



REQUEST FOR PROPOSALS DESIGN BUILD SERVICES

Design Build Agreement

**Written by: DISTRICT OF COLUMBIA DISTRICT
DEPARTMENT OF TRANSPORTATION**

November 4, 2016

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1 Introduction

This Design-Build Agreement (DBA) is entered into with the Prime Contractor and between the District of Columbia, Office of Contracting and Procurement, by and through the District Department of Energy and Environment (hereinafter referred to as, “the District” or “DOEE”) and the Prime Contractor (hereinafter, “Design-Build [DB] Contractor”), (collectively referred to as “the parties”), hereto and the following facts:

The purpose of this Project is to design and build low impact development (LID) stormwater retrofits at two (2) locations. The first site aims to capture and treat for maximum stormwater and to add aesthetic value to the 2000 block of Hamlin Street, NE. The project for the 2000 block is to be located on the southeastern half of the block. The second site is within the U.S. National Arboretum (USNA), along the western side of Hickey Lane NE and just north of R Street NE entrance.

The Contract is a firm fixed price Design-Build Agreement obligating the DB Contractor to perform all Work necessary to complete the Project by the deadlines specified herein, for the Contract Price, subject only to specified exceptions. To allow the District to budget for the Project and to reduce the risk of cost overruns, the Contract includes restrictions affecting the DB Contractor’s ability to make Claims for an increase to the Contract Price or an extension of the Completion Deadline(s). The DB Contractor agrees to assume such responsibilities and risks and has reflected the assumption of such responsibilities and risks in the Contract Price.

If the DB Contractor fails to complete the Project within the time limitations set forth in the Contract Documents, then the District will suffer substantial losses and damages. The Contract Documents therefore provide that the DB Contractor shall pay the District substantial Liquidated Damages if such completion is delayed.

It is the DB Contractor’s sole responsibility to perform their own due diligence and further investigations as may be necessary. The District and the DB Contractor both agree that the DB Contractor assumes full responsibility and liability with respect to the design of the Project, and the District and the DB Contractor both agree that the DB Contractor shall indemnify and hold harmless the District and others with respect to any defects in the Project. NOW, THEREFORE, in consideration of the sums to be paid to the Design-Build Contractor by the District, the foregoing premises and the covenants and agreements set forth herein, the parties hereby agree as follows.

2 Contract Components; Interpretation of Contract Documents

2.1 Contract Documents

The term “Contract Documents” shall mean the solicitation document DOC347388 that was issued on PASS Ariba e-Sourcing and that will be agreed upon with the DB Contractor before it turns into a contract.

For the purposes of this Section 3.1, modifications mean (1) a written amendment to the Solicitation document DOC347388, (2) a change to the contract, (3) a Change Order, or (4) a Force Account Change Order, or (5) a Directive Letter.

2.2 Order of Precedence

Please refer to Solicitation Document DOC347388.

2.3 Reference Information Documents

The documents included in the Reference Information Documents (RIDs) are for information only and are not to be relied upon by the DB Contractor. Cross-references in the Contract Documents to the RIDs do not incorporate the RIDs or portions thereof as Contract Documents or requirements.

2.4 Interpretations

In the Contract Documents:

- A. The singular includes the plural and vice versa.
- B. References to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statute or regulation referred to as of the Proposal Due Date.
- C. Words such as “herein,” “hereof,” and “hereunder” refer to the entire document in which they are contained and not to any particular provision or Section.
- D. Words not otherwise defined that have well-known technical or construction industry meanings are used in accordance with such recognized meanings and are considered terms of art.
- E. References to Persons include their respective permitted successors and assigns and, in the case of Governmental Persons, Persons succeeding to their respective functions and capacities.
- F. Words of any gender used herein include each other gender.
- G. Words which are capitalized have the meaning as defined in the Contract Documents.

Unless otherwise specified, lists contained in the Contract Documents defining the Project or the Work shall not be deemed all-inclusive. The DB Contractor acknowledges and agrees that it had the opportunity and obligation, before submission of its Proposal, to review the Contract Documents and to bring to the District’s attention any conflicts or ambiguities contained therein. The DB Contractor further acknowledges and agrees that it has independently reviewed the Contract Documents with legal counsel and that it has the requisite experience and sophistication to understand, interpret, and agree to the particular language of the Contract Documents. Accordingly, in the event of an ambiguity in or Dispute regarding the interpretation of the Contract Documents, the Contract Documents shall not be construed against the Person that prepared them, and instead other rules of interpretation shall be used.

2.5 Omission of Details; Clarification by the District

The DB Contractor shall not take advantage of any apparent Error in the Contract. Should it appear that the Work to be done or any matter relative thereto is not sufficiently detailed or explained in the Contract Documents, the DB Contractor shall apply to the District in writing for such further written explanations as may be necessary and shall conform to the explanation provided. The DB Contractor shall promptly notify the District in writing of all Errors that it may discover in the Contract Documents and shall obtain specific instructions in writing regarding any such Error before proceeding with the Work affected thereby.

DB Contractor shall perform all work and services that are reasonably inferable from the Contract Documents. The term “reasonably inferable” takes into consideration the understanding of the parties hereto that not every detail or condition will be shown in the Contract Documents. The DB Contractor shall not be entitled to an increase in the Contract Price (as described in Section 13.1, Contract Price, of the DB Agreement) due to the absence of any detail, condition, or specification the DB Contractor may require or for any construction which

may be found necessary as the Work progresses in order to complete the construction of the Project. If an item or system is either shown or specified, all material and equipment required for the proper installation of such item or system and needed to make a complete functioning and operating installation shall be provided whether or not detailed or specified, omitting only such parts as are specifically excepted by the District.

2.6 District of Columbia and Federal Requirements

The DB Contractor must comply with all applicable District of Columbia and Federal Requirements, including the requirements in Exhibit C and Title I, Part B of the Fair Criminal Record Screening Act, D.C. Code §§ 32-1341 – 32-1345. Notwithstanding anything to the contrary contained herein, in the event of any conflict between any District of Columbia requirements, Federal Requirements, or other requirements of the Contract Documents, the Federal Requirements shall prevail, take precedence, and be in force over and against any such conflicting provisions, unless the District of Columbia requirements are more stringent as allowed by federal law.

2.6.1 Contract Assurances

The DB Contractor, subconsultant, or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Contract. The DB Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of this Contract. Further, the DB Contractor shall comply with the requirements of D.C. Code §2-1401.01 et seq. Failure by the DB Contractor to carry out these requirements is a material breach of this Contract, which may result in the termination of this Contract or such other remedy as the District deems appropriate.

3 Obligations of Contract

3.1 Performance as Directed

At all times during the term hereof, including during the course of and notwithstanding the existence of any Dispute, the DB Contractor shall perform in a diligent manner and without delay; shall abide by the District's decision or order; and shall comply with all applicable provisions of the Contract.

3.2 General Obligations of DB Contractor

The DB Contractor, in addition to performing all other requirements of the Contract Documents, shall:

- A. Furnish all design and other services; provide all materials, equipment, and labor; and undertake all efforts necessary or appropriate (excluding only those services, materials and efforts that the Contract Documents specify will be undertaken by other Persons): (i) to construct the Project and maintain it during construction in strict accordance with the requirements of the Contract Documents, including the Contract Schedule, all legal requirements, all Governmental Approvals, the Project Management Plan, Applicable Standards, and all other applicable safety, environmental, licensing and other requirements, taking into account the ROW drawings and other constraints affecting the Project, so as to achieve the Completion Deadlines; and (ii) otherwise to do everything required by and in strict accordance with the Contract Documents.
- B. At all times, provide a Design Build Manager, approved by the District, who: (i) will have full responsibility for the prosecution of the Work; (ii) will act as agent and be a single point of contact in all matters on behalf of the DB Contractor; (iii) will be present (or his approved designee will be present) at the Site at all times that Work is performed; and (iv) will have authority to bind the DB Contractor on all matters relating

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to the Project. Either the DB Contractor Project Manager or his designee will attend all meetings related to the Project.

- C. Obtain all Governmental Compliance Approvals (other than those agreed to be obtained by the District in other areas of the Contract Documents).
- D. Comply with all conditions imposed by and undertake all actions required by and all actions necessary to maintain in full force and effect all Governmental Approvals, including implementation of all environmental commitments and mitigation measures required by the Contract Documents, except to the extent that such responsibility is expressly assigned in the Contract Documents to another Person.
- E. Provide such assistance as requested by the District in dealing with any Person and/or in prosecuting and defending lawsuits in any and all matters relating to the Project, which may include providing information and reports regarding the Project, executing declarations, and attending meetings and hearings, but which shall in no event be deemed to require the DB Contractor to provide legal services.
- F. Comply with all requirements of all applicable legal requirements, including, without limitation: (i) the environmental laws, including all environmental commitments, mitigation and monitoring measures required for the Project, including those set forth in Section 7, Environmental, and requirements regarding the handling, generation, treatment, storage, transportation and disposal of Hazardous Materials; (ii) the Americans with Disabilities Act of 1990, 42 U.S. Code (USC) § 12101 et seq., including any amendments, as well as all applicable regulations and guidelines; and (iii) the Federal Requirements.
- G. Comply with all Applicable Standards, including, without limitation, those revised to ensure their enforceability.
- H. Cooperate and coordinate with the District and Governmental Persons with jurisdiction over the Project in the review and oversight of the Project and other matters relating to the Work.
- I. Make payments to Third Parties required by the Contract Documents, if any, including but not limited to, payments to Utility Companies.
- J. Supervise and be responsible to the District for acts and omissions of all DB Contractor-Related Entities, as though the DB Contractor directly employed all such Persons.
- K. Assure compliance with Title VI of the Civil Rights Act of 1964.
- L. Assure compliance with the Americans with Disabilities Act of 1990.
- M. Assure compliance with Section 504 of the Rehabilitation Act of 1973.
- N. Assure compliance with Office of Civil Rights and Federal Requirements regarding: Equal Employment Opportunities, Disadvantaged Business Enterprises, On-the-Job Training, Apprenticeships, and work force development.

3.3 Representations and Covenants

The DB Contractor represents and covenants for the benefit of the District as follows:

3.3.1 Evaluation of Constraints

The DB Contractor has evaluated the constraints affecting delivery of the Project, including, but not limited to the available right of way and the conditions of any Environmental Approvals, and has grounds for agreeing that the Project can be delivered within such constraints, within the time specified in Exhibit B, and within the Contract Price.

3.3.2 Review of Site Information

DB Contractor has reviewed the information provided by the District in the Solicitation; inspected and examined the Site and surrounding locations; and undertaken other appropriate activities sufficient to familiarize itself with surface and subsurface conditions affecting the Project. Any failure to do so will not relieve it from responsibility for successfully performing the Work without additional expense to the District. As a result of such review, inspection, examination, and other activities, the DB Contractor is familiar with and accepts the physical requirements of the Work. Before beginning any Work on a particular aspect of the Project, the DB Contractor shall verify all governing dimensions and conditions at the Site and shall examine all adjoining work that may have an impact on such Work. The DB Contractor shall be responsible for ensuring that the Design Documents and Construction Documents accurately depict all governing and adjoining dimensions and conditions.

The DB Contractor warrants, represents, covenants, and agrees to call to the District's attention anything of any nature in any drawings, specifications, plans, sketches, instructions, information, requirements, procedures, and other data supplied to the DB Contractor (by the District or any other party) which it regards in its opinion as unsuitable, improper, or inaccurate in connection with the purposes for which such document or data is furnished. Nothing shall excuse or detract from the DB Contractor's responsibilities or obligations hereunder in a case where such document or data is furnished unless the DB Contractor advises the District in writing that in its opinion such document or data and any requests made therein for action are unsuitable, improper, or inaccurate and the District confirms in writing that it wishes the DB Contractor to proceed in accordance with the data as originally given.

3.3.3 Governmental Approvals

If any Governmental Approvals required to be obtained by the DB Contractor must formally be issued in the name of the District, the DB Contractor shall undertake all efforts to obtain such approvals, with the District's reasonable cooperation with the DB Contractor, including execution and delivery of appropriate applications and other documentation. The DB Contractor shall assist the District in obtaining any Governmental Approvals that the District may be obligated to obtain, including providing information requested by the District and participating in meetings regarding such approvals.

3.3.4 Progression of Work

The DB Contractor shall at all times schedule, direct and complete its Work in order to provide an orderly progression of the Work to achieve Substantial Completion, Final Completion, and Final Acceptance by the applicable Completion Deadlines and in accordance with the Approved Contract Schedules, including furnishing such employees, materials, facilities, and equipment and working such hours (including extra shifts, overtime operations, Sundays and Holidays, as approved by DOEE) as may be necessary to achieve such goals, all at the DB Contractor's own expense, except as otherwise specifically provided in Section 14.

3.3.5 DB Contractor/Employee Performance Requirements

The DB Contractor and its internal design team or design Subcontractor(s) have maintained, and throughout the term of the Contract and its design Subcontract(s) shall maintain, all required authority, license status, professional ability, skills, and capacity to perform the Work and shall perform them in strict accordance with the requirements of the Contract Documents. If the District determines in its sole discretion that any Person employed by the DB Contractor or by any Subcontractor is not performing the Work in strict accordance with the Contract Documents, the District has the authority to require the DB Contractor to replace any DB Contractor's representative, including staff members, who is not performing to the satisfaction of the District.

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At the written request of the District, such Person shall not be re-employed on the Project without the prior written Approval of the District. If such Person is not replaced with skilled and experienced personnel for the proper performance of the Work, then the District may, in its sole discretion, take any appropriate and available contract remedy by delivery of written notice. Such action shall in no way relieve the DB Contractor of any obligation contained in the Contract Documents or entitle the DB Contractor to a Change Order. Once compliance is achieved, the

DB Contractor shall be entitled to and shall promptly resume the Work.

DB Contractor shall remove or cause to be removed from any Project site any employee of DB Contractor or of any Subcontractor or supplier at any tier upon the reasonable request of the District if, in the District's opinion, such employee has engaged in inappropriate, offensive, vulgar, or disruptive behavior or speech, including, without limitation, lewd or sexually harassing behavior or speech. DB Contractor shall make its Project employees at any Project site aware of this provision and shall cause all Subcontractors and suppliers with employees at any Project site to make their employees aware of this provision.

3.3.6 Design and Engineering Personnel

Refer to Key Personnel under Section L.19 on the Solicitation Document DOC347388.

3.3.7 Organization

The DB Contractor is duly organized and validly existing under the laws of the District of Columbia with all requisite power to own its properties and assets and carry on its business as now conducted or proposed to be conducted. The DB Contractor [and its joint venture members] is [are] duly qualified to do business and are in good standing in the District of Columbia and will remain in good standing throughout the term of the Contract and for as long thereafter as any obligations remain outstanding under the Contract Documents.

3.3.8 Authorization

The execution, delivery, and performance of the Contract have been duly authorized by all necessary actions of the DB Contractor and, if applicable, the DB Contractor's members and/or Major Participants and will not result in a breach or a default under the organizational documents of any such Person or any indenture, loan, credit agreement, or other material agreement or instrument to which any such Person is a party or by which its properties and assets may be bound or affected.

3.3.9 Legal, Valid, and Binding Obligation

The Contract constitutes the legal, valid, and binding obligation of the DB Contractor and, if applicable, of each member of the DB Contractor.

3.3.10 False or Fraudulent Statements and Claims

The DB Contractor recognizes that the requirements of the Program Fraud Civil Remedies Act of 1986, 31 USC § 3801 et seq., "Program Fraud Civil Remedies." Accordingly, by signing the Contract, the DB Contractor certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, or it may make pertaining to the Contract. In addition to other penalties that may be applicable, the DB Contractor acknowledges that if it makes a false, fictitious, or fraudulent Claim, statement, submission, or certification, the District and the federal government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986, on the DB Contractor to the extent the federal government deems appropriate.

4 Information Supplied to DB Contractor; Responsibility for Design

Disclaimer

4.1 Information Supplied

The District has made available to the DB Contractor information that is described in the Contract Documents as RIDs regarding the Project.

4.2 Responsibility for Design

The DB Contractor agrees that it has full responsibility for the design of the Project and that the DB Contractor shall furnish the design of the Project, regardless of the fact that certain conceptual design work occurred and was provided to the DB Contractor prior to the date of execution of the Contract. The DB Contractor specifically acknowledges and agrees that:

- A. The DB Contractor is not entitled to rely on and has not relied on: (i) the RIDs; or (ii) any other documents or information provided by the District, including the Conceptual Design Plans, unless specifically permitted in the Contract Documents.
- B. The DB Contractor's Warranties and indemnities hereunder cover any Errors in the Project even though they may be related to Errors in the RIDs or Conceptual Design.
- C. The Engineer of Record shall be responsible for all aspects of the design, and shall ensure that the design conforms to the Contract – regardless of who performs the Work.

4.3 Disclaimer

4.3.1 No Liability Regarding Reference Information Documents

DOEE does not represent or warrant that the information contained in the Solicitation, is either complete or accurate or that such information conforms to the requirements of the Contract Documents.

The DB Contractor understands and agrees that the District shall not be responsible or liable in any respect for any loss, damage, cost or expense whatsoever suffered by the DB Contractor or any Related Entity by reason of any use of any information contained in the Conceptual Design or RIDs or any action or forbearance in reliance thereon, except to the extent that the Contract Documents provide that the DB Contractor shall be entitled to an increase in the Contract Price and/or extension of Contract Time with respect to such matter. The DB Contractor further acknowledges and agrees that: (i) if and to the extent the DB Contractor or anyone on the DB Contractor's behalf uses any of said information in any way, such use is made on the basis that the DB Contractor, not the District, has approved and is responsible for said information; and (ii) the DB Contractor is capable of conducting and obligated hereunder to conduct any and all studies, analyses and investigations as it deems advisable to change, recreate, verify or supplement said information, and that any use of said information is entirely at the DB Contractor's own risk and at its own discretion.

Notwithstanding anything in the Contract Documents to the contrary, no field explanations or interpretations provided by DOEE at any meetings and no comments or approvals by DOEE on Design Documents or Released for Construction Documents shall be deemed, construed, or interpreted to: (a) amend, supersede, or alter the terms, requirements, limitations, or meaning of any Contract Document; or (b) release or relieve the DB

Contractor from full responsibility for the design of the Project in strict accordance with the Contract Documents.

4.4 Professional Licensing Laws

The District will not contract for, pay for, or receive any design services that are in violation of any professional licensing laws; and by execution of the Contract, this is acknowledged by the DB Contractor. The parties agree that the DB Contractor is fully responsible for furnishing the design of the Project and will provide the design services required by the Contract Documents. Any references in the Contract Documents to the DB Contractor’s responsibilities or obligations to “perform” the design portions of the Work, that are required to be performed by licensed design professionals, shall be deemed to mean that the DB Contractor shall “furnish” the design for the Project. The terms and provisions of this Section 5.4 shall control and supersede every other provision of the Contract Documents.

5 Time Within Which Project Shall be Completed; Scheduling

5.1 Time is of the Essence

For this Contract, the DB Contractor shall consider that time is of the essence for the delivery of this Project. Work must be completed on the agreed due date from the DOC347388 Solicitation PDF document.

5.2 Notice to Proceed

The DB Contractor shall begin performance of the Work as directed and described in the Notice to Proceed (NTP) issued by the District. NTP will be issued following execution of the Contract. The DB Contractor shall proceed with the Work and shall not receive its first monthly progress payment until it has submitted an Initial Baseline Schedule that is acceptable to the District.

5.3 Completion Deadlines

5.3.1 Substantial Completion Deadline

The DB Contractor shall achieve all work within the time of the Period of Performance under Section F of DOC347388 Solicitation PDF document.

5.3.2 No Time Extensions

Except as otherwise specifically provided in Section 14, the District shall have no obligation to extend any Completion Deadlines, and the DB Contractor shall not be relieved of its obligation to comply with the Contract Schedule and the applicable Completion Deadlines for any reason.

5.4 Contract Schedules

The DB Contractor shall deliver the Work in accordance with the Approved Contract Schedules, as described in Volume II, Book II, Section 26. Such schedules shall also be the basis for calculating the amount of monthly progress payments to be made to the DB Contractor.

5.5 Recovery Schedule

If a Recovery Schedule would be required in order to meet a Completion Deadline due to an event that entitles the DB Contractor to a Change Order as described in Section 14, the District shall have the right in its sole discretion to decide whether to allow a time extension with no extended overhead or other delay or disruption damages payable, except as provided in Section 15, or to require implementation of the Recovery Schedule without such time extension.

In such an event, the DB Contractor shall submit to the District at least two alternative Change Order forms, one of which shall include a Recovery Schedule and show the proposed Acceleration Costs associated with the Recovery Schedule, and the other which shall provide for an extension of the Completion Deadline without any increase in the Contract Price except as provided in Section 15. If the District elects to implement the Recovery Schedule in lieu of a time extension, the District shall issue a Change Order increasing the Contract Price to account for additional Acceleration Costs, if any. If it is not feasible to recover to the original Completion Deadline, or if DB Contractor believes that the costs associated with such a recovery are prohibitive, then the DB Contractor shall recommend a date to be shown in the time extension Change Order form.

5.6 Prerequisites for Start of Construction

The DB Contractor shall not start construction (or resume construction following any suspension) of any portion of the Project until all of the following events have been fully satisfied with respect to the Work proposed to be constructed:

- A. The District has issued NTP.
- B. All DOEE and other Governmental Agency Approvals and environmental requirements necessary for construction of such portion of the Project have been obtained, and all conditions of such Approvals that are a prerequisite to starting such construction have been performed.
- C. DB Contractor has issued Released for Construction plans.
- D. All insurance policies and bonds required to be delivered to the District hereunder have been submitted to the District as applicable and remain in full force and effect.
- E. All necessary rights of access for such portion of the Project have been obtained.
- F. Any additional conditions for construction set forth in the Contract Documents have been met.

6 Control of Work

6.1 Control and Coordination of Work

The DB Contractor shall be solely responsible for and have control over all aspects of the Work, including but not limited to construction means, methods, techniques, sequences, procedures, and site safety and shall be solely responsible for coordinating all portions of the Work, subject to all requirements of the Contract Documents.

6.2 Safety

The DB Contractor shall be solely responsible for the safety of and shall provide protection to prevent damage, injury, or loss to all persons on the Site or who would reasonably be expected to be affected by the Work,

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including individuals performing the Work, employees of the District and its consultants, visitors to the Site and members of the public who may be affected by the Work. The DB Contractor shall have a Safety Manager stationed at the Project for the duration of construction activities. The DB Contractor shall at all times comply with its safety program. The DB Contractor shall immediately notify the District if the DB Contractor believes that any Contract requirement creates a safety issue.

Regardless of the District's authority to suspend the work by written order as set forth in Section 16.2.A, the District shall have no obligation to issue such order. The failure to issue such order shall not create any liability of the District, and the DB Contractor shall remain solely responsible for safety.

Except as otherwise expressly provided in the Contract Documents, the DB Contractor is authorized to refuse admission either to the premises or to the working space covered by the Contract to any person whose admission is not specifically authorized in writing by the District.

6.3 Process to be Followed for Discovery of Certain Site Conditions

6.3.1 Notification to the District

If the DB Contractor becomes aware of: (i) any onsite material that the DB Contractor believes may contain previously unidentified Hazardous Materials required to be removed or treated; (ii) any human remains, artifacts, and/or other items of historical, archaeological, or geological significance within the ROW; or (iii) any Differing Site Conditions, as a condition precedent to the DB Contractor's right to a Change Order, the DB Contractor shall immediately notify the District thereof by telephone or in person, to be followed by written notification as soon as practicable. The DB Contractor shall immediately stop work and secure the area. Operations within 50 feet of the area shall be temporarily suspended and shall not be resumed at that location unless and until authorized by the District. In such event, the District will review the location within two (2) Business Days of receipt of notification and will advise the DB Contractor at that time whether to resume Work or whether further investigation is required. Any delay resulting from the District reviewing the location up to two (2) Business Days shall not be considered a District-caused delay. The DB Contractor shall be entitled to payment for removal and disposal of certain Hazardous Materials, as provided in Section 15.9. This Section does not entitle the DB Contractor to a Change Order except as expressly provided by the Contract.

6.3.2 Further Investigation

The DB Contractor shall promptly conduct such further investigation with respect to Section 7.3.1 as the District deems appropriate. Within five (5) Business Days after its initial notice to the District, the DB Contractor shall advise the District of any action recommended to be taken regarding the situation. If Hazardous Materials are involved, the notice shall describe the type of Remediation Work, if any, which the DB Contractor proposes to undertake with respect thereto. If human remains, artifacts, or paleontological, historical, geological, cultural, or biological resources are present, the notice shall advise the District as to what course of action the DB Contractor intends to take with respect thereto and whether the location must be fenced off or whether Work can resume. The District then will either approve, or require modification of, the DB Contractor's proposed actions. Any additional Governmental Approvals that may become required will be performed in accordance with Section 4.3.3.

6.3.3 Recommence Work

The District shall have the right to require the DB Contractor to resume Work in the area at any time, even though an investigation may still be ongoing (so long as such Work is not in violation of any legal requirements or Governmental Approvals). The DB Contractor shall promptly resume Work in the area upon receipt of

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notification from the District to do so. On resuming Work, the DB Contractor shall follow all applicable procedures contained in the Contract Documents and all other legal requirements with respect to such Work, consistent with the District's determination or preliminary determination regarding the nature of the material, resources, or species.

6.3.4 Obligation to Minimize Impacts

The DB Contractor shall ensure that all of its activities and the activities of all DB Contractor-Related Entities are undertaken in a manner that will minimize the effect on surrounding property and the public to the maximum extent practicable.

6.4 Quality Management

6.4.1 DB Contractor Quality Management

The DB Contractor shall perform the quality management necessary to comply with its obligations under the Contract Documents.

6.4.2 Oversight, Audit, Inspection, and Testing by the District and Others

All materials and each part or detail of the Work shall also be subject to oversight, audit, and testing by the District and other Persons designated by the District. When any third party, including a Utility Company, railroad company, unit of government, or political subdivision, is to accept or pay for a portion of the cost of the Work, its respective representatives have the right to oversee, audit, inspect, and test the Work to the extent such Work is related to such third party. Such oversight, audit, inspection, and/or testing does not make such Person a party to the Contract, nor will it change the rights of the parties hereto. The

DB Contractor hereby consents to such oversight, inspection, and testing by the District and other Persons. Upon request from the District, the DB Contractor shall furnish information to such Persons as are designated in such request and shall permit such Persons access to the Site and all parts of the Work.

6.4.3 Obligation to Uncover Finished Work

At all times before Final Acceptance, the DB Contractor shall remove or uncover such portions of the finished construction Work as directed by the District. After examination by the District, the DB Contractor shall restore the Work to the standard required by the Contract Documents. If the Work exposed or examined is not in conformance with the requirements of the Contract Documents, then the cost of uncovering, removing and restoring the Work or making good the parts removed and recovery of any delay to the Critical Path occasioned thereby shall be at the DB Contractor's expense. If Work exposed or examined under this Section 7.4.3 is in conformance with the requirements of the Contract Documents, then the cost of uncovering, removing and restoring the Work shall be paid in accordance with Section 15, and any delay in the Critical Path from uncovering, removing and restoring Work shall be the District's responsibility. Refer to Section 7.6 for provisions regarding payments owing by the DB Contractor to the District, if the District agrees (in its sole discretion) to accept certain Nonconforming Work.

6.5 Effect of Oversight, Spot Checks, Assessment, Tests, Acceptances, and Approvals

6.5.1 Oversight and Acceptance

The DB Contractor shall not be relieved of its obligation to perform the Work in strict accordance with the Contract Documents, or any of its other obligations under the Contract Documents, by oversight, spot checks, assessments, reviews, tests, inspections, acceptances, Approvals, approvals by any Persons, or by any failure of any Person to take such action. The oversight, spot checks, assessments, reviews, tests, inspections, acceptances, Approvals, or approvals by any Person do not constitute Final Acceptance of the particular material or Work or waiver of any legal or equitable right with respect thereto. The District may reject or require the DB Contractor to remedy any Nonconforming Work and/or identify additional Work that must be done to bring the Project into compliance with Contract requirements at any time before Final Acceptance, whether or not previous oversight, spot checks, assessments, reviews, tests, inspections, acceptances, Approvals, or approvals by any Persons were conducted.

6.5.2 No Estoppels

The District shall not be precluded or estopped, by any measurement, estimate, or certificate made either before or after Final Acceptance and payment therefore, from showing that any such measurement, estimate, or certificate is incorrectly made or untrue, or from showing that the true amount and character of the Work performed and materials furnished by the DB Contractor do not conform in fact to the requirements of the Contract Documents. Notwithstanding any such measurement, estimate, certificate, or payment made in accordance therewith, the District shall not be precluded or estopped from recovering from the DB Contractor and its Surety(ies) such damages as the District may sustain by reason of the DB Contractor's failure to comply or to have complied with the terms of the Contract Documents.

6.6 Nonconforming Work

6.6.1 Rejection, Removal, and Replacement of Work

Subject to the District's right, in its sole discretion, to accept or reject Nonconforming Work, the DB Contractor shall remove and replace rejected Nonconforming Work to conform with the requirements of the Contract Documents, at the DB Contractor's expense and without any time extension. The DB Contractor shall promptly take all action necessary to prevent similar deficiencies from occurring in the future. The fact that the District may not have discovered the Nonconforming Work shall not constitute an acceptance of such Nonconforming Work. If the DB Contractor fails to correct any Nonconforming Work within five (5) Days of receipt of notice from the District requesting correction (or, for Nonconforming Work that cannot be corrected within five (5) Days, if the DB Contractor fails to provide to the District a schedule approved by the District for correcting any such Nonconforming Work within such 5-Day period, begin correction within such 5-Day period and thereafter diligently prosecute such correction in accordance with such approved schedule to completion), then the District may cause the Nonconforming Work to be remedied or removed and replaced, and may deduct the cost of doing so from any monies due or to become due the DB Contractor and/or obtain reimbursement from the DB Contractor for such cost.

6.6.2 Nonconforming Work Pay Adjustment

The District may, in its sole discretion, accept any Nonconforming Work without requiring it to be fully corrected and shall be entitled to a pay adjustment (or reimbursement of a portion of the Contract Price, if applicable). In such event, the District shall be entitled to reimbursement of a portion of the Contract Price in an amount determined by the District. In certain events, however, it may not be possible for the Nonconforming Work to be

made to conform to the requirements of the Contract Documents, including, but not limited to, the DB Contractor's failure to perform required items to be paid in equal monthly amounts indicated in the Work Breakdown Structure during a required time period. In general, the pay adjustment (or reimbursement) shall equal, at the District's election: (i) the amount allocated to such Work in the Revised Baseline Schedule; (ii) the DB Contractor's cost savings associated with its failure to perform the Work in strict accordance with the Contract requirements; or (iii) the amount deemed appropriate by the District to provide compensation for impacts to affected parties, such as future maintenance and/or other costs relating to the Nonconforming Work. In certain events, the District shall be entitled to a pay adjustment (or reimbursement) as expressly set forth elsewhere in the Contract Documents. Such reimbursement shall be deducted from future payments or, if future payments are insufficient to cover the amount owing, shall be payable to the District within 30 Days after DB Contractor's receipt of an invoice.

7 Environmental Compliance

7.1 Environmental Compliance

In performance of the Work, the DB Contractor shall comply with all requirements of all applicable Environmental Laws and Governmental Approvals issued there under, whether obtained by the District or the DB Contractor. The DB Contractor acknowledges and agrees that it will be responsible for all fines and penalties that may be assessed in connection with its failure to comply with such requirements.

7.1.1 Mitigation Requirements

The DB Contractor shall perform all environmental mitigation measures (which term shall be deemed to include all requirements of the Environmental Approvals and similar Governmental Approvals, regardless of whether such requirements would be considered to fall within a strict definition of the term). The mitigation requirements for the Project are set forth in in the DBA. The Contract Price includes compensation for the DB Contractor's performance of all such mitigation measures that are included in the agreed-upon scope of the Contract, for performance of all mitigation measures arising from New Environmental Approvals, which Section 8.3.3 designates as the DB Contractor's responsibility, for mitigation measures required by any Governmental Approvals, and for all other Activities to be performed by the DB Contractor as described in Section 8.

7.1.2 New Environmental Approvals to be Obtained by the District

The District will be responsible for obtaining any New Environmental Approvals necessitated by a time and money change order described in Section 14.1. The DB Contractor shall provide all necessary support to the District with respect to obtaining any such New Environmental Approval.

7.1.3 New Environmental Approvals to be Obtained by Contractor

If a New Environmental Approval becomes necessary for any reason other than those specified in Section 8.3.2, the DB Contractor shall be fully responsible for obtaining the New Environmental Approval and any other Environmental Approvals that may be necessary, and for all resulting requirements, as well as for any litigation arising in connection therewith. The District will reasonably assist the DB Contractor in obtaining any New Environmental Approvals. If the New Environmental Approval is associated DB Contractor-requested Change Order, the costs of obtaining and complying with the terms of the New Environmental Approval shall be considered in calculating the Contract Price adjustment under Section 15.2.4.

8 Equal Employment Opportunity; Subcontracts;

8.1 Equal Employment Opportunity

8.1.1 Equal Employment Opportunity Policy

The DB Contractor confirms that it has an equal opportunity policy ensuring equal employment opportunity. The DB Contractor shall comply with D.C. Official Code §2-1401.01 et seq., the District’s Equal Employment Opportunity (EEO) Policy.

8.1.2 Non-Discrimination

- A. The DB Contractor shall not discriminate against any employee or applicant for employment because of actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, disability, matriculation, political affiliation, genetic information, source of income, or place of residence or business. Sexual harassment is a form of sex discrimination which is prohibited by the D.C. Human Rights Act (DCHRA), 2-1401.01 et seq. In addition, harassment based on any of the above protected categories is prohibited by the DCHRA.
- B. The DB Contractor agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, disability, matriculation, political affiliation, genetic information, source of income, or place of residence or business.

The affirmative action shall include, but not be limited to, the following:

- a. Employment, upgrading or transfer;
 - b. Recruitment or recruitment advertising;
 - c. Demotion, layoff, or termination;
 - d. Rates of pay, or other forms of compensation; and
 - e. Selection for training and apprenticeship.
- C. The DB Contractor agrees to post in conspicuous places, available to employees and applicants for employment, noticed to be provided by the District, setting forth the provisions in paragraphs 1 and 2 of this section concerning non-discrimination and affirmative action.
 - D. The DB Contractor shall, in all solicitations or advertisements for employees placed by or on behalf of the DB Contractor, state that all qualified applicants will receive consideration for employment pursuant to the non-discrimination requirements set forth in paragraph 2 of this section.
 - E. The DB Contractor agrees to send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided by the District, advising said labor union or workers’ representative of the DB Contractor’s commitments under this nondiscrimination clause and the DCHRA, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
 - F. The DB Contractor agrees to permit access to its books, records, and accounts pertaining to its employment practices, by the District’s Chief Procurement Officer or designee, or the Director of Human

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Rights or designee, for purposes of investigation to ascertain compliance with the DCHRA and its rules at 4 DCMR ch. 11, and to require under terms of any subcontractor agreement each subcontractor to permit access of such subcontractor's books, records, and accounts for such purposes.

- G. The DB Contractor agrees to comply with the provisions of 4 DCMR and with all guidelines for equal employment opportunity applicable in the District of Columbia adopted by the Director of the Office of Human Rights, or any authorized official.
- H. The DB Contractor shall include in every subcontract, except construction subcontractors for standard commercial supplies or raw materials, the equal opportunity clauses, paragraph A through H of this section, so that such provisions shall be binding upon each subcontractor or vendor.
- I. The DB Contractor shall take such action with respect to any subcontract as the CO may direct as a means of enforcing these provisions, including sanctions for noncompliance; provided, however, that in the event the DB Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the CO, the DB Contractor may request the District to enter into such litigation to protect the interest of the District.

8.1.3 Reserved

8.1.4 Federal Workforce Requirements

The DB Contractor must comply with the applicable and most current federal work force requirements for Washington, DC, as specified by the Department of Labor and the Living Wage Act of 2006, D.C. Official Code § 2-220.01, et. seq.

8.2 Subcontracting Policy

8.2.1 DBE Requirements

This Project is funded in part by a grant DOEE received through a FY 2018 DC Non-Point Source Management Program with Statutory Authority from Clean Water Construction grant from the U.S. Environmental Protection Agency's Clean Water State Revolving Fund. As a condition of the grant award, DOEE is subject to the EPA's Disadvantaged Business Enterprise (DBE) Program rule found in section XI of "Federal Requirements and Contract Provisions for Work under the Federal Water Pollution Control Act, as Amended by the Environmental Protection Agency, Region III," which is an Applicable Document CLIN0009 to the Solicitation DOC347388. The EPA's DBE requirements apply to procurements under EPA financial assistance agreements performed by an award recipient, the prime contractor, and all subcontractors.

The objectives of the EPA's Participation by DBEs in Procurement rule are to help remove barriers to the participation of DBEs in the award of contracts under EPA financial assistance agreements; and to provide appropriate flexibility to recipients of EPA financial assistance in establishing and providing contracting opportunities for DBEs.

The DB Contractor shall not discriminate on the basis of race, color, national origin or sex in the performance of this Contract. The DB Contractor shall carry out applicable requirements of 40 CFR part 33 in the award and administration of subcontracts awarded under this Contract. Failure by the DB Contractor to carry out these requirements is a material breach of this contract which may result in the termination of this contract or other legally available remedies.

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The DB Contractor shall include EPA’s Disadvantaged Business Enterprise (DBE) Program in every subcontract so that the provision will be binding upon each Subcontractor.

8.2.3 DBE Program Components

The key functional components of the DBE program that apply to the DB contract are as follows:

- A. Documentation of the Six Good Faith Efforts and Contract Administration Requirements
- B. Minority Business Enterprise (“MBE”)/Women’s Business Enterprise (“WBE”) Reporting

8.2.4 Six Good Faith Efforts

The DB Contractor shall adhere to the Six Good Faith Efforts whenever procuring construction, equipment, services and supplies, which includes both pre-bid and post-contract subcontracting efforts. The Six Good Faith Efforts are detailed in section XI of “Federal Requirements and Contract Provisions for Work under the Federal Water Pollution Control Act, as Amended by the Environmental Protection Agency, Region III,” which is an Applicable Document CLIN0009 to the Solicitation DOC347388. Key components follow:

- A. Ensure DBEs are made aware of contracting opportunities to the fullest extent practicable through outreach and recruitment activities. This will include placing DBEs on solicitation lists and soliciting them whenever they are potential sources.
- B. Post solicitations for proposals for a minimum of 30 calendar days before the bid or proposal closing date.
- C. Document DBE outreach and solicitation time period, and submit documentation of these efforts to DOEE along with the proposal. Subcontracting efforts by the prime contractor or subcontractors that occur after execution of the prime contract must also adhere to the Six Good Faith Efforts. Documentation of these later efforts shall be submitted to DOEE upon completion. Documentation of these efforts usually includes a record of electronic communications or telecommunications, along with an explanation of the process used and outcomes of the outreach.

8.2.5 Subcontracting Process

Pursuant to section 2-128.46 of the Small and Certified Business Enterprise Development and Assistance Amendment Act of 2014, government-assisted projects over \$250,000.00 shall require 35% subcontracting to Small Business Enterprises (SBE) unless waived by the Department of Small and Local Business Development (DSLBD). If there are insufficient qualified SBEs to fulfill the 35% subcontracting requirement, the requirement may be satisfied by subcontracting 35% to Certified Business Enterprises (CBE) certified by the DSLBD; provided that all reasonable efforts were made to find qualified SBE subcontractors.

DOEE desires that DBEs participate in the project to the greatest extent possible, and requires that qualified SBE/CBE subcontractors who are also certified DBEs be given preference in hiring.

8.2.5.1 Finding Certified DBE, SBE, and CBE Firms

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Pursuant to 40 C.F.R. § 33.201, in order for the DBE Contractor or a Subcontractor to be counted toward the District's MBE/WBE accomplishments it must be certified. These DBE directories can aid compliance: [DC DOT DBE Directory](#), [MD DOT: Office of Minority Business Enterprise Directory](#), and the [VA DBE Directory](#). The [DSLBD CBE database](#) allows focused searches for local businesses that are certified DBEs, SBEs, and CBEs.

8.2.6 Inclusion in Subcontracts

In every (sub) contract the DB Contractor shall require adherence to provisions of the Davis-Bacon Act, and require use of the Davis Bacon Wage Determination Attachment J.2 to the solicitation, so that such provisions will be binding upon each Subcontractor.

8.2.7 Limitation on Subcontracted Work

The DB Contractor shall perform with his own organization, Work amounting to not less than 30 percent of the construction Work, and the Major Participant responsible for design shall perform with his own organization, Work amounting to not less than 30 percent of the design Work. The percentage of construction Work sublet shall be determined by dividing the total dollar value of the Subcontracts for construction Work, excluding any Subcontracts with Major Participants but including any Subcontracts under and through Major Participants, by the portion of the Contract Price allocable to construction Work (as determined by the District). The percentage of design Work sublet shall be determined by dividing the total dollar value of the design Subcontracts (except Subcontract(s) between the DB Contractor and the Major Participant(s) responsible for design) by the total dollar value of the prime design Subcontract(s); (i.e. the Subcontract(s) between the DB Contractor and the Major Participant(s) responsible for design).

8.2.8 District's Rights to Guarantees and Warranties

Each Subcontract shall provide that, pursuant to terms in form and substance satisfactory to the District, all guarantees and Warranties, express and implied, shall inure to the benefit of the District as well as the DB Contractor.

8.2.9 Subcontract Terms

Each Subcontract shall include all terms and conditions of the Contract Documents in the Subcontracts and ensure compliance by the Subcontractor with all applicable requirements of the Contract Documents, including solicitation, and DBA.

8.2.10 Subcontract Data and Reporting

- A. By submission of a completed Subcontracting Plan, provided on the Ariba eSourcing Solicitation DOC347388, the DB Contractor shall notify the DOEE, in writing, of the name and address of, and licenses held by, and SBE, CBE, DBE certification(s) of each Subcontractor (excluding Suppliers) as soon as the potential Subcontractor has been identified by the DB Contractor, but in no event, less than 14 Days prior to the scheduled initiation of Work by such proposed Subcontractor.
- B. By October 15 of each District fiscal year, the DB Contractor shall provide the DOEE CA with a subcontracting summary that details, in writing, the name and address of each Subcontractor utilized on the Project in the just-completed District fiscal year, which runs October 1 to September 30. Each entry shall include the following:

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- a. the total amount paid to the subcontractor for work on the project in that period;
 - b. DBE number, if applicable, or “NOT A DBE;” and
 - c. If a DBE, designation as a Minority Business Enterprise (MBE) or Woman’s Business Enterprise (WBE).
- C. The DB Contractor shall provide the DOEE with a list of its Subcontractors (including Suppliers) from time to time upon request by DOEE.
- D. The DB Contractor shall deliver to DOEE, within 10 Days after execution, copies of all Subcontracts with Major Participants and Key Subcontractors and, within 10 Days after receipt of a request from DOEE, copies of all other Subcontracts.
- E. The DB Contractor shall allow DOEE and EPA access to all Subcontracts and records regarding Subcontracts.

8.2.10.1 D.C. Mandatory Subcontracting Requirements

- A. Unless the Director of the Department of Small and Local Business Development (DSLBD) has approved a waiver in writing, for all contracts in excess of \$250,000, at least 35% of the dollar volume of the contract shall be subcontracted to qualified small business enterprises (SBEs).
- B. If there are insufficient SBEs to completely fulfill the requirement of paragraph H.9.1.1, then the subcontracting may be satisfied by subcontracting 35% of the dollar volume to any qualified certified business enterprises (CBEs); provided, however, that all reasonable efforts shall be made to ensure that SBEs are significant participants in the overall subcontracting work.
- C. A prime contractor that is certified by DSLBD as a small, local or disadvantaged business enterprise shall not be required to comply with the provisions of sections H.9.1.1 and H.9.1.2.
- D. Except as provided in H.9.1.5 and H.9.1.7, a prime contractor that is a CBE and has been granted a proposal preference pursuant to D.C. Official Code § 2-218.43, or is selected through a set-aside program, shall perform at least 35% of the contracting effort with its own organization and resources and, if it subcontracts, 35% of the subcontracting effort shall be with CBEs. A CBE prime contractor that performs less than 35% of the contracting effort shall be subject to enforcement actions under D.C. Official Code § 2-218.63.
- E. A prime contractor that is a certified joint venture and has been granted a proposal preference pursuant to D.C. Official Code § 2-218.43, or is selected through a set-aside program, shall perform at least 50% of the contracting effort with its own organization and resources and, if it subcontracts, 35% of the subcontracting effort shall be with CBEs. A certified joint venture prime contractor that performs less than 50% of the contracting effort shall be subject to enforcement actions under D.C. Official Code § 2-218.63.
- F. Each CBE utilized to meet these subcontracting requirements shall perform at least 35% of its contracting effort with its own organization and resources.

- G. A prime contractor that is a CBE and has been granted a proposal preference pursuant to D.C. Official Code § 2-218.43, or is selected through a set-aside program, shall perform at least 50% of the on-site work with its own organization and resources if the contract is \$1 million or less.

8.2.10.2 D.C. Subcontracting Plan

If the prime contractor is required by law to subcontract under this contract, it must subcontract at least 35% of the dollar volume of this contract in accordance with the provisions of section H.9.1 of this clause. The plan shall be submitted as part of the proposal and may only be amended after award with the prior written approval of the CO and Director of DSLBD. Any reduction in the dollar volume of the subcontracted portion resulting from an amendment of the plan after award shall inure to the benefit of the District.

Each subcontracting plan shall include the following:

- (1) The name and address of each subcontractor;
- (2) A current certification number of the small or certified business enterprise;
- (3) The scope of work to be performed by each subcontractor; and
- (4) The price that the prime contractor will pay each subcontractor.

8.2.10.3 Copies of Subcontracts

Within twenty-one (21) days of the date of award, the Contractor shall provide fully executed copies of all subcontracts identified in the subcontracting plan to the CO, CA, District of Columbia Auditor and the Director of DSLBD.

8.2.10.4 D.C. Subcontracting Plan Compliance Reporting

If the Contractor has a subcontracting plan required by law for this contract, the Contractor shall submit a quarterly report to the CO, CA, District of Columbia Auditor and the Director of DSLBD. The quarterly report shall include the following information for each subcontract identified in the subcontracting plan:

- (A) The price that the prime contractor will pay each subcontractor under the subcontract;
- (B) A description of the goods procured or the services subcontracted for;
- (C) The amount paid by the prime contractor under the subcontract; and
- (D) A copy of the fully executed subcontract, if it was not provided with an earlier quarterly report.

If the fully executed subcontract is not provided with the quarterly report, the prime contractor will not receive credit toward its subcontracting requirements for that subcontract.

8.2.10.5 Annual Meetings

Upon at least 30-days written notice provided by DSLBD, the Contractor shall meet annually with the CO, CA, District of Columbia Auditor and the Director of DSLBD to provide an update on its

subcontracting plan.

8.2.10.6 Notices

The Contractor shall provide written notice to the DSLBD and the District of Columbia Auditor upon commencement of the contract and when the contract is completed.

8.2.10.7 Enforcement and Penalties for Breach of Subcontracting Plan

- A. A contractor shall be deemed to have breached a subcontracting plan required by law, if the contractor (i) fails to submit subcontracting plan monitoring or compliance reports or other required subcontracting information in a reasonably timely manner; (ii) submits a monitoring or compliance report or other required subcontracting information containing a materially false statement; or (iii) fails to meet its subcontracting requirements.
- B. A contractor that is found to have breached its subcontracting plan for utilization of CBEs in the performance of a contract shall be subject to the imposition of penalties, including monetary fines in accordance with D.C. Official Code § 2-218.63.
- C. If the CO determines the Contractor's failure to be a material breach of the contract, the CO shall have cause to terminate the contract under the default provisions in **clause 8 of the SCP, Default.**

8.2.11 Responsibility for Work by Subcontractors

Notwithstanding any Subcontract or agreement with any Subcontractor, the DB Contractor shall be fully responsible for all Work. The District shall not be bound by any Subcontract, and no Subcontract shall include a provision purporting to bind the District.

8.3 Key Personnel

8.3.1 Key Personnel

The proposal submitted should identify Key Personnel for the Project; refer to Section L.19 of the Solicitation document.

9 Risk of Loss

9.1 Site Security and Access

The DB Contractor shall provide appropriate security for the Site, including securing any buildings from entry; shall take all reasonable precautions; and shall provide protection to prevent damage, injury, or loss to the Work and materials and equipment to be incorporated therein, as well as all other property at the Site, whether owned by the DB Contractor, the District, or any other Person.

9.2 Maintenance and Repair of Work and Onsite Property

9.2.1 Responsibility of Contractor

The DB Contractor shall maintain, rebuild, repair, restore, or replace all Work (including Design Documents, Released for Construction Documents, As-Built Documents, and materials, equipment, supplies, and maintenance equipment that are purchased for permanent installation in or for use during construction of the Project, regardless of whether the District has title thereto under the Contract Documents) that is damaged prior to the date of acceptance of maintenance liability by the District or third parties as specified in Section 12.2.2. All such Work shall be at no additional cost to the District except to the extent that the District is responsible for such costs as provided in Section 14.

9.2.2 Relief from Liability for Maintenance

Effective as of the date of Final Acceptance by the District of the Project, the District is responsible for maintenance for all elements of the Project that have been Accepted. Nothing in the Contract Documents, however, shall be construed to relieve the DB Contractor of full responsibility for making good any non-latent defect in Work or material found on any portion of Work prior to Final Acceptance of the entire Project, to alter in any manner the method of payment prescribed in the Contract Documents, or to constitute a waiver of any Claim the District may have against the DB Contractor on the entire Project. Notwithstanding the foregoing, all elements of the Work that will be owned by Persons other than the District (such as Utility facilities) will be considered accepted for purposes of maintenance responsibility only as of the date of acceptance of maintenance responsibilities by such Persons.

9.3 Damage to Offsite Property

The DB Contractor shall take all required precautions and provide protection to prevent damage, injury, or loss to property adjacent to the Site or likely to be affected by the Work. The DB Contractor shall restore damaged, injured, or lost property caused by an act or omission of any DB Contractor-Related Entity to a condition similar or equal to that existing before the damage, injury, or loss occurred.

9.4 Third-Party Agreements and District-Obtained Permits

The DB Contractor shall comply with all provisions in the third-party agreements and District-obtained permits.

10 Change Orders

10.1 Time and Money Changes

The DB Contractor may request a Change Order, subject to the limitations set forth in Section 15 for increased costs and/or additional time for Completion Deadlines only for the following:

- A. Additional costs and/or time directly attributable to additional Work resulting from District-Directed Changes.
- B. Additional costs and/or time directly attributable to unavoidable delays arising from a suspension order pursuant to Section 14.1.

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- C. Additional costs and/or time directly attributable to a delay in issuance of NTP to the extent provided in Sections 6.2.
- D. Additional costs and/or time directly attributable to Differing Site Conditions, to the extent provided in Section 13.8.
- E. Certain additional costs or time relating to removal and disposal of Hazardous Materials as described in Section 13.9, to the extent provided therein.
- F. Certain additional costs and/or time relating to material errors in the Drawings, as described in Section 13.10, to the extent provided therein.
- G. Additional costs and/or time directly attributable to uncovering, removing, and restoring Work, to the extent provided in Section 7.4.3.
- H. Additional costs and/or time directly attributable to the discovery at, near, or on the Site articles of historical, architectural, archaeological significance or species listed as threatened or endangered discovered within the Drawing, provided that the existence of such articles or species was not disclosed in the RFP or discoverable through reasonable investigation prior to the Proposal Due Date.
- I. Additional costs and/or time directly attributable to the suspension, termination, interruption, denial, failure to obtain, nonrenewal or amendment of any Environmental Approval or New Environmental Approval required to be obtained by the District, except as otherwise provided in Section 8.3.
- J. Additional costs and/or time directly attributable to any change in a legal requirement, change in the judicial interpretation of a legal requirement, or adoption of any new legal requirement, which is materially inconsistent with legal requirements in effect on the Price Proposal Due Date (excluding any such change or new legal requirement which was passed or adopted as of the Price Proposal Due Date but has a defined future effective date) and which: (i) requires a material modification in the Project Work; (ii) requires the DB Contractor to obtain a major District or federal environmental approval not previously required for the Project; or (iii) specifically targets the Project or the DB Contractor.
- K. Additional costs and/or time directly attributable to any lawsuit seeking to restrain, enjoin, challenge, or delay construction of the Project, except to the extent that the risk of such lawsuit has been assumed by the DB Contractor under Section 8.3; or the lawsuit otherwise arises out of any act, omission, or breach of obligation of Contractor, a Subcontractor or any person for whom Contractor is contractually or legally liable.
- L. Additional time and/or money directly attributable to third party Hazardous Materials / Hazardous Material spills.

10.2 Time-Only Changes

The DB Contractor may request a Change Order for time extensions, subject to the limitations set forth in Section 13.6.3, for additional time for Completion Deadlines, only for the following:

- A. Force Majeure Events as described in Section 16.2.
- B. Failure or inability of the District to provide responses to proposed schedules, design submittals or other submittals and matters for which response by the District is required within the time periods indicated in the Contract Documents, so long as such schedules, design submittals, or other submittals and matters meet all of the applicable requirements of the Contract Documents.

11 Changes in the Work

This Section 13 sets forth the requirements for obtaining all Change Orders under the Contract. The DB Contractor hereby acknowledges and agrees that the Contract Price constitutes full compensation for performance of all Work, subject only to those exceptions specified in this Section 13, and that the District is subject to constraints which limit its ability to increase the Contract Price or extend the Completion Deadlines. The DB Contractor hereby waives the right to make any Claim for a time extension or for any monetary compensation in addition to the Contract Price and other compensation specified in the Contract, except as set forth in this Section 13.

11.1 Procedure for Change Order Requests

11.1.1 Change Orders

The term “Change Order” shall mean a written amendment to the terms and conditions of the Contract Documents issued in accordance with this Section 13. A Change Order shall not be effective for any purpose unless executed by the District. Change Orders may be requested by the DB Contractor only pursuant to Section 12. Change Orders may be issued for the following purposes (or combination thereof):

- A. To modify the Work
- B. To revise a Completion Deadline
- C. To revise the Contract Price
- D. To revise other terms and conditions of the Contract Documents

The CO will notify the DB Contractor of the determination whether or not an adjustment of the Contract is warranted. Upon the determination by the CO that an adjustment to the Contract is warranted, the District will execute the Change Order.

11.1.2 Issuance of Directive Letter

The District may, at any time, issue a Directive Letter to the DB Contractor in the event of any Dispute regarding the Work or for any desired change in the Work. The Directive Letter will state that it is issued under this Section 13, will describe the Work in question, and will state the basis for determining compensation, if any. The DB Contractor shall proceed immediately with the Work as directed in the letter, pending the execution of a formal Change Order or, if the letter states that the Work is within the original scope of the Work, the DB Contractor shall proceed with the Work as directed but shall have the right pursuant to Section 13 to request that the District issue a Change Order with respect thereto.

Receipt of a Directive Letter from the District is a condition precedent to the DB Contractor’s right to claim that a District-Directed Change has occurred, provided that no Directive Letter shall be required for alleged District-Directed Changes directly attributable to delays caused by bad faith actions, active interference, gross negligence or comparable tortious conduct by the District. The fact that a Directive Letter was issued by the District shall not be considered evidence that in fact a District-Directed Change occurred. The determination as to whether a District-Directed Change in fact occurred shall be based on an analysis of the original Contract Document requirements and a determination whether the Directive Letter in fact constituted a change in those requirements. The foregoing requirements shall not imply that a Directive Letter would be required in order for

the DB Contractor to have the right to receive compensation for Work within its original scope for which additional compensation is specifically allowed under this Section 13.

11.1.3 Performance of Changed or Extra Work

As a condition precedent to the DB Contractor’s right to receive additional payment or an extension of a Completion Deadline for changed or extra work, the DB Contractor shall have received either a Directive Letter from the District stating that it is issued pursuant to Section 13 or a Change Order for such work executed by the District. To the extent that the DB Contractor undertakes any such work without receiving a Directive Letter or Change Order executed by the District, the DB Contractor shall be deemed to have performed such work voluntarily and may not be entitled to a Change Order in connection therewith. In addition, the DB Contractor may be required to remove or otherwise undo any such work at its sole cost.

11.2 Value Engineering Change Proposals

DOEE desires the DB Contractor to have significant flexibility in determining how best to deliver the Project within the parameters established by the Contract Documents. The DB Contractor is encouraged to submit VECPs whenever it identifies potential savings. Notwithstanding the foregoing, DOEE’s Approval is required with respect to any proposed changes in the requirements of the Contract Documents. This Section 13.2 sets forth the requirements applicable to VECPs.

11.2.1 Definition of Value Engineering Change Proposal

A VECP is a proposal developed and documented by the DB Contractor requesting a change in the requirements of the Contract Documents that must decrease the Contract Price and maintain or improve the finished product’s required function, such as service life, reliability, economy of operation, ease of maintenance, necessary standardized features, or appearance, and must not require an extension of the Contract Completion Deadlines.

11.2.2 Required Information

At a minimum, the following information shall be submitted by the DB Contractor with each Change Order Request:

- A. A statement that the submission is a Change Order Request, a narrative description of the proposed change, the advantages and disadvantages of the proposed change and the justification for changes in function or characteristics and the effect the proposed change has on performance.
- B. Drawings or visualizations that show how the Change Order Request will affect aesthetics.
- C. Identification of all Contract requirements (with reference to specific Sections) that must be changed if the Change Order Request is Approved.
- D. A description of any previous use or tests of the proposal and the conditions and results.
- E. Date or time by which a Change Order adopting the Change Order Request must be issued in order to obtain the maximum cost reduction, noting any effect on the Contract Schedule.
- F. A complete cost analysis including current pricing for the existing Contract requirements compared to the DB Contractor’s cost estimate of the proposed changes.

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The DB Contractor shall provide any additional information requested by the District in a timely manner. Additional information could include results of field investigations and surveys, design computations, and field change sheets.

11.2.3 District Review and Approval or Rejection

Upon receipt of a Change Order Request, the District will process it but will not be liable for any delay in acting upon any proposal submitted pursuant to this Section 13.2. The DB Contractor may withdraw all or part of any Change Order Request at any time prior to Approval by the District. Until and unless the Modification is approved, the DB Contractor shall comply with the Contract Documents.

The District may approve, in its sole discretion, in whole or in part, by Change Order, any Change Order Request submitted. Until a Change Order is issued on a Change Order Request, the DB Contractor shall remain obligated to perform in accordance with the Contract Documents. The decision of the District as to rejection or Approval of any Change Order Request shall be at the sole discretion of the District and shall be final and not subject to partnering, Dispute resolution, or appeal. The DB Contractor shall have no Claim for any additional costs or delays resulting from the rejection of a Change Order Request, including but not limited to development costs, loss of anticipated profit, or increased material or labor costs.

11.2.4 Contract Price Adjustment

If the District Approves a Change Order Request submitted by the DB Contractor pursuant to this Section 13.2, the Contract Price shall be adjusted in accordance with the following:

- A. The term “estimated net savings,” as used in this Section 13.2, shall mean: (i) the difference between the cost of performing the Work according to the Contract Documents using current estimates, including DB Contractor’s labor, material, equipment, overhead and profit, and the actual cost to perform it according to the proposed change and in accordance with allowable costs under the Contract Documents; less (ii) the costs of studying and preparing the Change Order Request as proven by the DB Contractor and Approved by the District in accordance with the Change Order procedures set forth herein; less (iii) any additional costs incurred by the District (including, without limitation, costs relating to any Relocations and ROW and implementation costs) resulting from the Change Order Request.
- B. Except as specified in Section 13.2.4, the DB Contractor is not entitled to share in either collateral or future contract savings. The term “collateral savings” means those measurable net reductions in the District’s costs resulting from the Change Order Request, including costs of maintenance by the District, logistics, and the District-furnished property. The term “future contract savings” shall mean reductions in the cost of performance of future construction contracts resulting from a Change Order Request submitted by the DB Contractor.
- C. Subject to Section 13.2.4, the Contract Price shall be reduced by an amount equal to the sum of (i) 100 percent of any additional costs incurred by the District resulting from the Change Order Request; plus (ii) 50 percent of the estimated net savings.

11.2.5 Use of Value Engineering Changes by the District

All Approved Change Order Requests and negotiated changes will become the property of the District and shall contain no restrictions imposed by the DB Contractor on their use or disclosure. The District retains the right to use, duplicate, and disclose in whole or in part any data necessary for the utilization of the Approved Change Order Request or negotiated change proposal on any other or subsequent projects without any obligation to the

DB Contractor. This provision is not intended to deny rights provided by law with respect to patented materials or processes.

11.3 Force Account Change Orders

The Force Account Change Order shall instruct the DB Contractor to perform the Work, indicating expressly the intention to treat the items as changes in the Work and setting forth the kind, character, and limits of the Work as far as they can be ascertained; the terms under which changes to the Contract Price will be calculated; and the estimated total change in the Contract Price anticipated there under. Upon final calculation of the allowable costs, the District shall issue a modified Change Order setting forth the final adjustment to the Contract Price. The costs and additional amounts allowed in Section 13 (and no others) shall be used for calculating the change in the Contract Price. No direct compensation will be allowed for other miscellaneous costs for which no specific allowance is provided in Section 13.5.

The District and the DB Contractor may agree to negotiate unit prices for a Force Account Change Order. Measurement of any unit-priced quantities will be as specified in the Change Order. Unit prices shall be deemed to include all costs for labor, material, overhead, and profit; and shall not be subject to change regardless of any change in the estimated quantities. Upon final determination of the quantities, the District will issue a modified Change Order setting forth the final adjustment to the Contract Price.

11.4 Contents of Change Orders

The DB Contractor shall prepare a scope of work, cost estimate, impacted delay analysis, if any, and other information as required by this Section for each Change Order form and RCO:

Scope of Work: The scope of work shall describe in detail, satisfactory to the District, all Activities associated with the Change Order, including a description of additions, deletions, and modifications to the existing Contract requirements.

Cost Estimate: The cost estimate shall set out the estimated costs in such a way that a fair evaluation can be made. It shall include a breakdown for labor, materials, equipment, overhead (which includes all indirect costs) and profit, unless the District agrees otherwise. The estimate shall include costs allowable under Section 13, if any. If the work is to be performed by Subcontractors and is sufficiently defined to obtain Subcontractor quotes, the DB Contractor shall obtain quotes with breakdowns showing cost of labor, materials, equipment, overhead, and profit on the Subcontractor's stationery and shall include such quotes as backup for the DB Contractor's estimate. No additional payment shall be allowed except as provided in Section 13.

DBE Requirements: The DB Contractor shall ensure that DBEs have full and equal opportunity to compete fairly in the performance of Change Orders. All requests for change orders shall include a DBE impact analysis.

Impacted Delay Analysis: If the DB Contractor claims that such event, situation, or change affects the Critical Path affecting the Completion Deadline, it shall provide an impacted delay analysis indicating all Activities represented or affected by the change with Activity numbers, durations, predecessor and successor Activities, resources and cost, and with a narrative report, in a form satisfactory to the District, which compares the proposed new schedule to the Original Baseline Schedule or Revised Baseline Schedule, as appropriate. Except as otherwise provided in this Section, the impacted delay analysis shall only modify the Activities that have been impacted by the event and that justify the requested extension. The DB Contractor may reschedule Activities not otherwise affected by the event in order to take advantage of additional float available as a result of the requested time extension. Any such rescheduling shall be reflected in the impacted delay analysis.

Other Supporting Documentation: The DB Contractor shall provide such other supporting documentation as may be required by the District.

11.4.1 Justification

All requests for Change Orders shall include a narrative justification therefor, detailing all causes of the proposed change, making specific reference to the applicable provisions of Sections 12 and 13 that permit a Change Order to be issued, and describing the data and documents that establish the necessity of such proposed change.

11.4.2 Contractor Representation

DB Contractor (or Subcontractor, if applicable) shall submit a Cost Certification document that the amount of time and/or compensation requested includes all known and anticipated impacts or amounts, direct, indirect, and consequential, that may be incurred as a result of the event or matter giving rise to such proposed change and that the DB Contractor has no reason to believe and does not believe that the factual basis for the Change Order is falsely represented.

11.4.3 Incomplete Change Orders

Each RCO provided under Section 13 shall meet all requirements set forth in Section 13.5, provided that if any such requirements cannot be met due to the nature of the occurrence, the DB Contractor shall provide an incomplete RCO, which shall meet the following criteria:

- A. Comply with all requirements capable of being met.
- B. Include a list of requirements that are not fulfilled, together with an explanation reasonably satisfactory to the District stating why such requirements cannot be met.
- C. Provide such information regarding projected impact on the Critical Path affecting a Completion Deadline as requested by the District.
- D. In all events include sufficient detail to ascertain the basis for the proposed Change Order and any price increase associated therewith, to the extent such amount is then ascertainable.

The DB Contractor shall furnish, when requested by the District, such further information and details as may be required to determine the facts or contentions involved. The DB Contractor agrees that it shall give the District access to any and all of the DB Contractor's books, records, and other materials relating to the Work, and shall cause its Subcontractors to do the same, so that the District can investigate the basis for such proposed Change Order. The DB Contractor shall provide the District with a monthly update to all outstanding incomplete requests for Change Order, describing the status of all previously unfulfilled requirements and stating any changes in projections previously delivered to the District, time expenditures to date, and time anticipated for completion of the Activities for which the time extension is claimed. The District may reject the DB Contractor's Claim at any point in the process. Once a complete RCO is provided, the District's failure to respond thereto within 14 Days of delivery of the request shall be deemed a rejection of such request. Although the District intends to review incomplete Change Orders for the purposes of timely delivery described in Section 13.5.3, the District shall have no obligation to review the backup associated with any RCO until a complete RCO is provided.

11.4.4 Phased Change Orders

The District and DB Contractor may mutually agree to use a multiple-step process involving issuance of a Change Order that includes an estimated design cost and that provides for a revised Change Order to be issued after a

certain design level has been reached, thus allowing a refinement and definition of the estimated construction cost.

11.5 Certain Limitations for all Change Orders

11.5.1 Limitation on Contract Price Increases

Any increase in the Contract Price allowed hereunder shall exclude the following:

- A. Costs caused by the breach of Contract or fault or negligence, or failure to act of any DB Contractor-Related Entity.
- B. Costs that could reasonably have been avoided by the DB Contractor, including by re-sequencing, reallocating, or redeploying its forces to other portions of the Work or to other activities unrelated to the Work, including any additional costs reasonably incurred in connection with such reallocation or redeployment.
- C. Costs for any rejected Work that failed to meet the requirements of the Contract Documents and any necessary remedial Work.

11.5.2 Limitation on Acceleration Costs; Delay and Disruption Damages

Limitations on Acceleration Costs, Delay and Disruption Damages, and other limitations include the following:

Acceleration Costs; Delay and Disruption Damages: Acceleration Costs shall be compensable hereunder only with respect to Change Orders issued by the District as an alternative to allowing an extension of a Completion Deadline as contemplated by Section 12. Delay and disruption damages shall be compensable hereunder only in the case of a delay pursuant to Section 12 to the extent that it entitles the DB Contractor to an extension of a Completion Deadline. Costs of rearranging the DB Contractor's work plan not associated with an extension of a Completion Deadline shall not be compensable hereunder.

Other Limitations: Delay and disruption damages shall be limited to direct costs directly attributable to the delays described in this Section and overhead and profit thereon, in accordance with Section 13.7.6, and any additional field office and jobsite overhead costs incurred by the DB Contractor directly attributable to such delays and allowable under Section 15.5.1. In addition, before the DB Contractor may obtain any increase in the Contract Price to compensate for any delay and disruption damages or Acceleration Costs, the

DB Contractor shall have demonstrated to the District's satisfaction that:

- A. Its schedule, which defines the affected Critical Path, in fact, sets forth a reasonable method for completion of the Work.
- B. The change in the Work or other event or situation, which is the subject of the requested Change Order, has caused or will result in an identifiable and measurable disruption of the Work, which affected the Critical Path, in turn affecting a Completion Deadline.
- C. The delay or disruption damage was not due to any breach of contract or fault or negligence, or act or failure to act by any DB Contractor-Related Entity and could not reasonably have been avoided by the DB Contractor, including by re-sequencing, reallocating, or redeploying its forces to other portions of the Work or other activities unrelated to the Work subject to reimbursement for additional costs reasonably incurred in connection with such reallocation or redeployment.
- D. The delay for which compensation is sought is not concurrent with any delay attributable to DB Contractor.

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- E. The DB Contractor has suffered or will suffer actual costs due to such delay, each of which costs shall be documented in a manner satisfactory to the District.

The failure of the DB Contractor to achieve Substantial Completion earlier than the contractually agreed-upon date for Substantial Completion shall not be the basis of a claim for damages for delay.

11.5.3 Limitation on Time Extensions

Any extension of a Completion Deadline allowed hereunder shall exclude any delay to the extent that it:

- A. Did not impact the Critical Path affecting a Completion Deadline.
- B. Was due to the fault or negligence, or act or failure to act of any Contractor-Related Entity.
- C. Could reasonably have been avoided by the DB Contractor, including by re-sequencing, reallocating or redeploying its forces to other portions of the Work provided that if the request for extension involves a District-caused delay, the District shall have agreed, if requested to do so, to reimburse the DB Contractor for its costs incurred, if any, in re-sequencing, reallocating, or redeploying its forces.

The DB Contractor shall demonstrate to the District's satisfaction that the change in the Work or other event or situation, which is the subject of the RCO seeking a change in a Completion Deadline, has caused or will result in an identifiable and measurable disruption of the Work, which has affected the Critical Path Activity affecting a Completion Deadline.

11.6 Pricing of Change Orders

The District and the DB Contractor, on its own behalf and on behalf of its Subcontractors, shall endeavor to negotiate, in good faith, a reasonable cost for each Change Order. Subject to the foregoing exceptions, in general, the price of a Change Order shall be negotiated in accordance with this Section 13.7 or shall be based on Force Account records pursuant to Section 13.4.

11.6.1 Scope Development Risk

Risk associated with the Work described in the Change Order, defined as scope development risk, may be included in a Change Order through an additional amount agreed to by the District and the DB Contractor. For any such request, the DB Contractor shall include a justification detailing why the requested change order should be considered a scope development risk.

11.6.2 Labor Costs

The cost of labor shall be separated into construction-related Work and non-construction-related Work as described below. The use of a labor classification that would increase the extra work cost will not be permitted unless the DB Contractor establishes the necessity for such additional costs. The cost of labor shall be calculated based on straight time for all hours worked, unless the DB Contractor obtains the District's prior Approval for overtime.

Construction Labor: The cost of labor for workers used in the actual and direct performance of construction-related Work, including Lead Workers, whether provided by the DB Contractor or a Subcontractor, will equal the sum of the following: (i) actual unburdened wages (the base wage paid to the employee exclusive of any fringe benefits); plus (ii) the actual costs paid to, or on behalf of, employees for liability and worker's compensation insurance premiums, unemployment insurance contributions and social security taxes, health and welfare benefits, pension fund benefits or other benefits, if such amounts are required by the collective

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bargaining agreement or employment contract, applicable to the classes of labor employed on the work; plus (iii) 15 percent overhead and profit of the sum of the above items.

Non-Construction Labor: The cost of labor for non-construction-related Work, whether provided by the DB Contractor or a Subcontractor, will equal the sum of the following: (i) actual wages (the base wage paid to the employee exclusive of any fringe benefits); plus (ii) an overhead based on the audited Federal Acquisition Regulations (FAR) field rates not to exceed 145 percent, or if a company has no FAR rate, an overhead of 145 percent. Contractor will also be paid for profit on non-construction labor of 10 percent of labor costs plus overhead.

11.6.3 Material Costs

Material costs will be addressed as described below:

Materials: Payment for cost of required materials will be free on board (North American Usage) to the Project site or Delivered At Place (DAP) to the Project Site for international shipments [Incoterms, 2010] with an allowance of up to 15 percent to cover overhead and profit. For landscape plantings, up to 25 percent will be allowed to cover overhead and profit.

Rented Equipment: The current edition of the *Rental Rate Blue Book for Construction Equipment* published by Data Quest shall be used to calculate the equipment rental rates.

Contractor's Equipment: Payment for required equipment owned by the DB Contractor or an Affiliate of the DB Contractor will be based solely on an hourly rate derived by dividing the current appropriate monthly rate from the *Rental Rate Blue Book for Construction Equipment* published by Data Quest by 176 hours. No additional or separate payment will be made under any circumstance for repair cost, freight and fuel, lubricants, insurance, any other costs and expenses, or overhead and profit. Payment for such equipment made idle by delays attributable to the District will be based on one-half the derived hourly rate described in this subsection. Approved transportation charges will be paid (one way) from the nearest source if the equipment is brought to the Project specifically for use on the Change Order Work and is not to be used on any other Work.

Aggregate rental charges for an item of Contractor-owned equipment shall not exceed the fair market purchase price for such equipment at the time of its commitment to the Work. The original purchase price and date of purchase of the equipment will be documented with a copy of the purchase invoice and submitted to the District along with a proposed fair market value. The fair market values to be used for purposes of this contract clause will be subject to advance approval of the District. Such aggregate limitations will apply and no further rentals shall be charged even if a piece of equipment is later replaced by a similar piece of equipment.

Liability Insurance: When additional liability insurance is required, the payment for the additional insurance will be based on the additional premiums, up to which 3 percent of additional premium will be allotted to cover handling.

11.6.4 Permit Fees

The DB Contractor will be reimbursed for the cost of any additional permit fees payable as the result of a change in the Work requiring additional permit fees. Backup documentation supporting each cost item for this category shall be provided by the DB Contractor and Approved by the District prior to any payment authorization being granted.

The DB Contractor will be paid an additional percent (5%) for overhead and profit.

11.6.5 Subcontracted Work

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For administration and all overhead costs in connection with Subcontract Work, the DB Contractor will receive an amount equal to five percent (5%) of the cost of the Subcontracted Work. This shall fully compensate the DB Contractor for administration, general superintendence, overhead, profit, and expenses not otherwise recoverable with respect to subcontracted Work. This shall not apply to the following: (i) Subcontracts with Affiliates; or (ii) Subcontracts with Suppliers.

11.6.6 Overhead and Profit

Overhead and profit costs will be addressed as described below:

Items included in Overhead and Profit: Unless otherwise indicated in this Section 13, any overhead and profit and labor surcharges described herein are full and complete compensation for all indirect costs of the added or changed Work, as well as for profit thereon. The DB Contractor's overhead and profit percentages and labor surcharges as described in this Section 13 shall be considered to include, among other costs, salary and expenses of executive officers, supervising officers or supervising employees, and clerical employees; charges for minor equipment, such as small tools, and other miscellaneous supplies and services; incidental job burdens; bonuses not otherwise covered; field, jobsite, and general home office expenses of all types (including timekeepers, bookkeepers, and other general office help); supervisory expenses of all types (excluding only direct supervision of force account work); and all other overhead, general condition and indirect costs and expenses, and profit. With respect to non-construction-related labor costs, overhead is included as part of the labor surcharge calculated in accordance with Section 13 and includes accessories such as computer-assisted drafting and design systems, computers, facsimile transmission machines, scanners, plotters, etc.

Payment of Overhead and Profit: The foregoing overhead and profit and labor surcharges will be paid to the DB Contractor only for Work it performs; in the case of Work that is subcontracted, the additional payment for Subcontract administration will be allowed to the DB Contractor as described in Section 13.7.5; and all other overhead and profit and labor surcharges will be allowed to the Subcontractor who actually performs the Work.

Materials and Equipment: No overhead, profit or other surcharges will be paid to the DB Contractor for any materials or equipment furnished by the District.

Credit Items: Where the DB Contractor's or any Subcontractor's portion of a change involves credit items, or the proposed change is a net deductive change, the DB Contractor shall include all DB Contractor's and Subcontractor's overhead and profit in computing the value of the credit.

11.6.7 Compliance with Federal Acquisition Regulations

Reimbursable expenses shall be limited to and comply with the FARs. Expenses excluded by the FARs shall not be reimbursed.

11.7 Differing Site Conditions

11.7.1 Cost Compensation

Upon the DB Contractor's fulfillment of all applicable requirements of Sections 7.3 and 13, and subject to the limitations contained therein and listed above, the District shall be responsible for, and agrees to Approve Change Orders to compensate the DB Contractor for their (i) additional costs directly attributable to changes in the Work arising from Differing Site Conditions, and (ii) extension of the Completion Deadlines as a result of any delay in the Critical Path affecting the Completion Deadlines.

11.7.2 Burden of Proof

The DB Contractor shall bear the burden of proof that a Differing Site Condition exists and that it could not reasonably have worked around the Differing Site Condition to avoid additional cost. Each request for a Change Order relating to a Differing Site Condition shall be accompanied by a statement signed by a qualified professional setting forth all relevant assumptions made by the DB Contractor with respect to the condition of the Site, justifying the basis for such assumptions, explaining exactly how the existing conditions are eligible for a Change Order under the terms of this DBA, and stating the efforts undertaken by the DB Contractor to find alternative design or construction solutions to eliminate or minimize the problem and the associated costs.

11.8 Removal and Disposal of Hazardous Materials

11.8.1 Hazardous Materials

The DB Contractor will be reimbursed for the remediation of Hazardous Materials within the project by Change Order Request in accordance with Section 13.3.

The DB Contractor is entitled to an extension of Completion Deadlines if the Hazardous Materials discovery results in delays to the Critical Path. The DB Contractor shall notify DOEE within one business day upon discovery of Hazardous Materials.

The DB Contractor is not entitled to an increase in price for remediation costs resulting from its own acts or omissions, or Hazardous Materials brought onto the Site by the DB Contractor.

The DB Contractor is not entitled to payment or time with respect to: (a) Hazardous Materials that could have been avoided by reasonable design modifications or construction techniques, (b) costs that could have been avoided, (c) Hazardous Materials on additional properties outside of the Drawing, or (d) improperly documented labor, material and other costs as a result of the DB Contractor failing to submit complete and accurate records in accordance with the requirements of, at minimum, Force Account Change Orders Section 13.4, or as otherwise directed by the District.

11.8.2 Limitations on Change Orders

All Change Orders authorized by this Section shall be subject to the restrictions, limitations, and procedures set forth herein. Allowable costs shall be limited to the incremental costs associated with the fact that Hazardous Materials subject to removal and disposal compensable under Section 13.9 are present. The DB Contractor shall take all reasonable steps to minimize any such costs. In addition, compensation for removal and disposal of Hazardous Materials compensable under Section 13.9 will not be allowed unless the DB Contractor demonstrates to the District's satisfaction that:

- A. the removal and disposal of Hazardous Materials could not have been avoided by reasonable design modifications or construction techniques; and
- B. the DB Contractor's plan for removal and disposal of Hazardous Materials represents the approach most beneficial to the Project and the District. The DB Contractor shall provide the District with such information, analyses, and certificates as may be requested by the District in order to enable a determination regarding eligibility for payment.

11.9 Material Errors in Drawings

Upon the DB Contractor's fulfillment of all applicable requirements of this Section 13, and subject to the limitations contained herein, the District shall be responsible for and agrees to issue Change Orders: (i) to compensate the DB Contractor for additional costs directly attributable to material errors in the Drawing limits

indicated in the Drawings; and (ii) to extend the Completion Deadlines as the result of any delay in the Critical Path affecting the Completion Deadlines caused by any such errors. The DB Contractor shall provide written notice to the District immediately upon discovery of any such material error. The District, in the District's sole discretion, shall have the right to cure any such error, such as by acquiring additional property.

11.10 Waiver

The DB Contractor hereby expressly waives all rights to assert any and all Claims based on any change in the Work, delay or acceleration including any change, delay, suspension or acceleration that, but for the express terms of the Contract Documents, could be inferred or implied at law for which the DB Contractor failed to provide proper and timely notice or failed to provide a timely RCO, and agrees that the DB Contractor shall be entitled to no compensation or damages whatsoever in connection with the Work except to the extent that the Contract Documents expressly specify that the DB Contractor is entitled to a Change Order or other compensation or damages.

11.11 Disputes

If the District and the DB Contractor agree that a request to increase the Contract Price and/or extend any Completion Deadlines by the DB Contractor has merit, but are unable to agree as to the amount of such price increase and/or time extension, the Dispute shall be subject to the provisions on the SCP.

The DB Contractor shall proceed with the performance of work in accordance with the provisions of Section 13.4 while negotiations or the Dispute resolution process is ongoing.

11.12 No Release or Waiver

11.12.1 Extension of Time for Performance

No extension of time granted hereunder shall release the DB Contractor's Surety from its obligations. The District shall not be deemed to have waived any rights under the Contract, including its right to abrogate the Contract for abandonment or for failure to complete within the time specified, or to impose and deduct damages as may be provided herein as the result of any grant of an extension of time beyond the date fixed for the completion of any part of the Work, any acceptance of performance of any part of the Work after a Completion Deadline, or the making of any payments to the DB Contractor after such date.

11.12.2 No Change Order Based on Course of Conduct Order by Unauthorized Person

No course of conduct or dealings between the parties, or express or implied acceptance of alterations or additions to the Work, and no Claim that the District has been unjustly enriched shall be the basis for any Claim, request for additional compensation, or extension of a Completion Deadline. Further, the DB Contractor shall undertake, at its risk, work included in any written or oral request, order, or other authorization issued by a Person in excess of that Person's authority as provided herein. The DB Contractor shall be deemed to have performed such work as a volunteer and at its sole cost. In addition, the District may require the DB Contractor to remove or otherwise undo any such work at the DB Contractor's sole cost.

12 Suspension of Work

12.1 Suspension for Convenience

The District may, at any time and for any reason by written notice, order the DB Contractor to suspend all or any part of the Work required under the Contract Documents for the period of time that the District deems appropriate for the convenience of the District. Such suspension for convenience will be considered a District-Directed Change. The DB Contractor shall promptly comply with any such written suspension order. The DB Contractor shall promptly recommence the Work upon receipt of written notice from the District directing the DB Contractor to resume Work.

12.2 Suspension for Cause

The District has the authority by written order to suspend the Work without liability to the District wholly or in part for the DB Contractor's failure to:

- A. Correct conditions unsafe for the Project personnel or general public.
- B. Comply with any Governmental Approval, legal requirement, or otherwise carry out the requirements of the Contract.
- C. Carry out orders of the District.
- D. Comply with environmental requirements.
- E. Comply with the requirements for developing and implementing the Project Management Plan.

The DB Contractor shall promptly comply with any such written suspension order. The DB Contractor shall promptly recommence the Work upon receipt of written notice from the District directing the DB Contractor to resume Work.

12.3 DB Contractor Responsibilities During Suspension

During periods that Work is suspended by the District, the DB Contractor shall prevent damage or injury to the Project and other facilities; protect and secure materials stored both on-site and off-site; provide for drainage; obtain and maintain compliance with all Governmental Approvals; maintain all Contractor- provided insurance and bonds; and erect necessary temporary structures, signs or other facilities required to maintain the Project and other facilities in the Project vicinity. During any suspension period, unless otherwise directed by the District, the DB Contractor shall continue to be responsible for maintenance of traffic in accordance with DBA, and for maintenance during construction in accordance within maintenance during construction. If the suspension is for the District's convenience, the additional work performed by the DB Contractor during the suspension period shall be considered a District-Directed Change.

13 Termination for Convenience

13.1 Notice of Termination

The District may terminate the Contract and the performance of the Work by the DB Contractor in whole, or in part, if the District determines, in its sole discretion that a termination is in the best interest of the District. The District shall notify the DB Contractor of its decision to terminate by delivering to the DB Contractor a written Notice of Termination specifying the extent of termination and its effective date. Termination (or partial

termination) of the Contract shall not relieve any Surety of its obligation for any Claims arising out of the Work performed.

13.2 DB Contractor Responsibilities upon Termination

After receipt of a Notice of Termination, and except as otherwise directed by the District, the DB Contractor shall immediately proceed as follows, regardless of any delay in determining or adjusting any amounts due under this Section 15:

- A. Stop Work as specified in the notice.
- B. Communicate such notice to all affected Subcontractors that their Subcontracts are not to be further performed unless otherwise authorized in writing by the District.
- C. Place no further Subcontracts or orders for materials, services or facilities, except as necessary to complete the continued portion of the Work, if any, or for mitigation of damages.
- D. Terminate all Subcontracts to the extent that they relate to the Work terminated.
- E. Assign to the District in the manner, at the times, and to the extent directed by the District, all of the right, title, and interest of the DB Contractor under the Subcontracts so terminated, in which case the District will have the right, in its sole discretion, to accept performance, settle, or pay any or all Claims arising out of the termination of such Subcontracts.
- F. Settle all outstanding liabilities and Claims arising out of such termination of Subcontracts, with the Approval of the District, to the extent it may be required, which Approval shall be final.
- G. Provide the District with an inventory list of all materials previously produced, purchased, or ordered from Suppliers for use in the Work and not yet used in the Work, including its storage location, as well as any documentation or other property required to be delivered hereunder, which is either in the process of development or previously completed but not yet delivered to the District, and such other information as the District may request; and transfer title and deliver to the District, in the manner, at the times, and to the extent, if any, directed by the District: (i) fabricated or un-fabricated parts, the Work in process, completed Work, supplies and other material produced or acquired for the Work terminated; and (ii) the Design Documents, Construction Documents, and all other completed or partially completed drawings (including plans, elevations, sections, details, and diagrams), specifications, records, samples, information, and other property that would have been required to be furnished to the District if the Work had been completed.
- H. Complete performance in accordance with the Contract Documents of all Work not terminated.
- I. Take all action that may be reasonably necessary, or that the District may direct, for the safety, protection and preservation of: (i) the public, including public and private vehicular movement; (ii) the Work; and (iii) the equipment, machinery, materials, and property related to the Contract Documents that is in the possession of the DB Contractor and in which the District has or may acquire an interest.
- J. As authorized by the District in writing, use its best efforts to sell, in a manner, at the times, to the extent, and at the price or prices directed or authorized by the District, any property of the types referred to in Section 17.2(G), except for Design Documents, Construction Documents, other completed or partially completed drawings (including plans, elevations, sections, details, and diagrams), specifications, records, samples, and information; provided, however, that the DB Contractor: (i) is not required to extend credit to any purchaser; and (ii) may acquire the property under the conditions prescribed and at prices Approved by the District. The proceeds of any transfer or disposition will be applied to reduce any

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payments to be made by the District under the Contract Documents or paid in any other manner directed by the District.

- K. If requested by the District, withdraw from the portions of the Site designated by the District and remove such materials, equipment, tools, and instruments used by, and any debris or waste materials generated by, the DB Contractor and any Subcontractor in the performance of the Work as the District may direct.
- L. Take other actions directed by the District.

13.3 Responsibility After Notice of Termination

The DB Contractor shall continue to be responsible for damage to materials after issuance of the Notice of Termination, except as follows:

- A. The DB Contractor's responsibility for damage to materials, for which partial payment has been made as provided herein, shall terminate when the District certifies that those materials have been stored in the manner and at the locations directed by the District.
- B. The DB Contractor's responsibility for damage to materials purchased by the District subsequent to the issuance of the notice that the Contract is to be terminated shall terminate when title and delivery of those materials has been taken by the District.

Immediately after the District determines that the DB Contractor has completed the Work directed to be completed prior to termination and such other work as may have been ordered to secure the Project for termination, the DB Contractor will not be required to provide for continuing safety, security, and maintenance at the Site. Subsequent to the determination that all materials have been stored in the manner and at the locations directed by the District, further handling of such materials shall be the responsibility of the District.

13.4 Negotiated Termination Settlement

13.4.1 Settlement Proposal

After receipt of a Notice of Termination, the DB Contractor shall submit a final termination settlement proposal to the District in the form and with the certification prescribed by the District. The DB Contractor shall submit the proposal promptly, but no later than 1 year from the effective date of termination, unless the DB Contractor has requested a time extension in writing within such period and the District has agreed in writing to allow such an extension. The District will then review the DB Contractor's termination settlement proposal and will act upon it, return it with comments or reject it. If the DB Contractor fails to submit the proposal within the time allowed, the District may determine, on the basis of information available to it, the amount, if any, due to the DB Contractor because of the termination and shall pay the DB Contractor the amount so determined.

13.4.2 Negotiated Settlement Amount

The DB Contractor and the District may agree, as provided in Section 15.4.1, upon the whole or any part of the amount or amounts to be paid to the DB Contractor by reason of the total or partial termination of Work pursuant to this Section 15. Such negotiated settlement may include a reasonable allowance for profit solely on Work which has been completed as of the termination date and subsequently accepted by the District. Such agreed amount(s), exclusive of settlement costs, shall not exceed the total Contract Price as reduced by the amount of payments otherwise made and as further reduced by the Contract Price of Work not terminated. Upon calculation of the settlement amount, the Contract will be amended accordingly; and the DB Contractor will be paid the agreed amount. Nothing in Section 15.5, prescribing the amount to be paid to the DB Contractor

in the event that the DB Contractor and the District fail to agree upon the whole amount to be paid to the DB Contractor by reason of the termination of Work pursuant to this Section 15, shall be deemed to limit, restrict, or otherwise determine or affect the amount(s) which may be agreed upon to be paid to the DB Contractor pursuant to this Section 15.4. Unless otherwise agreed to by the parties as a part of a negotiated settlement, the District's execution and delivery of any settlement agreement shall not affect any of its rights under the Contract Documents with respect to completed Work, relieve the DB Contractor from its obligations with respect thereto, including Warranties, or affect the District's rights of payment or performance under the Payment and Performance Bond as to such completed or non-terminated Work.

13.5 Determination of Settlement Amount if Negotiations Fail

If the DB Contractor and the District fail to agree, as provided in Section 15.4.2, upon the whole amount to be paid to the DB Contractor by reason of the termination of Work pursuant to this Section 15, the amount payable (exclusive of interest charges) shall be calculated by the District in accordance with the following, but without duplication of any amounts agreed upon in accordance with Section 15.4.

13.5.1 Payment Amount

The District will pay the DB Contractor the sum of the following amounts for Work performed prior to the effective date of the Notice of Termination, as such amounts are calculated by the District:

- A. The DB Contractor's actual reasonable out-of-pocket cost without profit and including equipment costs only to the extent permitted by Section 13 for all Work performed, including mobilization, demobilization, and work done to secure the Project for termination, including reasonable overhead and accounting for any refunds payable with respect to insurance premiums, deposits, or similar items, as established to the District's satisfaction. In calculating the reasonable cost, deductions will be made for the cost of materials to be retained by the DB Contractor and amounts realized by the sale of materials and for other appropriate credits. Deductions will also be made for the cost of damaged materials. When, in the opinion of the District, the cost of an item of Work is excessively high due to costs incurred to remedy or replace defective or rejected Work, the reasonable cost to be allowed will be the estimated reasonable cost of performing that Work in compliance with the requirements of the Contract Documents, and the excessive actual cost will be disallowed. Reasonable out of pocket costs and overhead for the purposes of this Section 15.5.1.1, to the extent not already reimbursed, paid, or payable, or provided for in Section 13, shall be limited to the following:
 - a. Additional costs of professional services at rates in effect under the DB Agreement or otherwise previously in use for the Project, or if not in effect or in use, then according to reasonable and customary rates of the profession in the locality of the Project.
 - b. Costs of labor, including social security, unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance.
 - c. Costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed subject to the provisions of this subsection. Costs of transportation, storage, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by the DB Contractor at the site and fully consumed in the performance of the Work. Costs of materials, supplies, temporary facilities, machinery, equipment and tools that are not fully consumed shall be based on the cost or value of the item at the time it is first used

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on the Project site less the value of the item when it is no longer used at the Project site. Costs for items not fully consumed by the DB Contractor shall mean fair market value.

- d. Rental costs of machinery and equipment, exclusive of hand tools, whether rented from the DB Contractor or others, all provided at the site by DB Contractor, all so long as the District has approved such items and the rental rates in advance in writing; and if tools, machinery or construction equipment are rented from the DB Contractor, the rental rate, including freight and delivery costs and all operating expenses except labor, shall be approved in advance by the District and shall be in accordance with the “Rental Rate Blue Book for Construction Mobilization Costs” published by Primedia, latest edition (“Blue Book”), but no higher than the prevailing competitive rates for rental of similar equipment in the Project vicinity. For tools, machinery, or construction equipment that is required to be on standby, the Blue Book rental rate shall be reduced by fifty percent (50%). Standby time should not exceed 8 hours per day, 40 hours per week, or the annual usage hours as established by the rate guide. If the Blue Book is used to calculate rental costs for periods of less than one month, then hourly rates will be developed by dividing the Blue Book monthly rental rate by 176 (or such other factor as was used by the publisher for defining the number of hours in a month). If equipment can be purchased for an amount comparable to the aggregate rental cost of said equipment, then DB Contractor shall purchase such equipment and turn it over to the District upon final completion of the Work, or, at the District’s option, credit to the District with the amount of the fair market resale value.
- e. Costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work.
- f. Additional costs of supervision and field office personnel directly attributable to the change or termination.
- g. With the District’s prior written approval, wages or salaries of the DB Contractor’s supervisory and administrative personnel when stationed at the site.
- h. Wages and salaries of the DB Contractor’s supervisory or administrative personnel engaged at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work.
- i. Bonuses, profit sharing, incentive compensation and any other discretionary payments paid to anyone hired by the DB Contractor or paid to the Engineer or any Consultant, Contractor or supplier, with the District’s prior written approval.
- j. Payments made by the DB Contractor to the Engineer, Architect, Landscape Architect, Consultants, Subcontractors and suppliers in accordance with the requirements of their subcontracts.
- k. Costs of materials described in Section 15.5.1 in excess of those actually installed to allow for reasonable waste and spoilage. Unused excess materials, if any, shall become the District’s property upon termination or, at the District’s, shall be sold by the DB Contractor. Any amounts realized from such sales shall be credited to the District as a deduction from the amount payable due to termination.
- l. Costs of removal of debris from the site of the Work and its proper and legal disposal.

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- m. Costs of materials and equipment suitably stored off the site at a mutually acceptable location, with the District's prior written approval subject to the requirements of the DB Agreement with respect to "stockpiling."
 - n. Premiums for that portion of insurance and bonds required by the Contract Documents that can be directly attributed to the DB Agreement. With the District's prior approval self-insurance for either full or partial amounts of the coverages required by the Contract Documents.
 - o. Sales, use or similar taxes imposed by a governmental authority that are related to the Work and for which the DB Contractor is liable, except for a tax on the net income of DB Contractor. The District may be exempt from the payment of sales taxes for materials incorporated into improvements to real property, depending on the laws of the jurisdiction where the Project is located. DB Contractor shall use such exemptions fully to the extent available.
 - p. Fees and assessments for the building permit and for other permits, licenses and inspections for which the DB Contractor is required by the Contract Documents to pay.
 - q. Fees of laboratories for tests required by the Contract Documents, except those related to defective or nonconforming Work for which reimbursement is hereby excluded.
 - r. Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent rights arising from such requirement of the Contract Documents; and payments made in accordance with legal judgments against the DB Contractor resulting from such suits or claims and payments of settlements made with the District's prior written consent.
 - s. With the District's prior written approval, costs for electronic equipment and software directly related to the Work.
 - t. Deposits lost for causes other than the DB Contractor's negligence or failure to fulfill a specific responsibility in the Contract Documents.
 - u. With the District's prior written approval, expenses incurred in accordance with the DB Contractor's standard written personnel policy for relocation, and temporary living allowances of, the DB Contractor's personnel required for the Work.
 - v. That portion of the reasonable expenses of the DB Contractor's supervisory or administrative personnel incurred while traveling in discharge of duties connected with the Work.
- B. Costs Not to Be Reimbursed Upon Termination as Part of this Contract
- a. Salaries and other compensation of the DB Contractor's personnel stationed at the DB Contractor's principal office or offices other than the site office;
 - b. Expenses of the DB Contractor's principal office and offices other than the site office;
 - c. Overhead and general expenses, except as may be expressly included in Section 15.5.A;
 - d. The DB Contractor's capital expenses, including interest on the DB Contractor's capital employed for the Work;
 - e. Costs due to the negligence or failure of the DB Contractor, Subcontractors and suppliers or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable to fulfill a specific responsibility of the Design-Build Agreement;
 - f. Any cost not specifically and expressly described in Section 15.5.A;

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- g. Costs including, but not limited to, the failure to perform of any DB Contractor related entity or Subcontractor or the bankruptcy or insolvency of any DB Contractor related entity or Subcontractor.
 - h. Legal and administrative costs to review and negotiate the DB Agreement and the other Contract Documents.
 - i. Travel and subsistence expense of DB Contractor, its officers or employees incurred while traveling between the Project and DB Contractor's principal or branch offices, and travel in the metropolitan area of the Project.
 - j. Fines, penalties, sanctions or impositions assessed or imposed by any governmental body, instrumentality or tribunal arising from the fault of DB Contractor.
 - k. Costs incurred by DB Contractor resulting from the failure of DB Contractor or its Subcontractors to coordinate their work with that of the District and its contractors, and third parties including, without limitation, utility companies, if any, after agreeing to the schedules therefor, or failure of DB Contractor to comply with directives of the District not in conflict with said schedules.
 - l. Costs resulting from the failure of DB Contractor or any Subcontractor to procure and maintain insurance as and to the extent required by the Contract Documents.
 - m. Any and all personnel costs, including, without limitation, wages, salaries, and benefits, except for personnel based at the site office and only as specifically provided herein.
 - n. Any and all overhead expense, or office expense at any location, except site office expense to the extent specifically included herein.
 - o. Costs related to DB Contractor's indemnification obligations pursuant to the terms of the executed Design Build Agreement.
 - p. The cost of capital, including, without limitation, interest on capital, regardless of whether it is related to the Project.
 - q. Any cost arising out of the fault or negligence of DB Contractor, its Subcontractors, or any person or entity for whom they may be liable, including, without limitation, costs related to defective, rejected, or nonconforming work, materials or equipment, and damage to persons or property.
 - r. Liquidated or actual damages imposed by the District.
 - s. Any and all costs not specifically authorized herein, including, without limitation, any cost which would cause the Contract Price allocable to the satisfactorily completed and accepted Work to be exceeded.
- C. As profit on 15.5.1.A, a sum determined by the District to be fair and reasonable, provided, however, that if it appears that the DB Contractor would have sustained a loss on the entire Contract had it been completed, no profit shall be included or allowed under this Section 15.5.1; and an appropriate adjustment shall be made by reducing the amount of the settlement to reflect the indicated rate of loss.
- D. The cost of settling and paying Claims arising out of the termination of Work under Subcontracts as provided in Section 15.2(F), exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the Subcontractor prior to the effective date of the Notice of Termination under the Contract, shall be included in the cost as defined in 15.5.1(A).

13.5.2 Maximum Compensation

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The DB Contractor acknowledges and agrees that it shall not be entitled to any compensation in excess of the value of the Work performed as calculated and provided in Section 15.5.1, plus its settlement costs. Items such as lost or anticipated profit, unabsorbed overhead, and opportunity costs shall not be recoverable by the DB Contractor upon termination of the Contract. However, the total amount to be paid to the DB Contractor, inclusive of costs described in Sections 15.5.1.C, may not exceed the total Contract Price less the amount of payments previously made and less the Contract Price of any Work not terminated. Furthermore, if any refund is payable with respect to insurance or bond premiums, deposits or similar items, which were previously passed through to the District by the DB Contractor, such refund shall be paid directly to the District or otherwise credited to the District. Notwithstanding anything to the contrary contained herein, if a termination occurs prior to the authorized commencement of construction, the total amount payable to the DB Contractor shall in no event exceed the amounts attributable to design only and previously made insurance or bond payments.

13.5.3 Excluded Items

Except for normal spoilage and to the extent that the District will have otherwise expressly assumed the risk of loss, the amounts payable to the DB Contractor under Section 15.5.1 will exclude the fair value, as determined by the District, of equipment, machinery, materials, and property that are destroyed, lost, stolen, or damaged so as to become undeliverable to the District, or to a buyer pursuant to Section 15.2(J).

The amount set forth in the Proposal by the DB Contractor for the Work terminated shall be a factor to be analyzed in determining the value of the Work terminated.

13.5.4 Payment of Termination Amount

Upon determination of the amount of the termination payment, the Contract shall be amended to reflect the agreed termination payment, and the DB Contractor shall be paid the agreed amount.

13.6 Partial Termination

If a termination hereunder is partial, the Contract Price for the remainder of the Work shall be adjusted as appropriate to account for the change in the overall scope of the Project.

13.7 Reduction in Amount Due to DB Contractor

The amount otherwise due the DB Contractor under this Section 15 shall be reduced by the following: (i) all unliquidated advance or other payments made to or on behalf of the DB Contractor applicable to the terminated portion of the Contract; (ii) the amount of any Claim which the District may have against any Contractor-Related Entity in connection with the Contract; (iii) the agreed price for, or the proceeds of the sale of, any property, materials, supplies or other things acquired by the DB Contractor or sold, pursuant to the provisions of this Section 15, and not otherwise recovered by or credited to the District; (iv) amounts that the District deems advisable, in its sole discretion, to retain to cover any existing or threatened Claims, Liens, and stop notices relating to the Project, including Claims by Utility Companies; (v) the cost of repairing any Nonconforming Work; and (vi) any amounts due or payable by the DB Contractor to the District.

13.8 Partial Payments

The District may, from time to time, under such terms and conditions as it may prescribe and in its sole discretion, make partial payments on account against costs incurred by the DB Contractor in connection with the terminated portion of the Contract, whenever in the opinion of the District the aggregate of such payments shall

be within the amount to which the DB Contractor will be entitled under this Section 15. If the total of such payments is in excess of the final amount agreed or determined to be due under this Section 15, such excess shall be payable by the DB Contractor to the District upon demand, together with interest at a rate equal to the average rate at the time being received from the investment of state funds, as determined by the District Treasurer, for the period from the date such excess payment is received by the DB Contractor to the date on which such excess is repaid to the District. However, no interest will be charged with respect to any such excess payment attributable to a reduction in the DB Contractor's Claim by reason of retention or other disposition of termination inventory until 10 Days after the date of such retention or disposition, or such later date as determined by the District by reason of the circumstances.

13.9 Inclusion in Subcontracts

The DB Contractor shall insert in all Subcontracts a requirement that the Subcontractor shall stop Work on the date and to the extent specified in a Notice of Termination from the District in accordance with this Section 15 and shall require Subcontractors to insert the same provision in each Subcontract on all tiers.

13.10 Limitation on Payments to Subcontractor

For the purposes of Sections 15.4.2 and 15.5, upon termination under Section 15.2(D) of Work under any Subcontract, the DB Contractor will not be entitled to reimbursement for that portion of the termination settlement with any such Subcontractor, which constitutes anticipatory or unearned profit on Work not performed or which constitutes consequential damages on account of the termination or partial termination.

13.11 No Unearned Profit or Consequential Damages

Under no circumstances shall the DB Contractor be entitled to anticipatory or unearned profit or consequential or other damages as a result of a termination or partial termination under this Section 15. The payment to the DB Contractor calculated in accordance with this Section 15 constitutes the DB Contractor's sole and exclusive remedy for a termination under this Section 15.

13.12 No Waiver

Anything contained in the Contract to the contrary notwithstanding, a termination under this Section 15 shall not waive any right or claim to damages, which the District may have; and the District may pursue any cause of action, which it may have at law or in equity or under the Contract.

13.13 Dispute Resolution

The failure of the parties to agree on amounts due under this Section 15 shall be a Dispute to be resolved in accordance with SCP.

13.14 Allowability of Costs

All costs claimed by the DB Contractor under this Section 15 shall, at a minimum, be allowable, allocable, and reasonable in accordance with the cost principles and procedures of 48 CFR Part 31.

13.15 Suspension of Work

In the event of any suspension of Work by the District occurring for more than 180 consecutive Days after suspension, the DB Contractor shall have the right to consider the Contract to have been terminated for convenience under this Section 15. The DB Contractor shall notify the District of such election by delivering to the District a written Notice of Termination due to such suspension specifying its effective date. Upon delivery by the DB Contractor to the District of a Notice of Termination due to suspension, the provisions of this Section 15 shall apply.

14 Default and Force Majeure Events

14.1 Default

- A. The District may, subject to the provisions of paragraph C of this clause, by written notice of default to the DB Contractor, terminate the whole or any part of the Contract in any one of the following circumstances:
 - a. If the Contractor fails to make delivery of the supplies or to perform the Work within the time specified in the Contract or any extension thereof; or
 - b. If the DB Contractor fails to perform any of the other provisions of the Contract, or so fails to make progress as to endanger performance of the Contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of ten (10) Days (or such longer period as the CO may authorize in writing) after receipt of notice from the CO specifying such failure.
- B. In the event the District terminates the Contract in whole or in part as provided in paragraph A of this clause, the District may procure, upon such terms and in such manner as the CO may deem appropriate, supplies or Work similar to those so terminated, and the DB Contractor shall be liable to the District for any excess costs for similar supplies or Work; provided, that the DB Contractor shall continue the performance of the Contract to the extent not terminated under the provisions of this clause.
- C. Except with respect to Defaults of subcontractors, the DB Contractor shall not be liable for any excess costs if the failure to perform the Contract arises out of causes beyond the control and without the fault or negligence of the DB Contractor. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the District or federal government in either their sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, industry-wide strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform must be beyond the reasonably anticipatable control and without fault or negligence of the DB Contractor. If the failure to perform is caused by the Default of a subcontractor, and if such Default arises out of causes beyond the control of both the DB Contractor and the subcontractor, and without the fault or negligence of either of them, the DB Contractor shall not be liable for any excess cost for failure to perform, unless the supplies or the Work to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the DB Contractor to meet the required delivery schedule. The term “subcontractor(s)” means subcontractor(s) at any tier.
- D. If the Contract is terminated as provided in paragraph A. of this clause, the District, in addition to any other rights provided in this clause, may require the DB Contractor to transfer title and deliver to the District, in the manner and to the extent directed by the CO, (a) completed supplies and Work, and (b)

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such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and Contract rights (hereinafter collectively called “manufacturing materials”) that the DB Contractor has specifically produced or specifically acquired for the performance of such part of the Contract as has been terminated; and the DB Contractor shall, upon direction of the CO, protect and preserve property in possession of the DB Contractor in which the District has an interest. Payment for completed supplies and Work delivered to and accepted by the District will be at the applicable Contract Price. Payment for manufacturing materials delivered to and accepted by the District and for the protection and preservation of property shall be in amounts agreed upon by the DB Contractor and CO; failure to agree to such amount shall be a dispute. The District may withhold from amounts otherwise due the DB Contractor for such completed supplies, Work or manufacturing materials such sum as the CO determines to be necessary to protect the District against loss because of outstanding liens or claims of former lien holders.

- E. If, after termination of the Contract under the provisions of this clause, it is determined for any reason that the DB Contractor was not in Default under the provisions of this clause, or that the default was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the Contract contains a clause providing for termination of convenience of the District, be the same as if the notice of termination had been issued pursuant to such clause. See Section 15 - Termination for Convenience.
- F. The rights and remedies of the District provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under the contract.

14.2 Force Majeure

In addition to any other rights provided under the Contract to terminate the Contract, DOEE reserves the right to terminate the Contract if the District believes it is necessary due to a Force Majeure Event. If DOEE chooses not to terminate the Contract pursuant to this Section 16.2, the DB Contractor will be entitled to one additional day of contract time for each day of non-concurrent delay caused by the specified causes; the extension of time is the DB Contractor’s sole remedy provided they are beyond the DB Contractor’s reasonably anticipatable control and not due to an act or omission by the DB Contractor or its Subcontractors, that materially and adversely affect the DB Contractor’s obligations and could not have been avoided by the exercise of caution, due diligence, or reasonable efforts by DB Contractor, including:

- A. Any earthquake, tornado, hurricane, flood, or other natural disaster causing direct physical damage to the Project.
- B. Any epidemic in the Project area
- C. Any freight embargo
- D. Industry-wide strikes, unless caused by the DB Contractor
- E. Any blockade, rebellion, war, riot, act of sabotage or civil commotion that causes direct physical damage to the Project
- F. Matters related to national security
- G. Material change in law, except as provided in Section 12.1.K.
- H. Issuance of a Temporary Restraining Order or other form of injunction by a court that prohibits prosecution of a material portion of the Work, except as provided in Section 12.1.L.

15 Damages

15.1 Liquidated Damages

15.1.1 Failure to Meet Contract Requirements

The DB Contractor understands and agrees that if the DB Contractor fails to complete the Work in accordance with the Contract Documents, the District will suffer losses and damages. The DB Contractor agrees that it shall be liable for all such losses and damages. The DB Contractor acknowledges and agrees it is impracticable and extremely difficult to ascertain and calculate the actual damages which would accrue to the District and the public in the event of the DB Contractor’s failure to achieve Substantial Completion and Final Completion by the applicable Project Completion Deadlines.

Therefore, the DB Contractor and the District have agreed to stipulate the amount payable by the DB Contractor in the event of its failure to meet the Completion Deadlines. The DB Contractor acknowledges and agrees that such Liquidated Damages are intended to compensate the District solely for the DB Contractor’s failure to meet these Contract Document requirements, and not as a penalty, and shall not excuse the DB Contractor from liability from any other breach of Contract requirements, including any failure of the Work to conform to applicable requirements.

15.1.1.1 Failure to Meet Substantial Completion Deadline

If the DB Contractor fails to achieve the Substantial Completion Deadline, the DB Contractor agrees to pay the District Liquidated Damages in the following amount: \$2000 per Day or portion of a Day for the DB Contractor’s failure to achieve Substantial Completion by the Substantial Completion Deadline if not the fault of the District, and the DB Contractor agrees and acknowledges that such amount is an accurate estimate of the actual damages the District would incur in the event of such a delay.

15.1.1.2 Failure to Meet Final Completion Deadline

If the DB Contractor fails to achieve the Final Completion Deadline, the DB Contractor agrees to pay the District Liquidated Damages in the following amount: \$1000 per Day or portion of a Day for the DB Contractor’s failure to achieve Final Completion by the Final Completion Deadline if not the fault of the District, and the DB Contractor agrees and acknowledges that such amount is an accurate estimate of the actual damages the District would incur in the event of such a delay.

15.1.1.3 Reserved

15.1.1.4 Maximum Damage Amounts/Consequential Damages

There is no maximum cap on Cumulative Liquidated Damages under Section 17.1.1. Both the DB Contractor and the District agree that they are not entitled to consequential damages.

15.2 Offset/Waiver

15.2.1 Offset

The DB Contractor hereby agrees that the District may use all or any portion of any consideration or refund due the DB Contractor under the present contract to satisfy, in whole or in part, any debt due the District.

15.2.2 No Waiver

Permitting or requiring the DB Contractor to continue and finish the Work or any part thereof after a Completion Deadline shall not act as a waiver of the District’s right to receive Liquidated Damages hereunder or any rights or remedies otherwise available to the District.

15.3 Payment of Liquidated Damages

To the extent Liquidated Damages are not deducted in a monthly progress report payment from any amount owed to the District by the DB Contractor, the District may send the DB Contractor an invoice, and the Liquidated Damages shall be payable by the DB Contractor to the District within 10 Days after the DB Contractor’s receipt of the invoice.

16 Indemnification

16.1 Indemnifications by Contractor

- A. The DB Contractor agrees to defend, indemnify and hold harmless the District, its officers, agencies, departments, agents, and employees (collectively the “District”) from and against any and all claims, losses, liabilities, penalties, fines, forfeitures, demands, causes of action, suits, costs and expenses incidental thereto (including reasonable cost of defense and attorneys’ fees), (collectively “Claims”), resulting from, arising out of, or in any way connected to activities or work performed by the DB Contractor, the DB Contractor’s officers, employees, agents, servants, subcontractors, or any other person acting for or by permission of the DB Contractor in performance of this Contract. The DB Contractor assumes all risks for direct and indirect damage or injury to the property or persons used or employed in performance of this Contract. The DB Contractor shall also repair or replace any District property that is damaged by the DB Contractor, DB Contractor’s officers, employees, agents, servants, subcontractors, or any other person acting for or by permission of the DB Contractor while performing work hereunder.
- B. The indemnification obligation under this section shall not be limited by the existence of any insurance policy or by any limitation on the amount or type of damages, compensation or benefits payable by or for DB Contractor or any subcontractor, and shall survive the termination of this Contract. The District agrees to give the DB Contractor written notice of any claim of indemnity under this section. Additionally, DB Contractor shall have the right and sole authority to control the defense or settlement of such claim, provided that no contribution or action by the District is required in connection with the settlement. Monies due or to become due to the DB Contractor under the contract may be retained by the District as necessary to satisfy any outstanding claim which the District may have against the DB Contractor.

16.2 Responsibility of the District for Certain Hazardous Materials

16.2.1 Pre-existing Site Contamination

Except for Hazardous Materials for which the DB Contractor is responsible as described in Section 13.9.1 and, without contradiction of any assertion by the District of third-party liability, for purposes of the Contract only:

- A. The DB Contractor shall not be required to execute any hazardous waste manifests as a "generator."

- B. Hazardous Materials encountered in the performance of the Work shall be disposed of, if at all, using a U.S. Environmental Protection Agency Identification Number or other appropriate legal device obtained by, and carried in the name of, the District or another Person designated by the District. The DB Contractor is responsible for contacting DOEE and obtaining all permits and approvals associated with Hazardous Materials removal and disposal.

16.2.2 No Effect on Other Rights

The foregoing obligations shall not be construed to negate, abridge, or reduce other rights or obligations that would otherwise exist in favor of a party hereunder.

16.3 Comprehensive Environmental Response, Compensation, and Liability Act Agreement

Without limiting their generality, the indemnities set forth in Section 18.1 are intended to operate as agreements pursuant to Section 107(e) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC Section 9607(e), to insure, protect, hold harmless, and indemnify the parties indemnified in said Section 20.1.

17 Acceptance of Project

17.1 Substantial Completion

As a prerequisite to Substantial Completion, the DB Contractor shall provide written notice to the District when all of the following have occurred with respect to the Project:

- A. The District and the DB Contractor have agreed upon a Punch List for Substantial Completion.
- B. The DB Contractor has completed all Work except for Punch List items, final cleanup, and other items only included in the requirements for Final Acceptance.
- C. The DB Contractor has ensured that the Work in connection with Substantial Completion has been performed in accordance with the requirements of the Contract Documents.
- D. The DB Contractor has ensured that the Project may be operated safely without injury to any Person or damage to the Project or any other property on or off the Site.
- E. The DB Contractor has ensured that the Project is ready to be opened for all traffic and that no further Work is required that would involve any lane, shoulder or sidewalk closure except as necessary to complete Punch List items.
- F. The DB Contractor has received all applicable Governmental Approvals required for the Project.
- G. The DB Contractor has furnished to the District certifications from the DB Contractor's Design Manager, in form and substance satisfactory to the District, certifying that the Design Documents meet the requirements of the Contract Documents.
- H. The DB Contractor has furnished to the District certifications from the DB Contractor's Project Manager, in form and substance satisfactory to the District, certifying that the construction meets the requirements of the Contract Documents.

- I. The DB Contractor has obtained all applicable third-party Approvals relating to the Work, and all third parties have completed all Work that involves obligations by the DB Contractor.

17.2 Notice of Substantial Completion

Upon receipt of the DB Contractor’s notice under Section 19.1, the District, will verify that the following have occurred:

- A. All Nonconforming Work identified as prerequisites to Substantial Completion has been corrected.
- B. All Punch List items identified as prerequisites to Substantial Completion have been completed.
- C. All other requirements identified as prerequisites to Substantial Completion have been met.

If any Work does not meet the requirements of the Contract Documents or Work has not been completed, the District will promptly advise the DB Contractor as to Nonconforming Work or incomplete Work necessary to be corrected as a condition to Substantial Completion. Upon correction of the Nonconforming Work excluding Punch List items identified for Final Acceptance, the DB Contractor shall provide written notification to the District; and the District will verify that all prerequisites to Substantial Completion have been met and will issue a Notice of Substantial Completion.

17.3 Affidavit of Final Completion

The DB Contractor shall provide to the District an executed sworn Affidavit of Final Completion in accordance with this Section 19.3 when all of the following have occurred:

- A. The District has received all Released for Construction Documents, Design Documents, As-Built Documents, Drawings record maps, surveys, test data, and other deliverables required under the Contract Documents for the Project, whichever is applicable. The DB Contractor has furnished to the District alignment points as part of the As-Built Documents.
- B. All special tools, equipment, furnishings, and supplies purchased by and/or used by the DB Contractor, as provided in the Contract Documents, have been delivered to the District free and clear of Liens and all Warranties have been transferred and assigned to the District.
- C. All of the DB Contractor’s and Subcontractors’ personnel, supplies, equipment, waste materials, rubbish, and temporary facilities have been removed from the Site. The DB Contractor has restored and repaired all damage or injury arising from such removal to the satisfaction of the District, and the Site is in good working order and condition.
- D. The DB Contractor has furnished to the District certifications from the DB Contractor’s Quality Control Manager, in form and substance satisfactory to the District, certifying that there are no outstanding Nonconforming Work or Punch List items.
- E. All of the DB Contractor’s other obligations under the Contract Documents and other than obligations, which by their nature are required to be performed after Final Acceptance as determined by the District, have been satisfied in full or waived in writing by the District.

The Affidavit of Final Completion shall include the following statement:

To the best of the DB Contractor’s knowledge and belief, the Work under the Contract has been completed in strict accordance with the Contract Documents, no lawful debts for labor or materials are outstanding and no federal excise tax has been included in the Contract Price; all requests for funds for undisputed Work under the Contract, including changes in the Work,

and all billings of whatsoever nature are accurate, complete and final and no additional compensation over and above the final payment will be requested or is due under the Contract or under any adjustment issued for said undisputed Work; there are no outstanding Claims, Liens or stop notices relating to the Project, including Claims by Utility Companies; there is no existing default by the DB Contractor under any Utility Agreement, and no event has occurred which, with the passing of time or giving of notice or both, would lead to a Claim relating to the Work or event of default under any Utility Agreement; and upon receipt of final payment, the DB Contractor and Subcontractors acknowledge that the District and any and all employees of the District and their authorized representatives will thereby be released, discharged and acquitted from any and all Claims or liability for additional sums on account of undisputed Work performed under the Contract.

If the DB Contractor is unable to provide the affidavit in the above form, the affidavit shall certify that all such outstanding matters are set forth in an attached list that shall describe the outstanding matters in such detail as may be requested by the District. The affidavit shall include a representation of the DB Contractor that it is diligently and in good faith contesting all such matters by appropriate legal proceedings and shall provide a status report regarding the same, including an estimate of the maximum payable with respect to each such matter.

17.4 Notice of Final Acceptance

Upon the District's receipt of the Affidavit of Final Completion, the District will verify that the following have occurred:

- A. All Nonconforming Work has been corrected other than obligations that by their nature are required to be performed after Final Acceptance as determined by the District.
- B. All Punch List items have been completed other than obligations which by their nature are required to be performed after Final Acceptance as determined by the District.
- C. All other requirements identified as prerequisites to Final Acceptance have been met.

If any Work does not meet the requirements of the Contract Documents or Work has not been completed, the District will promptly advise the DB Contractor as to Nonconforming Work or incomplete Work necessary to be corrected as a condition to Final Acceptance. Upon correction of the Nonconforming Work, including incomplete Work, the DB Contractor shall provide written notification to the District and the District will verify that all prerequisites to Final Acceptance have been met and will issue a Notice of Final Acceptance.

17.5 Overpayments; No Relief from Continuing Obligations

Final Acceptance will not prevent the District from correcting any measurement, estimate or certificate made before or after completion of the Work, or from recovering from the DB Contractor, the Surety(ies) or both, the amount of any overpayment sustained due to failure of the DB Contractor to fulfill the obligations under the Contract. A waiver on the part of the District of any breach by the DB Contractor shall not be held to be a waiver of any other or subsequent breach. Final Acceptance shall not relieve the DB Contractor from any of its continuing obligations hereunder, or constitute any assumption of liability by the District.

17.6 Reserved

17.7 Assignment of Causes of Action

The DB Contractor hereby offers and agrees to assign to the District all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 USC Section 15), arising from purchases of goods, services, or materials pursuant to the Contract or any Subcontract. The assignment shall be made and become effective at the time the District tenders final payment to the DB Contractor, without further acknowledgment by the parties.

18 Warranties

18.1 Warranties by Contractor

18.1.1 Project Warranties

The DB Contractor warrants the following:

- A. When applicable law requires that services be performed by licensed professionals, the DB Contractor shall provide those services (“Professional Design Work”) through qualified, licensed professionals. DB Contractor shall be responsible to the District for the professional negligence, errors and omissions, of such professionals.
- B. DB Contractor agrees to use its best efforts to perform, or cause to be performed, all Professional Design Work (i) in accordance with the usual and customary professional standards of care, skill and diligence consistent with good professional design practices for professional design firms in the Washington, D.C. metropolitan area that provide professional design services for projects that are similar in size, scope, and budget to the Project, and (ii) in compliance with all applicable federal and District of Columbia laws, regulations, codes, ordinances, orders and with those of any other body having jurisdiction. There are no obligations, commitments, or impediments of any kind known to the DB Contractor that will limit or prevent performance by the DB Contractor of its Professional Design Work. DB Contractor hereby agrees to correct, at its own cost, any of its Professional Design Work, and the services of its professional design consultants, that do not meet the standard of care.
- C. DB Contractor warrants to the District the sufficiency and completeness of all Professional Design Work, and that all Professional Design Work including, without limitation, all drawings, specifications, and other information furnished or provided by DB Contractor, shall be reasonably accurate and free from any material errors or omissions. Neither acceptance nor approval of DB Contractor’s Professional Design Work by the District shall relieve DB Contractor of any of its duties or release it from any liability with respect to Professional Design Work, it being understood that the District is, at all times, relying upon DB Contractor for its skill and knowledge in performing DB Contractor’s Professional Design Work. The District shall have the right to reject any of DB Contractor’s Work because of any fault, damage, or defect in the Work due to any material errors or omissions in the plans, drawings, specifications, and other Professional Design Work prepared or furnished by DB Contractor. Upon notice of any such errors or omissions, DB Contractor shall promptly provide any and all services necessary to correct or remedy them at no additional cost to the District. Should the DB Contractor refuse or neglect to correct any such damage or defect within a reasonable time after notice, the District may cause the damage or defect to be corrected and withhold payment or collect monetary damages equal to the cost of replacing or repairing the defective Work. DB Contractor’s obligation to correct its errors and omissions is in addition to, and not in substitution for, any other remedy for defective services or Work which the District may have at law or in equity, or both.

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- D. The construction Work furnished pursuant to the Contract Documents shall be performed in a good, workmanlike manner and shall conform to the standards of care and diligence normally practiced by recognized construction firms performing construction of a similar nature in the District.
- E. Materials and equipment furnished under the Contract Documents shall be of good quality and, when installed, shall be new, or as allowed under this Contract, recycled materials shall be in good condition and shall meet all contractual requirements.
- F. The Work shall meet all of the requirements of the Contract Documents.
- G. The specifications and/or drawings selected or prepared for use during construction are appropriate for their intended use.
- H. The Project shall be fit for use for the intended purpose.

18.1.2 Transfer of Title

The DB Contractor warrants that it owns, or will own, and has, or will have, good and marketable title to all materials, equipment, tools and supplies furnished, or to be furnished, by it and its Subcontractors that become part of the Project or are purchased for the District for the operation, maintenance, or repair thereof, free and clear of all Liens. Title to all of such materials, equipment, tools and supplies, which shall have been delivered to the Site, shall pass to the District, free and clear of all Liens, upon the sooner of: (i) incorporation into the Project; or (ii) payment by the District to the DB Contractor of invoiced amounts pertaining thereto. Notwithstanding any such passage of title, the DB Contractor shall retain sole care, custody and control of such materials, equipment, tools and supplies, and shall exercise due care with respect thereto as part of the Work until Final Acceptance or until the DB Contractor is removed from the Project.

18.1.3 Project Warranty Term

The Warranty term shall commence upon Final Acceptance by the District. Warranties regarding all elements of the Project shall remain in effect until one (1) year after Final Acceptance, provided that the Warranty term for elements of the Project that will be owned by Persons other than the District (such as Utility Companies) shall remain in effect for such a term as may be required under any applicable agreement (such as Utility Agreements). If the District concludes that any of the Work has not met the standards set forth in Section 23.1 at any time within the Warranty period, then the DB Contractor shall correct such Work as specified below within the 2-year Warranty term.

Warranties for installed equipment such as traffic signals, electronic message boards, lighting, and related facilities provided by manufacturers shall be transferred to or assigned to the District in accordance with the Standard Specifications.

The Warranties apply notwithstanding maintenance work performed by DOEE or the Maintenance Contractor during the Warranty period.

18.1.4 Corrective Work

Within seven (7) Days of receipt by the DB Contractor of notice from the District specifying a failure of any of the Work to satisfy the DB Contractor's Warranties, or of any Subcontractor representation, Warranty, guarantee, or obligation that the DB Contractor is responsible to enforce, the DB Contractor and the District shall mutually agree when and how the DB Contractor shall remedy such violation; provided, however, that in case of an emergency as indicated by the District in its notice requiring immediate curative action, the DB Contractor and the District shall agree on a remedy immediately upon notice by the District of such emergency. If the DB

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Contractor does not use its best efforts to proceed to effectuate such remedy within the agreed time, or if the DB Contractor and the District fail to reach such an agreement within such 7-Day period or immediately, in the case of emergency conditions, then the District, after notice to the DB Contractor, shall have the right to perform or have performed by third parties the necessary remedy, and the costs thereof shall be borne by the DB Contractor. The DB Contractor shall reimburse the District for such costs within 30 Days after the DB Contractor's receipt of the invoice. The District may agree to accept Nonconforming Work in accordance with Section 7.6.

The District and the DB Contractor shall conduct a walkthrough of the Site prior to expiration of the Warranty period and shall produce a Punch List of those items requiring Warranty Work.

18.1.5 Contractor's Costs of Correction of Work

All costs of correcting such rejected Work, including additional testing and inspections, shall be deemed included in the Contract Price. The DB Contractor shall reimburse the District and pay the District's expenses made necessary thereby within 30 Days after the DB Contractor's receipt of invoice. The DB Contractor shall be responsible for obtaining any required Governmental Approvals or other consents from any other Person in connection with the Warranty Work.

18.2 Subcontractor Warranties

18.2.1 Assignment

Without in any way derogating the DB Contractor's own representations and Warranties and other obligations with respect to all Work, the DB Contractor shall obtain from all Subcontractors and cause to be extended to the District, appropriate representations, Warranties, guarantees and obligations with respect to the design, materials, workmanship, equipment, tools and supplies furnished by such Subcontractors, including all such representations, Warranties, guarantees, and obligations required to be furnished by Subcontractors pursuant to the Contract Documents. All representations, Warranties, guarantees, and obligations of Subcontractors shall: (i) be written so as to survive the entire District and the DB Contractor inspections, tests, and approvals; and (ii) run directly to and be enforceable by the DB Contractor and/or the District and their respective successors and assigns. The DB Contractor hereby assigns to the District all of the DB Contractor's rights and interest in all extended Warranties for periods exceeding the applicable Warranty period that are received by the DB Contractor from any of its Subcontractors.

18.2.2 Enforcement

Upon receipt from the District of notice of a failure of any of the Work to satisfy any Subcontractor Warranty, representation, guarantee, or obligation, the DB Contractor shall enforce or perform any such representation, Warranty, guarantee, or obligation, in addition to the DB Contractor's other obligations hereunder. The District's rights under this Section 20.2.2 shall commence at the time such representation, warranty, guarantee, or obligation is furnished, and shall continue until the expiration of the DB Contractor's relevant Warranty. Until such expiration, the DB Contractor shall be responsible for the cost of any equipment, material, labor (including re-engineering), or shipping; and the DB Contractor shall be required to replace or repair defective equipment, material, or workmanship furnished by any Subcontractor.

18.3 No Limitation of Liability

The foregoing Warranties are in addition to all rights and remedies available under the Contract Documents or applicable law and shall not limit the DB Contractor’s liability or responsibility imposed by the Contract Documents or applicable law with respect to the Work, including liability for design defects, latent construction defects, strict liability, negligence, or fraud.

18.4 Warranty Beneficiaries

In addition to benefiting the District and its successors and assigns, the Warranties and Subcontractor Warranties provided under this Section 20 shall inure to the benefit of, and shall be directly enforceable by, any local agencies and Utility Companies with respect to those portions of the Work owned or controlled by each such Person.

18.5 Remedies for Breach of Warranty

In addition to the District’s other rights and remedies hereunder, at law or in equity, the DB Contractor shall be liable for actual damages resulting from its failure to provide corrective Work in accordance with Section 20.1.4 and any breach of an express Warranty or any defect in the Work.

18.6 Warranty Disputes

Any disagreement between the District and the DB Contractor relating to Section 20 shall be subject to the Dispute resolution provisions contained in Section 18, provided that the DB Contractor shall proceed as directed by the District pending resolution of the Dispute.

19 Documents and Records

19.1 Project Records

19.1.1 Maintenance of Records

The DB Contractor shall maintain at the DB Contractor’s Project Manager’s office in the District a complete set of all books, records, and documents prepared or employed by the DB Contractor with respect to the Project. The project records and documentation shall be maintained in a manner that meets or exceeds DOEE and Federal Requirements.

19.1.2 Audit and Inspection Rights

The DB Contractor shall grant to the District, FHWA and their respective authorized representatives such audit and inspection rights and allow such Persons such access to and the right to copy such books and records including all tax returns and supporting documentation filed with any Governmental Persons as such Persons may reasonably request from time to time in connection with the issuance of Change Orders, the resolution of Disputes, and such other matters as such Persons reasonably deem necessary for purposes of complying or verifying compliance with the Contract and legal requirements, including responding to requests pursuant to the D.C. Freedom of Information Act (FOIA).

19.1.3 Audit of Force Account Work

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Where the payment method for any Work is on a Force Account basis, such examination and audit rights shall include all books, records, documents, and other evidence and accounting principles and practices sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of such Work. If an audit indicates the DB Contractor has been over-credited under a previous progress report or progress payment, that over-credit will be credited against current progress reports or payments.

19.1.4 Change Order Pricing Data

For cost and pricing data submitted in connection with pricing Change Orders, unless such pricing is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the public, or prices set by law or regulation, DOEE has the right to examine all books, records, documents, and other Contractor data related to the negotiation of or performance of Work under such Change Orders for the purpose of evaluating the accuracy, completeness and currency of the cost or pricing data submitted. The right of examination shall extend to all documents deemed necessary by such Persons to permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

19.1.5 Claims Audits

All Claims filed against the District shall be subject to audit at any time following the filing of the Claim. The audit may be performed by employees of the District or by an auditor under contract with the District. No notice is required for any audit beginning before 60 Days after Final Acceptance. Thereafter, the District shall provide a 20-Day notice to the DB Contractor, any Subcontractors, or their respective agents before beginning an audit. The DB Contractor, Subcontractors, or their agents shall provide adequate facilities, acceptable to the District, for the audit during normal business hours. The DB Contractor, Subcontractors, and their agents shall cooperate with the auditors. Failure of the DB Contractor, Subcontractors, or their agents to maintain and retain sufficient records to allow the auditors to verify all or a portion of the Claim or to permit the auditors access to the books and records of the DB Contractor, Subcontractors, or their agents shall constitute a waiver of the Claim and shall bar any recovery thereunder. At a minimum, the auditors shall have available to them the following documents:

- A. Daily time sheets, superintendent's log books, and supervisor's daily reports
- B. Union agreements
- C. Insurance, welfare, and benefits records
- D. Payroll registers
- E. Earnings records
- F. Payroll tax forms
- G. Material invoices and requisitions
- H. Material cost distribution worksheet
- I. Equipment records (such as lists of company equipment and/or rates)
- J. Subcontractors' (including Suppliers) and agents' invoices
- K. Subcontractors' and agents' payment certificates
- L. Canceled checks (payroll and Suppliers)
- M. Job cost report

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- N. Job payroll ledger
- O. General ledger
- P. Cash disbursements journal
- Q. Email, letters, and correspondence
- R. Network servers, data storage devices, backup media
- S. All documents that relate to each and every Claim, together with all documents that support the amount of damages as to each Claim.
- T. Work sheets used to prepare the Claim establishing the cost components for items of the Claim including labor, benefits and insurance, materials, equipment, and Subcontractors; and all documents that establish the time periods, individuals involved, and the hours worked and the rates for the individuals.

Full compliance by the DB Contractor with the provisions of this Section 21.1.5 is a contractual condition precedent to the DB Contractor's right to seek relief under SCP. The DB Contractor represents and warrants the completeness and accuracy of all information it or its agents provides in connection with this Section 21.

19.1.6 Ownership of Documents

All data, sketches, charts, calculations, plans, specifications, electronic files, correspondence and other documents created or collected under the terms of the DBA Documents ("Work Materials") shall be considered "works made for hire" for which the District owns the copyright. If the Work Materials do not constitute works made for hire as a matter of law, then DB Contractor hereby transfers and assigns all rights in the Work Materials to the District. The DB Contractor shall provide any further documentation of this transfer that the District requests. The DB Contractor shall secure the same agreement from all Subcontractors performing services in connection with the DB Contractor's performance under this DBA. Design Documents shall become DOEE's property upon preparation; Construction Documents shall become DOEE's property upon delivery to DOEE; and other documents prepared or obtained by DB Contractor in connection with the performance of its obligations under the DBA Documents, including studies, manuals, Record Drawings, technical and other reports and the like, shall become the property of DOEE upon DB Contractor's preparation or receipt thereof. Copies of all Design Documents and Construction Documents shall be furnished to DOEE upon preparation or receipt thereof by DB Contractor. DB Contractor shall maintain all other documents described in this Section 21.1.6 in accordance with the requirements of Section 21.1 and shall deliver copies to DOEE as required by the DBA Documents or upon request if not otherwise required to be delivered, with an indexed set delivered to DOEE as a condition to Final Acceptance.

19.2 Retention of Records

The DB Contractor shall establish and maintain all books, records and documents (including electronic storage media) relating to the Contract, in accordance with generally accepted accounting principles and practices which sufficiently and properly reflect all revenues and expenditures of funds provided by the District under the Contract.

The DB Contractor shall retain all records, financial records, supporting documents, statistical records, and any other documents (including electronic storage media), collectively referred to as "Records", pertinent to the contract for a period of no less than three (3) years from the date of submission of the final financial report for the Federal grant. If any audit, litigation, or claim, or other action involving the records has been started before the end of the three-year period, the DB Contractor must retain the Records until completion of the litigation,

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claim, audit, or other action and the final unappealable resolution of all issues which arise from it, or until the end of the three-year period, whichever is later.

The DB Contractor shall make these Records available, at the DB Contractor's office and at all reasonable times, for inspection, review, or audit by the CO, federal, District, or other personnel duly authorized by the CO. The DB Contractor shall make such Records available, without charge, and shall allow such Persons to make copies of such Records at no expense to the District.

The requirements of this section further apply to any Subcontractor or any agents of the DB Contractor or any Subcontractor.

19.3 District of Columbia Freedom of Information Act

19.3.1 Applicability of Law

The DB Contractor acknowledges and agrees that all records, documents, drawings, plans, specifications, and other materials in the DB Contractor's or the District's possession directly related to the Project, including materials submitted to the District by the DB Contractor, are subject to the provisions of the D.C. FOIA. The DB Contractor shall be solely responsible for all determinations made by it under such act and for clearly and prominently marking each and every page or sheet of its materials with trade secret, privileged information, or confidential commercial, financial, geological, or geophysical data as it determines to be appropriate. The DB Contractor is advised to contact legal counsel concerning such act and its application to the DB Contractor.

19.3.2 Confidential Materials

If any of the materials submitted by the DB Contractor to the District are clearly and prominently labeled as trade secret, privileged information, or confidential commercial, financial, geological, or geophysical data by the DB Contractor, the District will endeavor to advise the DB Contractor of any request for the disclosure of such materials prior to making any such disclosure. Under no circumstances, however, will the District be responsible or liable to the DB Contractor or any other Person for the disclosure of any such labeled materials, whether the disclosure is required by law or by court order or occurs through inadvertence, mistake, or negligence on the part of the District, except for any disclosure of trade secrets or proprietary information except for such disclosures (i) as permitted or required by law or order of a court or other governmental body, (ii) of information that entered the public domain subsequent to the time it was communicated to the District by the DB Contractor through no fault of the District, and (iii) of information obtained by third parties which was lawfully and rightfully transmitted to the District free of any obligations subsequent to the time it was communicated to the District by the DB Contractor.

19.3.3 Contractor to Defend Against Disclosure Request

In the event of litigation concerning the disclosure of any material submitted by the DB Contractor to the District, the District's sole involvement will be as a Stakeholder retaining the material until otherwise ordered by a court, and the DB Contractor shall be fully responsible for otherwise prosecuting or defending any action concerning the materials at its sole expense and risk.

19.3.4 Cooperation with the District Regarding D.C. FOIA Requests

The District of Columbia Freedom of Information Act, at D.C. Official Code §2-352(a-3), requires the District to make available for inspection and copying any record produced or collected pursuant to a District contract with a private contractor to perform a public function, to the same extent as if the record were maintained by the

agency on whose behalf the contract is made. If the DB Contractor receives a request for such information, the DB Contractor shall immediately send the request to the CA who will provide the request for the FOIA Officer for the agency with programmatic responsibility in accordance with the D.C. Freedom of Information Act. If the agency with programmatic responsibility receives a request for a record maintained by the DB Contractor pursuant to the contract, the CA will forward a copy to the DB Contractor. In either event, the DB Contractor is required by law to provide all responsive records to the CA within the timeframe designated by the CA. The FOIA officer for the agency with programmatic responsibility will determine the releasability of the records. The District will reimburse the DB Contractor for the costs of searching and copying the records in accordance with D.C. Official Code §2-352 and Chapter 4 of Title 1 of the D.C. Municipal Regulations.

20 Cooperation and Coordination with Others

20.1 Cooperation with Other Contractors

The District and other agencies may undertake or award other contracts for additional work on or near the Site. The DB Contractor shall cooperate and coordinate with the District and such other Projects, contractors and stakeholders to the extent reasonably necessary for the performance by the District and such other Projects, contractors and stakeholders of their work and shall cause its employees, agents, officers, and Subcontractors and other Persons for whom the DB Contractor may be contractually or legally responsible to so cooperate. If other separate contracts are awarded by the District that affect the Work, the DB Contractor shall conduct its Work without interfering with or hindering the progress or completion of the work being performed by others.

20.2 Interference by Other Contractors

If the DB Contractor asserts that any of the District's other contractors have hindered or interfered with the progress or completion of the Work, then the DB Contractor will use its best efforts to settle disputes with other contractors. The DB Contractor shall have the right to request the CO to resolve such dispute as a Dispute pursuant to SCP, provided the other contractor and its sureties have agreed to submit the Dispute to the CO and that such proceeding shall be conducted at no cost to the District.

21 Miscellaneous Provisions

21.1 Amendments

The Contract may be amended by a written instrument duly executed by the parties or their respective successors or assigns, or by unilateral change order issued by the CO.

21.2 Waiver

21.2.1 No Waiver of Subsequent Rights

Either party's waiver of any breach or failure to enforce any of the terms, covenants, conditions, or other provisions of the Contract Documents at any time shall not in any way limit or waive that party's right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision, any course of dealing or custom of the trade notwithstanding. Furthermore, if the parties make and implement any interpretation of the Contract Documents without documenting such interpretation by an instrument in writing

signed by both parties, such interpretation and implementation thereof will not be binding in the event of any future Disputes. The consent by one party to any act by the other party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

21.2.2 Custom Does Not Constitute Waiver

No act, delay, or omission done, suffered, or permitted by one party or its agents shall be deemed to waive, exhaust, or impair any right, remedy, or power of such party under the Contract Documents, or to relieve the other party from the full performance of its obligations under the Contract Documents. No custom or practice between the parties in the administration of the terms of the Contract Documents shall be construed to waive or lessen the right of a party to insist upon performance by the other party in strict compliance with the terms of the Contract Documents.

21.2.3 Waivers Must be in Writing

No waiver of any term, covenant, or condition of the Contract Documents shall be valid unless in writing and signed by the party providing the waiver.

21.3 DB Contractor

The DB Contractor is an independent contractor, and nothing contained in the Contract Documents shall be construed as constituting any relationship with the District other than that of an independent contractor. In no event shall the relationship between the District and the DB Contractor be construed as creating any relationship whatsoever between the District and any of the DB Contractor's employees. Neither the DB Contractor nor any of its employees is or shall be deemed to be an employee of the District. Except as otherwise specified in the Contract Documents, the DB Contractor has sole authority and responsibility to employ, discharge, and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Subcontractors, and for all other Persons whom the DB Contractor or any Subcontractor hires or engages to perform or assist in performing the Work.

21.4 Successors and Assigns

The Contract Documents shall be binding upon and inure to the benefit of the District and the DB Contractor and their permitted successors, assigns, and legal representatives.

21.4.1 Assignment by the District

The District may assign all or part of its right, title and interest in and to the Contract, including rights with respect to the Surety bonds required hereunder and any other performance security provided, to any Person, with the prior written approval of the DB Contractor.

21.4.2 Assignment by DB Contractor

The DB Contractor may assign its rights to receive payment under the Contract Documents and may Subcontract Work in accordance with the Approved Subcontracting and DBE Plan and in compliance with the requirements of the Contract Documents. The DB Contractor shall not otherwise sublet, transfer, assign or dispose of any portion of the Contract, or delegate any of its duties hereunder, except with the District's prior written Approval, at the District's sole option and discretion. The DB Contractor's assignment or delegation of any of its Work

under the Contract Documents shall be ineffective to relieve the DB Contractor of its responsibility for the Work assigned or delegated, unless the District, in its sole discretion, has approved such relief from responsibility.

21.5 Designation of and Cooperation with Representatives

21.5.1 Designation of Representatives

Concurrently with execution hereof, the District and the DB Contractor shall each designate an individual or individuals, who shall be authorized to make decisions and bind the parties on matters relating to the Contract Documents. The parties may also designate technical representatives, who shall be authorized to investigate and report on matters relating to the construction of the Project and negotiate on behalf of each of the parties but who do not have the authority to bind the District or the DB Contractor.

21.5.2 Cooperation

The DB Contractor shall cooperate with the District and all representatives of the District designated as described above.

21.6 Gratuities and Conflicts of Interest

Neither the DB Contractor nor any of its employees, agents, or representatives shall offer or give to an officer, official, or employee of the District of Columbia gifts, entertainment, payments, loans, or gratuities. The DB Contractor represents and warrants that it has not previously offered or given any gifts, entertainment, payments, loans, or gratuities in violation of such prohibitions.

21.7 Survival

The Dispute resolution provisions contained in SCP or within the DBA, and all other provisions, which by their inherent character should survive termination of the Contract, shall survive the termination of the Contract.

21.8 Limitation on Third-Party Beneficiaries

It is not intended by any of the provisions of the Contract Documents to create any third-party beneficiary hereunder, or to authorize anyone not a party hereto to maintain a suit for personal injury or property damage pursuant to the terms or provisions hereof, except to the extent that specific provisions (such as the Warranty and indemnity provisions) identify third parties and state that they are entitled to benefits hereunder. The duties, obligations, and responsibilities of the parties to the Contract Documents with respect to such third parties shall remain as imposed by law. The Contract Documents shall not be construed to create a contractual relationship of any kind between the District and a Subcontractor or any other Person except the DB Contractor.

21.9 No Personal Liability

The District's authorized representatives are acting solely as agents and representatives of the District when carrying out the provisions of or exercising the power or authority granted to them under the Contract Documents. They shall not be liable either personally or as employees of the District for actions in their ordinary course of employment.

21.10 Further Assurances

The DB Contractor shall promptly execute and deliver to the District all such instruments and other documents and assurances as are reasonably requested by the District to further evidence the obligations of the DB Contractor hereunder, including assurances regarding assignments of Subcontractors contained herein.

21.11 Severability

If any clause, provision, Section, or part of the Contract is ruled invalid under this DBA or otherwise by a court of competent jurisdiction, then the parties shall: (i) promptly meet and negotiate a substitute for such clause, provision, Section, or part, which shall, to the greatest extent legally permissible, effect the original intent of the parties, including an equitable adjustment to the Contract Price to account for any change in the Work resulting from such invalidated portion; and (ii) if necessary or desirable, apply to the court or other decision maker (as applicable) that declared such invalidity for an interpretation of the invalidated portion to guide the negotiations. The invalidity or unenforceability of any such clause, provision, Section, or part shall not affect the validity or enforceability of the balance of the Contract, which shall be construed and enforced as if the Contract did not contain such invalid or unenforceable clause, provision, Section, or part.

