, the terms and conditions of the Design-Build Agreement, and Applicable Law. The Board shall not:
 - (i) undermine the provisions of the Design-Build Agreement,
 - (ii) disregard or alter any requirements of the Design-Build Agreement, or alter the allocation of risk specified therein; or

- (iii) supplant or otherwise interfere with the respective rights, authority, duties, and obligations of either DDC or the Design-Builder as set forth in the Design-Build Agreement.
- (f) The Board will make all reasonable efforts to reach unanimous recommendations. If this cannot be accomplished, the Board must include written minority recommendations and supporting rationale within the full Board report, but do not identify the dissenting member.
- (g) Board Members may withdraw from the Board upon delivery of written notice of withdrawal to DDC, the Design-Builder and the other Board Members, which notice must specify a withdrawal date at least sixty 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 Procedure*) 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.
- (h) 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 DDC and the Design-Builder.
- (i) Subject to any requirements under law, each Board Member will keep matters related to the DRB Agreement and the Board confidential.
- (j) 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 DDC or the Design-Builder. No Board Member will be entitled to any employee benefits.

3. **CONFERENCES 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 39.4 (*Disputes Review Board*) of the Agreement and as set forth in Part B (*Disputes Review Board Procedure*) of Exhibit 5 to the Agreement. The Board's written recommendation must include the Board's reasoning and supporting rationale for its conclusion.
- (b) Within the limits set by Section 39.4 (*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) DDC must furnish to each Board Member one copy of Project-related documents in accordance with Section 9(b)(i) of Part B (*Disputes Review Board Procedure*) 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 DDC, in accordance with Section 9(a)(ii) of Part B (*Disputes Review Board Procedure*) 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 Procedure*) of Exhibit 5 to the Agreement. All payments will be made within thirty (30) days of the Design-Builder's receipt of an acceptable invoice, which at minimum contains the information required in Section 5(b) below.
- (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 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) Out-of-pocket travel costs will be reimbursed to the extent they are pre-approved by the Design-Builder and DDC, following the guidance of the New York City Comptroller's Directive #6.
- (d) 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.
- (e) Unless otherwise permitted by the Parties, each Board Member may not bill more than fifteen (15) hours for the first month of engagement spent analyzing Contract Documents, attending trainings and reviewing DRB procedures. And no more than fifteen (15) hours per month thereafter preparing for any quarterly Project meetings or calls and communicating or coordinating with the Parties on matters not relating to Disputes. This hourly limitation does not apply to work performed by the Board Members in connection with any Disputes before the Board and should not be viewed as a minimum billable requirement as the City does not wish to encourage the billing of fifteen (15) hours per month unless such time is required for the Board Member's performance of its duties.
- (f) The Board Members may not bill for any administrative tasks performed on the Project (including, without limitation, preparing or discussing invoices, negotiating this DRB Agreement).

6. LEGAL RELATIONS

- 6.1 To the fullest extent permitted by Applicable Law, each Board Member shall be accorded quasi-judicial immunity for any interpretations or recommendations associated with Board activities.
- 6.2 Except for a breach of this DRB Agreement, to the fullest extent permitted by Applicable Law and to the extent the Board Member was acting within the scope of their employment and in the discharge of their duties and not in violation of any rule or regulation, DDC and the Design-Builder shall defend, indemnify and hold harmless each Board Member from (i) any personal or professional liability arising from or related to Board activities performed in accordance with this DRB Agreement, and (ii) any claims, losses, demands, costs, and damages for bodily injury, property damage, or economic loss arising out of or related to Board Members carrying out their obligations in accordance with this DRB Agreement. In connection with such indemnification, the Office of the Corporation Counsel (the New York City Law Department ("Law Department")) will represent and defend each Board Member except if a conflict exists; where such conflict exists, the Law Department will select conflict counsel.
- 6.3 The Parties agree that no Board Member shall participate as a witness or expert in any pending or subsequent litigation or arbitration arising out of this DRB Agreement, the Agreement and/or the Project, except in connection with any actions brought in connection with a Board Member breach

under Section 1(a) above, or any proceedings arising out of the City and the Design-Builder's obligations to defend, indemnify and hold harmless the Board Members under this Section 6.

7. MISCELLANEOUS

- (a) This DRB Agreement will commence upon execution of this DRB Agreement by DDC, the Design-Builder, and all three Board Members, subject to the right of 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 39 (*Dispute Resolution Procedure*) of the Agreement and Part B (*Disputes Review Board Procedure*) 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 39 (*Dispute Resolution Procedure*) of the Agreement and Part B (*Disputes Review Board Procedure*) of Exhibit 5 to the Agreement, Article 39 (*Dispute Resolution Procedure*) of the Agreement and Part B (*Disputes Review Board Procedure*) of Exhibit 5 to the Agreement, will control.
- (d) Notices under this DRB Agreement must be sent as provided in Article 41 (*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 DRB Agreement waive objection to those courts on the grounds of inconvenient forum or otherwise in relation to proceedings in connection with this DRB Agreement.
- (f) 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 **DDC,**

By: _____

Name: _____

Title: _____

By: _____

Name: _____

Title: Board Member _____

Address:

By: _____

Name: _____

Title: Board Member _____

Address:

By: _____

Name: _____

Title: Board Member _____

Address:

PART B

DISPUTES REVIEW BOARD PROCEDURE

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 DDC and the Design-Builder as set forth under Article 39 (*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 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 technical advisory firm reasonably acceptable to both Parties that is qualified and experienced in design-build methodology and with significant experience on projects in New York City or projects of similar size, type and complexity as the Project. 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 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 Design-Build 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 DDC or the Design-Builder at any tier;
- (b) no Board Member will have been previously employed by, have had financial ties to, or provided fee-based consulting services to, either Party within the two (2) years prior to award of the Design-Build Agreement, where the consulting fees or employment paid by that Party exceeded 20% of that member's total income in either year;
- (c) each Board Member will have completed any disputes review board training course provided by DDC for the Project, if any;
- (d) 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 DRB Agreement except with express approval of both Parties; and
- (e) 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.

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 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 DRB 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 DDC and the Design-Builder before their appointment is final and a written certification of no conflicts of interests as required by DDC.

5. SELECTION OF MEMBER 1 AND MEMBER 2

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 NTP. 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 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, DDC will unilaterally make a selection from the pre-qualified list.

7. EXECUTION OF MULTI-PARTY AGREEMENT

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 A (*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 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

DDC must furnish the following services and items:

- (i) **Contract-Related Documents:** DDC will furnish the Disputes Review Board and the Design-Builder a copy of all Contract Documents and all written instructions issued by DDC to the Design-Builder.
- (ii) **Coordination and Services:** 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**

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 Board, after approval by both parties, and the Design-Builder will then invoice DDC for 50% of the payment it made to Board Members in accordance with the payment provisions for any Progress Payment under the Agreement.

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 conference, 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.

PART D

OPERATING PROCEDURES

1. GENERAL

1.1. These Operating Procedures are issued to define the process to be followed by the Parties and the Dispute Review Board ("**Board**") pursuant to Part A Dispute Review Board Agreement, Part B Disputes Review Board Procedure and Article 39 of the Design-Build Agreement ("**Agreement**") (collectively, the "**DRB Contract Documents**"). These requirements are in addition to all of the other requirements in the DRB Contract Documents. To the extent there is any inconsistency between Part D Operating Procedures and any other provision in the DRB Contract Documents, Article 39 of the Agreement and the DRB Agreement will govern.

1.2. The Board will operate in an informal, flexible manner to implement its responsibilities under the DRB Contract Documents. The Board and the Parties will endeavor to be as efficient as possible in administering the Disputes Review Board process.

1.3. The Board will be impartial, unbiased and neutral in all of its actions.

1.4. These Operating Procedures may be changed with approval of DDC, the Design-Builder and the Board.

1.5 Capitalized terms used but not defined in these Operating Procedures will have the meanings set forth in the Agreement or the DRB Agreement, as applicable.

2. COMMUNICATIONS

2.1. The Design-Builder and DDC (each, a "**Party**", and collectively, "**Parties**") will identify a single designated representative ("**Party Representative(s)**") to interact with the chair of the Board (the "**DRB Chair**"). All communications with the Board will be accomplished through the DRB Chair and Party Representatives by email. Each Party Representative will be responsible for communicating with other members of their respective Project teams regarding Board matters and communications.

2.2. The DRB Chair and Party Representatives will determine schedules and arrangements for Board calls, meetings, Board Conferences, and any other Board proceedings.

2.3. Communications, papers, and other documents generated by either Party will be sent directly to the DRB Chair with confirmation to the DRB Chair that a copy of such documentation has also been sent to the other Party. If requested by the DRB Chair, designated communications and documents may be sent directly to the individual Board members. Generally, communications and submissions will be made by email and electronic means, however the DRB Chair may ask for hard copies as well.

2.4. There will be no *ex-parte* communication between a Board member and any Party, other than those conducted by the DRB Chair with the Party Representatives for scheduling and/or routine administrative purposes. The Board and the Parties will maintain the confidentiality of the information and documents furnished to the Board.

3. PROJECT DOCUMENTS TO BE FURNISHED TO THE BOARD

3.1. Prior to the kick-off meeting with the Board, DDC will provide each Board member with the Agreement, including the Project Requirements, for the Project (these may be in electronic form or hard copies, as determined by the DRB Chair).

3.2. Generally, on a monthly basis, the Parties will provide to the Board regularly generated copies of the following documents: baseline Project Schedule; Schedule updates; progress meeting minutes; logs of RFIs, Submittals, Change Orders, and Payment Requests; and other progress reports kept in the ordinary course. Other documents may be requested by the Board on a case by case basis.

3.3. The DRB Chair and the Party Representatives will confer and confirm the means and frequency of document updates to the Board; at a minimum, such documents will be provided before the Board kick-off meeting and thereafter prior to each Board meeting. The Board and the Party Representatives will schedule quarterly meetings as agreed to in advance, after the kick-off meeting.

4. BOARD MEETINGS

4.1. The Board kick-off meeting will be scheduled by the DRB Chair as soon as practicable after the Board is appointed. The DRB Chair will work with the Party Representatives to establish an agenda and to provide the Board with advance copies of pertinent project documents so that the Board can become familiar with the Project scope, budget and schedule and be briefed on the status of the Project as of the time the Board is on-boarded.

4.2. Subsequent Board meetings will be scheduled as agreed with the Parties, but must take place no more frequently than as specified in the DRB Agreement. The Board and the Parties will schedule the next two Board meetings in advance. If the Parties require an adjustment to the Board meeting schedule, the DRB Chair will schedule a new date satisfactory to the Parties and the Board.

4.3. The DRB Chair will confer with the Party Representatives to prepare a draft agenda for each Board meeting; the agenda will include the items listed in the DRB Contract Documents, as well as any items specific to the Project or the issues at hand. This draft agenda will be forwarded to the Parties and to the Board members at least ten (10) days prior to each regular meeting for review and comments. The DRB Chair will then take such comments into consideration, finalize the agenda, and distribute it to the Board members and to the Parties prior to the meeting.

4.4. The DRB Chair will confer with the Party Representatives on who should attend Board meetings and how information will be presented to the Board at the meeting. It is preferred that the Parties confer in advance of the Board meeting and prepare a joint Project update to the Board, tracking to the meeting agenda.

4.5. The Parties may agree to have the Board meetings coincide with regularly scheduled progress meetings. If that is done, the Board should attend the progress meeting as observers, and then hold the Board meeting immediately after the progress meeting.

4.6. Each Board meeting will consist of a round table discussion of the agenda items. The Board meeting will include a site visit for the Board to get a firsthand look at the work being performed on the Project. The Board should be accompanied by representatives of both Parties during any Board site visits.

4.7. After each Board meeting, the DRB Chair will prepare a high level summary of the issues addressed at the Board meeting. The Board meeting summary will be reviewed by the Parties and the Board members, corrected as necessary, and approved at the next Board meeting.

5. DISPUTE NEGOTIATIONS AND ADVISORY OPINIONS

5.1. Either Party may request that the Board provide an advisory opinion on an issue that could become a Dispute under the Agreement. In that case, the requesting Party will make a submission to the Board specifying the scope of the advisory opinion sought. The Board will determine if the issue is properly the subject of an advisory opinion and so advise the Parties.

5.2. If the Board agrees to provide an advisory opinion, the DRB Chair will hold a joint call with the Party Representatives to establish a plan and schedule for submissions and the date and location of the advisory opinion meeting. Unless otherwise agreed, the advisory opinion meeting will occur as part of the next scheduled Board meeting.

5.3. Generally, the Parties will simultaneously submit and exchange position statements with a brief discussion of their positions in bullet point format, together with any needed back up information or documents. The format and content of submissions can be tailored to the type of issue presented.

5.4. At the advisory opinion meeting, each Party will present its position and answer questions asked by the Board. The advisory opinion meeting will not be subject to the rules and procedures established for the Board Conferences set forth in Section 6 below. After hearing from the Parties, the Board will caucus and then give its advisory opinion verbally or in writing (as the Parties and the Board agree). In order to promote understanding of the Board's advisory opinion, the Parties may ask clarifying questions of the Board before the advisory opinion meeting is ended.

5.5. If the dispute remains unresolved, the Parties may continue with the Dispute Resolution process without prejudice to their positions on the issue, including that statements made / submitted at this stage may not be used against either Party.

5.6. The Board will not be bound by its advisory opinion if the issue results in a dispute under the Board process.

6. BOARD CONFERENCES

6.1. Each Party must submit their Dispute Statements to the Board, providing an equivalent level of detail as the Dispute Notification included as Part C of the DRB Agreement.

6.2. Parties agree initially to present entitlement only, they may also agree on a process and timeline for follow-on negotiations regarding time and cost (if entitlement is found and accepted), with the right to refer back to the Board for hearing any unresolved time and cost issues.

6.3. The DRB Chair will schedule a joint meeting or call, after receipt of each Party's Dispute Statements by the DRB Chair, with the Party Representatives and the Board members to attempt to agree on:

6.3.1. Scope of the Board Conference and relief requested (any unresolved scope issues will be determined by the Board)

6.3.2. Date for the Board Conference

6.3.3. Sequence, form and content of position papers (including rebuttals)

6.3.4. Preparation and exchange of expert reports (if used)

6.3.5. Schedule for submission of position papers and any other documents

6.3.6. Date for submission of Board conference participants list

6.3.7. Date for submission of Board conference presentations

6.3.8. Logistics of the DRB conference, including location and the manner in which documents will be submitted and exchanged

6.4. The DRB Chair will confirm to the Party Representatives and Board the schedule of actions and submissions leading up to the Board Conference. The DRB Chair may schedule other planning conferences, from time to time, to ensure that Board Conference preparations are proceeding effectively and efficiently.

6.5. The DRB Chair will hold a conference call with the Party Representatives to go over final logistics of the Board Conference, confirm that all submissions are in order, and address any issues of concern that the Parties have regarding the Board Conference.

7. PREPARATION FOR A BOARD CONFERENCE

7.1. The Board will commence a Board Conference within the requisite deadlines set forth in the Agreement, with due consideration to the needs and preferences of the Parties. Normally, in-person Board Conferences will be conducted at or near the project site or may be virtual.

7.2. DDC will provide administrative services such as conference facilities and support services, as needed for the Board Conference.

7.3. The DRB Chair will confer with the Parties on whether the Dispute Statements (and rebuttals, if requested) will be serial (Claimant submits first, followed by Respondent) or simultaneous (Claimant Respondent submit at same time); generally, the goal is to make the submission process as efficient as possible by ensuring focus on the issues in dispute.

7.4. Each Party's position paper should be structured to be a stand-alone document that includes at minimum the information listed in the Dispute Notification included as Part C of the DRB Agreement; states the Party's position on each element of the dispute; clearly defines the contractual justification for the stated position; and provides the reasoning as to why each believes the other Party's position is not contractually or factually correct. The position paper must also include supporting exhibits referred to in the position paper text or that will be used at the Board Conference.

7.5. When the scope of the Board Conference includes Subcontractor claims, the position papers should include any necessary information and documents from the Subcontractor and should be identified as such.

7.6. When the scope of the Board Conference includes time and quantum issues, the referring Party should include (a) a Time Impact Analysis (for time-related issues) and (b) full cost details (for quantum-related issues). The other Party's response should include its counter-analysis, if any.

7.7. Position papers must be simultaneously delivered to the Board members and the other Party on a schedule to be established by the Board. The Board will also establish a schedule for rebuttal papers, if any.

7.8. Once position papers and/or rebuttal papers have been submitted, the Parties may not introduce new information or documents regarding the dispute, absent the Board's permission.

7.9. On a date set by the Board, the Parties will exchange and submit to the Board a list of the participants and other attendees that each Party plans to have at the Board Conference. The Parties are encouraged to limit the number of persons at the Board Conference to the necessary minimum, preferably those directly involved in the Project; those with direct knowledge of the issues in dispute; or those whose presence is needed because they will be reviewing the Board's recommendation. The list of attendees should include:

7.9.1. Name, title and professional affiliation

7.9.2. Role of the person at the Board Conference (observer or participant)

7.9.3. Brief summary of matters that any participant is anticipated to address

7.10. On a date set by the Board, the Parties will submit and exchange any presentation materials they intend to use at the Board Conference. The Parties are encouraged to use summaries, charts, chronologies, and visual aids that will assist the Board in understanding the information and documents to

be presented. If a Party uses a PowerPoint presentation, the slides should be numbered and the Board should be given a copy in a format that permits notetaking. The presentation materials should be consistent with the position papers and/or rebuttals previously submitted.

8. CONDUCT OF THE BOARD CONFERENCE

8.1. At any Board Conference that includes Subcontractor claims, the Design-Builder must require that each Subcontractor (including lower tier Subcontractors or any Supplier) involved in the dispute have present at the Board Conference an authorized representative with actual knowledge of the facts underlying the subcontractor claim. The Subcontractor's representative should be prepared to answer questions by the Board, if any, and may assist in the presentation.

8.2. The Parties' legal counsel may attend Board Conference as an observer, provided that prior permission is obtained from the other Party. Legal counsel will not participate in the Board Conference unless requested by the Parties and approved in advance of the Board Conference by the Board; if such participation is requested and approved, it will be limited to providing input on legal issues relating to the dispute.

8.3. The Board will have sole discretion in determining whether putative evidence may be introduced in the Board Conference process. There will be no testimony under oath or any cross-examination by the other Party.

8.4. Except for good cause shown, no Party will be allowed to present information, documents, etc., at the Board Conference that was not included in the pre- Board Conference submissions or otherwise provided to the other Party pre- Board Conference. In those rare instances where supplemental or new information is permitted, the Board Conference will be held open until the other Party has had an adequate opportunity to respond.

8.5. Each Party will be allowed to present its position uninterrupted by the other Party. The Claimant will make its presentation first, followed by the Respondent. After both Parties have made their presentations, the Board will hear rebuttals in turn.

8.6. The Board may ask questions (a) during presentations where clarification is sought in order to follow the information or documents being presented, or (b) after the presentations and during the rebuttals. After completion of both presentations, the Parties may ask the Board for permission to ask the other Party questions for purposes of clarifying (not arguing with) information that has been presented.

8.7. The DRB Chair will ensure that the Parties have ample opportunity to fully present their respective positions and to rebut the opposing positions.

8.8. Once the Parties are satisfied that they have presented their arguments completely and the Board has no further questions, the DRB Chair will advise whether the Board Conference is closed at that time, or whether the Board wants any additional submittals. If additional submittals are requested, the Board will set a submission schedule, and once the additional submittals are received, the DRB Chair will advise the Parties when the Board Conference is closed.

9. BOARD DELIBERATIONS AND REPORT

9.1. Following the close of the Board Conference, the Board will confer to review the Party's submissions and issue a recommendation to the Parties within the time allowed under the DRB Contract Documents. (The Board will close the Board Conference by email after receipt of all briefs exhibits, etc.) Additional time may be allowed if both Parties agree.

9.2. If a unanimous recommendation cannot be reached, the dissenting Board member's recommendation, along with the supporting rationale, will be included as a minority opinion in the Board's report, however, the dissenting Board member will not be identified.

9.3. The report will consist of a concise description of the dispute and relief requested; appropriate summaries of each Party's position; findings as to the facts of the dispute; citation to applicable parts of the Agreement, Contract Documents, project records, and Party submissions; analysis and rationale for the recommendation; and the recommendation.

9.4. Within 15 Business Days of receiving the Board's recommendations, both Parties must respond to the Board in writing, signifying that the dispute is either resolved or remains unresolved. Failure by either Party to provide written acceptance or rejection the Board's recommendation within the 15 Business Days shall be deemed to be acceptance of the recommendation by that Party.

EXHIBIT 6

Final 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 15.1(d) 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 Designer of Record

In accordance with Section 15.1 of the DB Agreement, I certify on behalf of the Designer of Record, 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;
 - 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 Designer of Record

Name:

Company:

Date:

Signed and Sealed:

3. This Section to be completed by the Quality Assurance Manager

In accordance with Section 15.1 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 and 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) 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. Part of this process will be participation in M/WBE compliance meetings throughout the Project’s implementation at a frequency jointly agreed to by both Parties (“**M/WBE Compliance Meetings**”).
- (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 on a regular basis regarding 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**" set forth in Schedule A. The Design-Builder will meet the M/WBE Goals in its performance of the Work. The Parties will, on a monthly basis document the Design-Builder's 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.² 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 every six months in a manner as agreed between the Parties and will be reviewed by the M/WBE Coordinators (as described in Section 1.3(b) above). 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 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

² **Note:** The M/WBE Achievement and Utilization Plan must be based on the Final Goals set by DDC during the RFP Process. The Final Goals will be imported into this Agreement and will become the M/WBE Goals 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).

“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.

- (iii) Construction Work and Design Work performed by M/WBEs and payable through any Allowance, including the Allowance for Compensable Relief Events, will count towards achieving the M/WBE Goals in accordance with Section 4 (*Counting M/WBE Participation*).

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** With each Payment Request, 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(a) (*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 33.3 (*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 33.3(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 provide for and maintain its own 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 List of Proposed M/WBEs Form, 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 33.3 (*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 Total Phase 1 and Phase 2 Contract Price designated for the cost to perform the Design Work or for the cost to perform 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 M/WBEs 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

PART A

Performance Bond and Payment Bond

FORM OF PERFORMANCE 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, 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 amounts required by
the Principal to pay the City under, and in accordance with, Section 33.6 of the Contract, up to the full amount

New York City Department of Design and Construction

Design-Build Agreement
GMP / BBJ

Exhibit 8 (Performance Bond, Payment Bond and Warranty Bond)

of the above penal sum, in complete discharge and exoneration of this bond and of all the liabilities of the Surety 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 such amount, 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 obligations under this performance bond.

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.

New York City Department of Design and Construction

Design-Build Agreement
GMP / BBJ

Exhibit 8 (Performance Bond, Payment Bond and Warranty Bond)

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.

New York City Department of Design and Construction

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Exhibit 8 (Performance Bond, Payment Bond and Warranty Bond)

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.

New York City Department of Design and Construction

Design-Build Agreement
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Exhibit 8 (Performance Bond, Payment Bond and Warranty Bond)

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

PART B
Warranty Bond

FORM OF WARRANTY BOND

Bond No.:

KNOWN ALL BY THESE PRESENTS: That we _____ as Principal, and _____, a corporation organized and existing under the Laws of the State of _____, Co-Surety are held and firmly bound unto _____ as Oblige, in the total sum of _____ U.S. Dollars (\$) for the payment whereof said Principal and Co-Surety bind themselves, their administrators, successors and assigns, jointly and severally, as provided herein.

WHEREAS, the Principal entered into a design-build contract (the "**Contract**") with the Oblige dated _____ for _____ ("Work").

1. GENERAL CONDITIONS - NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the Principal shall satisfy all warranty obligations under the Contract, including correcting and rectifying any nonconforming or defective Work and maintaining and remedying said Work free from defects in materials and workmanship, in each case, for the duration of the Warranty Period (the as defined and extended under the Contract, then this obligation shall be void; otherwise it shall remain in full force and effect.
2. SURETY OBLIGATION - If the Principal fails to fulfill its obligation as set forth in Section 1 above, in accordance with the Contract, the Co-Surety shall upon the Oblige's request either (i) perform the relevant rectification or corrective work required either directly or through a contractor approved by DDC or (ii) promptly (but no later than 14-days upon receipt of demand from the Oblige) pay out, reimburse, and make good to the Oblige the cost to correct such defective or nonconforming Work. In no event shall this obligation of the Co-Surety reduce, modify, eliminate, or alter the Principal's obligations not otherwise satisfied in full by the Co-Surety's performance or payment under this Warranty Bond, to correct or rectify any nonconforming or defective Work under the Contract or pay any amounts in connection therewith, in each case whether or not the cost of such rectification or correction by the Principal exceeds the penal sum of this Warranty Bond.

PROVIDED, HOWEVER, that any suit under this bond shall be commenced no later than two (2) years from the expiration date of the Warranty Period (as defined and may be extended under the Contract); provided, however, that if this limitation is prohibited by any law controlling the construction hereof, such limitation shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law, and said period of limitation shall be deemed to have accrued and shall commence to run on the expiration date of the Warranty Period.

Signed this day of , 20 .

(Principal)

By:

[co-surety]

By: _____
_____, Attorney-in-Fact

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 33 (*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

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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).

(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 (l) 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 Rates 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 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

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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

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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 **Earned Safe and Sick Leave Law**

(a) **Introduction and General Provisions**

- (i) The Design-Builder must comply with the Earned Safe and Sick Time Act (“**ESSTA**”), codified at Title 20, Chapter 8 of the New York City Administrative Code, also known as the “Paid Safe and Sick Leave Law”, which requires covered employees (as defined in Admin Code § 20-91) in New York City to be provided with paid safe and sick time. Contractors of DDC or of other governmental entities may be required to provide safe and sick time pursuant to the ESSTA.

- (ii) The ESSTA is enforced by the New York City Department of Consumer and Worker Protection (“**DCWP**”), which has promulgated 6 RCNY §§ 7-101 and 201 et seq. (“**DCWP Rules**”).
- (iii) The Design-Builder agrees to comply in all respects with the ESSTA and the DCWP 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 ESSTA in performance of this Agreement may result in its termination.
- (iv) The Design-Builder must notify (with a copy to DCWP at **ComplianceMonitoring@dcwp.nyc.gov**) the DDC ACCO in writing within 10 days of receipt of a complaint (whether oral or written) or notice of investigation regarding the ESSTA involving the performance of this Agreement. Additionally, the Design-Builder must cooperate with DCWP’s guidance and must comply with DCWP’s subpoenas, requests for information, and other document demands as set forth in the ESSTA and DCWP Rules. More information is available at **<https://www1.nyc.gov/site/dca/about/paid-sick-leave-what-employers-need-to-know.page>**.
- (v) Upon conclusion of a DCWP investigation, Design-Builder will receive a findings letter detailing any employee relief and civil penalties owed. Pursuant to the findings, Design-Builder will have the opportunity to settle any violations and cure the breach of this Agreement caused by failure to comply with the ESSTA either i) without a trial by entering into a consent order or ii) appearing before an impartial judge at the City’s administrative tribunal. In addition to and notwithstanding any other rights and remedies available to the City, non-payment of relief and penalties owed pursuant to a consent order or final adjudication within 30 days of such consent order or final adjudication may result in the termination of this Agreement without further opportunity to settle or cure the violations.

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

New York City Department of Design and Construction

Design-Build Agreement
GMP / BBJ

Exhibit 9 (Standard Legal and Public Policy Requirements)

(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

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 construction 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;

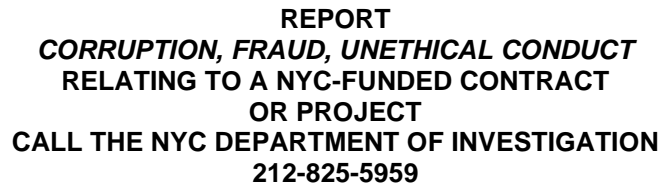
- (ii) take steps to promote adequate security for the protection of employees from under-represented religious groups both at the work-place and while traveling to and from Work;
- (iii) ban provocative religious or political emblems from the workplace;
- (iv) publicly advertise all job openings and 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



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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/DIRECTIVE FORM

MWR No. Description: ***[Include Description of Request/Directive]***
MWR-XXX

Contract No. Contract Name: ***[Include Contract Name]***
XXX-XXX-XXX

Requirements and Provisions for Work Reference:

Reason for Waiver Request/Directive:

Description of Alternate Proposed/Directed (attach additional information as required):

Instructions: If a Minor Waiver Directive issued to the Design-Builder by DDC, skip the following and proceed to the "DDC Authorization" section to execute the Minor Waiver Directive:

Is MWR Time-Sensitive Yes ☐ No ☐ **Requested Response Date:**

The Design-Builder certifies that:

- (i) there will be no time or cost impact to the City as a result of this Request, including no delay to achieving any Guaranteed Completion Date and no additional cost or expense to complete the Project; and
- (ii) this Request will not impair or diminish any Project Requirement.

Designer of Record confirms they endorse this waiver request with due regard to responsibilities as Designer of Record for Design Work.

Approval Status: **Approved:** ☐ **Conditions:**

Name/Signature Designer of Record]:

Date:

Authorized by:

Title:

Date:

[Name/Signature Design-Builder]

Approval Status: **Approved** ☐ **Rejected** ☐ **Submit More Information** ☐ **Submit Change Proposal** ☐

DDC Authorization:

Authorized by:

Title:

Date:

[*Name/Signature DDC*]

Exhibit 11

Form of Closing Bond

[INSTRUCTIONS:

- (a) Submit a Closing Bond for the Design-Builder substantially in the form of this Exhibit 11 on and in connection with execution of the Design-Build Agreement.]

Bond No.

KNOW ALL PERSONS BY THESE PRESENTS, that the _____, as Design-Builder, and _____, as Qualified Surety, each a corporation duly organized under the laws of the State of New York (the "**State**"), having its Design-Builder place of business at the address listed on the attached page, in the State indicated on the attached page, and authorized as a surety in the State of New York, are hereby jointly and severally held and firmly bound unto the City of New York or its successors or assigns ("the **City**"), in the amount of Fifteen million **United States Dollars (US \$15,000,000.00)** (the "**Bonded Sum**"), the payment of which we each bind ourselves, and our heirs, executors, administrators, representatives, successors, and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Design-Builder has entered into a design-build agreement with the City, dated [*], (the "**Design-Build Agreement**") for the design and construction of the Project (as defined in the Design-Build Agreement);

NOW, THEREFORE, the condition of this Closing Bond is such that, upon occurrence of any of the events set forth below, then this obligation shall be null and void; otherwise it shall remain in full force and effect, and the Bonded Sum will be forfeited to the City as liquidated damages and not as a penalty, upon receipt by the Design-Builder and Qualified Surety or by the Design-Builder and Qualified Sureties listed on the attached page (the "**Co-Sureties**") of notice of such forfeiture from the City:

(a) the Design-Builder's performance of all of its obligations under Article 2 (Phase 1 Process) of the Design-Build Agreement so that the Design-Builder achieves Phase 2 (as defined under the Design-Build Agreement); or

(b) notwithstanding the Design-Builder complying with its obligations during Phase 1 (as defined under the Design-Build Agreement), the Design-Build Agreement is terminated for no-fault of either Party (as defined under the Design-Build Agreement) during Phase 1, including, without limitation, any termination under Articles 32 and 35 of the Design-Build Agreement.

If the City is entitled to draw on this Closing Bond in accordance with Section 4.5 (Closing Bond) of the Design-Build Agreement, the Design-Builder and the Qualified Surety or Co-Sureties hereby jointly and severally agree to pay to the City the full Bonded Sum herein above set forth, as liquidated damages and not as a penalty, within 10 days after the City's notice of such entitlement under the Design-Build Agreement.

The City and the Qualified Surety shall return this Closing Bond to the Design-Builder following commencement of Phase 2 under the Design-Build Agreement, including, if applicable, upon

the City's receipt from the Design-Builder of conforming Payment Bonds and Performance Bonds for Phase 2 (as defined under the Design-Build Agreement).

The following terms and conditions shall apply with respect to this Closing Bond:

1. If suit is brought on this Closing Bond by the City and judgment is recovered, the Design-Builder and Qualified Surety or Co-Sureties shall pay all costs incurred by the City in bringing such suit, including, without limitation, reasonable attorneys' fees and costs as determined by the court.
2. The Co-Sureties agree to empower a single representative with authority to act on behalf of all of the Co-Sureties with respect to this Closing Bond, so that the City will have no obligation to deal with multiple sureties hereunder. All correspondence from the City to the Co-Sureties and all claims under this Closing Bond shall be sent to such designated representative. The Co-Sureties also agree to designate a single agent for service of process with respect to any actions on this Closing Bond, which agent shall be either (a) a natural person or (b) a corporation qualified to act as an agent for service of process under New York law. The designated representative and agent for service of process may be changed only by delivery of written notice (by personal delivery or by certified mail, return receipt requested) to the City designating a single new representative and/or agent, signed by all of the Co-Sureties. The initial representative shall be:

[name and address]

and the initial agent for service of process shall be:

[name and address]

SIGNED and SEALED this _____ day of _____, 20____

Design-Builder

By: _____

Co-Surety

By: _____

Attorney in Fact

By: _____

Co-Surety

By: _____
Attorney in Fact

By: _____

Co-Surety

By: _____
Attorney in Fact

[ADD APPROPRIATE SURETY ACKNOWLEDGMENTS]

CO-SURETIES

SURETY NAME
SURETY ADDRESS
INCORPORATED IN

Exhibit 12

Form of Key Subcontractor Performance Bond

(Bond No. ____)

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 _____
(hereinafter referred to as the "Primary Obligees") and the Additional Obligees (as defined in the Multiple
Obligees Rider attached to this bond, and, together with the Primary Obligees, the "Obligees") or to their
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 Primary Obligees
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 Obligees from all cost and
damage which they may suffer by reason of the Principal's default of the Contract, and shall fully reimburse
and repay the Obligees for all outlay and expense which the Obligees may incur in making good any such
default and shall protect the said Obligees against, and pay any and all amounts, damages, cost and
judgments which may or shall be recovered against said Obligees or their officers or agents or which the said
Obligees 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.

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The Surety (Sureties), for value received, hereby stipulates and agrees, upon written notice from the Obligees that the Obligees have determined that the Principal is in default of the Contract, to either (1) pay amounts required by the Principal to pay the Obligees under, and in accordance with, Section 33.6 of the Contract, up to the full amount of the above penal sum, in complete discharge and exoneration of this bond and of all the liabilities of the Surety 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 such amount, 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 Obligees and to complete all Work within the time set forth in the Contract or such other time as agreed to between the Obligees and Surety in accordance with the Contract. The Surety and the Obligees 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 obligations under this performance bond.

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

[LEGAL NAME OF SURETY]

Multiple Obligee Rider

(For concurrent execution with the Key Contractor Performance Bond)

This Rider is to be attached to and forms a part of Performance Bond No.: ____ (hereinafter referred to as "**Bond**") issued by _____ (collectively, "**Surety**"), on the ____ day of ____, ____.

WHEREAS, 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**") has entered into a contract with _____ (the "**Primary Obligee**"), an entity duly authorized to do business in the State of New York (the "**State**"), bearing the date of ____ for _____ (the "**Design-Build Agreement**"); and

WHEREAS, the Primary Obligee has entered into a contract with _____ an entity duly authorized to do business in the State as Bond Principal (the "**Principal**"), bearing the date of ____ (the "**Subcontract**") for the performance of work under the Design-Build Agreement; and

WHEREAS, the Primary Obligee requires that Principal provide a performance bond and that the City (the "**Additional Obligee**") be named as additional obligee under the performance bond; and

WHEREAS, the Primary Obligee has requested the Principal and the Surety, and the Principal and the Surety have agreed, to execute and deliver this Rider concurrently with the issuance of the Bond.

NOW, THEREFORE, the undersigned hereby agree and stipulate that the Additional Obligee shall be added to the Bond as named co-obligee, subject to the conditions set forth below:

- (1) The aggregate liability of the Surety under the Bond, to the Primary Obligee, the Additional Obligee any or all of them (each, being a "**Co-Obligee**"), as their interests may appear, is limited to the penal sum of said Bond. The Additional Obligee's rights hereunder are subject to the same defenses Principal and/or Surety have against the Primary Obligee, provided that the Additional Obligee has received notice and thirty (30) days' prior opportunity to cure a breach or default by the Primary Obligee under the Subcontract.
 - (2) Nothing contained in this Rider shall be held to change, alter or vary the terms of the attached Bond except as set forth hereinabove. In the event of a conflict between the Bond and this Rider, the parties agree that this Rider shall govern and control. All references to the Bond, either in the Bond or in this Rider, shall include and refer to the Bond as supplemented and amended by this Rider. Except as provided by this Rider, all other terms and conditions of the Bond remain in full force and effect.
 - (3) Except as herein modified, the Bond shall be and remains in full force and effect.
- Signed, sealed and dated this ____ day of _____, 202__.

Principal: [Principal]
By: _____
Name: _____
Its: _____

(Seal)

Primary Obligee: [Primary Obligee]

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By: _____
Name: _____
Its: _____

(Seal)

Additional Oblige:

The City of New York

By: _____
Name: _____
Its: _____

(Seal)

Surety:

[Surety]

By: _____
Name: _____
Its: _____

(Seal)

Form of Key Subcontractor Payment Bond

(Bond No. ____)

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 _____,
(hereinafter referred to as the "Primary Obligee" and the Additional Obligee (as defined in the Multiple
Obligee Rider attached to this bond, and, together with the Primary Obligee, the "Obligees") or to their
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 Primary Obligee
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

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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 Obligees themselves.
- (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 Obligees 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 Obligees 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 Obligees 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

[LEGAL NAME OF SURETY]

Multiple Obligee Rider

(For concurrent execution with the Key Contractor Payment Bond)

This Rider is to be attached to and forms a part of Payment Bond No.: ____ (hereinafter referred to as "**Bond**") issued by _____ (collectively, "**Surety**"), on the ____ day of ____, ____.

WHEREAS, 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**") has entered into a contract with _____ (the "**Primary Obligee**"), an entity duly authorized to do business in the State of New York (the "**State**"), bearing the date of _____ for _____ (the "**Design-Build Agreement**"); and

WHEREAS, the Primary Obligee has entered into a contract with _____ an entity duly authorized to do business in the State as Bond Principal (the "**Principal**"), bearing the date of ____ (the "**Subcontract**") for the performance of work under the Design-Build Agreement; and

WHEREAS, the Primary Obligee requires that Principal provide a payment bond and that the City (the "**Additional Obligee**") be named as additional obligee under the payment bond; and

WHEREAS, the Primary Obligee has requested the Principal and the Surety, and the Principal and the Surety have agreed, to execute and deliver this Rider concurrently with the issuance of the Bond.

NOW, THEREFORE, the undersigned hereby agree and stipulate that the Additional Obligee shall be added to the Bond as named co-obligee, subject to the conditions set forth below:

- (1) The aggregate liability of the Surety under the Bond, to the Primary Obligee, the Additional Obligee any or all of them (each, being a "**Co-Obligee**"), as their interests may appear, is limited to the penal sum of said Bond. The Additional Obligee's rights hereunder are subject to the same defenses Principal and/or Surety have against the Primary Obligee, provided that the Additional Obligee has received notice and thirty (30) days' prior opportunity to cure a breach or default by the Primary Obligee under the Subcontract.
 - (2) Nothing contained in this Rider shall be held to change, alter or vary the terms of the attached Bond except as set forth hereinabove. In the event of a conflict between the Bond and this Rider, the parties agree that this Rider shall govern and control. All references to the Bond, either in the Bond or in this Rider, shall include and refer to the Bond as supplemented and amended by this Rider. Except as provided by this Rider, all other terms and conditions of the Bond remain in full force and effect.
 - (3) Except as herein modified, the Bond shall be and remains in full force and effect.
- Signed, sealed and dated this _____ day of _____, 202__.

Principal: [Principal]
By: _____
Name: _____
Its: _____

(Seal)

Primary Obligee: [Primary Obligee]

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By: _____
Name: _____
Its: _____

(Seal)

Additional Oblige:

The City of New York

By: _____
Name: _____
Its: _____

(Seal)

Surety:

[Surety]

By: _____
Name: _____
Its: _____

(Seal)

Schedule A: Contract Information

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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><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>	[Fill in at contract conformance]
<p><u>DBA 4.1</u></p> <p><u>IDENTIFICATION OF GUARANTOR(S)</u></p> <p>(If applicable.)</p>	[Fill in at contract conformance if applicable]
<p><u>DBA 4.2</u></p> <p><u>PERFORMANCE AND PAYMENT BONDS</u></p>	<ul style="list-style-type: none"> • Phase 1 – delivered prior to commencement of Enabling Work: <ul style="list-style-type: none"> ○ Performance Bond: <u>100%</u> of the Enabling Work value ○ Payment Bond: <u>100%</u> of the Enabling Work value • Phase 2 – delivered prior to commencement of Phase 2 – One of two options (to be proposed as part of the Proposal at the RFP stage):

	<ul style="list-style-type: none"> • Option 1 Phase 2 Bonding Requirements <ul style="list-style-type: none"> ○ Performance Bond: <u>40%</u> of the Contract Price ○ Payment Bond: <u>40%</u> of the Contract Price • Option 2 Phase 2 Bonding Requirements <ul style="list-style-type: none"> ○ Performance Bond: <u>25%</u> of the Contract Price ○ Payment Bond: <u>25%</u> of the Contract Price, plus ○ payment bonds and performance bonds or Subguard Insurance from Key Subcontractors performing Construction Work as required by DBA Section 18.4
<p><u>DBA 4.5</u></p> <p><u>CLOSING BOND</u></p>	<ul style="list-style-type: none"> • Closing bond: \$15,000,000
<p><u>DBA 9.2</u></p> <p><u>SITE VALIDATION PERIOD</u></p>	<p>The following Unknown Site Conditions may only be claimed as Compensable Relief Events and Modifications to the Initial Target Price during the period between NTP and the Final Proposal Submission Date.</p> <ul style="list-style-type: none"> ■ Unknown Geotechnical Condition ■ Unknown Physical Condition ■ Unknown City Asset Latent Defect
<p><u>DBA 10.2</u></p> <p><u>CITY OBTAINED 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 • Any approval from the State Commission on Correction

<p><u>DBA 13</u></p> <p><u>GUARANTEED COMPLETION DATE FOR SUBSTANTIAL COMPLETION</u></p> <p>Measured from the NTP Date.</p>	<ul style="list-style-type: none"> • <u>1547 CCDs</u>
<p><u>DBA 13</u></p> <p><u>GUARANTEED COMPLETION DATE FOR FINAL COMPLETION</u></p>	<ul style="list-style-type: none"> • <u>180 CCDs</u> <p>Measured from the actual date of Substantial Completion.</p>
<p><u>DBA 13.3</u></p> <p><u>LIQUIDATED DAMAGES FOR DELAY – SUBSTANTIAL COMPLETION</u></p>	<ul style="list-style-type: none"> • \$145,000/CCD
<p><u>DBA 13.7(a)</u></p> <p><u>LD CAP</u></p>	<ul style="list-style-type: none"> • <u>\$26,000,000</u>
<p><u>DBA 13.7(b)</u></p> <p><u>AGGREGATE LIMITATION ON LIABILITY</u></p>	<p><u>\$500,0000,000</u></p> <ul style="list-style-type: none"> • Subject to Section 14.7(c) (<i>Exclusions from Limitations on Liability</i>).
<p><u>DBA 15.3</u></p> <p><u>COST SAVINGS AT FINAL COMPLETION</u></p>	<p>Where applicable for a GMP Contract Price, the parties will share in any Final Savings at Final Completion as follows:</p> <p>80% for DDC</p> <p>20% for Design-Builder</p>
<p><u>DBA 21.8</u></p> <p><u>RETAINAGE</u></p>	<ul style="list-style-type: none"> • 5% of the value of Phase 1 Enabling Work • 5% of the value of Phase 2 Construction Work

<p align="center"><u>DBA 25.2</u> <u>EXTRA WORK & ALLOWANCE WORK</u> <u>COSTS: DESIGN WORK</u></p>	<p>Direct Salary Rate X Multiplier</p> <ul style="list-style-type: none"> The Multiplier is set forth in Schedule B.
<p align="center"><u>DBA 25.4(a)</u> <u>NET COSTS FOR COMPENSABLE</u> <u>RELIEF EVENTS EXTRA WORK OR</u> <u>ALLOWANCE WORK</u></p>	<p>Allowable Overhead Rate Computation in connection with actual incurred home-office expenses must include the Design-Builder's audited Statement of Direct Labor, Fringe Benefits and General Overhead prepared in accordance with Part 31 of the Federal Acquisition Regulation for the three (3) most recent fiscal years, using the Design-Builder's standard fiscal calendar.</p> <p>The application must also include a statement disclosing whether the Design-Builder has had an audited multiplier for overhead accepted by a local, state or federal entity within the three (3) most recent fiscal years, or a statement disclaiming any such circumstances. If the Design-Builder has had an audited multiplier for overhead accepted by a local, state or federal entity within the three (3) most recent fiscal years, the Design-Builder must submit such multiplier(s) and a copy of the letter or other documents from the-accepting entity demonstrating such acceptance.</p>
<p align="center"><u>DBA 27.2 WARRANTY BOND</u></p>	<ul style="list-style-type: none"> ½% of the value of total Construction Work
<p align="center"><u>DBA 28.1 WARRANTY PERIOD</u></p>	<ul style="list-style-type: none"> For any Enabling Work that is occupied by the City following Phase 1, at completion of such Enabling Work, 730 CCDs from the date of such completion. For all Work completed on or prior to Substantial Completion, 730 CCDs from the date of Substantial Completion, and For all Work completed from the date of Substantial Completion to Final Completion, 730 CCDs 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 31.16(d) AND 41</u> <u>DDC'S ADDRESS(ES)/EMAIL FOR</u> <u>NOTICES</u></p>	<p>Department of Design and Construction 3030 Thomson Avenue Long Island City, NY 11101</p> <p>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> <ul style="list-style-type: none"> • And to the DDC Representative and DDC Project Manager or Engineer In Charge, as applicable, identified in the NTP via email and via regular mail to 3030 Thomson Avenue, Long Island City, NY 11101.
<p style="text-align: center;"><u>DBA 37</u> <u>IDENTIFICATION OF DESIGN-BUILDER</u> <u>REPRESENTATIVE</u></p>	<p>[Fill in at contract conformance.]</p> <ul style="list-style-type: none"> • [name] • [mailing address] • [email/phone]
<p style="text-align: center;"><u>DBA 41(b)</u> <u>DESIGN-BUILDER'S</u> <u>ADDRESS(ES)/EMAIL FOR NOTICES</u></p>	<p>[Fill in at contract conformance.]</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 1</u> <u>KEY SUBCONTRACTS</u></p>	<ol style="list-style-type: none"> 1. Design Subcontract 2. Key Subcontracts listed in Schedule G 3. Any other Key Subcontracts identified in the Design-Builder Proposal Commitments

	Key Subcontractors for each Key Subcontract must be identified in the Design-Builder Proposal Commitments.
<p><u>DBA EXHIBIT 1</u></p> <p><u>SUBSTANTIAL COMPLETION LONG STOP DATE</u></p>	<ul style="list-style-type: none"> • <u>180 CCDs</u> <p>Measured from the Guaranteed Completion Date for Substantial Completion.</p>
<p><u>DBA EXHIBIT 7</u></p> <p><u>PARTICIPATION BY MINORITY-OWNED AND WOMEN-OWNED BUSINESS ENTERPRISES</u></p>	<p>MWBE Goals</p> <ul style="list-style-type: none"> • Construction Work (including Enabling Work): <u>30%</u> of the value of the cost to perform Construction Work • Design Work: <u>30%</u> of the value of the cost to perform the Design Work • Both Construction and Design Work MWBE Goals are further broken down as follows: <ul style="list-style-type: none"> ○ Black American: 10% ○ Hispanic American: 10% ○ Unspecified: 10% <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"> • Phase 1 Services, excluding Design Work and Enabling Work • Insurance Policies • Bonds provided by the Design-Builder in accordance with DBA 4.2 and 4.5. • All Allowances, except for the Unit Price Work Allowance • Purchase of specialty equipment including, but not limited to, security hardware, steel wall panels, and detention plumbing fixtures ("Specialty Equipment"). Additional Specialty Equipment may be excluded with DDC approval. Installation of such Specialty Equipment will be included in the Contract Price for the purposes of calculating MWBE participation goals.

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 30	City of New York, its officials and employees
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
■ Workers’ Compensation DBA 31.1(a) ■ Disability Benefits Insurance DBA 31.1(a) ■ Employers’ Liability DBA 31.1(a) <input type="checkbox"/> Jones Act DBA 31.1(b) <input type="checkbox"/> U.S. Longshoremen’s and Harbor Workers Act DBA 31.1(b)	<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>Timing for proof of Insurance Policies from the Design-Builder: on or prior to the Agreement Date.</p>

	<p>Jones Act and U.S. Longshoremen's and Harbor Workers' Compensation Act: Statutory per U.S. Law.</p> <p><input type="checkbox"/> Additional Requirements:</p>
<p>■ Commercial General Liability DBA 31.1(c)</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, \$4,000,000 completed operations.</p> <p>■ Per project aggregate/project specific coverage.</p> <p>■ Completed operations coverage to be provided for a minimum of six (6) years.</p> <p>The City must be listed as an Additional Insured, as follows:</p> <p>“City of New York, including its officials and employees”, with coverage at least as broad as ISO Forms 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 Forms CG 20 10 and CG 20 37. The Additional Insured endorsement must either specify the entity's name, if known, or the entity's title (e.g., Project Manager):</p> <ol style="list-style-type: none"> 1. AECOM USA, Inc.; Hill International, Inc.; and AECOM – HILL JOINT VENTURE 2. 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. <p>Timing for proof of Insurance Policy from the Design-Builder: on or prior to the Agreement Date.</p> <p>■ Additional Requirements:</p>

	<p>Maximum Deductible/Retention: \$250,000</p> <p>No restrictions or exclusions shall apply to limit coverage for the scope of services for the project or, more particularly for falls from height.</p> <p>There must be no wrap-up exclusion on the policy.</p>
<p>■ Builders' Risk DBA 31.1(d)</p>	<p>■ Required: 100% of the value of Construction Work</p> <p>□ Required: 100 % of total amount for the following item(s) of Work listed in the Schedule of Values:</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>Timing for proof of Insurance Policy from the Design-Builder: on or prior to the commencement of Construction Work.</p> <p>■ Additional Requirements:</p> <p>Maximum Deductible/Retention: [TBD] AOP/[TBD] for flood, earthquake</p>
<p>■ Commercial Auto Liability DBA 31.1(e)</p>	<p>\$2,000,000 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>Coverage may be provided through a combination of primary and excess policies.</p> <p>Timing for proof of Insurance Policy from the Design-Builder: on or prior to the Agreement Date.</p>

	<p>Additional Insureds:</p> <ol style="list-style-type: none"> 1. "City of New York, including its officials and employees", and 2. All additional insureds listed in Commercial General Liability (DBA 31.1(c)), above. 3. _____ <p><input type="checkbox"/> Additional Requirements:</p>
<p>■ Professional Liability DBA 31.1(f)</p>	<p>Minimum for the Design-Builder: <u>\$50,000,000</u> per claim</p> <ul style="list-style-type: none"> ■ Per project aggregate/project specific coverage. ■ The retroactive date for coverage will be no later than the commencement date of design. ■ In the event of cancellation or non-renewal the discovery period for insurance claims will be at least 5 years. ■ Construction Management must be listed as a Professional Service covered by the policy without being subject to limitation by a specific definition (for Construction Managers only); ■ Additional Requirements: <ul style="list-style-type: none"> • Maximum Deductible/Retention: \$500,000 except as approved by DDC. <p>Rectification coverage requirements limited to new construction scope.</p> <p>Timing for proof of Insurance Policy from the Design-Builder: on or prior to the Agreement Date.</p>
<p>■ Contractors Pollution Liability DBA 31.1(g)</p>	<p><u>\$25,000,000</u> each occurrence <u>\$25,000,000</u> aggregate</p> <ul style="list-style-type: none"> ■ Per project aggregate/project specific coverage: <ul style="list-style-type: none"> • This insurance must be maintained for at least 10 years after substantial completion and acceptance of the Project. <p>Additional Insureds:</p>

	<p>1. "City of New York, including its officials and employees", and</p> <p>2. All additional insureds listed in Commercial General Liability (DBA 31.1(c)), above.</p> <p>3. _____</p> <p>Timing for proof of Insurance Policy from the Design-Builder: on or prior to commencement of Construction Work.</p> <p>■ Additional Requirements:</p> <p>Maximum Deductible/Retention: [TBD]</p>
<p><input type="checkbox"/> Marine Protection and Indemnity DBA 31.1(h)(i)</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><input type="checkbox"/> Hull and Machinery Insurance DBA 31.1(h)(ii)</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>_____</p>
<p><input type="checkbox"/> Marine Pollution Liability DBA 31.1(h)(iii)</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 31.1(i)</p>	<p><u>\$5,000,000</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 31.1(j)</p>	<p><u>\$5,000,000</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>
<p>□ Marine Pollution Liability DBA 31.1(h)</p>	<p>\$ _____ each occurrence \$ _____ aggregate</p> <p>Additional Insureds: 1. "City of New York, including its officials and employees", and 2. _____ 3. _____</p>
<p>■ Umbrella/Excess Liability Insurance DBA 31.1(k)</p>	<p><u>\$100,000,000</u> each occurrence <u>\$100,000,000</u> minimum aggregate</p> <p>■ Per project aggregate/project specific coverage.</p> <p>■ Completed operations coverage to be provided for a minimum of six (6) years</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 costs must be in addition to the limit of liability.</p> <p>The following must be listed as additional insureds:</p> <p>1. "City of New York, including its officials and employees", with coverage at least as</p>

	<p>broad as ISO Form CG 20 10 and CG 20 37.</p> <p>2. All additional insureds listed in Commercial General Liability (DBA 31.1(c)), above, with coverage at least as broad as ISO Form 20 26.</p> <p>■ Additional Requirements:</p> <p>No deductible or retention may apply.</p> <p>Timing for proof of Insurance Policy from the Design-Builder: on or prior to the Agreement Date.</p>
<p>■ Railroad Protection Liability Policy DBA 31.1(k)</p>	<p><u>\$2,000,000</u> each occurrence <u>\$6,000,000</u> aggregate</p> <p>Named Insureds:</p> <ol style="list-style-type: none"> 1. New York City Transit Authority (NYCTA), 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>Timing for proof of Insurance Policy from the Design-Builder: on or prior to the commencement of Construction Work.</p> <p>■ Additional Requirements:</p> <p>(ISO-RIMA or equivalent form) approved by Permitior 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

	<p>environmental- related work and/or exposures exist.</p> <ul style="list-style-type: none">• 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. <p>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>
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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 must 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 _____

Appendix I: Form of Stipend Agreement

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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 Proposers eligible to submit a Proposal for the Manhattan Facility (the "**Project**").
- (B) The Proposer is concurrently submitting a Proposal in response to the Request for Proposals for the Project issued by DDC on *[insert RFP release date]*: (as amended, the "**RFP**") in accordance with the Instructions to Proposers included as Volume 1 of the RFP (the "**ITP**").
- (C) The ITP provides for the execution and delivery of this Stipend Agreement between 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 DDC in accordance with Section 3.3 (*Compensation and Payment*), the Proposer has irrevocably elected to accept payment of one or more Stipend payments, subject to the terms of this Agreement and the ITP.
- 2.2 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. DDC will determine the Proposal's or Interim Design Submittal's responsiveness pursuant to the ITP.
- 2.3 All Work Product, including Proposals and Interim Design Submittals, submitted by the Proposer will become the property of the City upon the Work Product's delivery to 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 DDC as follows:

- (a) with regards to Work Product related to the Interim Design Submittal, no later than the deadline for the submission of the Interim Design Submittal as described in Exhibit B of the ITP; and
- (b) with regards to the remainder of the Work Product, the Proposal Due Date, provided that the Proposer must deliver all Work Product to DDC not previously submitted by the Proposer within 15 Days after 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 2.8 (*Stipend*) of the ITP, if:
- (a) DDC cancels the procurement after the issuance of the RFP for reasons not caused by the Proposer, but on or before the Proposal Due Date; or
 - (b) DDC cancels the procurement after the Proposal Due Date without selecting a Selected Proposer for reasons not caused by the Proposer; or
 - (c) DDC selects another "Proposer" as the Selected Proposer and:
 - (i) the Closing Date occurs; or
 - (ii) the Closing Date does not occur and DDC cancels the procurement; or
 - (d) 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 7.7 (General Right of Revocation) of the ITP,
 - (e) 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) (the "Cancellation Stipend Amount"); or
 - (ii) for all reasons described in Sections 3.1(b) through 3.1(d), up to \$6,000,000 (the "Proposal Stipend Amount"), which such Proposal Stipend Amount will be reduced for any amounts paid to the Proposer previously for submitting a responsive Interim Design Submittal in accordance with Section 4 below (the "**IDS Stipend Amount**", with each of the Cancellation Stipend Amount, IDS Stipend Amount and Proposal Stipend Amount a "**Stipend Amount**").
- 3.2 If the procurement is canceled in accordance with Section 3.1(a) above, the following stipend payment schedule applies, provided that any amounts previously received from DDC by the Proposer as the result of an IDS Stipend Amount payment will be deducted from the amounts below (any negative amounts will result in no Cancellation Stipend Amount payment to the Proposer):

Schedule of Cancellation Dates	Maximum Stipend Amount
TBD	TBD

- 3.3 To receive a Stipend payment under Section 3.1:
- (a) the Proposer must have executed and returned this Agreement to DDC within 30 Days of RFP issuance, or in such time as reasonably directed by DDC;
 - (b) the Proposer must have registered and created an account in the City's Payee Information Portal (PIP), available at www.nyc.gov/pip²;
 - (c) the conditions and requirements in Section 2.8 (*Stipend*) of the ITP must first be satisfied;
 - (d) the Proposer must not be in violation of the terms of the ITP;
 - (e) for each Stipend Amount payment, the Proposer must timely submit the following to DDC (and in any event no later than 15 Days from becoming eligible for such Stipend Amount payment in accordance with this Stipend Agreement and the ITP):
 - (i) an invoice in the form of (Annex 1) to this Agreement (an "**Invoice**"); and
 - (ii) copies of documentation evidencing the Proposer's Eligible Costs incurred to date claimed for reasonable review and approval by DDC, all of which to be submitted with the invoice in (i) above.
- 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 DDC the relevant Invoice and other documentation complying with the requirements of this Agreement and 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 2.8 (*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 DDC selects the Proposer as the Selected Proposer and the Closing Date occurs, the Proposer will not be entitled to any Stipend Amounts or other compensation under this Agreement or the ITP, and any Stipend Amounts previously paid under this Agreement to the Selected Proposer will be deducted from any mobilization payment to be paid to the Selected Proposer under the Design-Build Agreement and any Proposal Bond will be returned to the Proposer.
- 3.7 If DDC selects the Proposer as the Selected Proposer and the Proposer's status as the Selected Proposer is revoked in accordance with Section 7.8 (*Revocation of Selected Proposer Status for Non-Compliance*) of the ITP, the Proposer will not be entitled to any Stipend Amounts or other compensation under this Agreement or the ITP and Section 4.2 shall apply.

² 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://www.nyc.gov/site/mocs/opportunities/pip.page>

- 3.8 Failure to deliver the invoice within the time period specified above will be deemed a rejection of the relevant Stipend Amount.
- 3.9 Upon execution, this Agreement is subject to registration pursuant to section 328 of the City Charter and appropriation of funds for any payment of any Stipend Amount under Applicable Law.
- 3.10 DDC retains the right to unilaterally deduct from any Stipend Amount any costs incurred by DDC that may arise from a Claim, Dispute or denied protest by the Proposer in respect of this RFP or the RFP Process.
- 3.11 The Proposer may only submit one Invoice for each of the Cancellation Stipend Amount, IDS Stipend Amount or Proposal Stipend Amount; the Proposer is not eligible for multiple payments of any one Stipend Amount, and in no event shall be eligible to receive more than the Proposal Stipend Amount.
- 3.12 Any of the Proposer's Eligible Costs previously included on an Invoice submitted to DDC may not be included on any subsequent Invoice submitted to DDC.

4. **IDS Stipend Amount Payment Requirements**

- 4.1 To be eligible for an IDS Stipend Amount payment, the Proposer must:
 - (a) submit to DDC a responsive Interim Design Submittal satisfying the requirements of the ITP (as determined by DDC in accordance with the ITP) by the deadline described in Exhibit B of the ITP; and
 - (b) within 15 days of submitting its Interim Design Submittal or within the timeframe as reasonably directed by DDC, submit to DDC, in addition to and along with the information provided in Section 3.3(e), an executed proposal bond in the form attached as Annex 2 to this Agreement (the "Proposal Bond") in an amount equal to the Proposer's invoiced IDS Stipend Amount payment.
- 4.2 The IDS Stipend Amount payable by DDC will be the lesser of the following two amounts:
 - (i) the Proposer's Eligible Costs incurred as of the date of submission of the Invoice for the IDS Stipend Amount, or
 - (ii) \$3,000,000.00.
- 4.3 If after the receipt of any IDS Stipend Amount, the Proposer:
 - (a) fails to submit a responsive Proposal in accordance with the ITP within the time period required by the ITP;
 - (b) withdraws any part or all of its Proposal (without the consent of DDC) before the expiration of the Proposal Validity Period (as may be extended in accordance with the ITP);
 - (c) otherwise refuses or is unable to furnish any commitments made in its Proposal prior to the Closing Date; or
 - (d) is selected by DDC as the Selected Proposer and the Proposer's status as the Selected Proposer is revoked in accordance with ITP Section 7.8 (Revocation of Selected Proposer Status for Non-Compliance),

then DDC will be entitled to draw and retain the full amount of the Proposal Bond in accordance with the Proposal Bond. The Proposer acknowledges that the forfeiture of

the Proposal Bond constitutes liquidated damages and is not a penalty, and the amount forfeited is fair and reasonable and such payment represents a reasonable estimate of fair compensation to the City for the work required to procure the Project and the reputational losses which may accrue.

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 DDC's prior written consent, in its sole discretion. Any assignment without the required consent of DDC will be null and void and may, in DDC's sole discretion, disqualify the Proposer from further consideration for the RFP Process and the Project.
- 6.2 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 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 DDC agree that the Proposer and the members of its DB Team and their respective employees are not employees, agents, or representatives of DDC or its Associates as a result of this Agreement.

7.2 Entire Agreement

This Agreement, together with the ITP and the Proposal Bond, 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 [*Project Name*] (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 [●], 2024, between 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 2.8 (*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 DDC that the Proposer is eligible for payment pursuant to Section 2.8 (*Stipend*) of the ITP and the Stipend Agreement.

The Proposer acknowledges that submission of this invoice, and payment by 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: _____

Annex 2
Form of Proposal Bond

INSTRUCTIONS:

- (a) Submit a Proposal Bond for the Proposer substantially in the form of this Annex 2 to the Agreement.

Bond No.

KNOW ALL PERSONS BY THESE PRESENTS, that the _____, as Principal, and _____, as Surety or as Co-Sureties, each a [insert entity type] duly organized under the laws of the state indicated on the attached page, having its principal place of business at the address listed on the attached page, in the state indicated on the attached page, and authorized as a surety in the State of New York, are hereby jointly and severally held and firmly bound unto the City of New York (the "**City**"), a municipal corporation acting by and through its Department of Design and Construction (the "**DDC**") in the amount of [●] **United States Dollars (US [\$[●]]³)** (the "**Bonded Sum**"), the payment of which we each bind ourselves, and our heirs, executors, administrators, representatives, successors, and assigns, jointly and severally, firmly by these presents.

WHEREAS, the City has issued a Request for Proposals (the "**RFP**") to design and build [insert project] (the "**Project**");

WHEREAS, pursuant to Volume 1 of the RFP (the "**ITP**"), the Principle and the City acting by and through DDC have entered into that certain stipend agreement dated [insert date] (the "**Stipend Agreement**"), pursuant to which the Principle is eligible for stipend payments from DDC as a result of responsive submittals provided in compliance with the ITP;

WHEREAS, the Principal is herewith submitting its Interim Design Submittal (as defined in the ITP, the "**IDS**"), which IDS is incorporated herein by this reference and has been submitted pursuant to the ITP;

WHEREAS, it is a condition precedent under the Stipend Agreement to the Principal receiving an IDS Stipend Amount payment that this Proposal Bond be executed and furnished to DDC;

NOW, THEREFORE, the condition of this bond is such that, upon occurrence of any of the events set forth below in subsections (a) and (b), then this obligation shall be null and void; otherwise it shall remain in full force and effect, and the Bonded Sum will be forfeited to the City as liquidated damages and not as a penalty, upon receipt by the Principal and Surety or by the Principal and Sureties listed on the attached page (the "**Co-Sureties**") of notice of such forfeiture from the City:

³ **NTD** – To be updated with the Proposer's IDS Stipend Amount agreed to be paid by DDC (in no case in excess of \$3 million).

- (a) the Proposer receives the Cancellation Stipend Amount or the Proposal Stipend Amount from DDC; or
- (b) the Closing Date has occurred.

Capitalized terms not otherwise defined in this Bond have the meanings given to those terms in the ITP.

If DDC has notified the Principal and the Surety that the Principal: (i) failed to submit a responsive Proposal in accordance with the ITP within the time period required by the ITP; (ii) withdrew any part or all of its Proposal (without the consent of DDC) before the expiration of the Proposal Validity Period (as may be extended in accordance with the ITP); (iii) otherwise refused or was unable to furnish any commitments made in its Proposal prior to the Closing Date; or (iv) DDC selected the Principal as the Selected Proposer and the Principal's status as the Selected Proposer is revoked in accordance with Section 7.8 (*Revocation of Selected Proposer Status for Non-Compliance*) of the ITP, the Principal and the Surety or Co-Sureties hereby agree to pay to the City the full Bonded Sum herein above set forth, as liquidated damages and not as a penalty, within 10 days after the Principal's notice of such failure.

The following terms and conditions shall apply with respect to this Bond:

1. If suit is brought on this Bond by the City and judgment is recovered, the Principal and Surety or Co-Sureties shall pay all costs incurred by the City in bringing such suit, including, without limitation, reasonable attorneys' fees and costs as determined by the court.
2. This Bond 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.
3. The Co-Sureties agree to empower a single representative with authority to act on behalf of all of the Co-Sureties with respect to this Bond, so that the City will have no obligation to deal with multiple sureties hereunder. All correspondence from the City to the Co-Sureties and all claims under this Bond shall be sent to such designated representative. The Co-Sureties also agree to designate a single agent for service of process with respect to any actions on this Bond, which agent shall be either (a) a natural person or (b) a corporation qualified to act as an agent for service of process under New York law. The designated representative and agent for service of process may be changed only by delivery of written notice (by personal delivery or by certified mail, return receipt requested) to the City designating a single new representative and/or agent, signed by all of the Co-Sureties. The initial representative shall be:

[name and address]

and the initial agent for service of process shall be:

 [name and address]

SIGNED and SEALED this _____ day of _____, 20____

 Principal

By: _____

 Co-Surety

By: _____
 Attorney in Fact

By: _____

 Co-Surety

By: _____
 Attorney in Fact

By: _____

Co-Surety

By: _____

Attorney in Fact

[ADD APPROPRIATE SURETY ACKNOWLEDGMENTS]

CO-SURETIES

SURETY NAME

SURETY ADDRESS

INCORPORATED IN