



## CITY OF PACIFIC GROVE

### AGENDA REPORT

**TO:** Honorable Mayor and Members of City Council  
**FROM:** Daniel Gho, Public Works Superintendent  
**MEETING DATE:** August 5, 2015  
**SUBJECT:** Selection of the Design- Build Entity for the Pacific Grove Local Water Project  
**CEQA:** Council Certified the EIR for this project through CEQA Plus

#### RECOMMENDATION

Authorize the City Manager to execute a contract with PERC Water to design and construct the Pacific Grove Local Water Project, and, given the complexity of the agreement and project, authorize the City Manager to make minor improvements to the agreement that may arise after Council action. The City Manager will report back to the Council with any agreed-to improvements.

#### DISCUSSION

On June 17, 2015, Council directed staff to continue negotiations with PERC Water for design and construction of the Pacific Grove Local Water Project (LWP). The negotiation team, consisting of the City's legal department, Public Works Superintendent, Environmental Programs Manager, and representatives from Brezack and Associates Planning, have had multiple discussions with PERC Water to refine terms of this agreement, based on the PERC Water best and final offer.

The City team focused on encouraging PERC Water to rely on innovative and creative designs and schedules consistent with its offer to minimize capital and operational costs for the LWP.

PERC Water Corporation (originally Pacific Environmental Resources Corp.) was founded in January 1998 as a single-source entity that provides services from initial design through construction. PERC can also offer long-term operations for projects. PERC Water is a licensed California Contractor that would serve as the General Contractor for the LWP. PERC Water has designed, constructed, and operated more than 20 water recycling facilities primarily in California and Arizona. It is directly connected to PACE (Pacific Advanced Civil Engineering, Inc.), a civil engineering firm specializing in wastewater reclamation facilities.

The PERC Water team consists of PERC Water Corporation (PERC) - Contract Lead, General Contractor, Operations, and Guarantor, and PACE as the design engineer.

**Final Design.** PERC Water's Design Build (D-B) proposal meets all requirements of the RFP. It provides detailed process narrative describing unit processes. The proposed Membrane

Bioreactor (MBR) equipment supplier is Koch, a major manufacturer of membranes in the United States. All equipment proposed for the LWP is from preferred manufacturers.

The PERC Water design entails provision of concrete, above grade tanks with an adjacent 640-square foot masonry building containing aeration system blowers, permeate pumps, optional UV disinfection system, chemical feed systems including the sodium hypochlorite feeder, chemicals, storage, and a small office/laboratory. Chemicals are securely stored inside the building. A minimum of mechanical equipment (pumps and motors) will be located outdoors.

The office/lab area will be completely enclosed within the masonry building and include an HVAC system, furniture, and a process lab to accommodate operational testing, sample collection, and observations to operate the facility. The main Programmable Logic Controller (PLC) and Supervisory Control and Data Acquisition (SCADA) system terminal will be located within this area, achieving a central location to monitor and operate the entire facility.

PERC Water employees are responsible for start-up, testing, and initial operation of the plant until turn-over to the City. PERC has identified a start-up team headed by Patrick Wiley, a California Grade V Operator. He will be assisted by PERC employees including Grade III and Grade IV operators. The identified three senior operators have experience working with Koch membranes and other plants designed by PACE.

PERC's proposal describes seeding and establishment of the biomass necessary for treatment. Their proposal includes a plan for start-up, transition, and acceptance testing.

**Costs.** The PERC Water agreement has a maximum total fixed design-build price of \$6,360,736. The City has identified two optional items (UV Disinfection and remediation of exterior tanks if lead-based paints are present). Elimination of the optional items would reduce the maximum total price to \$6,023,736. The City would procure equipment for the project at a cost of 1,011,829 to eliminate payment of sales tax. In addition, the City has included a City contingency of \$278,528, and \$194,970 for City representatives to review and inspect the work. The total maximum project cost for design, construction, equipment, optional items, and contingencies would be \$7,674,063.

PERC Water will share with the City any savings to its \$730,000 contingency budget (which is separate from the City's contingency, any savings from which are the City's alone). The City, however, has not reduced the project costs as the amount remaining at the end of the project from PERC's contingency budget cannot be known until the end of the project.

The City anticipates receipt of a grant of approximately \$2,415,000 for construction costs determined by the State as eligible for funding. If the construction grant is obtained, the City would fund the remaining costs of \$5,285,000. The City has applied for a 30-year low-interest loan from the State for remaining costs. The loan would provide a 1% interest rate for a maximum 30-year term. The total annual cost to the City for loan repayment would be \$443,000.

**State Revolving Fund Loan.** The State Water Resource Control Board (SWRCB), Division of Local Assistance evaluates the funding application and approves the grant and low-interest loans

the LWP. Comment letters received in connection with SWRCB funding assistance for the LWP have caused the SWRCB to deem the project as “Controversial”. The consequence of this designation is SWRCB staff can no longer process and approve the financial package as a ministerial action, but must instead process this as a discretionary decision that must be made by the full SWRCB board. It is anticipated the LWP funding will be consideration on the SWRCB agenda for October, 2015.

The LWP Supplemental Draft Environmental Impact Report (SDEIR) is now being circulated for public review and comment. The SDEIR is an environmental assessment that supplements the LWP EIR certified in 2014. The SDEIR identifies and analyzes potential environmental effects related to City water entitlements associated with reuse of portions of water saved by the LWP. At this time, Council shall only consider authorizing the proposed contract with PERC Water to design and construct the Pacific Grove Local Water Project. This decision is analyzed in the LWP EIR certified in 2014.

The issue of entitlements available for use calls for separate regulatory review and action by the Monterey Peninsula Water Management District (MPWMD). The LWP Supplemental Draft Environmental Impact Report (SDEIR) addresses potential impacts associated with the grant or use of the re-use entitlements.

**Schedule.** Throughout the Design Build procurement effort, the City reiterated its goal for the project to be online and operational before December 31, 2016, the effective date severe water reductions may be imposed on Cal-Am by reason of the Cease and Desist Order “water supply cliff.”

To meet this timeline it is imperative for the Design Build Entity to immediately start LWP design. PERC Water will begin the design of the project upon execution of the agreement. The design phase is anticipated to take not more than 116 days. Approvals, permitting, and equipment procurement also occurs that 116 day period. Following design approval, PERC Water will begin to construct the project. Construction is estimated to span not more than 156 days. Startup and testing is planned in mid-September, 2016. This date will allow the City and CourseCo an opportunity to test and use the recycled product water for two months before the end of the irrigation season.

PERC Water will begin operator training in October, 2016. Final project closeout and completion is planned for December, 2016. The LWP schedule is located within the agreement as exhibit B.

**Golf Links and Cemetery.** The Golf Links and the Cemetery are the primary customers for this phase of the LWP.

The City entered into a long-term lease in 2014 with CourseCo for the management and operation of Pacific Grove Golf Links. Part of this lease predetermines the amount and cost of water to be delivered to the golf course. Section 6.2 (b) of the lease between the City and CourseCo states that after the third anniversary of the commencement date of the lease (i.e., April 1, 2017), tenant shall pay up to \$443,332 per year for water supplied to the premises, up to

27,200,000 gallons or 83.47 acre-feet. If 27.2 million gallons are not used, there will be a 50-50 split of remaining monetary savings, but if more than 27.2 million gallons are used CourseCo will pay all costs to purchase the additional water. CourseCo will pay the City \$5,311.27 per acre foot of water. (As a point of comparison, over the past five years the Golf Fund has paid an average of approximately \$5,274 per acre foot for potable water irrigation.) The projected cost of producing and delivering reclaimed irrigation water will be \$3,544 per acre foot; the net difference is \$1,767 per acre foot.

The Cemetery is an enterprise fund, and all revenues generated from the sale of plots and niches go into the Cemetery fund for operations and maintenance. Operations and maintenance includes purchase of water for irrigation purposes. Currently the City irrigates the Cemetery with potable water delivered by Cal-Am; the cost of the water is provided by the Cemetery Fund. During calendar year 2014 the City used 6.83 acre feet of water at the Cemetery, and paid \$71,455 for that potable water at a cost of over \$10,000 per acre foot. (The difference in unit price between the Golf Links and the Cemetery is due to (1) different rates and different tier structures for different types of users; and (2) fixed costs and fees associated with CalAm water service to both locations. As meter fees and some other fees are fixed, and are being spread out over a smaller volume of water at the Cemetery, the cost per acre foot is higher.) Upon receipt of the SRF loan and grant approval, staff will return to the Council to: (1) create a Water Enterprise Fund; (2) adopt policies for its management; and (3) determine the price of water produced to all users but CourseCo (as that price is already fixed).

Over the last half decade, the turf grasses at the Cemetery and golf course have been under significant stress due to the lack of adequate irrigation and severe drought. The City reduced irrigation at the Golf Links and Cemetery during this time due escalating costs of Cal-Am water. Additional restrictions apply to use of this water by reason California drought emergency legislation. Without such constraints, the Cemetery should use approximately 10 acre-feet of water per irrigation season. If the Cemetery purchased water from the treatment facility at the cost of \$5,311.27 per acre-foot (the same cost that applies to the golf course) the annual water cost would be \$53,113. Use of reclaimed water would result in annual savings approximating \$18,300. Further, the amount of water would enable full and proper irrigation of Cemetery turf.

If CourseCo uses only the minimum amount of water permitted in the lease, the sale of water for the Golf Links would generate \$443,332 per year; sale of water to the Cemetery would generate a minimum of \$53,113 per year. Amortized annual costs for the LWP are projected at \$443,000 annually. Thus, even with no additional water sales, the margin generated will be \$53,445 annually, which can be placed in a reserve or used for other Water Enterprise Fund purposes.

## **OPTIONS**

1. Direct staff to negotiate additional changes to the proposed agreement.
2. Direct staff to negotiate a final agreement with Auburn Constructors.

## **FISCAL IMPACT**


Funds of \$200,000 for the recommended agreement are available in the Fund 1 Division 126 and are budgeted for fiscal year 15/16. Once the SRF loan is finalized all costs associated with the LWP will be charged to the SRF loan, through the newly established Water Enterprise Fund.


**ATTACHMENTS**

- 1. Resolution
- 2. Design and Construction Agreement (Note: not all exhibits are attached. They include, for example, extensive lists of equipment. All exhibits are available upon request.)

RESPECTFULLY SUBMITTED:

REVIEWED BY:

  
\_\_\_\_\_  
Daniel Gho  
Public Works Superintendent City Manager

  
\_\_\_\_\_  
Thomas Frutchey

**RESOLUTION NO. 15-xxx**  
**RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PACIFIC GROVE**  
**AUTHORIZING THE CITY MANGER TO ENTER INTO AN AGREEMENT WITH**  
**PERC WATER FOR THE DESIGNING AND BUILDING OF THE PACIFIC GROVE**  
**LOCAL WATER PROJECT FOR AN AMOUNT NOT TO EXCEED \$7,700,000**

**FINDINGS**

1. The Pacific Grove Local Water Project (Project) consists of the designing and building of a satellite recycled water treatment plant able to produce 125 acre feet of irrigation water and a recycled water distribution system able to distribute that water to the Pacific Grove Golf Links, El Carmelo Cemetery and surrounding areas.
2. Components include: A new diversion pipeline that would be constructed from the diversion structure to the treatment facility, headworks facility (including flow metering, fine screens, and grit removal), combined biological filtration treatment using a Membrane Bioreactor process, disinfection, solids management, odor control, retrofit of the existing tanks to serve as recycled water storage reservoirs, and pump station to pressurize the recycled water distribution system.
3. The Final Environmental Impact Report was certified for the Local Water Project in November of 2014.
4. The City had conducted a rigorous evaluation process to determine the Design- Build entity that provides the City with the best overall value for design and construction of the Pacific Grove Local Water Project.
5. In February of 2015 the City issued a Request for Qualifications, and the City received 5 Statements of Qualifications (SOQ) from the following design-build entities (presented in alphabetic order).
  - Anderson Pacific/IEC
  - Auburn Constructors/HydroScience
  - Overaa Construction/Stantec
  - PercWater/Pace
  - Western Water/Summit
6. Upon the completion of the review of the SOQ's, the City determined the three D-B entities that would receive the Request for Proposals. The City issued a Request for Proposals (RFP) on March 31 to three design-build entities, again presented in alphabetic order:
  - Auburn Constructors/HydroScience
  - Overaa Construction/Stantec
  - PercWater/Pace
7. On May 8, the City received quality proposals for the design and construction of the project from all three engineering and construction teams and conducted interviews of the three firms on May 13 and 14 of 2015.

8. On June 17, 2015, City staff presented to the Council a recommendation to continue final negotiations with PERC Water for the design and construction of the Pacific Grove Local Water Project.
9. The negotiation team, consisting of the City's Legal Department, Public Works Superintendent, Environmental Programs Manager, and representatives from Brezack and Associates Planning have had multiple discussions with PERC Water to solidify this agreement, based on their design- builds team best and final offer.
10. The negotiations team has been focused on encouraging PERC Water to continue to be innovative, creative in their designs and schedules, and to continue to evaluate the capital and operational cost for this project.
11. Through the evaluation and negotiations process the City has determined that PERC Water will give the City the best overall design and construction for the Pacific Grove Local Water Project.
12. An Agreement in the amount of \$7,700,000 for the design and construction of the Local Water Project will be entered into between the City of Pacific Grove and PERC Water.
13. The City anticipates receiving a grant of approximately \$2,415,000 for construction costs determined by the State as eligible for funding. If the construction grant is obtained, the City would fund the remaining costs of \$5,285,000. The City has applied for a 30-year low-interest.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF PACIFIC GROVE:**

1. The Council determines that each of the Findings set forth above is true and correct, and by this reference incorporates those Findings as an integral part of this Resolution.
2. The Council authorizes the City Manager to execute an agreement with PREC Water for the design and construction of the Pacific Grove Local Water Project in amount of \$7,700,000.
3. This Resolution shall become effective immediately following passage and adoption thereof.

**PASSED AND ADOPTED BY THE COUNCIL OF THE CITY OF PACIFIC GROVE**  
this 5<sup>th</sup> day of August, 2015, by the following vote:

AYES:

NOES:

ABSENT:

APPROVED:

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BILL KAMPE, Mayor

ATTEST:

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City Clerk

APPROVED AS TO FORM:

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DAVID C. LAREDO, City Attorney



# DESIGN-BUILD AGREEMENT

between

THE CITY OF PACIFIC GROVE,  
CALIFORNIA (“Owner”)

and

PERC WATER CORPORATION  
 (“Design-Builder”)

Dated: August \_\_\_\_, 2015

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**EXHIBITS**

- “A” - Scope of Work
- “B” - Project Schedule
- “C” - Contract Price Schedule
- “D” - Insurance Schedule
- “E” - Mitigation, Monitoring and Reporting Plan
- “F” - Project Equipment List
- “G” - Permits Schedule
- “H” - Conceptual Drawing and P&ID
- “I” - Prevailing Wage Code Provisions

# **DESIGN-BUILD AGREEMENT**

THIS DESIGN-BUILD AGREEMENT (the “**Agreement**”) is made and entered into as of the \_\_\_\_\_ day of August in the year of 2015 (the “**Effective Date**”), by and between the following parties, for services in connection with the Project identified below.

## **OWNER:**

**CITY OF PACIFIC GROVE**  
2100 Sunset Drive  
Pacific Grove, CA 93950  
Attn: Daniel Gho, Public Works Director  
Phone: 831-648-5722  
Fax No.: 831-375-0627  
Email: [dgho@cityofpacificgrove.org](mailto:dgho@cityofpacificgrove.org)

## **DESIGN-BUILDER:**

**PERC WATER CORPORATION**  
959 South Coast Drive, Suite 315  
Costa Mesa, CA 92626  
Attn:  
Brian D. Cullen, President  
Phone: (714) 352-7750  
Fax No.: 714-352-7765  
Email: [bcullen@percwater.com](mailto:bcullen@percwater.com)

## **PROJECT:**

Pacific Grove Local Water Project

In consideration of the mutual covenants and obligations contained herein, Owner and Design-Builder (collectively, "**Parties**") agree as set forth herein.

## **Article 1**

### **Scope of Work**

**1.1** Design-Builder shall perform all design and construction services, and provide all material, equipment (except the Owner's Equipment, which will be purchased by Owner and delivered to the Site as instructed by Design-Builder), tools and labor, necessary to complete the Work described in and reasonably inferable from the Contract Documents and as more particularly described in the Scope of Work attached hereto as Exhibit "A" (the "**Scope of Work**").

## **Article 2**

### **Contract Documents**

- 2.1** The Contract Documents are comprised of the following:
- 2.1.1** All written modifications, amendments, minor changes and Change Orders to this Agreement;
  - 2.1.2** The Construction Drawings;
  - 2.1.3** The Exhibits attached to this Agreement;
  - 2.1.4** This Agreement; and
  - 2.1.5** Any other documents prepared and approved in accordance with this Agreement.

## **Article 3**

### **Interpretation and Intent**

**3.1** The Contract Documents are intended to permit the parties to complete the Work and all obligations required by the Contract Documents within the Contract Time for the Contract Price. The Contract Documents are intended to be complementary and interpreted in harmony so as to avoid conflict, with words and phrases interpreted in a manner consistent with construction and design industry standards. In the event inconsistencies, conflicts, or ambiguities between or among the Contract Documents are discovered after execution of the Agreement, Design-Builder and Owner shall attempt to resolve any ambiguity, conflict or inconsistency informally, recognizing that the Contract Documents shall take precedence in the order in which they are listed in Article 2 hereof. All of the capitalized terms contained herein not otherwise defined herein shall have the meanings ascribed to such terms in Article 4 hereof.

**3.2** In the preparation of the Construction Drawings and the performance of the Work: (i) Design-Builder shall be entitled to reasonably rely on the accuracy of the information described in Section 6.2.1 hereof; and (ii) Design-Builder shall be entitled to an adjustment in the Contract Price and/or Contract Time to the extent Design-Builder's cost and/or time of performance have been adversely impacted by any such information that is inaccurate.

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

## **Article 4**

### **Basic Definitions**

**4.1** “**Acceptable Influent**” means only influent received by the Project that meets all of the applicable parameters set forth in the Scope of Work. In addition, Acceptable Influent excludes any influent received by the Project that: (i) exceeds the operating and design capability of the Project; or (ii) has significantly different chemical, physical or biological characteristics including, without limitation, chloride, sulfate, boron, aluminum, iron, selenium, mercury and cyanide, from those set forth in the Scope of Work.

**4.2** “**Acceptance Test**” means the usual and customary testing of any equipment, system or component included in the Work to be performed following Substantial Completion for the purposes of demonstrating that the Project operates in accordance with the Scope of Work and Construction Drawings. The Acceptance Test shall be performed for at least sixteen (16) Calendar Days and shall be performed without any process treatment failures of the Project that cause the Project to fail to produce Compliant Effluent from Acceptable Influent.

**4.3** “**Agreement**” means this Design-Build Agreement between Owner and Design-Builder.

**4.4** “**Application for Payment**” is defined in Section 12.2.1 hereof.

**4.5** “**Calendar Day**” shall mean calendar days.

**4.6** “**Commencement Date of Construction**” means the date on which the Construction Portion of the Work commences in accordance with the applicable permits obtained by Design-Builder for the construction of the Project.

**4.7** “**Commencement Date of Design**” is defined in Section 10.2.1 hereof.

**4.8** “**Compliant Effluent**” means effluent produced by the Project from Acceptable Influent that meets the requirements of Title 22 of the California Code of Regulations and is permitted to be used for all classes of recycled water.

**4.9** “**Confidential Information**” means information determined by the transmitting party to be of a confidential or proprietary nature and: (i) the transmitting party identifies as either confidential or proprietary; (ii) the transmitting party takes steps to maintain the confidential or proprietary nature of the information; and (iii) the document is not otherwise available in or considered to be in the public domain. The receiving party agrees to maintain the confidentiality of the Confidential Information and agrees to use the Confidential Information solely in connection with the Project.

**4.10** “**Contract Documents**” is defined in Article 2 hereof.

**4.11** “**Contract Price Schedule**” is defined in Section 11.1 hereof.

**4.12** “**Construction Drawings**” mean a set of drawings, plans and specifications necessary for the construction of the Project that are consistent with, and a logical evolution of, the Scope of Work consistent with Good Industry Practices and which will be used by Design-Builder to construct the Project. The

Construction Drawings are intended to be the documents for which Owner will issue a building permit for the Work. The term "Construction Drawings" includes drawings, plans and specifications contained in Change Orders, as applicable.

**4.13** "Construction Notice to Proceed" is defined in Section 10.2.2 hereof.

**4.14** "Construction Portion of the Work" means the portion of the Work described in the section of the Contract Price Schedule titled "Construction."

**4.15** "CWSRF" means the California Clean Water State Revolving Fund or its successors.

**4.16** "Design-Build Team" is comprised of Design-Builder, the Design Consultant, and key Subcontractors identified by Design-Builder. A complete list of the Design-Build Team will be delivered to Owner no later than the Commencement Date of Construction.

**4.17** "Design-Builder's Representative" is set forth in Section 16.2.2 hereof.

**4.18** "Design-Builder's Senior Representative" is defined in Section 16.2.1 hereof.

**4.19** "Design Consultant" means individuals appropriately licensed by the State of California and experienced in work similar to the Project who are full-time employees and officers of Pacific Advanced Civil Engineering, Inc., a California corporation.

**4.20** "Engineer of Record" means the licensed engineer of record. The Engineer of Record for Owner is the City Engineer. The Engineer of Record for Design-Builder is Mr. Jamie Matthews, P.E., an employee of Pacific Advanced Civil Engineering, Inc., a California corporation.

**4.21** "Engineering Notice to Proceed" is defined in Section 10.2.1 hereof.

**4.22** "Engineering Portion of the Work" means the portion of the Work described in the section of the Contract Price Schedule titled "Project Development and Design."

**4.23** "Final Completion Date" is the date on which all the Work is complete in accordance with the Contract Documents, including, but not limited to, any items identified in the punch list set forth in the Substantial Completion Letter and the submission of all documents required by Section 12.7.2 hereof.

**4.24** "Financial Assistance Agreement" means a copy of the final financing agreement signed by the authorized person on behalf of the CWSRF that authorizes the disbursement of funds to Owner in an amount that together with all other amounts immediately available to Owner for payment to Design-Builder under this Agreement, is not less than the Contract Price. Reasonable evidence of all other immediately available funds shall be provided to Design-Builder upon request.

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

**4.26** "Good Industry Practices" means those methods, techniques, standards and practices which at the time they are employed and in light of the circumstances known or reasonably believed to exist at such time, are generally recognized and accepted as good and prudent practices in the construction, operation or maintenance, as the case may be, for the municipal water and/or wastewater industry in California and are consistent with the same degree of skill and care ordinarily exercised by members of the respective trade or profession.

**4.27** "Hazardous Conditions" are any materials, wastes, substances and chemicals deemed to be

hazardous under applicable Legal Requirements, or the handling, storage, remediation, or disposal of which are regulated by applicable Legal Requirements.

**4.28** “**Initial Financial Commitment Letter**” means a copy of the initial financing agreement signed by the authorized person on behalf of the CWSRF that authorizes the disbursement of funds to Owner in an amount not less than the cost set forth in the Contract Price Schedule for the Engineering Portion of the Work.

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

**4.30** “**MMRP**” means the Mitigation, Monitoring and Reporting Plan attached hereto as Exhibit “E.”

**4.31** “**Owner’s Equipment**” is defined in Section 6.3.1 hereof.

**4.32** “**Owner’s Representative**” is set forth in Section 16.1.2 hereof.

**4.33** “**Owner’s Senior Representative**” is defined in Section 16.1.1 hereof.

**4.34** “**Payment Bond**” is defined in Section 17.4.2 hereof.

**4.35** “**Performance Bond**” is defined in Section 17.4.1 hereof.

**4.36** “**Permits Schedule**” means Exhibit “G” attached hereto.

**4.37** “**Project Schedule**” is defined in Section 10.4.2.

**4.38** “**Project Equipment List**” means Exhibit “F” attached hereto.

**4.39** “**Scheduled Substantial Completion Date**” is defined in Section 10.4.1 hereof.

**4.40** “**Site**” is the land or premises on which the Project is located.

**4.41** “**Subcontractor**” is any person or entity retained by Design-Builder as an independent contractor to perform a portion of the Work and shall include suppliers of materials and labor.

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

**4.43** “**Substantial Completion**” or “**Substantially Complete**” means the date when all of the following events have been accomplished: (i) the Project has completed a required twenty-four (24)-hour clean water test; (ii) a letter requesting Substantial Completion has been received by Owner from Design-Builder that includes a detailed punch list of outstanding items to complete, and that, if not completed, would not delay the commencement of the Acceptance Test (the “**Substantial Completion Letter**”); and (iii) the Design Consultant has issued a Certificate of Substantial Completion (the “**Certificate of Substantial Completion**”); provided, however, that Substantial Completion shall be deemed to have occurred no later than the completion of the Acceptance Test.

**4.44** “**Work**” is comprised of all Design-Builder’s design, construction and other services required by the Contract Documents, including procuring and furnishing all materials, equipment (except the Owner’s Equipment, which will be purchased by Owner and delivered to the Site as instructed by Design-Builder), services and labor reasonably inferable from the Contract Documents.

**4.45** “**Working Day**” shall mean working or business days in the City of Pacific Grove, California.



## **Article 5**

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

#### **5.1 General Services.**

**5.1.1** Design-Builder's Representative shall be reasonably available to Owner and shall have the necessary expertise and experience required to supervise the Work. Design-Builder's Representative shall communicate regularly with Owner and shall be vested with the authority to act on behalf of Design-Builder. Design-Builder's Representative may be replaced by Design-Builder only with the approval of Owner, which approval will not be unreasonably withheld, delayed or conditioned.

**5.1.2** Design-Builder shall provide Owner with a monthly status report detailing the progress of the Work, including: (i) whether the Work is proceeding according to the Project Schedule; (ii) whether discrepancies, conflicts, or ambiguities exist in the Contract Documents that require resolution; (iii) whether health and safety issues exist in connection with the Work; and (iv) other items that require resolution so as not to jeopardize Design-Builder's ability to complete the Work for the Contract Price and within the Contract Time.

#### **5.2 Design Professional Services.**

**5.2.1** Design-Builder shall provide, through the Design Consultant, the necessary design services, including architectural, engineering and other design professional services, for the preparation of the Construction Drawings to permit Design-Builder to complete the Work. Nothing in the Contract Documents is intended or deemed to create any legal or contractual relationship between Owner and any Design Consultant.

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

**5.3.1** The standard of care for all design professional services performed to execute the Work shall be the care and skill ordinarily used by members of the design profession practicing under similar conditions at the same time and locality of the Project.

#### **5.4 Design Development Services.**

**5.4.1** No later than ten (10) Working Days after delivery to Owner by Design-Builder of the 40% - 50% Construction Drawings, Design-Builder, the Design Consultant and Owner shall meet and approve such Construction Drawings unless such Construction Drawings are not consistent with, and a logical evolution of, the Scope of Work consistent with Good Industry Practices or require clarification or corrections. No later than five (5) Working Days after delivery to Owner by Design-Builder of the 80% - 90% Construction Drawings, Design-Builder, the Design Consultant and Owner shall meet and approve such Construction Drawings unless such Construction Drawings are not consistent with, and a logical evolution of, the Scope of Work consistent with Good Industry Practices.

**5.4.2** Finally, no later than five (5) Working Days after delivery to Owner by Design-Builder of the final Construction Drawings, Design-Builder, the Design Consultant and Owner shall meet and approve such final Construction Drawings unless such final Construction Drawings are not consistent with, and a logical evolution of, the Scope of Work consistent with Good Industry Practices or require clarification or corrections.

**5.4.3** If any revisions to any of the Construction Drawings are required following any such meeting with Owner, the Design Consultant shall revise such Construction Drawings and no later than three (3) Working Days after delivery to Owner by Design-Builder of the revised Construction Drawings, Design-Builder, the Design Consultant and Owner shall meet and approve such revised Construction Drawings unless such revised Construction Drawings are not consistent with, and a logical evolution of, the Scope of Work consistent with Good Industry Practices. Neither Owner's review nor approval of any interim Construction Drawings and Construction Documents shall be deemed to transfer any design liability from Design-Builder to Owner.

**5.5 Compliance with Law.**

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

**5.5.2** The Contract Price and/or Contract Time shall be adjusted to compensate Design-Builder for the effects of any changes in the Legal Requirements enacted after the date of the Agreement affecting the performance of the Work. Such effects may include, without limitation, revisions Design-Builder is required to make to the Construction Documents because of changes in Legal Requirements.

**5.6 Government Approvals and Permits.**

**5.6.1** Except as identified as the responsibility of Owner in the Permit Schedule, Design-Builder shall obtain and pay for all necessary permits, approvals, licenses, government charges and inspection fees required for the prosecution of the Work by any government or quasi-government entity having jurisdiction over the Project. Owner shall assist Design-Builder in obtaining such permits, approvals and licenses where Owner has initiated the application, review or approval process prior to having provided Design-Builder with the Engineering Notice to Proceed.

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

**5.7 Design-Builder's Construction Phase Services.**

**5.7.1** Design-Builder shall provide through itself or Subcontractors the necessary supervision, labor, inspection, testing, start-up, material, equipment, machinery, temporary utilities and other temporary facilities to permit Design-Builder to complete construction of the Project consistent with the Contract Documents.

**5.7.2** Design-Builder shall perform all construction activities efficiently and with the requisite expertise, skill and competence to satisfy the requirements of the Contract Documents. Design-Builder shall at all times exercise complete and exclusive control over the means, methods, sequences and techniques of construction.

**5.7.3** Design-Builder shall employ only Subcontractors who are duly licensed and qualified to perform the Work consistent with the Contract Documents. Owner may reasonably but promptly object to Design-Builder's selection of any Subcontractor, provided that the Contract Price and/or Contract Time shall be adjusted to the extent that Owner's decision improperly impacts Design-Builder's cost and/or time of performance.

**5.7.4** Design-Builder assumes responsibility to Owner for the proper performance of the Work

of Subcontractors and any acts and omissions in connection with such performance. Nothing in the Contract Documents is intended or deemed to create any legal or contractual relationship between Owner and any Subcontractor or Sub-Subcontractor, including but not limited to any third-party beneficiary rights.

**5.7.5**

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

**5.7.6** Design-Builder shall keep the Site free from all debris, trash and construction wastes, including fuels, lubricants, sewage and chemicals. Design-Builder shall obtain and adhere to the provisions of a Storm Water Pollution Prevention Plan ("**SWPPP**") from the Central Coast Regional Water Quality Control Board and shall perform the Construction Portion of the Work efficiently, safely and without interfering with the use of adjacent land areas and without any offsite discharges to surface water, including to the Pacific Ocean. Design-Builder shall implement all construction-related Best Management Practices ("**BMPs**") defined in the SWPPP for the protection of the Site and activities to prevent, and remediate as required, on Site drainages and off Site discharges. Any and all costs of remediation or penalties resulting from such impermissible flow shall be the sole and exclusive responsibility of Design-Builder. Upon Final Completion, Design-Builder shall remove all debris, trash, construction wastes, materials, equipment, machinery and tools arising from the Work to permit Owner to occupy the Project for its intended use.

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

**5.8.1** Design-Builder recognizes the importance of performing the Work in a safe manner so as to prevent damage, injury or loss to: (i) all individuals at the Site, whether working or visiting; (ii) the Work, including materials and equipment incorporated into the Work or stored on-Site or off-Site; and (iii) all other property at the Site or adjacent thereto. Design-Builder assumes responsibility for implementing and monitoring all safety precautions and programs related to the performance of the Work. Design-Builder shall, prior to commencing construction, designate a Safety Representative with the necessary qualifications and experience to supervise the implementation and monitoring of all safety precautions and programs related to the Work. Unless otherwise required by the Contract Documents, Design-Builder's Safety Representative shall be an individual stationed at the Site who shall have responsibilities on the Project in addition to safety. The Safety Representative shall make routine daily inspections of the Site and shall hold weekly safety meetings with Design-Builder's personnel, Subcontractors and others as applicable.

**5.8.2** Design-Builder and Subcontractors shall comply with all Legal Requirements relating to safety, as well as any Owner-specific safety requirements set forth in the Contract Documents, provided that such Owner-specific requirements do not violate any applicable Legal Requirements. Design-Builder will immediately report in writing any safety-related injury, loss, damage or accident arising from the Work to Owner's Representative and, to the extent mandated by Legal Requirements, to all government or quasi-government authorities having jurisdiction over safety-related matters involving the Project or the Work.

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

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

**5.9.1** Design-Builder warrants to Owner that before Final Completion the construction, including all materials and equipment furnished as part of the construction, shall be free from all defects in performance and workmanship. Design-Builder shall furnish all equipment as new unless

otherwise specified in the Contract Documents, of good quality, appropriate and fit for Project use, in conformance with the Contract Documents and free of defects in materials and workmanship. Design-Builder's warranty obligation excludes defects caused by abuse, alterations, or failure to maintain the Work in a commercially reasonable manner. Nothing in this warranty is intended to limit any manufacturer's warranty to the extent it may provide Owner with greater warranty rights than set forth in this Article or the Contract Documents; Design-Builder will provide Owner with all manufacturers' warranties upon Substantial Completion.

## **5.10 Correction of Defective Work.**

**5.10.1** Prior to the Final Completion Date, Design-Builder shall, within seven (7) Calendar Days of receipt of written notice from Owner that the Work is not in conformance with the Contract Documents, take meaningful steps to commence correction of such nonconforming Work, including the correction, removal or replacement of the nonconforming Work and any damage caused to other parts of the Work affected by the nonconforming Work. If Design-Builder fails to commence the necessary steps within such seven (7)-Calendar Day period, Owner, in addition to any other remedies provided under the Contract Documents, may provide Design-Builder with written notice that Owner will commence correction of such nonconforming Work with its own forces. If Owner does perform such corrective Work, Design-Builder shall be responsible for all reasonable costs incurred by Owner in performing such correction. If the nonconforming Work creates an emergency requiring an immediate response, the seven (7)-Calendar Day period identified herein shall be deemed inapplicable.

**5.10.2** After the Final Completion Date, Design-Builder agrees to repair or replace any Work that is found to be defective or found to not be in conformance with the Contract Documents within a period of two (2) years from the date of Substantial Completion (the "**Construction Warranty**"), or within such longer period to the extent required by any specific warranty included in the Contract Documents (the "**Warranty Period**"); provided, however, that Design-Builder makes no warranty with respect to the performance of the Project following Final Completion. This is Owner's sole and exclusive remedy with respect to any Work following Final Completion. The Construction Warranty is Design-Builder's sole and exclusive warranty with respect to the Work or the Project and Design-Builder disclaims all other warranties, express or implied, including, without limitation any implied warranty with respect to merchantability or fitness for a particular purpose.

## **5.11 Meetings.**

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

**5.11.2** Following the issuance of the Engineering Notice to Proceed, Design-Builder shall arrange a design meeting with Owner and the Design Consultant. The meeting agenda will include the following: (i) review Permits Schedule and the respective parties' responsibilities for obtaining the Permits; and (ii) review the Project Schedule with respect to the estimated schedule for the preparation, review and approval of the Construction Drawings in accordance with the Agreement. Before this meeting, Design-Builder will deliver to Owner two (2) paper copies and one (1) electronic copy of the updated Project Schedule. The Scheduled Substantial Completion Date will not be modified on the Project Schedule without the prior written consent of Owner. The Project Schedule will be updated on a monthly basis through Substantial Completion.

**5.11.3** Following the issuance of the Construction Notice to Proceed, an on Site preconstruction meeting will be held with Design-Builder and Owner. The meeting agenda will

include the following: (i) communication procedures; (ii) general discussion of the parties' roles and responsibilities under the Agreement; (iii) confirmation of Owner's Representative and Design-Builder's Representative as the primary contact for each party; (iv) confirmation of the form and timing for submittal and payment of Applications for Payment; (v) review of the updated Project Schedule; and (v) other general operational procedures in connection with the performance of the Work.

**5.11.4** Design-Builder will meet weekly with Owner and as needed, the other members of the Design-Build Team, to update Owner on some or all of the following, as applicable: (i) procurement and delivery of equipment; (ii) responses to Owner's requests for information pursuant to the Agreement; (iii) general update on the progress of the Work; and (iv) if applicable, updates to the Project Schedule.

## **Article 6**

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

#### **6.1 Duty to Cooperate.**

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

**6.1.2** Owner shall give Design-Builder timely notice of any Work that Owner notices to be defective or not in compliance with the Contract Documents.

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

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

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

**6.2.1.2** Geotechnical studies describing subsurface conditions, and other surveys describing other latent or concealed physical conditions at the Site;

**6.2.1.3** Temporary and permanent easements, zoning and other requirements and encumbrances affecting land use, or necessary to permit the proper design and construction of the Project and enable Design-Builder to perform the Work;

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

**6.2.1.5** Record drawings of any existing structures at the Site; and

**6.2.1.6** Environmental studies, reports and impact statements describing the environmental conditions, including Hazardous Conditions, in existence at the Site.

**6.2.2** Owner is responsible for securing and executing all necessary agreements with adjacent land or property owners that are necessary to enable Design-Builder to perform the Work. Owner is further responsible for all costs, including attorneys' fees, incurred in securing these necessary agreements.

**6.3 Purchase of Equipment by Owner**

**6.3.1** Owner, at Owner's sole cost and expense, shall purchase directly and have delivered to Design-Builder at the time and location instructed by Design-Builder, all of the equipment designated for purchase by Owner on the Project Equipment List (the "**Owner's Equipment**"). All of the Owner's Equipment shall conform to the specifications supplied to Owner by Design-Builder and shall be incorporated into the Project as set forth in the final Construction Drawings. Design-Builder shall select the Owner's Equipment, determine if it can be delivered in accordance with the Project Schedule, accept delivery, unload the Owner's Equipment (if required), secure the Owner's Equipment, and be responsible for the Owner's Equipment once delivered to the Site. If any of the Owner's Equipment is not timely delivered, or the Owner's Equipment when delivered does not conform to the required specifications and replacement Owner's Equipment is required to be purchased by Owner, and such delay causes a delay in the scheduled completion of the Work, Design-Builder shall be entitled to a Change Order pursuant to Article 11 hereof for an increase in the Contract Time and, if applicable, an increase in the Contract Price. Design-Builder is responsible for the installation of the Owner's Equipment and its startup in accordance with the recommendations of the equipment manufacturers.

**6.4 Financial Information.**

**6.4.1** Prior to issuance of the Engineering Notice to Proceed, and thereafter until Final Completion, at Design-Builder's request, Owner shall promptly furnish reasonable evidence satisfactory to Design-Builder that Owner has adequate funds available and committed to fulfill all of Owner's contractual obligations under the Contract Documents. If Owner fails to furnish such financial information in a timely manner, Design-Builder may stop Work under Section 14.3 hereof or exercise any other right permitted under the Contract Documents.

**6.4.2** Design-Builder shall cooperate with the reasonable requirements of Owner's lenders or other financial sources. Notwithstanding the preceding sentence, after execution of the Agreement, Design-Builder shall have no obligation to execute for Owner or Owner's lenders or other financial sources any documents or agreements that require Design-Builder to assume obligations or responsibilities greater than those existing obligations Design-Builder has under the Contract Documents.

**6.5 Owner's Representative.**

**6.5.1** Owner's Representative shall be responsible for providing Owner-supplied information and approvals in a timely manner to permit Design-Builder to fulfill its obligations under the Contract Documents. Owner's Representative shall also provide Design-Builder with prompt notice if it observes any failure on the part of Design-Builder to fulfill its contractual obligations, including any errors, omissions or defects in the performance of the Work. Owner's Representative shall communicate regularly with Design-Builder and shall be vested with the authority to act on behalf of Owner.

**6.6 Government Approvals and Permits.**

**6.6.1** Owner shall obtain and pay for all necessary permits, approvals, licenses, government charges and inspection fees set forth in the Permits Schedule.

**6.6.2** Owner shall provide reasonable assistance to Design-Builder in obtaining those

permits, approvals and licenses that are Design-Builder's responsibility as set forth in the Permits Schedule.

**6.7 Owner's Separate Contractors.**

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

## **Article 7**

### **Ownership of Work Product**

**7.1 Work Product.**

**7.1.1** All drawings, specifications and other documents and electronic data, including such documents identified in the Agreement, furnished by Design-Builder to Owner under this Agreement ("**Work Product**") are deemed to be instruments of service and Design-Builder shall retain the ownership and property interests therein, including but not limited to any intellectual property rights, copyrights and/or patents, subject to the provisions set forth in this Article.

**7.2 Owner's Limited License Upon Project Completion and Payment in Full to Design-Builder.** Upon Owner's payment in full for all Work performed under the Contract Documents, Design-Builder shall grant Owner a limited license to use the Work Product in connection with:

**7.2.1** Owner's occupancy of the Project, conditioned on Owner's express understanding that its alteration of the Work Product without the involvement of Design-Builder is at Owner's sole risk and without liability or legal exposure to Design-Builder or anyone working by or through Design-Builder, including Design Consultants of any tier (collectively the "**Indemnified Parties**"), and on Owner's obligation to provide the indemnity set forth in this Article; and

**7.2.2** Owner's future expansion of the Project on or near the Site (a "**Future Expansion**"); provided, however, that in the event of any proposed Future Expansion Owner shall give Design-Builder a right of first offer (the "**ROFO**") with respect to the design and construction of the future expansion. Under the ROFO, Owner will deliver written notice to Design-Builder of the detailed description of the proposed Future Expansion, the proposed contract price for the design and construction of the Future Expansion and the proposed contract time for the completion of design and construction of the Future Expansion (the "**ROFO Notice**"). To exercise the ROFO, Design-Builder will deliver written notice to Owner no later than thirty (30) Calendar Days after receipt by Design-Builder of the ROFO Notice. Upon acceptance of the ROFO Notice by Design-Builder, Owner and Design-Builder shall promptly negotiate, execute and deliver a design-build agreement substantially in the form of this Agreement modified to reflect the specific terms and conditions related to the Future Expansion. If Design-Builder fails to timely accept the ROFO, Owner may enter into an agreement for the design and construction of the Future Expansion with a third party on terms and conditions no more favorable than those set forth in the ROFO Notice. Any use of the Work Product in connection with any Future Expansion by any third party is conditioned on Owner's express understanding that its alteration of the Work Product without the involvement of Design-Builder is at Owner's sole risk and without liability or legal exposure to any of the Indemnified Parties and on Owner's obligation to provide



the indemnity set forth in this Article.

**7.3 Owner's Limited License upon Owner's Termination for Convenience or Design-Builder's Election to Terminate.** If Owner terminates this Agreement for its convenience as set forth in Article 15 hereof, or if Design-Builder elects to terminate this Agreement in accordance with Section 14.4 hereof, Design-Builder shall, upon Owner's payment in full of the amounts due Design-Builder under the Contract Documents, grant Owner a limited license to use the Work Product to complete the Project and subsequently occupy the Project, and Owner shall thereafter have the same rights as set forth in this Article, conditioned on the following:

**7.3.1** Use of the Work Product is at Owner's sole risk without liability or legal exposure to any Indemnified Party and on Owner's obligation to provide the indemnity set forth in this Article; and

**7.3.2** Owner agrees to pay Design-Builder the additional sum of One Hundred Thousand Dollars (\$100,000) as compensation for the right to use the Work Product to complete the Project and subsequently use the Work Product in accordance with this Article if Owner resumes the Project through its employees, agents, or third parties.

**7.4 Owner's Limited License upon Design-Builder's Default.**

**7.4.1** If this Agreement is terminated due to Design-Builder's default pursuant to Section 14.2 hereof, then Design-Builder grants Owner a limited license to use the Work Product to complete the Project and subsequently occupy the Project, and Owner shall thereafter have the same rights and obligations as set forth in this Article. Notwithstanding the preceding sentence, if it is ultimately determined that Design-Builder was not in default, Owner shall be deemed to have terminated the Agreement for convenience, and Design-Builder shall be entitled to the rights and remedies set forth in Section 7.3 hereof.

**7.5 Owner's Indemnification for Use of Work Product.**

**7.5.1** If Owner is required to indemnify any Indemnified Parties based on the use or alteration of the Work Product under any of the circumstances identified in this Article, Owner shall defend, indemnify and hold harmless such Indemnified Parties from and against any and all claims, damages, liabilities, losses and expenses, including attorneys' fees, arising out of or resulting from the use or alteration of the Work Product.

## **Article 8**

### **Electronic Data**

**8.1 Electronic Data.**

**8.1.1.** The parties recognize that the Contract Documents, including the Construction Drawings and three-dimensional modeling and other Work Product, may be transmitted among Owner, Design-Builder and others in electronic media as an alternative to paper hard copies (collectively "**Electronic Data**").

**8.2 Transmission of Electronic Data.**

**8.2.1** Owner and Design-Builder shall agree upon the software and the format for the transmission of Electronic Data. Each party shall be responsible for securing the legal rights to access the agreed-upon format, including, if necessary, obtaining appropriately licensed copies of the applicable software or electronic program to display, interpret and/or generate the Electronic Data.

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

**8.2.3** By transmitting Work Product in electronic form, the transmitting party does not transfer or assign its rights in the Work Product. The rights in the Electronic Data shall be as set forth in Article 7 hereof. Under no circumstances shall the transfer of ownership of Electronic Data be deemed to be a sale by the transmitting party of tangible goods.

### **8.3 Electronic Data Protocol.**

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

**8.3.2** Electronic Data will be transmitted in the format agreed upon in this Article, including file conventions and document properties, unless prior arrangements are made in advance in writing.

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

**8.3.4** The transmitting party specifically disclaims all warranties, expressed or implied, including, but not limited to, implied warranties of merchantability and fitness for a particular purpose, with respect to the media transmitting the Electronic Data. However, transmission of the Electronic Data via electronic means shall not invalidate or negate any duties pursuant to the applicable standard of care with respect to the creation of the Electronic Data, unless such data is materially changed or altered after it is transmitted to the receiving party, and the transmitting party did not participate in such change or alteration.

## **Article 9**

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

## 9.1 Hazardous Conditions.

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

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

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

**9.1.4** Design-Builder will be entitled to an adjustment in its Contract Price and/or Contract Time to the extent Design-Builder's cost and/or time of performance have been adversely impacted by the presence of Hazardous Conditions.

**9.1.5** To the fullest extent permitted by law, Owner shall indemnify, defend and hold harmless Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them, and their officers, directors, employees and agents, from and against any and all claims, losses, damages, liabilities and expenses, including attorneys' fees and expenses, arising out of or resulting from the presence, removal or remediation of Hazardous Conditions at the Site, except to the extent that such claims or demands arise from the negligence or willful or intentional acts or omissions of Design-Builder.

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

## 9.2 Differing Site Conditions.

**9.2.1** Concealed or latent physical conditions or subsurface conditions at the Site that: (i) materially differ from the conditions indicated in the Contract Documents; or (ii) are of an unusual nature, differing materially from the conditions ordinarily encountered and generally recognized as inherent in the Work are collectively referred to herein as "**Differing Site Conditions.**" If Design-Builder encounters a Differing Site Condition, Design-Builder will be entitled to an adjustment in the Contract Price and/or Contract Time to the extent Design-Builder's cost and/or time of performance are adversely impacted by the Differing Site Condition.

**9.2.2** Upon encountering a Differing Site Condition, Design-Builder shall provide prompt written notice to Owner of such condition, which notice shall not be later than fourteen (14) Calendar Days

after such condition has been encountered. Design-Builder shall, to the extent reasonably possible, provide such notice before the Differing Site Condition has been substantially disturbed or altered.

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## **Article 10**

### **Contract Time**

#### **10.1 Obligation to Achieve Contract Times.**

**10.1.1** Design-Builder agrees that it will commence performance of the Work and achieve the Contract Time in accordance with Article 5 hereof subject to any adjustments in the Contract Time in accordance with the Agreement.

#### **10.2 Notice to Proceed.**

**10.2.1 Date of Commencement of Design.** Owner shall make its best efforts to secure its Initial Financial Commitment Letter for funding of the Project within ninety (90) Calendar Days after the Effective Date. City shall deliver the Notice to Proceed with the Engineering Portion of the Work (the "**Engineering Notice to Proceed**") to Design-Builder no later than five (5) Working Days after Owner receives its Initial Financial Commitment Letter. Design-Builder shall commence the Engineering Portion of the Work no later than five (5) Working Days following Design-Builder's receipt of the Engineering Notice to Proceed (the "**Commencement Date of Design**") unless the parties mutually agree otherwise in writing.

City reserves the right to secure bridge financing for the Engineering Portion of the Work. If Owner fails to secure financing within ninety (90) Calendar Days of the Effective Date, the parties shall meet and confer and/or exercise such parties' right to terminate the Agreement, as provided below.

If the Engineering Notice to Proceed has not been received by Design-Builder on or before ninety (90) Calendar Days following the Effective Date, either party may terminate this Agreement effective immediately following delivery of written notice of such termination in accord with the notice provisions of this Agreement. Promptly following such termination for failure to timely deliver the Engineering Notice to Proceed, Design-Builder shall deliver to Owner an invoice for the direct costs and expenses incurred by Design-Builder in connection with this Project and this Agreement and no later than thirty (30) Calendar Days following delivery of such invoice to Owner, Owner shall pay the amount set forth in such invoice to Design-Builder. In addition, if the Engineering Notice to Proceed is delivered by Owner to Design-Builder after five (5) Working Days following the Effective Date but before the notice of termination described above is delivered: (i) Design-Builder shall be entitled to extend the Scheduled Substantial Completion Date by a number of Calendar Days equal to the number of Calendar Days after the Effective Date that the Engineering Notice to Proceed is delivered to Design-Builder minus five (5) Working Days; and (ii) the Contract Price shall be increased by an amount equal to the reasonable expenses and costs incurred by Design-Builder related to such delay. Owner shall promptly execute a Change Order approving such extension of the Scheduled Substantial Completion Date and increase to the Contract Price.

**10.2.2 Date of Commencement of Construction.** Upon receipt of the fully-signed Financial Assistance Agreement, Owner will provide a subsequent Construction Notice to Proceed to Design-Builder for the Construction Portion of the Project (the "**Construction Notice to Proceed**"). If the Construction Notice to Proceed has not been received by Design-Builder on or before ninety (90) Calendar Days following the Engineering Notice to Proceed, either party may terminate this Agreement effective immediately following delivery of written notice of such

termination in accord with the Notice Provisions of this Agreement. Promptly following such termination for failure to timely deliver the Construction Notice to Proceed, Design-Builder shall deliver to Owner an invoice for the direct costs and expenses incurred by Design-Builder in connection with this Project and this Agreement that are in addition to the amounts received as of that date from Owner by Design-Builder following the Engineering Notice to Proceed and the performance of the Engineering Portion of the Work and no later than thirty (30) Calendar Days following delivery of such invoice to Owner, Owner shall pay the amount set forth in such invoice to Design-Builder. In addition, if the Construction Notice to Proceed is delivered by Owner to Design-Builder after five (5) Working Days following the delivery of the Engineering Notice to Proceed but before the notice of termination described above is delivered: (i) Design-Builder shall be entitled to extend the Scheduled Substantial Completion Date by a number of Calendar Days equal to the number of Calendar Days after the delivery of the Engineering Notice to Proceed minus five (5) Working Days; and (ii) the Contract Price shall be increased by an amount equal to the reasonable expenses and costs incurred by Design-Builder related to such delay. Owner shall promptly execute a Change Order approving such extension of the Scheduled Substantial Completion Date and increase to the Contract Price.

### **10.3 Delays to the Work.**

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

**10.3.2** In addition to Design-Builder's right to a time extension for those events set forth in this Article, Design-Builder shall also be entitled to an appropriate adjustment of the Contract Price.

### **10.4 Substantial Completion and Final Completion.**

**10.4.1** Substantial Completion of the entire Work shall be achieved no later than four hundred nine (409) Calendar Days after the Commencement Date of Design (as adjusted, if applicable, the "**Scheduled Substantial Completion Date**").

**10.4.2** The Work shall progress substantially in accordance with the Initial Project Schedule attached hereto as Exhibit "B," as amended from time to time in accordance with the Agreement (the "**Project Schedule**").

**10.4.3** Final Completion of the Work shall be achieved as expeditiously as reasonably practicable.

**10.4.4** All of the dates set forth in this Article (collectively the "**Contract Time**") shall be subject to adjustment in accordance with this Agreement.

### **10.5 Time is of the Essence.** The parties mutually agree that time is of the essence with respect to the dates and times set forth in the Contract Documents.

**10.6 Liquidated Damages.**

**10.6.1** Design-Builder understands that if Substantial Completion is not attained by the Scheduled Substantial Completion Date, Owner will suffer damages that are difficult to determine and accurately specify. Design-Builder agrees that if Substantial Completion is not attained by the Scheduled Substantial Completion Date (the "**LD Date**"), Designer-Builder shall pay Owner Five Thousand Dollars (\$5,000) as liquidated damages for each Calendar Day that Substantial Completion extends beyond the LD Date and Design-Builder agrees to pay such liquidated damages as herein provided; and in case the same are not paid, agrees that Owner may deduct the amount thereof from any money due or that may become due Design-Builder under this Agreement; provided, however, that an amount equal to fifty percent (50%) of the remaining Contingency Amount (as defined in the Contract Price Schedule) may be used by Design-Builder to offset any amount payable under this Section.

**10.6.2** If the Work is not finished and completed in all parts and requirements on or before the LD Date, Owner shall have the right to extend the LD Date or not, as may seem best to serve the interest of Owner; and if Owner decides to extend the LD Date, Owner shall further have the right to charge to Design-Builder and to deduct from the final payment of the Work, all or any part, as it may deem proper, of the actual cost of engineering, inspection, superintendence and other overhead expenses incurred by Owner during the period of such extension of the LD Date, except that the cost of final measurements and preparation of final estimate shall not be included in such charges.

**10.6.3** Any liquidated damages assessed pursuant to this Agreement shall be in lieu of all liability for any and all extra costs, losses, expenses, claims, penalties and any other damages, whether special or consequential, and of whatsoever nature incurred by Owner which are occasioned by any delay in achieving the Contract Time.

**10.6.4** Owner and Design-Builder agree the maximum aggregate liability Design-Builder has for any liquidated damages that may be assessed under this Agreement for failure to achieve the Contract Time shall be Eight Hundred Thousand Dollars (\$800,000).

**10.7 Early Completion Bonus.** If Substantial Completion is attained on or before the Scheduled Substantial Completion Date (the "**Bonus Date**"), Owner shall pay Design-Builder at the time of Final Payment under Article 12 hereof an early completion bonus of One Thousand Nine Hundred Dollars (\$1,900) for each Calendar Day that Substantial Completion is attained earlier than the Bonus Date. Owner and Design-Builder agree that the maximum aggregate amount that Design-Builder shall receive as the early Completion Bonus is Three Hundred Thousand Dollars (\$300,000).

**10.8 Additional Compensation.** In addition to Design-Builder's right to a time extension for those events set forth in Section 10.3 hereof, Design-Builder shall also be entitled to an appropriate adjustment of the Contract Price for those events set forth in Section 10.3 hereof; provided, however, that for Force Majeure Events, Design-Builder shall only be entitled to an increase in the Contract Price if said events exceed three (3) cumulative Calendar Days. Said additional compensation shall be limited to Two Thousand Dollars (\$2,000) per Calendar Day for each Calendar Day the Work is delayed beyond the Scheduled Substantial Completion Date.

## **Article 11**

### **Contract Price**

**11.1 Contract Price.** Owner shall pay Design-Builder in accordance with Article 12 hereof the sum of Six Million Three Hundred Sixty Thousand Seven Hundred Thirty-Six Dollars (\$6,360,736) (the "**Contract Price**"). Unless otherwise provided in the Contract Documents, the Contract Price is deemed to include all sales, use, consumer and other taxes mandated by applicable Legal Requirements and subject to the assumptions set forth in Exhibit "C" attached hereto (the "**Contract Price Schedule**").

**11.2 Markups for Changes.** If the Contract Price requires an adjustment due to changes in the Work, and the cost of such changes is determined under this Article, the following markups shall be allowed on such changes:

**11.2.1** For additive Change Orders, including additive Change Orders arising from both additive and deductive items, it is agreed that Design-Builder shall receive an additional amount equal to five percent (5%) of the additional costs incurred for that Change Order.

**11.2.2** For deductive Change Orders, including deductive Change Orders arising from both additive and deductive items, the deductive amounts shall include: No additional reduction to account for Design-Builder's Fee or any other markup.

### **11.3 Change Orders.**

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

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

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

**11.3.1.3** The extent of the adjustment to the Contract Time.

**11.3.2** All changes in the Work authorized by applicable Change Order shall be performed under the applicable conditions of the Contract Documents. Owner and Design-Builder shall negotiate in good faith and as expeditiously as possible the appropriate adjustments for such changes; provided, however, that no extra Work or changed Work shall commence until a Change Order has been fully executed by both parties.

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

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

**11.4.1** Minor Changes in the Work do not constitute a Change Order and do not involve an adjustment in the Contract Price and/or Contract Time and do not materially and adversely affect the Work, including the design, quality, performance and workmanship required by the Contract Documents. Design-Builder may make minor changes in the Work consistent with the intent of the Contract Documents; provided, however, that Design-Builder shall promptly inform Owner, in writing, of any such changes and record such changes on the documents maintained by Design-Builder. Owner reserves the right to direct minor changes in Work as described in this Section.



## **11.5 Contract Price Adjustments.**

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

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

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

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

**11.5.1.4** If an increase or decrease cannot be agreed to as set forth in this Article, the cost of the change of the Work shall be determined by the reasonable expense and savings in the performance of the Work resulting from the change, including a reasonable overhead and profit, as may be set forth in the Agreement.

**11.5.2** If unit prices are set forth in the Contract Documents or are subsequently agreed to by the parties, but application of such unit prices will cause substantial inequity to Owner or Design-Builder because of differences in the character or quantity of such unit items as originally contemplated, such unit prices shall be equitably adjusted.

**11.5.3** If Owner and Design-Builder disagree upon whether Design-Builder is entitled to be paid for any services required by Owner, or if there are any other disagreements over the scope of Work or proposed changes to the Work, Owner and Design-Builder shall resolve the disagreement pursuant to Article 13 hereof. As part of the negotiation process, Design-Builder shall furnish Owner with a good faith estimate of the costs to perform the disputed services in accordance with Owner's interpretations.

## **11.6 Emergencies.**

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

# **Article 12**

## **Procedure for Payment**

### **12.1 Schedule of Values.**

**12.1.1** Set forth in the Contract Price Schedule are the Schedule of Values for the Project. The Schedule of Values: (i) subdivides the Work into its respective parts; (ii) indicates the respective values for all items comprising the Work; and (iii) will serve as the basis for monthly progress payments made to Design-Builder throughout the Work.

### **12.2 Progress Payments.**

**12.2.1** Design-Builder shall submit to Owner on or before the fifth (5th) Calendar Day of each

month following the month in which the Work was performed, beginning with the first (1<sup>st</sup>) month after the Commencement Date of Design, Design-Builder's Application for Payment (the "**Application for Payment**"). The Application for Payment shall be accompanied by all supporting documentation required by the Contract Documents and/or established at the meeting required by Section 5.11.1 hereof.

**12.2.2** The Application for Payment may request payment for equipment and materials not yet incorporated into the Project, provided that: (i) Owner is satisfied that the equipment and materials are suitably stored at either the Site or another acceptable location; (ii) the equipment and materials are protected by suitable insurance; and (iii) upon payment, Owner will receive the equipment and materials free and clear of all liens and encumbrances upon payment in full for any equipment purchased by Design-Builder following receipt of payment for such equipment from Owner.

**12.2.3** All discounts offered by Subcontractor, Sub-Subcontractors and suppliers to Design-Builder for early payment shall accrue one hundred percent (100%) to Design-Builder to the extent Design-Builder advances payment. Unless Owner advances payment to Design-Builder specifically to receive the discount, Design-Builder may include in its Application for Payment the full undiscounted cost of the item for which payment is sought.

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

**12.2.5** Owner shall make payment within twenty-five (25) Calendar Days after Owner's receipt of each properly submitted and accurate Application for Payment, but in each case less the total of payments previously made, and less amounts properly withheld under this Section.

### **12.3 Retainage on Progress Payments.**

**12.3.1** Owner will retain ten percent (10%) from Design-Builder's Applications for Payment, exclusive of any payments with respect to the Engineering Portion of the Work from each Application for Payment; provided, however, that when fifty percent (50%) of the value of the Work has been satisfactorily completed by Design-Builder and paid for by Owner, and Design-Builder is otherwise in compliance with its contractual obligations hereunder, Owner will not retain any additional amounts from Design-Builder's subsequent Applications for Payment. Owner will also reasonably consider reducing retainage for Subcontractors completing their work early in the Project.

**12.3.2** Within fifteen (15) Calendar Days after Substantial Completion, Owner shall release to Design-Builder fifty percent (50%) of all retained amounts then held by Owner, less an amount equal to: (i) the reasonable value of all remaining or incomplete items of Work as noted in the Certificate of Substantial Completion; and (ii) all other amounts Owner is otherwise entitled to withhold pursuant to this Article. The remaining fifty percent (50%) of the retained amounts held by Owner shall be paid to Design-Builder no later than fifteen (15) Calendar Days after completion of the Acceptance Test.

### **12.4 Withholding of Payments.**

**12.4.1** On or before the date established in the Agreement, Owner shall pay Design-Builder all

amounts properly due based on Owner's confirmation of Design-Builder's stated percentage of physical completion, including equipment costs, deposits and submittals of Design-Builder, set forth in each Application for Payment. If Owner determines that Design-Builder is not entitled to all or part of an Application for Payment as a result of Design-Builder's failure to meet its obligations hereunder, it will notify Design-Builder in writing at least five (5) Calendar Days prior to the date payment is due. The notice shall indicate the specific amounts Owner intends to withhold, the reasons and contractual basis for the withholding, and the specific measures Design-Builder must take to rectify Owner's concerns. Design-Builder and Owner will attempt to resolve Owner's concerns prior to the date payment is due. If the parties cannot resolve such concerns, Design-Builder may pursue its rights under the Contract Documents, including those under Article 13 hereof.

**12.4.2** Notwithstanding anything to the contrary in the Contract Documents, Owner shall pay Design-Builder all undisputed amounts in an Application for Payment within the times required by the Agreement.

**12.5 Right to Stop Work and Interest.**

**12.5.1** If Owner fails to pay timely Design-Builder any amount that becomes due, Design-Builder, in addition to all other remedies provided in the Contract Documents, may stop Work pursuant to Section 14.3 hereof. All payments due and unpaid shall bear interest at the rate set forth in the Agreement.

**12.6 Design-Builder's Payment Obligations.**

**12.6.1** Design-Builder will pay Design Consultants and Subcontractors, in accordance with its contractual obligations to such parties, all the amounts Design-Builder has received from Owner on account of their work. Design-Builder will impose similar requirements on Design Consultants and Subcontractors to pay those parties with whom they have contracted. Design-Builder will indemnify and defend Owner against any claims for payment and mechanic's liens as set forth in Section 18.3 hereof.

**12.7 Final Payment.**

**12.7.1** Owner shall make final payment on Design-Builder's properly submitted and accurate Final Application for Payment within thirty (30) Calendar Days after Owner's receipt of the Final Application for Payment, provided that Design-Builder has achieved Final Completion.

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

**12.7.2.1** An affidavit that there are no claims, obligations or liens outstanding or unsatisfied for labor, services, material, equipment, taxes or other items performed, furnished or incurred for or in connection with the Work which will in any way affect Owner's interests subject to payment in full for any equipment purchased by Design-Builder following receipt of payment for such equipment from Owner;

**12.7.2.2** A general release executed by Design-Builder waiving, upon receipt of final payment by Design-Builder, all claims, except those claims previously made in writing to Owner and remaining unsettled at the time of final payment;

**12.7.2.3** Consent of Design-Builder's surety, if any, to final payment;

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

**12.7.2.5** Certificates of insurance confirming that required coverages will remain in effect consistent with the requirements of the Contract Documents.

**12.7.3** Upon making final payment, Owner waives all claims against Design-Builder except claims relating to: (i) Design-Builder's failure to satisfy its payment obligations, if such failure affects Owner's interests; (ii) the Construction Warranty; (iii) Design-Builder's failure to complete the Work consistent with the Contract Documents, including defects appearing after Substantial Completion; and (iv) the terms of any special warranties required by the Contract Documents.

**12.7.4** Owner shall be entitled to withhold from the Final Payment the reasonable value of completion of the correction of any nonconforming Work for any claims by Owner under Section 5.10.1 hereof.

**12.8 Interest.**

**12.8.1** Payments due and unpaid by Owner to Design-Builder, whether progress payments or final payment, shall bear interest commencing five (5) Calendar Days after payment is due at the rate of three and six-tenths percent (3.6%) per annum until paid.

**12.9 Record Keeping and Finance Controls.**

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

## **Article 13**

### **Contract Adjustments and Disputes**

**13.1 Requests for Contract Adjustments and Relief.**

**13.1.1** If either Design-Builder or Owner believes that it is entitled to relief against the other for any event arising out of or related to the Work or Project, such party shall provide written notice to the other party of the basis for its claim for relief. Such notice shall, if possible, be made prior to incurring any cost or expense and in accordance with any specific notice requirements contained in applicable sections of the Agreement. In the absence of any specific notice requirement, written notice shall be

given within a reasonable time, not to exceed twenty-one (21) Calendar Days, after the occurrence giving rise to the claim for relief or after the claiming party reasonably should have recognized the event or condition giving rise to the request, whichever is later. Such notice shall include sufficient information to advise the other party of the circumstances giving rise to the claim for relief, the specific contractual adjustment or relief requested and the basis of such request.

### **13.2 Dispute Avoidance and Resolution.**

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

**13.2.2** Design-Builder and Owner will first attempt to resolve disputes or disagreements at the field level through discussions between Design-Builder's Representative and Owner's Representative, which shall conclude within fourteen (14) Calendar Days of the written notice provided for in this Article unless Owner and Design-Builder mutually agree otherwise.

**13.2.3** If a dispute or disagreement cannot be resolved through Design-Builder's Representative and Owner's Representative, Design-Builder's Senior Representative and Owner's Senior Representative, upon the request of either party, shall meet as soon as conveniently possible, but in no case later than thirty (30) Calendar Days after such a request is made, to attempt to resolve such dispute or disagreement. Five (5) Working Days prior to any meetings between the respective Senior Representatives, the parties will exchange relevant information that will assist the parties in resolving their dispute or disagreement.

**13.2.4** If after meeting, the respective Senior Representatives determine that the dispute or disagreement cannot be resolved on terms satisfactory to both parties, the parties shall submit within thirty (30) Calendar Days of the conclusion of the meeting of the respective Senior Representatives the dispute or disagreement to non-binding mediation. The mediation shall be conducted by a mutually agreeable impartial mediator, or if the parties cannot so agree, a mediator designated by the American Arbitration Association ("AAA") serving the County of Monterey, California pursuant to its Construction Industry Mediation Rules. The mediation will be governed by and conducted pursuant to a mediation agreement negotiated by the parties or, if the parties cannot so agree, by procedures established by the mediator. Unless otherwise mutually agreed by Owner and Design-Builder and consistent with the mediator's schedule, the mediation shall commence within ninety (90) Calendar Days of the submission of the dispute to mediation and shall be held in the County of Monterey, California.

### **13.3 Disputes.**

**13.3.1** Any claims, disputes or controversies between the parties arising out of or relating to the Agreement, or the breach thereof, which have not been resolved in accordance with the procedures set forth in this Article, shall be decided in a court of law. Venue shall be in the County of Monterey, California.

**13.3.2** Design-Builder and Owner expressly agree that any dispute pursuant to this Article may be joined or consolidated with any dispute involving any other person or entity: (i) necessary to resolve the claim, dispute or controversy; or (ii) substantially involved in or affected by such claim, dispute or controversy. Both Design-Builder and Owner will include appropriate provisions in all contracts they execute with other parties in connection with the Project to require such joinder or consolidation.

**13.4 Duty to Continue Performance.**

**13.4.1** Unless provided to the contrary in the Contract Documents, Design-Builder shall continue to perform the Work and Owner shall continue to satisfy its payment obligations to Design-Builder, pending the final resolution of any dispute or disagreement between Design-Builder and Owner.

**13.5 Consequential Damages.**

**13.5.1** Notwithstanding anything herein to the contrary (except as set forth in Section 13.5.2 hereof), neither Design-Builder nor Owner shall be liable to the other for any consequential, indirect or punitive losses or damages, whether arising in contract, warranty, tort (including negligence), strict liability or otherwise, including but not limited to losses of use, profits, business, reputation or financing.

**13.5.2** The consequential damages limitation set forth in this Article is not intended to affect the payment of liquidated damages or lost early completion bonus, if any, set forth in Article 10 hereof, which both parties recognize has been established, in part, to reimburse Owner or reward Design-Builder for some damages that might otherwise be deemed to be consequential.

**Article 14**

**Stop Work and Termination for Cause**

**14.1 Owner's Right to Stop Work.**

**14.1.1** Owner may, without cause and for its convenience, order Design-Builder in writing to stop and suspend the Work. Such suspension shall not exceed sixty (60) consecutive Calendar Days or aggregate more than ninety (90) Calendar Days during the duration of the Project.

**14.1.2** Design-Builder is entitled to seek an adjustment of the Contract Price and/or Contract Time if its cost or time to perform the Work has been adversely impacted by any suspension of stoppage of the Work by Owner.

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

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

**14.2.2** Upon the occurrence of an event set forth in Section 14.2.1 hereof, Owner may provide written notice to Design-Builder that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be cured, within seven (7) Working Days of Design-Builder's receipt of such notice. If Design-Builder fails to cure, or reasonably commence to cure, such problem, then Owner may give a second written notice to Design-Builder of its intent to terminate within an additional seven (7)-Working Day period. If Design-Builder, within such second seven (7)-Working Day period, fails to

cure, or reasonably commence to cure, such problem, then Owner may declare the Agreement terminated for default by providing written notice to Design-Builder of such declaration.

**14.2.3** Upon declaring the Agreement terminated pursuant to Section 14.2.2 hereof, Owner may enter upon the Site and take possession, for the purpose of completing the Work, of all materials, equipment, scaffolds, tools, appliances and other items thereon, which have been purchased or provided for the performance of the Work, all of which Design-Builder hereby transfers, assigns and sets over to Owner for such purpose, and to employ any person or persons to complete the Work and provide all of the required labor, services, materials, equipment and other items. In the event of such termination, Design-Builder shall not be entitled to receive any further payments under the Contract Documents until the Work shall be finally completed in accordance with the Contract Documents. At such time, if the unpaid balance of the Contract Price exceeds the cost and expense incurred by Owner in completing the Work, such excess shall be paid by Owner to Design-Builder. Notwithstanding the preceding sentence, Design-Builder will only be entitled to be paid for Work performed prior to its default. If Owner's cost and expense of completing the Work exceeds the unpaid balance of the Contract Price, then Design-Builder shall be obligated to pay the difference to Owner. Such costs and expense shall include not only the cost of completing the Work, but also losses, damages, costs and expense, including attorneys' fees and expenses, incurred by Owner in connection with the re-procurement and defense of claims arising from Design-Builder's default, subject to the waiver of consequential damages set forth in Section 13.5.1 hereof.

**14.2.4** If Owner improperly terminates the Agreement for cause, the termination for cause will be converted to a termination for convenience in accordance with the provisions of Article 15 hereof.

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

**14.3.1** Design-Builder may, in addition to any other rights afforded under the Contract Documents or at law, stop the Work for the following reasons:

**14.3.1.1** Owner's failure to provide financial assurances as required under Article 6 hereof; or

**14.3.1.2** Owner's failure to pay amounts properly due under Design-Builder's Application for Payment.

**14.3.2** Should any of the events set forth in this Section 14.3 occur, Design-Builder has the right to provide Owner with written notice that Design-Builder will stop the Work unless said event is cured within seven (7) Working Days from Owner's receipt of Design-Builder's notice. If Owner does not cure the problem within such seven (7)-Working Day period, Design-Builder may stop the Work. In such case, Design-Builder shall be entitled to make a claim for adjustment to the Contract Price and Contract Time to the extent it has been adversely impacted by such stoppage.

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

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

**14.4.1.1** The Work has been stopped for sixty (60) consecutive Calendar Days, or more than ninety (90) Calendar Days during the duration of the Project, because of court order, any government authority having jurisdiction over the Work, or orders by Owner under this Article, provided that such stoppages are not due to the acts or omissions of Design-Builder or anyone for whose acts Design-Builder may be responsible.

**14.4.1.2** Owner's failure to provide Design-Builder with any information, permits or approvals that are Owner's responsibility under the Contract Documents which result in the Work being stopped for sixty (60) consecutive Calendar Days, or more than ninety (90) Calendar Days during the duration of the Project, even though Owner has not ordered Design-Builder in writing to stop and suspend the Work pursuant to Section 15.1 hereof.

**14.4.1.3** Owner's failure to cure the problems set forth in Section 14.3 hereof after Design-Builder has stopped the Work.

**14.4.2** Upon the occurrence of an event set forth in this Article, Design-Builder may provide written notice to Owner that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be cured, within seven (7) Working Days of Owner's receipt of such notice. If Owner fails to cure, or reasonably commence to cure, such problem, then Design- Builder may give a second written notice to Owner of its intent to terminate within an additional seven (7)-Working Day period. If Owner, within such second seven (7)-Working Day period, fails to cure, or reasonably commence to cure, such problem, then Design-Builder may declare the Agreement terminated for default by providing written notice to Owner of such declaration. In such case, Design-Builder shall be entitled to recover in the same manner as if Owner had terminated the Agreement for its convenience under Article 15 hereof.

#### **14.5 Bankruptcy of Owner or Design-Builder.**

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

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

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

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

**14.5.2** The rights and remedies under Section 14.5.1 hereof shall not be deemed to limit the ability of the non-Bankrupt Party to seek any other rights and remedies provided by the Contract Documents or by law, including its ability to seek relief from any automatic stays under the United States Bankruptcy Code or the right of Design-Builder to stop Work under any applicable provision of this Agreement or seek a Change Order with respect to the Contract Time and/or the Contract Price based on the effects of Owner being a Bankrupt Party.



## **Article 15**

### **Termination for Convenience**

**15.1** Upon ten (10) Calendar Days' written notice to Design-Builder, Owner may, for its convenience and without cause, elect to terminate this Agreement. In such event, Owner shall pay Design-Builder for the following:

**15.1.1** All Work executed and for proven loss (not including profit or overhead and profit on uncompleted work), cost or expense in connection with the Work;

**15.1.2** The reasonable costs and expenses attributable to such termination, including demobilization costs and amounts due in settlement of terminated contracts with Subcontractors, equipment vendors and Design Consultants; and

**15.1.3** Overhead and profit in the amount of ten percent (10%) on the sum of items in Sections 15.1.1 and 15.1.2 hereof.

**15.2 Additional Compensation.** If Owner terminates this Agreement pursuant to Section 15.1 hereof, but Owner does not terminate the Project, in addition to the amounts set forth in Section 15.1 hereof, Design-Builder shall be entitled to receive one of the following as applicable:

**15.2.1** If Owner terminates this Agreement prior to delivery to Design-Builder of the Construction Notice to Proceed, Design-Builder shall be paid five percent (5%) of the remaining balance of the Contract Price; or

**15.2.2** If Owner terminates this Agreement after delivery to Design-Builder of the Construction Notice to Proceed, Design-Builder shall be paid five percent (5%) of the remaining balance of the Contract Price.

**15.3** If Owner terminates this Agreement pursuant to this Article and proceeds to design and construct the Project through its employees, agents or third parties, Owner's rights to use the Work Product shall be as set forth in Section 7.3 hereof. Such rights may not be transferred or assigned to others without Design-Builder's express written consent, which shall not be unreasonably withheld, and such third parties' agreement to the terms of Section 7.3 hereof.

## **Article 16**

### **Representatives of the Parties**

**16.1 Owner's Representatives.**

**16.1.1** Owner designates the individual listed below as its Senior Representative ("**Owner's Senior Representative**"), which individual has the authority and responsibility for avoiding and resolving disputes under Article 13 hereof:

City Manager,  
City of Pacific Grove, California  
2100 Sunset Drive  
Pacific Grove, CA 93950  
Fax No.: 831-648-5722  
Email: \_\_\_\_\_

**16.1.2** Owner designates the individual listed below as its Owner's Representative, which individual has the authority and responsibility set forth in Article 6 hereof:

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**16.2 Design-Builder's Representatives.**

**16.2.1** Design-Builder designates the individual listed below as its Senior Representative ("**Design-Builder's Senior Representative**"), which individual has the authority and responsibility for avoiding and resolving disputes under Article 13 hereof:

Brian D. Cullen, President  
PERC Water Corporation  
959 South Coast Drive, Suite 315  
Costa Mesa, CA 92626  
Fax No.; 714-352-7765  
Email: [bcullen@percwater.com](mailto:bcullen@percwater.com)

**16.2.2** Design-Builder designates the individual listed below as its Design-Builder's Representative, which individual has the authority and responsibility set forth in Article 5 hereof.

Nate Owen, Chief Operating Officer  
PERC Water Corporation  
959 South Coast Drive, Suite 315  
Costa Mesa, CA 92626  
Fax No.; 714-352-7765  
Email: [nowen@percwater.com](mailto:nowen@percwater.com)

## Article 17

### Bonds and Insurance

**17.1 Design-Builder's Insurance Requirements.**

**17.1.1** Design-Builder is responsible for procuring and maintaining the insurance for the coverage amounts all as set forth in the list of Insurance Policies attached hereto as Exhibit "D" (the "**Insurance Schedule**"). Coverage shall be secured from insurance companies with a current A.M. Best's rating of no less than A:VII and be authorized to do business in the state in which the Project is located, or otherwise allowed to place insurance through surplus line brokers under applicable provisions of the California Insurance Code or any federal law, and shall be reasonably satisfactory to Owner.

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

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

**17.2 Owner's Liability Insurance.**

**17.2.1** Owner shall procure and maintain from insurance companies or a Joint Power Agency authorized to do business in the state in which the Project is located such liability insurance as set forth in the Insurance Schedule, attached hereto as Exhibit "D", to protect Owner from claims which may arise from the performance of Owner's obligations under the Contract Documents or Owner's conduct during the course of the Project.

**17.3 Owner's Property Insurance.**

**17.3.1** Unless otherwise provided in the Contract Documents, Owner shall procure and maintain from insurance companies or a Joint Powers Agency authorized to do business in the state in which the Project is located, property insurance upon the entire Project to the full insurable value of the Project, including professional fees, overtime premiums and all other expenses incurred to replace or repair the insured property. The property insurance obtained by Owner shall include as additional insureds the interests of Owner, Design- Builder, Design Consultants and Subcontractors of any tier. Such insurance shall include but not be limited to the perils of fire and extended coverage, theft, vandalism, malicious mischief, collapse, flood, earthquake, debris removal and other perils or causes of loss as called for in the Contract Documents. The property insurance shall include physical loss or damage to the Work, including materials and equipment in transit, at the Site or at another location as may be indicated in Design-Builder's Application for Payment and approved by Owner. Owner is responsible for the payment of any deductibles under the insurance required by this Article

**17.3.2** Owner shall procure and maintain boiler and machinery insurance that will include the interests of Owner, Design-Builder, Design Consultants, and Subcontractors of any tier.

**17.3.3** No later than the date of delivery by Owner of the Construction Notice to Proceed, Owner shall provide Design-Builder with certificates evidencing that: (i) all Owner's insurance obligations required by the Contract Documents are in full force and in effect and will remain in effect until Design-Builder has completed all of the Work and has received final payment from Owner; and (ii) no insurance coverage will be canceled, renewal refused, or materially changed unless at least thirty (30) Calendar Days prior written notice is given to Design-Builder.

**17.3.4** Any loss covered under Owner's property insurance shall be adjusted with Owner and Design-Builder and made payable to both of them as trustees for the insureds as their interests may appear, subject to any applicable mortgage clause. All insurance proceeds received as a result of any loss will be placed in a separate account and distributed in accordance with such agreement as the interested parties may reach. Any disagreement concerning the distribution of any proceeds will be resolved in accordance with Article 13 hereof.

**17.3.5** Owner and Design-Builder waive against each other and Owner's separate contractors, Design Consultants, Subcontractors, agents and employees of each and all of them, all damages

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

**17.4 Bonds and Other Performance Security.** No later than ten (10) Calendar Days after delivery of the Construction Notice to Proceed, Design-Builder shall provide to Owner the following surety bonds in favor of Owner (the "**Bonds**") each in the aggregate amount of Five Million One Hundred Twenty-Three Thousand Six Hundred Thirty-Six Dollars (\$5,123,636), with respect to the costs of the performance of the Construction Portion of the Work. All of the premiums with respect to the Bonds shall be paid by Design-Builder. Owner hereby acknowledges and agrees that the respective Bonds are issued solely with respect to the performance and payment of the Construction Portion of the Work. At the request of Design-Builder, Owner will reasonably negotiate with Design-Builder and enter into an agreement that coordinates Owner's rights under and enforcement of the Bonds with other parties that are named in such bonds as requested by the issuer of the Bonds.

**17.4.1 Performance Bond.** To guarantee the faithful performance of the Construction Portion of the Work and to protect Owner if Design-Builder is in default in the performance of the Construction Portion of the Work, Design-Builder shall provide to Owner a faithful performance bond in the Bond Amount (the "**Performance Bond**"). Owner may, in its sole and absolute discretion, partially release or reduce a portion or portions of the Bond Amount of the Performance Bond as the Construction Portions of the Work are accepted by Owner provided that Design-Builder is not in default under this Agreement with respect to the performance of the Construction Portion of the Work and the total remaining security under the Performance Bond is not less than twenty-five percent (25%) of the Bond Amount. The Performance Bond shall be released at the end of the all applicable warranty periods with respect to the Construction Portion of the Work, provided that Design-Builder is not then in default under this Agreement with respect to the performance of the Construction Portion of the Work.

**17.4.2 Payment Bond.** To secure payment to Design-Builder's subcontractors, laborers, material men, and other persons furnishing labor, materials, or equipment for performance of the Construction Portion of the Work, Design-Builder shall provide Owner a payment bond in the Bond Amount (the "**Payment Bond**"). The Payment Bond may be released by written authorization of Owner after one (1) year following the completion of the Acceptance Test.

**17.4.3 Additional Requirements.** The surety for the Bonds shall have a current A.M. Best's rating of no less than A:VII and be authorized to do business in the State of California or otherwise allowed to place insurance through surplus line brokers under applicable provisions of the California Insurance Code or any federal law, and shall be reasonably satisfactory to Owner. As part of the obligation secured by the Bonds and in addition to the face amount of the Bonds, Design-Builder or its surety shall secure the costs and reasonable expenses and fees, including reasonable attorney's fees and costs, incurred by Owner in enforcing the obligations of this Agreement with respect to any default by Design-Builder in the performance of the Construction Portion of the Work.

## **Article 18**

### **Indemnification**

#### **18.1 Patent and Copyright Infringement.**

**18.1.1** Design-Builder shall defend any action or proceeding brought against Owner based on any claim that the Work, or any part thereof, or the operation or use of the Work or any part thereof, constitutes infringement of any United States patent or copyright, now or hereafter issued. Owner shall

give prompt written notice to Design-Builder of any such action or proceeding and will reasonably provide authority, information and cooperate in the defense of same. Design-Builder shall indemnify and hold harmless Owner from and against all damages and costs, including but not limited to attorneys' fees and expenses awarded against Owner or Design-Builder in any such action or proceeding. Design-Builder agrees to keep Owner informed of all developments in the defense of such actions.

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

**18.1.3** Sections 18.1.1 and 18.1.2 hereof shall not be applicable to any suit, claim or proceeding based on infringement or violation of a patent or copyright: (i) relating solely to a particular process or product of a particular manufacturer specified by Owner and not offered or recommended by Design-Builder to Owner; or (ii) arising from modifications to the Work by Owner or its agents. If the suit, claim or proceeding is based upon events set forth in the preceding sentence, Owner shall defend, indemnify and hold harmless Design-Builder to the same extent Design-Builder is obligated to defend, indemnify and hold harmless Owner in Section 18.1 hereof.

## **18.2 Tax Claim Indemnification.**

**18.2.1** If, in accordance with Owner's direction, an exemption for all or part of the Work is claimed for taxes, Owner shall indemnify, defend and hold harmless Design-Builder from and against any liability, penalty, interest, fine, tax assessment, attorneys' fees or other expenses or costs incurred by Design-Builder as a result of any action taken by Design-Builder in accordance with Owner's directive. Owner shall furnish Design-Builder with any applicable tax exemption certificates necessary to obtain such exemption, upon which Design-Builder may rely.

## **18.3 Payment Claim Indemnification.**

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

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

**18.4.1** Design-Builder, to the fullest extent permitted by law, shall indemnify, hold harmless and defend Owner, its officers, directors, agents and employees (collectively, "**Owner Parties**") from and against claims, losses, damages, liabilities, including attorneys' fees and expenses, for bodily injury, sickness or death, and property damage or destruction (other than to the Work itself) to the extent resulting from any third-party claims or demands based upon the negligent acts or omissions of Design-

Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable in connection with the performance of the Work except if, and to the extent that, such claims or demands arise from the negligence or willful or intentional acts or omissions of any Owner Party.

**18.4.2** If an employee of Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable has a claim against any Owner Party, Design-Builder's indemnity obligation set forth in Section 18.4.1 hereof shall not be limited by any limitation on the amount of damages, compensation or benefits payable by or for Design-Builder, Design Consultants, Subcontractors, or other entity under any employee benefit acts, including workers' compensation or disability acts.

**18.5 Owner's General Indemnification.**

**18.5.1** Owner, to the fullest extent permitted by law, shall indemnify, hold harmless and defend Design-Builder and any of Design-Builder's officers, directors, agents and employees (the "**Design-Builder Parties**"), from and against claims, losses, damages, liabilities, including attorneys' fees and expenses, for bodily injury, sickness or death, and property damage or destruction (other than to the Work itself) to the extent resulting from any third-party claims or demands based upon the negligent acts or omissions of Owner's separate contractors or anyone for whose acts any of them may be liable except if, and to the extent that, such claims or demands arise from the negligence or willful or intentional acts or omissions of any Design-Builder Parties.

**Article 19**

**Other Provisions**

**19.1 Assignment.**

**19.1.1** Neither Design-Builder nor Owner shall, without the written consent of the other, which shall not be unreasonably withheld, conditioned or delayed, assign, transfer or sublet any portion or part of the Work or the obligations required by the Contract Documents except as otherwise set forth in the Construction Documents; provided, however, that the consent of Owner to the assignment of the Contract Documents shall not be required in connection with the sale of substantially all of the assets of Design-Builder or the merger or conversion of Design-Builder in which Design-Builder is not the surviving entity.

**19.2 Successorship.**

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

**19.3 Governing Law.**

**19.3.1** The Agreement and all Contract Documents shall be governed by the laws of the state of California, without giving effect to its conflict of law principles. Venue shall be in the County of Monterey, California.

**19.4 Attorneys' Fees**

**19.4.1** In the event of any proceeding arising out of, or relating to, this Agreement or the Contract Documents, the prevailing party shall be entitled to recover from the losing party all of its costs and expenses incurred in connection with such proceeding, including court costs and reasonable

attorneys' fees, whether or not such proceeding is prosecuted to judgment.

**19.5 Severability.**

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

**19.6 No Waiver.**

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

**19.7 Headings.**

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

**19.8 Notice.**

**19.8.1** Whenever the Contract Documents require that notice be provided to the other party, notice will be deemed to have been validly given: (i) upon delivery in person to the individual intended to receive such notice; (ii) four (4) Calendar Days after being sent by registered or certified U. S. mail, postage prepaid to the address indicated in the Agreement, or (iii) one (1) Working Day after: (A) transmission by facsimile, by the time stated in a machine generated confirmation that notice was received at the facsimile number of the intended recipient; or (B) delivery to a commercial overnight courier for next Working Day delivery.

**19.9 Amendments.**

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

**19.10 Entire Agreement**

**19.10.1** The Contract Documents constitute the entire agreement between the parties hereto pertaining to the subject matter hereof, and are the final, complete and exclusive expression of the terms and conditions thereof. All prior or contemporaneous agreements, representations, negotiations and understandings of the parties hereto in connection with or related to the Project and the performance of the Work, oral or written, express or implied, are hereby superseded and merged herein.

**19.11 Prevailing Wage Project**

**19.11.1** This is a prevailing wage Project. Design-Builder will pay all wages in accordance with applicable prevailing wage laws including, without limitation, the sections of the California Labor Code set forth in Exhibit "I" attached hereto (the "**Prevailing Wage Laws**").

In executing and delivering this Agreement effective as of the Effective Date, Owner and Design-Builder each individually represents that it has the necessary financial resources to fulfill its obligations under this

Agreement, and each has the necessary corporate approvals to execute this Agreement, and perform the services described herein.

**OWNER:**

**DESIGN-BUILDER:**

**CITY OF PACIFIC GROVE**

**PERC WATER CORPORATION**

By: \_\_\_\_\_  
Thomas Frutchey

By: \_\_\_\_\_  
Brian Cullen

Title: City Manager

Title: President

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

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

Approved as to Form:

\_\_\_\_\_  
David Laredo, City Attorney

Approved as to Content:

\_\_\_\_\_



**SCOPE OF WORK**

**[TO BE INSERTED]**

**[ALSO TO BE ATTACHED ARE APPENDICES A, B & C FROM RFP]**

**DRAFT**

**INITIAL PROJECT SCHEDULE**

**[SEE ATTACHED]**

DRAFT

**CONTRACT PRICE/SCHEDULE OF VALUES/CONTINGENCY**

<b>PROJECT DEVELOPMENT AND DESIGN</b>	
<b>Task</b>	<b>Cost</b>
Engineering	\$800,000
Permitting	\$22,000
Other (Specify):	\$
<b>Subtotal Project Development and Design Costs</b>	<b>\$822,000</b>

<b>CONSTRUCTION</b>		
<b>Division</b>	<b>Title</b>	<b>Cost</b>
01A	General Requirements	\$1,144,000
01B	Engineering Services During Construction	\$364,000
02	Site Construction (including yard piping and valves –including 6" potable water line)	\$977,000
03	Concrete	\$355,000
04	Masonry (All Buildings)	\$45,000
05	Metals	Included
06	Wood and Plastic	Included
07	Thermal and Moisture Protection	Included
08	Doors and Windows	Included
09	Finishes	Included
10	Specialties (Sprinkler System Upgrades for Recycled Water)	\$75,000
11	Equipment	\$472,736
12	Furnishings	Included
13	Special Construction (including instrumentation and controls)	\$445,000
14	Conveying Systems	Included
15	Mechanical	\$726,000
16	Electrical	\$520,000
<b>Subtotal Construction Costs</b>		<b>\$5,123,636</b>

**Exhibit "C"**

<b>START-UP AND ACCEPTANCE TESTING</b>	
<b>Description</b>	<b>Cost</b>
Commissioning and Start-Up Activities	\$78,000
Acceptance Testing Activities	Included
<b>Subtotal Start-up and Acceptance Costs</b>	<b>\$78,000</b>

<b>OTHER DIRECT AND INDIRECT COSTS</b>	
<b>Description</b>	<b>Cost</b>
Performance Bond and Payment Bond	Included
Required Design-Build Period Insurance	Included
Letter of Credit	N/A
Other (Specify):	N/A
<b>Subtotal Other Direct and Indirect Costs</b>	<b>\$0</b>

<b>OPTIONAL ITEMS</b>	
<b>Description</b>	<b>Cost</b>
Remediation of Exterior Tanks & Coating	\$165,000
UV Disinfection	\$172,000
<b>Subtotal Optional Items</b>	<b>\$337,000</b>

**TOTAL FIXED DESIGN-BUILD PRICE: \$6,360,736**

**ASSUMPTIONS**

The Fixed Design-Build Price of \$6,360,736 is subject to the following assumptions:

1. There will be no Labor Compliance Consultant required in connection with the Project;
2. There will be no Scheduling Consultant required in connection with the Project;
3. The scope of the landscaping will be as set forth in the Scope of Work;
4. Owner's consultant will lead all permitting work required of Design-Builder and/or Owner;
5. The Project will not require the use of a bridge crane;
6. The landscaping will include Rainbird sprinkler heads and irrigation materials;
7. The Scope of Work includes replacing heads, valves, valve box lids and hose bibs;
8. Allowance of \$50,000 included to bring power to the Site;
9. Current paint on tanks is non-PCB;
10. Concrete Storage Tanks currently do not leak;
11. No assessment or remediation of existing contaminated soils or groundwater is included;
12. No groundwater anticipated during excavation;
13. No hard digs required;
14. No ripping or blasting is assumed or included;
15. Existing concrete tanks are structurally sound;
16. Excess spoils and direct to be stockpiled on the Site; and

**Exhibit "E"**

17. Existing Site materials are suitable for backfill.

### **SHARED CONTINGENCY**

The Fixed Design-Build Price above includes a Design/Builder Contingency of \$730,000 (the "**Contingency Amount**"). The application and use of the Contingency Amount will be controlled solely by Design-Builder during the performance of the Work. In connection with the delivery of the Final Payment Application, Design-Builder will include a reasonably detailed description of the dates and amounts of the Contingency Amount used in connection with the Work. To the extent there is a remaining balance of the Contingency Amount, Owner and Design-Builder will share such amount equally and the final payment due Design-Builder shall be adjusted accordingly.

### **SCHEDULE OF INSURANCE**

Design-Builder shall carry the following insurance coverages during the performance of the Work:

1. Commercial General Liability - \$1,000,000 Each Occurrence  
- \$2,000,000 Aggregate
2. Automobile Liability - \$1,000,000 Combined Single Limit
3. Umbrella Excess Liability - \$10,000,000 Each Occurrence and Aggregate
4. Workers Compensation - \$1,000,000 Each Accident
5. Professional Liability - \$3,000,000

**MITIGATION AND MONITORING PLAN**

**[TO BE ATTACHED]**

DRAFT

**PROJECT EQUIPMENT LIST**

**[TO BE INSERTED]**

DRAFT

**PERMITS SCHEDULE**

**[TO BE INSERTED]**

DRAFT



**CONCEPTUAL DRAWING AND P&ID**

**[TO BE ATTACHED]**

DRAFT

### **PREVAILING WAGE LABOR CODE PROVISIONS**

The following provisions are included in this Subcontract pursuant to California Labor Code Section 1775:

1771. Except for public works projects of one thousand dollars (\$1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works. This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

1775. (a) (1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars (\$200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

(2) (A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

- (i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
- (ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

- (B) (i) The penalty may not be less than forty dollars (\$40) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, unless the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
- (ii) The penalty may not be less than eighty dollars (\$80) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if the contractor or subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.
- (iii) The penalty may not be less than one hundred twenty dollars (\$120) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.

(C) If the amount due under this section is collected from the contractor or subcontractor, any outstanding wage claim under Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 against that contractor or subcontractor shall be satisfied before applying that amount to the penalty imposed on that contractor or subcontractor pursuant to this section.

(D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.

#### **Exhibit "J"**

(E) The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor or subcontractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

(b) If a worker employed by a subcontractor on a public works project is not paid the general prevailing rate of per diem wages by the subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

- (1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of this section and Sections 1771, 1776, 1777.5, 1813, and 1815.
- (2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.
- (3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.
- (4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

(c) The Division of Labor Standards Enforcement shall notify the contractor on a public works project within 15 days of the receipt by the Division of Labor Standards Enforcement of a complaint of the failure of a subcontractor on that public works project to pay workers the general prevailing rate of per diem wages.

1776. (a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

- (1) The information contained in the payroll record is true and correct.
- (2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

- (1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.
- (2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract and the Division of Labor Standards Enforcement of the Department of Industrial Relations.
- (3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public may not be given access to the records at the principal office of the contractor.

(c) Unless required to be furnished directly to the Labor Commissioner in accordance with paragraph (3) of subdivision (a) of Section 1771.4, the certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division. The payroll records may consist of printouts of payroll data that are maintained as computer records, if the printouts contain the same information as the forms provided by the division and the printouts are verified in the manner specified in subdivision (a).

(d) A contractor or subcontractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Except as provided in subdivision (f), any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body or the Division of Labor Standards Enforcement shall be marked or obliterated to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or the subcontractor performing the contract shall not be marked or obliterated. Any copy of records made available for inspection by, or furnished to, a multiemployer Taft-Hartley trust fund (29 U.S.C. Sec. 186(c)(5)) that requests the records for the purposes of allocating contributions to participants shall be marked or obliterated only to prevent disclosure of an individual's full social security number, but shall provide the last four digits of the social security number. Any copy of records made available for inspection by, or furnished to, a joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (29 U.S.C. Sec. 175a) shall be marked or obliterated only to prevent disclosure of an individual's social security number.

(f) (1) Notwithstanding any other provision of law, agencies that are included in the Joint Enforcement Strike Force on the Underground Economy established pursuant to Section 329 of the Unemployment Insurance Code and other law enforcement agencies investigating violations of law shall, upon request, be provided nonredacted copies of certified payroll records. Any copies of records or certified payroll made available for inspection and furnished upon request to the public by an agency included in the Joint Enforcement Strike Force on the Underground Economy or to a law enforcement agency investigating a violation of law shall be marked or redacted to prevent disclosure of an individual's name, address, and social security number.

(2) An employer shall not be liable for damages in a civil action for any reasonable act or omission taken in good faith in compliance with this subdivision.

(g) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city, and county, and shall, within five working days, provide a notice of a change of location and address.

(h) The contractor or subcontractor has 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit one hundred dollars (\$100) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.

(i) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section.

(j) The director shall adopt rules consistent with the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) and the Information Practices Act of 1977 (Title 1.8 (commencing with Section 1798) of Part 4 of Division 3 of the Civil Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

1777.5. (a) Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

(b) Every apprentice employed upon public works shall be paid the prevailing rate of per diem wages for apprentices in the trade to which he or she is registered and shall be employed only at the work of the craft or trade to which he or she is registered.

(c) Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards that have been approved by the Chief of the Division of Apprenticeship Standards and who are parties to written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3 are eligible to be employed at the apprentice wage rate on public works. The employment and training of each apprentice shall be in accordance with either of the following:

- (1) The apprenticeship standards and apprentice agreements under which he or she is training.
- (2) The rules and regulations of the California Apprenticeship Council.

(d) When the contractor to whom the contract is awarded by the state or any political subdivision, in performing any of the work under the contract, employs workers in any apprenticeable craft or trade, the contractor shall employ apprentices in at least the ratio set forth in this section and may apply to any apprenticeship program in the craft or trade that can provide apprentices to the site of the public work for a certificate approving the contractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, the decision of the apprenticeship program to approve or deny a certificate shall be subject to review by the Administrator of Apprenticeship. The apprenticeship program or programs, upon approving the contractor, shall arrange for the dispatch of apprentices to the contractor. A contractor covered by an apprenticeship program's standards shall not be required to submit any additional application in order to include additional public works contracts under that program. "Apprenticeable craft or trade," as used in this section, means a craft or trade

determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the California Apprenticeship Council. As used in this section, "contractor" includes any subcontractor under a contractor who performs any public works not excluded by subdivision (o).

(e) Prior to commencing work on a contract for public works, every contractor shall submit contract award information to an applicable apprenticeship program that can supply apprentices to the site of the public work. The information submitted shall include an estimate of journeyman hours to be performed under the contract, the number of apprentices proposed to be employed, and the approximate dates the apprentices would be employed. A copy of this information shall also be submitted to the awarding body if requested by the awarding body. Within 60 days after concluding work on the contract, each contractor and subcontractor shall submit to the awarding body, if requested, and to the apprenticeship program a verified statement of the journeyman and apprentice hours performed on the contract. The information under this subdivision shall be public. The apprenticeship programs shall retain this information for 12 months.

(f) The apprenticeship program that can supply apprentices to the area of the site of the public work shall ensure equal employment and affirmative action in apprenticeship for women and minorities.

(g) The ratio of work performed by apprentices to journeymen employed in a particular craft or trade on the public work may be no higher than the ratio stipulated in the apprenticeship standards under which the apprenticeship program operates where the contractor agrees to be bound by those standards, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentice work for every five hours of journeyman work.

(h) This ratio of apprentice work to journeyman work shall apply during any day or portion of a day when any journeyman is employed at the jobsite and shall be computed on the basis of the hours worked during the day by journeymen so employed. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week shall not be used to calculate the ratio. The contractor shall employ apprentices for the number of hours computed as above before the end of the contract or, in the case of a subcontractor, before the end of the subcontract. However, the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the jobsite. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Administrator of Apprenticeship, upon application of an apprenticeship program, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

(i) A contractor covered by this section who has agreed to be covered by an apprenticeship program's standards upon the issuance of the approval certificate, or who has been previously approved for an apprenticeship program in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the applicable apprenticeship standards, but in no event less than the 1 to 5 ratio required by subdivision (g).

(j) Upon proper showing by a contractor that he or she employs apprentices in a particular craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by journeymen, the Administrator of Apprenticeship may grant a certificate exempting the contractor from the 1 to 5 hourly ratio, as set forth in this section for that craft or trade.

(k) An apprenticeship program has the discretion to grant to a participating contractor or contractor association a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting the contractor from the 1 to 5 ratio set forth in this section when it finds that any one of the following conditions is met:

- (1) Unemployment for the previous three-month period in the area exceeds an average of 15 percent.
- (2) The number of apprentices in training in the area exceeds a ratio of 1 to 5.
- (3) There is a showing that the apprenticeable craft or trade is replacing at least one thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis or on a local basis.
- (4) Assignment of an apprentice to any work performed under a public works contract would create a condition that would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large, or the specific task to which the apprentice is to be assigned is of a nature that training cannot be provided by a journeyman.

(l) When an exemption is granted pursuant to subdivision (k) to an organization that represents contractors in a specific trade from the 1 to 5 ratio on a local or statewide basis, the member contractors shall not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

(m) (1) A contractor to whom a contract is awarded, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade shall contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site. A contractor may take as a credit for payments to the council any amounts paid by the contractor to an approved apprenticeship program that can supply apprentices to the site of the public works project. The contractor may add the amount of the contributions in computing his or her bid for the contract.

(2) At the conclusion of the 2002-03 fiscal year and each fiscal year thereafter, the California Apprenticeship Council shall distribute training contributions received by the council under this subdivision, less the expenses of the Department of Industrial Relations for administering this subdivision, by making grants to approved apprenticeship programs for the purpose of training apprentices. The funds shall be distributed as follows:

- (A) If there is an approved multiemployer apprenticeship program serving the same craft or trade and geographic area for which the training contributions were made to the council, a grant to that program shall be made.
- (B) If there are two or more approved multiemployer apprenticeship programs serving the same craft or trade and county for which the training contributions were made to the council, the grant shall be divided among those programs based on the number of apprentices from that county registered in each program.
- (C) All training contributions not distributed under subparagraphs (A) and (B) shall be used to defray the future expenses of the Department of Industrial Relations for the administration and enforcement of apprenticeship standards and requirements under this code.

(3) All training contributions received pursuant to this subdivision shall be deposited in the Apprenticeship Training Contribution Fund, which is hereby created in the State Treasury. Upon appropriation by the Legislature, all moneys in the Apprenticeship Training Contribution Fund shall be used for the purpose of carrying out this subdivision and to pay the expenses of the Department of Industrial Relations.

(n) The body awarding the contract shall cause to be inserted in the contract stipulations to

effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

(o) This section does not apply to contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars (\$30,000).

(p) An awarding body that implements an approved labor compliance program in accordance with subdivision (b) of Section 1771.5 may, with the approval of the director, assist in the enforcement of this section under the terms and conditions prescribed by the director.

1813. The contractor or subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars (\$25) for each worker employed in the execution of the contract by the respective contractor or subcontractor for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted in the contract a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the Division of Labor Standards Enforcement.

1815. Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day at not less than 1 1/2 times the basic rate of pay.

