

Effective Design-Build Teaming Agreements Between Design-Builders and Consulting Engineers

ACEC/Massachusetts
Design-Build for Consulting Engineers
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Overview

- Statement of the Design Development Risk Problem and Professional Liability Risks for Consulting Engineers Involved in Design-Build Projects
- Elements of Effective Design-Build Teaming Agreements to Manage and Limit Design Development Risk
 - Scope and Limitations of Proposal Phase Services of Consulting Engineers
 - Recommendations as to Proposal Phase Studies, Investigations, and Disciplines/Levels of Design Development
 - Quantity Estimates
 - Design Development Contingency
 - Standard of Care
 - Limitation of Liability
 - Survival
- Summary

Design-Build: Procurement and Contractual Issues

- **Statement of the Problem and the Challenges**
- Substantial Increases In Final Design and Construction Cost **Compared** to DB Pricing Proposal and Contract Fixed Price
- Increases Manifest During Post-Award Design Development Process
- Design-Builder Has No (or Limited) Contractual Cost Adjustment Remedy From Project Owner
- Design-Builder Seeks Alternative Source for Recovery of “Cost Overrun” – Genesis of Professional Liability Claim Against Consulting Engineer

Design-Build: Procurement and Contractual Issues

The Basic Issues:

- During the Proposal Phase, can the DB Team **realistically** understand and **competitively** price on a fixed basis all of the components required to design and construct the project in compliance with Owner requirements and expectations
- Can the DB Team **realistically** assess, accept, tolerate and manage the significant degree of risk contractually allocated to it?

Statement of the Design Development Risk Problem and Professional Liability Risks for Consulting Engineers Involved in Design-Build Projects

Pre-Award Services in DB:

- Most **frequent** source of professional liability claims by Design-Builders against Consulting Engineers
- Source of most **severe** professional liability claims by Design-Builders against Consulting Engineers

Typical Professional Liability Claim against Consulting Engineer in DB:

- Consulting Engineer's conceptual or preliminary proposal phase design or studies, investigations or recommendations did not meet the Standard of Care, resulting in "cost overruns" in final design and construction that Design-Builder cannot recover under the terms of the prime DB Contract with the Owner.

Elements of Effective Design-Build Teaming Agreement to Manage and Limit Design Development Risk

- Elements of Effective Design-Build Teaming Agreements to Manage and Limit Design Development Risk:
 - Scope and Limitations of Proposal Phase Services of Consulting Engineer
 - Recommendations as to Proposal Phase Studies, Investigations, and Disciplines/Levels of Design Development
 - Quantity Estimates
 - Design Development Contingency
 - Standard of Care
 - Limitation of Liability
 - Survival
- Teaming Agreements, also labeled as a Phase I Agreements, Memorandum of Understanding, or Proposal Phase Agreement

Scope and Limitations of Proposal Phase Services of Consulting Engineer

Problem and Issues:

- The DB Team typically is required to respond to the RFP in a highly compressed schedule.
- The Design-Builder will seek to limit the scope of Proposal Phase services provided by the Consulting Engineer, but will want to have a reliable basis to price final design and construction cost, **while also being competitive.**

Contractual Objectives for Consulting Engineer

- Clarity in Contractual Service Scope Definition
- Clarity in contractual distribution and delegation of various design service scopes
- Reliance Rights on Owner-Furnished RFP materials (including those provided with disclaimers)
- Ability to Propose or make recommendations as to studies, investigations or preliminary design development
- Definition of “preliminary” design
- Limitations of Preliminary Design for Design, Estimating and Construction Purposes
- Expectation of Post-Award Design Evolution
- Inherent Risks Based on Reliance on Prototypical (i.e., non-project specific) Design Assumptions and Owner-Disclaimed Design, Owner-Furnished Studies, or other materials.
- Stated purpose/limitation of proposal phase design services

Recommendations as to Proposal Phase Studies, Investigations, and Disciplines/Levels of Design Development

Problem and Issues

- Owners typically provide in the RFP some minimal level of design, criteria or standards, data, reports and other materials (collectively “Materials”).
- The Materials may have different status- i.e., part of Contract Documents, Mandatory Requirements, Reference Documents
- Some of the Materials may be specifically (or more generally) disclaimed as to accuracy, completeness or suitability for any use by the DB Team.
- Some of the Materials may be highly prescriptive.
- The Design-Builder may substantially limit the scope of proposal phase services to be provided by the Consulting Engineer.
- The Design-Builder may unreasonably rely upon Proposal Phase Design in developing pricing and assessing risk and contingencies.

Contractual Objectives for Consulting Engineer

- The Consulting Engineer should document its recommendations to the Design-Builder for the performance during the proposal phase of specific studies, investigations or levels of discipline-specific design development and design approach validation.
- The Technical Proposal must be compliant with the requirements of the RFP, even though the procurement strategies of the Design-Builder may not align with these strategies
- The Design-Builder should accept risks due to (a) conscious and strategic submission of a non-compliant Technical Proposal and (b) failure to adhere to recommendations of the Consulting Engineer.
- The Design-Builder has authority to direct its Consulting Engineer’s performance provided that such direction does not compromise the Consulting Engineer’s ability to exercise independent professional judgment in conformance with the standard of care and contractual requirements.
- The purpose and limitations of the proposal phase design should be clearly stated and contractually documented.

Quantity Estimates

Problem and Issues

- In developing its Pricing Proposal, the Design-Builder will seek to estimate quantities of materials or construction components (e.g. drainage) to be required in the final design and construction of the permanent project work.
- The Design-Builder may seek, or require in the Teaming Agreement, the Consulting Engineer's input in the estimation of such quantities.
- Further, in some instances, the Design-Builder may request or require that the Consulting Engineer assume financial risk for "overrun" in estimated quantities.

Contractual Objectives for Consulting Engineer

- Quantity (and pricing) estimates should be the exclusive risk and responsibility of the Design-Builder.
- Quantities will correspondingly evolve (plus and minus, by material or construction component categories or types) based on or as a result of natural progression of design development; the information learned from post-award investigations and studies and corresponding evaluations; subsurface or site conditions; design or implementation of construction means and methods; Design-Builder, Owner or stakeholder preferences; and Owner input in the review of design submittals, to name a few influential factors.
- Quantities may be influenced by the manner or terms of the Design-Builder's subcontracts with Trade Sub-Contractors or material suppliers.

Quantity Estimates

- Contractual Quantity Risk may not be insurable unless obligations are aligned with Standard of Care application.
- In those circumstances in which the Consulting Engineer considers it appropriate to accept quantity risk, the Consulting Engineer should accept quantities responsibility only if (a) contractual baselines for estimated quantities are particularly defined; and (b) triggers for risk realization and financial responsibility and financial responsibility are clearly defined; and (c) assumptions, qualifications and exclusions as to specific quantities are included, for example:
 - Influences or impacts on quantities of construction means and methods
 - Unforeseen subsurface conditions
 - Owner or stakeholder scope changes or preferences
 - Sub-trade or materials suppliers terms or conditions or purchase/buy-out terms
 - Natural progression or evolution of design development
 - Generic exclusion for quantity variation due to causes beyond the control of Consulting Engineer
 - Need to “net” quantity variations among quantity categories or types
 - The Consulting Engineer shall have the ability to exercise independent professional judgment in all design approaches and determinations, and options, including design optimization, and value engineering.
 - The Consulting Engineer shall have a reasonable opportunity to mitigate potential quantity increases above contractual baseline estimates
 - Standard of Care Application, not strict liability for quantity increases above contractual baseline estimates

Design Development Contingency

Problem and Issues

- Realistic and prudent Design-Builder pricing should include adequate design development contingency.
- In many instances, in order to be competitive, Design-Builders aggressively reduce the amount of design development contingency.
- **Fixed price contracting, inadequate design development contingency, and imbalanced risk allocation terms in the prime DB Contract substantially elevate the risk of Design-Builder professional liability claims against Consulting Engineers.**

Design Development Contingency

As a Massachusetts Superior Court has recently commented in the context of a design-builder claim asserted against a consulting engineer:

“A number of experts testified concerning industry standards regarding the amount of contingency that a contractor should include when bidding a design/build project; consensus seemed to be that cost increases in the range of 10% should be expected. It is unnecessary for the court to find as a fact what the proper percentage for contingency was in this case; indeed, an appropriate contingency is undoubtedly dependent on the project and the amount of time available to the engineering team to advance toward a final design before bid submission. All of the experts, however, agreed, and the court finds, that in design/build projects weights, complexities and therefore construction costs invariably increase after the contract is awarded as design development proceeds to the final approved-by-owner construction design.”

- The Middlesex Corporation, Inc. v. Fay, Spofford & Thorndike, Inc., Commonwealth of Massachusetts, Superior Court, Civil Action 15-02992-BLS1, Memorandum of Decision, June 28, 2019, pp. 13-14.

Design Development Contingency

“The Design-Builder hereby affirms that it shall set aside a design contingency, at the rate of **twenty percent (20%) of the total cost of all construction contracts**, purchase orders, vendor agreements, and all other contracts for material, labor, and equipment required to fully construct the Project, and shall **reduce to five percent (5%) upon completion of the construction document plans**. This contingency shall also **cover increased costs due to design defects that are not caused by the Consulting Engineer’s standard of care departure**. The Design-Builder acknowledges that the Consulting Engineer is not responsible for the adequacy of the contingencies described herein. The **Design-Builder shall disclose and report periodically on the amount of available contingency, and** at the Consulting Engineer’s request.”

Design Development Contingency

- The purpose of design development contingency is to cover the cost attributable to (a) the natural and expected evolution, progression and process of design development; (b) risk for design defects e.g. errors/omissions - that do not result from SOC departures but are intrinsic to the design development process; (c) the acquisition and evaluation of information produced post-award that inform and influence the evolution and the process of design development; (d) the input, including preferences of the owner, concessionaire (their respective consultants) and other project stakeholders that will in all probability influence (if not direct) the design development process; (e) the coordination, integration and interface among design disciplines during the design development process; (f) design revisions due to fast track or multiple packages delivery approaches; (g) more detailed and resolute planning, design and implementation decisions as to the contractor's contemplated "means, methods, sequences" of construction as relevant to inform and influence permanent works design; and (h) the cost incident to progressing multiple packaged, sequential construction phasing (i.e., fast track).
- Contingency is not expected to cover genuine and proven standard of care departures.

Design Development Contingency

- Contingency in Design-Build should be segregated and aligned with specific and reasonably anticipated risk exposures and consequent cost exposures, such as those incident to the design development process.
- Unless contingency amounts (e.g. line items) have been (more) specifically aligned with specific risk category exposures, design development contingency should be available in an aggregate, undifferentiated manner for specific or individual elements of design development.
- Contingency should realistically and adequately account for risk variations due to evolution or changes in design or implementation of temporary works, or construction means, methods, sequences or procedures from the contemplated or planned construction approaches, and consequent cost and schedule impacts. Note, this contingency category is distinct from design development contingency pertaining to permanent works design.

Standard of Care

Problem and Issues

- The Design-Builder typically will be required in the prime DB Contract to accept warranty and fitness for purpose obligations pertaining to accuracy, completeness and suitability of design.
- Design-Builder will seek to flow down these elevated design defect risk contractual obligations to the Consulting Engineer
- Consulting Engineer's professional liability insurance will cover only breaches of a negligence-based standard of care, not higher standard or warranties.
- Strict and Prescriptive Design Criteria or Requirements (often directed by non-project Owner)
- Expert opinions significantly differ on standard of care application in design-build, especially as to Proposal Phase services
- Complex Scope; Undefinable or Unknown design details or conditions
- Number of Stakeholders with Differing and Conflicting Interests

Standard of Care

- **Key Issues: Design Development Risk**

1. Application of the Professional Standard of Care to Professional Liability Claims Arising out of Design Development Risk?
2. Relevance of Project Owner Procurement, Contractual and Risk Allocation Practices to Design Development Risk
3. Relevance of Design-Builder Bid Pricing, Estimating and Contingency to Design Development Risk
4. Flow down of prime DB Contract between Owner and Design-Builder

Standard of Care

- Professional Standard of Care – Application to Design Development Risk
- Reasonable care under the circumstances
 - Scope of services
 - Time constraints
 - Roles, responsibilities and risks of Owner and Design-Builder
 - Other factors and considerations
- Role of expert opinions: No presently recognized industry standard; Much subjectivity and advocacy in expert opinions
- Distinction between design defects and design negligence (i.e., professional standard of care departures).

Standard of Care

Representative provisions of MassDOT prime DB Contract relevant to design risk.

“The conceptual design for the Project and the RFP Documents form the basis for the Design to be furnished by the Design-Builder. The Parties intend for the Design-Builder to assume full responsibility and liability for the Design including correction of any errors, omissions, inconsistencies or other defects in the Design and correction of any errors, omissions, inconsistencies or other defects in the RFP Documents and for the Design-Builder to indemnify, defend and hold harmless MassDOT with respect to any defects in the Project which may relate to errors, omissions, inconsistencies or other defects in the conceptual design except as provided under M.G.L. c. 30, §39N”

Standard of Care

“11.1 General

The Design-Builder warrants that:

- A. All DB Work shall conform to all professional engineering principles generally accepted as standards of the industry in the Commonwealth.
- B. The Project shall be free of defects, including design defects, errors and omissions, and shall be free of Design Exceptions not previously approved by MassDOT in accordance with the Contract Documents.
- C. The Facility shall be fit for use for its intended functions.
- D. Construction of the Project shall be performed in a workmanlike manner using materials and equipment of good quality.
- E. The DB Work shall meet all of the requirements of the Contract Documents.”

Standard of Care

Professional Standard of Care Application

•Proposal Phase Services: Relevant Factors

- 1) Designer's Scope of Services
- 2) Design Management Role of Design-BUILDER
- 3) Distribution and Delegation of Design Responsibilities Among Various Project Participants other than Designer
- 4) Limited Information Available
- 5) Limited Reliance Rights Upon Owner-Furnished Information
- 6) Limited Purpose of Designer's Services (RFP requirements)
- 7) Expectation of need for substantial post-award
 - Investigations and studies that will inform and influence design development, potentially at variance from Proposal Phase conceptions
 - Design Development Progression
 - Interdisciplinary design interfaces and development
 - Review, comment and input from Owner and other project stakeholders in the design development and review process

Cont.

Standard of Care

- 8) Expectation that Design-Builder will realistically (a) price the cost of design and construction and (b) include in its pricing reasonable contingency for cost and time impacts associated with design development and design revisions unrelated to PSOC departures
- 9) Compressed time within which Proposal Phase Services are performed.
- 10) Directions or other controls, prescriptions, mandatory criteria/standards or other constraints imposed by Design Builder during the Proposal Phase.

Standard of Care

Contractual Objectives for Consulting Engineer

- Teaming Agreement should include a negligence-based Standard of Care provision, and specifically include in the provision statements that the application of the Standard of Care shall take into consideration:
 - Limitations of available information
 - Need for studies, investigations, tests, analyses and evaluations to inform and validate viable or optimal design approaches
 - The realist that codes and standards often are susceptible to differing interpretations, applications and judgements that will influence design development
 - Expectation of design evolution through design development
 - Changes in design made by Design-Builder or Owner
 - Limited fee
 - Limited scope of pre-proposal services
 - Compressed schedule
 - Other factors and considerations
 - Qualify or limit contractual flow down

Standard of Care

The DB Contractor acknowledges that all designs and information prepared by the Consultant under this Teaming Agreement (collectively, the “**Preliminary Information**”) are preliminary in nature and based on limited studies, information and design development. The DB Contractor is responsible for developing the design-build price for inclusion in the DB Proposal. The Parties recognize that final quantities determined after final design are expected to vary from any proposal phase estimates due to the natural progression of design development. The Consultant does not warrant or guarantee that its final design can be constructed within the DB Contractor’s design-build price or that the final quantities will not vary from any Proposal Phase estimates. For the avoidance of doubt, nothing herein shall be construed as relieving the Consultant from, and the Consultant remains responsible for, exercising reasonable skill, care and diligence in preparing the Preliminary Information.

Limitation of Liability

Problem and Issues

- Based on professional liability claims experience of Consulting Engineers in Design-Build due to design development risk, the liability exposure profile- measured in terms of severity and frequency- is substantial.
- The commensurate “reward” or fee for Proposal Phase services is minimal and hardly accounts for the enormity of the professional liability risk.

Contractual Objectives for Consulting Engineer

- Include limitation of liability for claims and liabilities arising out of Proposal Phase Services:

“To the fullest extent permitted by law, **the total liability in the aggregate**, of Consulting Engineer and Consulting Engineer’s officers, directors, employees, agents, and independent professional associates, and any of them, to Design-Builder and Owner, and anyone claiming by, through or under Design-Builder or Owner, for any and all injuries, claims, losses, expenses, or damages whatsoever arising out of or in any way related to Consulting Engineer’s services, the Project, or this Agreement, from any cause or causes whatsoever, including but not limited to, the negligence, errors, omissions, strict liability, breach of contract, misrepresentation, or breach of warranty of Consulting Engineer or Consulting Engineer’s officers, directors, employees, agents or independent professional associates, or any of them, **shall not exceed the total compensation received by Consulting Engineer for Proposal Phase Services for the Project.**”

Contractual Responses: Elements of Effective Design-Build Design (or Engineering) Services Agreement to Manage and Limit Design Development Risk

– Threshold Limitation of Liability

“Notwithstanding any provision of this Agreement to the contrary, and to the fullest extent permitted by law, the Design-Builder shall release, defend, indemnify and hold harmless the Engineer for the first \$5m in claims, costs or liabilities alleged or proven by the Design-Builder, or any of its subcontractors or suppliers, arising out of any errors, omissions or other professional acts or service deficiencies or failures of Engineer, or any of its subconsultants (“Professional Liability Exposure”). Any liability of Engineer and its Subconsultants in excess of that \$5m amount shall be (a) determined in accordance with the standard of care as defined in Section X of this Agreement and (b) subject to the consequential damages waiver in Section Y and the Aggregate Limitation of Liability in Section Z of this Agreement.”

Survival

Problem and Issues

- Teaming Agreement will be succeeded by a Design Services Agreement (“DSA”).
- The DSA may supersede the Teaming Agreement.

Contractual Objectives for Consulting Engineer

- Maintain legal effectiveness and relevance of Teaming Agreement following DB contract award.
- Require that relevant Teaming Agreement terms survive termination and/or be expressly incorporated into a subsequent Design Services Agreement.

“**Notwithstanding termination** of this Agreement, the provisions of this Agreement shall be applicable and govern in the application of the standard of care as to the adequacy of services performed under this Agreement.”

Survival

“Services provided by the Consulting Engineer in furtherance of the Project **prior to the Award Date** shall be deemed to have been undertaken and provided **pursuant to the terms and conditions of this Teaming Agreement**; and the adequacy of those services shall be evaluated in accordance with **the standard of care and other relevant provisions of the Teaming Agreement.**”

Summary

- Proposal Phase Services are the source of most **frequent** and **severe** Professional Liability Claims by Design-Builders against Consulting Engineers in Design-Build.
- Design-Builder and Consulting Engineer should implement an effective Design-Build Teaming Agreement to Manage and Limit Design Development Risk.
- The Teaming Agreement should include the following provisions to manage and limit design development risk:
 - Scope and Limitations of Proposal Phase Services of Consulting Engineers
 - Recommendations as to Proposal Phase Studies, Investigations, and Disciplines/Levels of Design Development
 - Quantity Estimates
 - Design Development Contingency
 - Standard of Care
 - Limitation of Liability
 - Survival

Contact Information

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**Design Build
Design Services Agreements
Key Contractual Provisions**

**ACEC/Massachusetts
Design-Build for Consulting
Engineers
July 20, 2022**

July 20, 2022
Gwen P. Weisberg
Donovan Hatem LLP

Learning Objectives

- Identify key terms to include in a Design Service Agreement (DSA) to manage and allocate professional liability risk following contract award and progressing through construction and project completion
- Become familiar with legal concerns relating to certain contract clauses
- Understand the implications of “flow down” from a Design Build Agreement to the DSA

Contract Provisions

Key Contractual Provisions:

Acknowledgement of Preliminary Design
Fast Track
Responsibilities
Order of precedence
Standard of Care
Indemnification
Limitation of Liability
Waiver of Consequential Damages
Ownership of Documents
Design Contingency
Reliance / Interpretation
Delay

Liquidated Damages
Coordination
Timing
Submittal Review
Changes
Additional Services
Payment
Suspension and Termination
Dispute Resolution
Disadvantaged Business Enterprises
Third Party Beneficiaries
Indemnitees

Acknowledgement of Preliminary Design

Design Builder and Designer anticipate that the design will not yet be complete at the time the Design Builder develops and commits to the Guaranteed Maximum Price. That being the case, the Design Builder acknowledges that there will be a reasonable degree of variance between the design at the time the Guaranteed Maximum Price is established and the final construction documents, provided however Designer and its consultants shall provide design to a level of detail as agreed to by the parties to support Design Builder to prepare quantity take-offs and price estimates for the work. Designer does not warrant or guarantee that the final design can be constructed within the Guaranteed Maximum Price, although Designer and its consultants remain responsible for performing all services in accordance with the Design Services Agreement, which includes the Standard of Care.

Design Builder acknowledges and agrees that (i) the design and plans prepared and delivered by Designer for Design Builder's Proposal were preliminary in nature, not fully detailed, subject to change, and not ready for construction; (ii) Design Builder, and not Designer, was responsible for the pricing assumptions and quantity take-offs underlying Design Builder's Proposal.

Fast Track

Design Builder acknowledges that it has been advised that the project will be affected by the fast-track process. Some of the effects of a fast-track project delivery process include the necessity of making early or premature commitments to design decisions and the issuance of incomplete and uncoordinated construction documents for permitting, bidding, and construction purposes in order to maintain a fast track or accelerated schedule, or the actual progress of the work of the Design Builder. Design Builder acknowledges that it has been advised that the project, if developed on a fast-track project delivery basis, may require associated coordination, design, and redesign of parts of the project after construction documents are issued and the construction contract is executed, and may require removal of work in place, all of which events may cause an increase in the cost of the work and/or an extension of the project construction schedule. Therefore, Design Builder acknowledges and understands that change orders arising from the fast-track project delivery process should be expected as a part of and related to this process; and Design Builder understands the necessity of including sufficient contingencies in the budget for the cost of the work to account for additional costs and construction schedule extensions arising from this process and agrees to include such contingencies in the project construction budget commensurate with industry standards for projects of similar scope and quality of this project

Responsibilities

Designer:

Designer has reviewed the Design Agreement Documents and all other documents referred to therein and Designer is satisfied that it can perform the Design Services for the Base Fee, consistent with the Design Agreement Documents and the scope, quality and quantity parameters underlying the Project Schedule and to allow Design Builder to fulfil its obligations to Developer and Owner. Design Builder also affirms it has reviewed the Design Agreement Documents and other documents referred to therein and Design Builder is satisfied it can perform and fulfill all obligations towards Designer, Developer, and Owner therein.

At the direction of Design Builder, Designer and Design Builder will meet regularly to discuss, develop and refine the Design Plan (subject to Change Order or Design Freeze) and to prepare for implementation of all other necessary procedures which will permit Design Builder and its Subcontractors, and Designer and its Sub-consultants, to carry out their respective obligations in connection with the DB D&C Work.

Responsibilities (continued)

Designer represents that:

- Designer and its Sub-consultants shall have obtained and maintain all necessary or required registrations, permits, authority, licenses and approvals required under Applicable Law, and have the qualifications, experience, competence, skills, know-how and capacity to perform the Design Services;
- Design Services will be performed by or under the supervision of persons who hold all necessary, valid licenses to practice in the State of [], by personnel who are skilled, experienced and competent in their respective trades or professions and who are professionally qualified to perform the Design Services in accordance with this Agreement;
- Designer has familiarized itself with the requirements of the Design Agreement Documents, including all Applicable Laws and Applicable Standards, and, consistent with the Standard of Care as it incorporates Best Management Practices, the Design Services can be performed in accordance with said requirements;

Responsibilities

Design Builder:

Design Builder Project Manager to represent and act for Design Builder with respect to the Services to be rendered under this Agreement (hereinafter referred to as the “Project Manager”). Project Manager shall have authority to transmit instructions, receive information, interpret and define Design Builder’s policies and decisions with respect to Design Services for the Project. Project Manager shall review and make appropriate recommendations on all requests submitted by Designer for payment for Design Services performed in accordance with this Agreement.

- Design Builder shall furnish required information and services and shall promptly render decisions to avoid delay in the orderly progress of Designer’s performance of the Design Services.
- Any agreed upon time frames in Exhibit [Scope/Schedule] are contingent upon Designer having access as contemplated herein.
- Design Builder shall advise Designer of any deficiencies or defects discovered by Design Builder with respect to the Design Services to be rendered by Designer hereunder.
- Design Builder represents that it has taken into consideration in the project budget and GMP the anticipated costs associated with correcting design errors and omissions that are within the Standard of Care.

Order of Precedence

In the event of any conflict between the provisions of Exhibit [] and the provisions of this Agreement, the provisions of this Agreement shall prevail. This Agreement will be null and void if Owner fails to award and enter into a contract with Design Builder for the Project, or if Owner fails to approve Designer.

The following documents are attached to this Agreement and hereby expressly incorporated by reference:

- General Conditions [DSA];
- Exhibit A – Scope of Services and Agreement Price;
- Exhibit B – Design Schedule; and
- Exhibit C – Key Personnel.

Order of Precedence (alternative required DBA flowdown)

Pursuant to Section [] of the Lease, Owner and Developer have agreed, and Design Builder accepts, in the event of any conflict, ambiguity or inconsistency between any terms or provisions of the Lease (including for the purposes hereof, the Reference Documents), the order of precedence, from highest to lowest, shall, except as provided otherwise in the other provisions of Section [], be as follows:

- (a) (1) any change order or other amendment to the Lease entered into in compliance with the terms of the Lease (to the extent applicable) (2) any settlement agreement between Owner and Developer, pursuant to which Owner and Developer agree to amend the Lease, and (c) any change required pursuant to Owner's internal authorization processes;
- (b) the main body of the Lease;
- (c) exhibits to the Lease;
- (d) Reference Documents (other than the Basis of Design and approved Construction Applications);
- (e) the Basis of Design; and
- (f) any approved Construction Application.

3.2.2 Further, in the event of any conflict, ambiguity or inconsistency between the General Provisions, Good Order Requirements, the Applicable Standards and/or the Requirements and Provisions for Work (excluding the General Provisions), the order of precedence, from highest to lowest, shall, except as provided otherwise in Section [] of the Lease, be as follows:

- (a) Good Order Requirements;
- (b) the General Provisions;
- (c) the Requirements and Provisions for Work (excluding the General Provisions); and
- (d) the Applicable Standards.

Standard of Care

Preferred Clause:

The Designer shall perform its services consistent with the professional skill and care ordinarily provided by design professionals practicing in the same or similar locality under the same or similar circumstances. The Designer makes no warranties, express or implied, under this Agreement or otherwise, in connection with Designer's services.

Standard of Care (alternative)

Negotiated Clause:

Designer agrees to perform the Services, for Design Builder and consistent with the Standard of Care and to Designer Builder's reasonable satisfaction, materially in accordance with the Contract Documents but only to the extent that the Contract Documents pertain to Designer's scope of services, manner and characteristics of the design of the Project and are appropriate for a design professional. The Contract Documents consist of (i) the Agreement, including these conditions and all exhibits or documents identified or incorporated in the Agreement; (ii) any written change orders, amendments, or other written modifications to the Agreement issued after the execution of the Agreement; and (iii) the Prime Contract (collectively "Contract Documents").

Standard of Care (alternative)

Flow down clause (from project lease):

Standard of Care shall mean the exercise of the degree of skill, diligence, prudence and foresight that would reasonably and ordinarily be expected from a **skilled and experienced** airport designer or engineer performing professional services and seeking to comply with its contractual obligations (including, in regard to the design and construction of a **world-class** [project]), complying with Applicable Law, Governmental Approvals and Applicable Standards, Best Management Practice, and engaged in the same type of undertaking under similar circumstances and conditions. Standard of Care is not static but rather will change over time; provided, however, that Standard of Care with respect to any particular activity will be determined at the time when such particular activity is performed.

Indemnification

To the fullest extent permitted by law, Designer shall indemnify, defend, and hold harmless the Indemnitees from and against all claims, proceedings, damages, losses, liability, costs, fees (including but not limited to reasonable attorneys' fees) and expenses to the extent caused by resulting from the negligent or wrongful performance of Designer's Design Services hereunder or any negligent error or omission of Designer, or a subconsultant or of anyone for whom Designer is liable. Except as set forth herein, Designer agrees to indemnify and defend Design Builder to the same extent that Design Builder has indemnified Developer and the Indemnitees under the DBA, to the extent caused by Designer's or its subconsultants', or any one for whom Designer is legally liable for such negligent or wrongful acts or omissions, or the Design Services to be provided by Designer hereunder. Notwithstanding the aforementioned or any other provision herein or in the Design Build Agreement to the contrary, with respect to claims that are covered under professional liability insurance, there shall be no duty to defend and Designer's indemnity obligation shall only be to the extent of its negligence.

Designer shall include in each agreement with a subconsultant an indemnity provision substantially similar to the provisions in this Article, which shall also expressly provide that the subconsultant shall defend, indemnify and hold harmless the Indemnitees, in addition to Design Builder, as set forth above in [this Article], and that the Indemnitees are third party beneficiaries of this Article.

Indemnification (alternative)

To the fullest extent allowable under the law, Designer shall indemnify, defend (but only with respect to Designer's rendering of non-professional services), and hold harmless Design Builder, Owner, and the shareholders, directors, officers, employees and agents of each (the "Indemnified Parties") from and against losses, damages, claims, liability, and costs and expenses incidental thereto (including costs of defense, settlement and reasonable attorney's fees) (the "Claim") which any or all of them may hereafter incur, be responsible for or pay out as a result of bodily injuries (including death) to any person, or damage, but only to the extent such damages are directly caused by (i) any negligent acts, negligent omissions or willful misconduct of Designer in the performance of the Services; or (ii) Designer's material breach of this Agreement. In the event adjudicated liable, Designer shall indemnify Design Builder amounts for which it is determined liable pursuant to any such Claim, including, without limitation, expenses of litigation, including reasonable attorneys' charges, and court costs.

Indemnification (alternative continued)

To the same extent as Design Builder under the Prime Contract, Designer is entitled to rely upon all information, documentation, data, reports and other materials furnished or made available to Design Builder by the Owner or others with authority over the Project.

Notwithstanding the foregoing, Designer shall be entitled to reasonably rely upon the accuracy of the information provided by Design Builder in accordance with the Standard of Care, and Designer shall not be responsible for any errors in Design Services resulting from any differing or concealed conditions that were not reasonably observable in accordance with the Standard of Care.

Designer hereby acknowledges and agrees that it is Designer's obligation to cause the Project to be designed in material accordance with the Contract Documents and the Standard of Care, and that the Indemnified Parties are fully entitled to rely on Designer's performance of such obligation. Designer further agrees that any review, acceptance and/or approval by Design Builder or Design Builder's Customer and/or others hereunder will not relieve Designer of any of its obligations under the Contract Documents or in any way diminish its liability for performance of such obligations or its obligations to provide indemnities hereunder.

Limitation of Liability

Preferred Clause:

Notwithstanding any provision of this Agreement to the contrary, and to the fullest extent permitted by law, the Design Builder shall release, defend, indemnify and hold harmless Designer for the first \$[] m in claims, costs or liabilities alleged or proven by the Design Builder, or any of its subcontractors or suppliers, arising out of any errors, omissions or other professional acts or service deficiencies or failures of Designer, or any of its subconsultants (“Professional Liability Exposure”). Any liability of Designer and its Subconsultants in excess of that \$[]m amount shall be (a) determined in accordance with the standard of care as defined in Section X of this Agreement and (b) subject to the consequential damages waiver in Section [] and the Aggregate Limitation of Liability in Section [] of this Agreement.

Limitation of Liability (alternatives)

Design Builder and Designer agree that there will be a \$50,000,000 [or other negotiated amount] limitation of liability on Designer's total liability for losses claimed against the Design Builder by the Developer, except for personal injury and non-project related property damage claims, abandonment, bodily injury and death, and willful misconduct and gross negligence.

Alternatively

Designer's total **aggregate** liability to Design Builder arising out of or related to this Agreement shall in no event exceed Designer's fee ~~.the lesser of times the total Agreement Price (as adjusted by change orders or amendments) actually paid by Design Builder to Designer, or the available proceeds of insurance that Designer is required to maintain under this Agreement;~~); provided, this liability cap expressly excludes any liability arising out of the gross negligence, intentional, or criminal misconduct of Designer's or Designer's' employee, agent, officer, director, or sub-consultant. **or any claim covered by the insurance Designer is required to maintain hereunder.**

Waiver of Consequential Damages

In no event shall Design Builder or Designer be liable to the other party, or the other party's affiliates, parents, members, partners, officers, subcontractors, consultants, or suppliers for any consequential, incidental, punitive, or special damages, including, without limitation, lost profits, lost revenues, loss of opportunity, loss of reputation, or financing costs arising out of or related to this Agreement. Provided, the foregoing shall not limit Designer's liability to Design Builder for any claim by Owner for which Designer would otherwise be responsible hereunder unless, and **only to the extent, Design Builder's liability is also limited by the terms of the Prime Contract.**

Waiver of Consequential Damages (alternative)

Flow Down Clause:

Designer and Design Builder waive Claims against each other for consequential damages arising out or relating to this Agreement and the performance of the Design Services (including, without limitation, damages incurred for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons); provided, however, that the **foregoing waiver will not apply to claims arising out of:**

- Either party's gross negligence or willful misconduct;
- Third party claims, including indemnification;
- Designer's refusal to perform because Design Builder exercises its right to withhold payment during the pendency of a Claim or dispute;
- Designer stops performance of the Design Services because Design Builder exercises its right to withhold payment during the pendency of a Claim or dispute;
- Personal injury and property damage claims (excluding damage to the D&C Work itself);
- Designer's failure to assign contracts upon termination;
- Either party preventing the other's personnel reasonable access to any portion of the Project Site or Design Services;
- Designer breaching any anti-bribery and anti-corruption covenants, including OFAC.

Ownership of Documents

Preferred Clause:

All drawings, specifications and other documents and electronic data furnished by Designer under this Agreement ("Work Product") are deemed to be instruments of service and Designer shall retain all ownership interests therein, including, without limitation, copyrights and all other common law, statutory and other proprietary rights. Designer hereby grants Design Builder, upon Design Builder's payment to Designer of all amounts due under the Agreement, a limited, non-exclusive, non-transferable license to use the Work Product solely for the purposes for which the Work Product was created. Neither Design Builder nor Design Builder's Client shall use the Work Product on any other project or alter the Work Product without the Designer's prior written consent. In the event of modification or alteration of the Work Product without Designer's written consent, or misuse of Work Product, and a claim is asserted against Designer and Designer's subconsultants, Design Builder and any other user of the Work Product shall indemnify and defend Designer and Designer's subconsultants from and against any and all claims, damages, liabilities, losses and expenses, including attorneys' fees, arising out of or resulting from the unauthorized use and/or alteration of the Work Product.

Ownership of Documents (alternative)

Design Builder shall and **does hereby assign, and shall cause the Designers and each Subcontractor to assign, to Developer** all of the respective right, title and interest (including all Intellectual Property rights) of Design Builder, the Designer, and such Subcontractor, if any, in, to and under any and all DB D&C Work Documents, including without limitation any Drawings, working drawings, Specifications, plans, reports, studies, data, technology, information and any other documents and other material in hardcopy or electronic format prepared by Design Builder or Designer at any time in connection with this Project. With respect to the DB D&C Work Documents, **Developer shall own any and all copyrights, trademarks, Intellectual Property rights, publicity rights, and trade secrets that arise therefrom.** Design Builder shall deliver the DB D&C Work Documents to Developer, from time to time, as required under this Agreement, upon any termination of this Agreement, or as otherwise required by Developer or, if not delivered prior to Final Completion of the Project, then upon such Final Completion and as a condition to Final Payment. Notwithstanding anything else in this agreement, the foregoing **assignments of Intellectual Property and other rights specifically exclude Intellectual Property: (a) belonging to Design Builder, Designer, and any Subcontractor prior to the effective date of this Agreement** (except as otherwise provided in the Letter of Intent, Preconstruction Agreement, Field Services Agreement and Interim Agreement); (b) **developed by Design Builder, Designer, and any Subcontractor outside the scope of, or not exclusively pursuant to, this Agreement** (except as otherwise provided in the Letter of Intent, Preconstruction Agreement, Field Services Agreement and Interim Agreement); (c) **licensed by Design Builder, Designer, and any Subcontractor from a third-party**; and/or (d) included within the DB D&C Work Documents but **which are generic, generally applicable to or standard in Design Builder, Designer, and any Subcontractor's business** (collectively, "Background Intellectual Property").

Design Contingency

Design Builder hereby affirms that it shall set aside a design contingency, at the rate of twenty percent (20%) of the total cost of all construction contracts, purchase orders, vendor agreements, and all other contracts for material, labor, and equipment required to fully construct the Project, and shall reduce to five percent (5%) upon completion of the construction document plans. This contingency shall also cover increased costs due to design defects that are not caused by Designer's standard of care departure. Design Builder acknowledges that Designer is not responsible for the adequacy of the contingencies described herein. Design Builder shall disclose and report periodically on the amount of available contingency, and at Designer's request.

Reliance / Differing Site Conditions

Designer shall be entitled to reasonably rely upon the accuracy of the information provided by Design Builder in accordance with the Standard of Care, and Designer shall not be responsible for any errors in Design Services resulting from any differing or concealed conditions that were not reasonably observable in accordance with the Standard of Care.

Alternatively

To the same extent as Design Builder under the DBA, Designer is entitled to rely upon information, documentation, data, reports and other materials furnished or made available by Developer or the Owner, unless otherwise specifically noted on such documents that Designer may not rely on such furnished information. Notwithstanding the foregoing, Designer shall, to the extent necessary to perform its Design Services investigate readily visible existing conditions or facilities, and make measured drawings thereof.

Delay

Absent delays caused by any third-party for whom Designer is not legally liable, Designer shall perform the Designer Services in accordance with the Design Procurement Schedule and all updates to the same that Design Builder provides to Designer. Design Builder agrees to consult with Designer regarding the milestone dates and Designer's deliverables required in support thereof. Designer shall submit for Design Builder's review periodic updates on Designer's progress against the Design Procurement Schedule and updates. The Design Procurement Schedule shall reflect activities for milestone deliverables to allow Designer to perform its Designer Services.

Delay (continued)

Except for delays caused by others over whom Designer has no control, Designer shall provide the Design Development Documents by the times set forth in [Scope of Services/Schedule] Design Builder agrees to consult with Designer regarding the milestone dates and Designer's deliverables required in support thereof. Designer acknowledges that in agreeing to provide the Design Development Documents within the times prescribed by the Project Schedule, Designer has accounted for a reasonable period of review and approval by Design Builder, Developer, and the Port Authority and, as appropriate, Governmental Entities having authority over the Design Services. Upon written request by Design Builder, Designer shall provide the work plan it developed for resource allocation of its personnel and Sub-consultants. Notwithstanding the aforementioned, Designer shall not be responsible or liable for material delays caused by Design Builder.

Liquidated Damages

Typically, Liquidated Damages clauses are flow downs from the DBA.

However, they are still capable of negotiation:

For delays not caused or contributed to by Designer, Designer shall (provided Designer has complied with all relevant notice periods) be entitled to extensions of time and limitations on damages for delay (liquidated or otherwise) to the same extent Design Builder is entitled to, and actually recovers for, such relief under the DBA.

Coordination

Designer shall coordinate the performance of the Design Services with the Separate Consultants for the purpose of (i) integrating and coordinating the instruments of service of the Separate Consultants with the instruments of service of Designer and its Sub-consultants, and (ii) identifying and resolving conflicts and inconsistencies with and between, the instruments of service of Designer and the Separate Consultants. Designer shall promptly advise Design Builder as to coordination problems, if any, that Designer discovers within the Standard of Care. Designer shall promptly respond to any inquiry from any a Separate Consultant regarding instruments of service or coordination of services. ~~and shall ensure that it produces integrated Design Documents.~~ Notwithstanding the foregoing, Designer shall have no liability for identifying or correcting any errors or omissions contained within the documents created by Separate Consultants.

Notwithstanding anything herein to the contrary, Designer is not responsible for the supervision or direction, or the quality, adequacy, suitability, completeness or timeliness of any design or other services performed or provided by any designers or subconsultants not under direct contract with Designer. Consistent with the Standard of Care, Designer shall coordinate the Design Services with those of other designers and subconsultants engaged directly or indirectly by the Design Builder.

Timing

Subject to the Standard of Care, **time is of the essence** with respect to the performance of the Design Services. **Excepting only delays caused by any third-party that owes Designer no duties of care or performance**, the Design Services to be rendered by Designer shall be performed and **completed in accordance with the Design Procurement Schedule**. Design Builder shall notify Designer in writing of changes to the Design Procurement Schedule. Notwithstanding the aforementioned, **Designer shall not be responsible or liable for delays caused by others not under contract to Designer, including but not limited to the Design Builder, Owner, Developer, the City of [], and any Governmental Entity** and all of their respective employees, subconsultants, subcontractors, directors, officers and representatives.

Submittal Review

Design Builder shall receive submittals, shop drawings, product data and samples (“Submittals”) from all Subcontractors and will manage the Submittal process, including keep a Submittal schedule and log, numbering each document and tracking the status of each item. Design Builder shall review the Submittals for form, completeness and compliance with the general intent and then forward Submittals to Designer for review for coordination and design intent ~~and assimilation~~ by Designer and its subconsultants. Designer and its subconsultants’ review of Submittals shall not relieve Subcontractors of responsibility for construction means and methods, techniques, accuracy and completeness of details furnished by Subcontractors, such as procedures, dimensions, quantities or safety precautions, but **nothing herein is intended to in any way relieve Designer of its responsibility to comply with the Standard of Care** ~~for the adequacy and completeness as to~~ of its Construction Documents, including all dimensions and details contained therein, or relieve Designer of the ~~proper~~ performance of any other Designer Services required by this Agreement.

Designer shall, consistent with the Project Schedule, timely review and approve or otherwise respond to Subcontractor Submittals. Designer **shall endeavor to** review, approve, or take other appropriate action upon properly submitted Submittals within seven business (7) Days of receipt of the Submittal by Designer **unless additional time is required in accordance with the Standard of Care.**

Changes

Design Builder shall prepare Change Orders in accordance with the DBA. If required by Design Builder, Designer shall review, sign or take other appropriate action on a Change Order including preparing and reproducing Construction Documents to describe work to be added, deleted or modified by the Change Order. **Designer acknowledges that any additional compensation and/or any adjustment to the Design Procurement Schedule shall be limited to the corresponding additional compensation and/or adjustment to the Project Schedule actually received by Design Builder from Developer** (and Developer from Owner, as the case may be). **but only if the adjustments allow Designer to perform the Design Services in accordance with the Standard of Care, and subject only to the Design Builder's good faith effort to obtain the additional compensation as mutually agreed upon by Designer and Design Builder.**

During the course of design development and completion of the Construction Documents, if **Design Builder requests specific deviations from the DSA Agreement** Documents (other than as a result of a Developer or Owner Change in accordance with above), which require re-design and an actual, material increase to Designer's costs and time of performance (a "Design Builder Change"), said **re-design shall constitute an Additional Service**. For all such Design Builder Changes, Designer shall, as a condition of payment for the Additional Service, prepare an estimated cost of the Design Builder Change for Design Builder's written approval prior to commencement of the Additional Service.

Additional Services

Designer and Design Builder will endeavor to mutually agree on any Additional Service compensation (in accordance with Article 7) and adjustment to the Design Procurement Schedule, which will be recorded in writing in the Design Builder Change Order Form. If such mutual agreement cannot be reached within ten (10) Days, Design Builder may direct Designer to proceed with such Additional Services with provisional amounts allocated for Additional Service compensation and time for performance in a provisional Design Builder Change Order. Designer shall proceed with such Additional Services in accordance with the provisional Design Builder Change Order, subject to disputes over final amounts and schedule adjustments being resolved in accordance with [the DSA] herein.

Suspension

Subject to [termination clauses] above, and as directed by Developer, Design Builder shall have the right to suspend performance of this Agreement, in whole or in part, without cause **to the same extent and according to the same procedures, safeguards, rights, and obligations that dictate the Developer's right to terminate Design Builder under the DBA.** Likewise, Designer shall have the same safeguards and rights as the terminated party under the DBA.

Alternatively

In the event that Design Builder has failed to pay Designer for undisputed, approved invoices submitted within thirty (30) days of such submission, Designer shall provide notice of intent to suspend services if Design Builder has not cured such non-payment within ten (10) days. If payment is not made within such thirty (30) day period, Design is entitled to suspend services. Upon suspension of performance for non-payment, Designer shall tender notice of such non-payment to Lender, Indemnitees. Any disputes as to invoices shall be addressed by Design Builder and Designer within ten (10) days of submission of such notice.

Termination

Termination for Cause. Design Builder may terminate this Agreement, in whole or in part, if Designer **materially** or repeatedly breaches any of its obligations under this Agreement and fails to begin to cure such breach within three (3) days of written notice of the same, **or such other period of time as the Parties may reasonably agree**. In such event, Design Builder may complete and/or correct the Services and use the balance of the amount owed to Designer to reimburse Design Builder for all costs incurred as a result, directly or indirectly, of Designer's default. If the balance of the amounts owed to Designer is not sufficient to reimburse Design Builder for all of the foregoing amounts, **then in the event Designer is adjudicated liable**, Designer shall indemnify Design Builder .

Termination for Convenience. Design Builder may terminate this Agreement immediately, in whole or in part, for Design Builder's convenience and without cause following ten (10) day's written notice to Designer. Designer's sole remedy for such termination is payment for Services performed by Designer **in accordance with the Standard of Care** prior to such termination, excluding compensation for loss of anticipated profits or unallocated overhead. Notwithstanding the foregoing, if Designer's Services are terminated as a result of a termination of Design Builder's work, in whole or in part, by Design Builder's Customer, Designer shall not be entitled to receive any greater amount than Design Builder may, on behalf of Designer, recover from Owner for such Services performed by Designer **in accordance with the Standard of Care** prior to termination, less Design Builder's reasonable costs and attorneys' fees in pursuing such recovery. Upon a determination by a court of competent jurisdiction or by an arbitrator that termination of this Agreement by Design Builder for cause was wrongful, then such termination will be deemed converted to a termination for convenience and Designer's remedies shall be limited to those set forth in this Section.

Payment

Unless otherwise agreed in writing and notwithstanding any other rights or obligations of either of the Parties under any contract documents or agreements, Designer shall carry on with the performance of its Design Services and duties hereunder during the pendency of any Claim, dispute or other matter in question or any proceeding to resolve any Claim, dispute or other matter in question; provided, however that Design Builder shall pay all amounts undisputedly owed under the Design Services Agreement. However, Design Builder shall be under no obligation to make payments on or against such Claims, disputes or other matters in question, during the pendency of any negotiation or proceeding to resolve such Claims, disputes or other matters in question, except to the extent Design Builder has no objection to such payments. Provided, however, to the extent permitted under Applicable Law, it is expressly acknowledged and agreed by Designer that an express condition precedent to any obligation of Design Builder to make any payment to Designer is Design Builder's receipt of such payment from Developer. To the extent the cause for non-payment is not alleged to have anything to do with Designer, then invoices submitted by Designer shall be due in accordance with the payment timelines established in this Agreement.

Dispute Resolution

A Claim is a demand or assertion by one of the Parties seeking an adjustment or interpretation of this Agreement, payment of money, extension of time or other relief with respect to the terms of the Agreement. The term “Claim” also includes other disputes and matters in question between Design Builder and Designer arising out of or relating to the Agreement. All Claims must be made in writing. The responsibility to substantiate Claims shall rest with the Party making the Claim.

With respect to all Claims or other matters in dispute between Designer and Design Builder arising from or otherwise relating to this Agreement, the Project, the Design Services, the Construction Documents or the breach thereof, the Parties shall endeavor to settle the dispute first through direct discussions. If the dispute cannot be settled through direct discussions, **the Parties shall endeavor to settle the dispute by mediation**. The location of the mediation shall be in the County of [], State of [], or such other location as may be designated by Design Builder. Once one Party files a request for mediation with the other Party, the Parties agree to conclude such mediation within thirty (30) Days of the filing of the request.

Any controversy or claim arising out of or relating to this Agreement or its breach not resolved by mediation, **shall be decided by litigation** in any [] State court or the U.S. District Court for the [] District of [] sitting in the City of [], County of [], and any appellate court from any thereof, but only after completion of the Project, **unless otherwise expressly agreed to in writing by the Parties**.

Dispute Resolution (alternative)

Owner Disputes. All disputes involving interpretation of the [DBA], any act or omission of Owner, or which otherwise are related to a corresponding dispute between Design Builder and Owner shall be considered “Owner Disputes”. **Designer agrees to be bound by the dispute resolution provisions in the Prime Contract with regards to any such disputes. If requested, Designer agrees to participate and/or support Contract with regards to any disputes. Further, if requested, Designer agrees to consent to any joinder in any such Owner Dispute.**

Other Disputes. Any other dispute or claim between Design Builder and Designer arising out of or relating to this Agreement **shall be resolved by litigation in a court of competent jurisdiction**. Designer does not object to and consents to the joinder and participation of any person or entity in such legal proceeding involving Design Builder and Designer that arises out of or relates to the Project, this Agreement or the Services. Provided that the parties **shall first participate in mediation** conducted in accordance with the American Arbitration Association Construction Industry Mediation Rules as a pre-condition to litigation. The venue for such mediation shall be in [] County, []. Each party shall pay its portion of the expense of mediation. Pending a final determination of a dispute or claim, **Designer shall proceed diligently and expeditiously with the Services in accordance with the Contract Documents as long as Design Builder pays Designer for undisputed Services performed by Designer**. All Designer claims relating to entitlement to additional money or the amount thereof shall be presented to Design Builder in writing within seven (7) days of the event or condition giving rise to the claim.

Litigation. Litigation shall be **venued in any court of competent jurisdiction** in the State of [], County Court in the State of [] which shall have exclusive jurisdiction and venue over any dispute arising hereunder . Designer irrevocably waives any objection based upon the grounds of “forum non conveniens” that it now or hereafter may have to commencement or prosecution of any legal action in such court. To the fullest extent permitted by law, jury trial is waived by all parties hereto.

Disadvantaged Business Enterprises

To the extent applicable to Designer's obligations under the DSA, Designer shall be solely responsible for compliance with the requirements of, and shall cause its Subcontractors and Subconsultants to comply with, Sections [] of the Lease, including the requirements therein to comply with the provisions of Schedules [] attached to the Lease.

Alternatively – DBA Flow down

Developer may reasonably require additional information related to contract compliance for M/WBE/LBE/SDVOB contractors and consultants be provided electronically through the compliance system (or other means) at any time before, during or after contract award. Processes and use of system are subject to change at any time by Developer or Owner; provided that Developer provides prior notice of any change in writing to Design Builder. If the system has not been implemented or is not available, all M/WBE/LBE/SDVOB and workforce compliance reporting set forth in Section [] shall be submitted on a monthly basis, no later than the [] day of each month. Without limiting any other requirement herein, Design Builder shall comply with the reporting requirements related to M/WBE/LBE/SDVOB contractors and consultants set forth in Sections [] of the Lease and Schedules with respect to the DB D&C Work, including without limitation the requirement to provide a Monthly M/WBE Report.

Third Party Beneficiaries

Designer and Design Builder acknowledge and agree that it is **their intention that (a) the Design Services be made available to the Affiliates of Developer (in addition to Developer itself), and (b) Owner and Developer, together with their successors and assigns, are third-party beneficiaries of this Agreement and are entitled to enforce the terms and conditions of this Agreement.** Except as provided in the immediately preceding sentence or in any indemnification or other provision in this Agreement that benefits the Indemnitees, or as otherwise expressly provided in this Agreement, no provision contained in this Agreement shall confer any benefit upon or grant any rights to any third parties nor give to third parties (in either case, other than Lender), any claim or right of action beyond such as may legally exist in the absence of any such provision.

Nothing contained in this Agreement shall grant or be deemed to grant Designer or any subconsultant or any other Person engaged by Designer or any of its subconsultants in the performance of any part of the Design Services any right of action or claim against Owner Indemnified Parties with respect to any work any of them may do in connection with the D&C Work or otherwise. Nothing contained herein shall create or be deemed to create any relationship between Owner and Designer or any subconsultant, or any other person engaged by Designer or any of its subconsultants in the performance of any part of the Design Services and Owner shall not be responsible to any of the foregoing for any payment due or alleged to be due thereto for any services performed or materials purchased in connection with the Design Services.

Indemnitees

This is typically a flow down requirement from the Lease

Indemnitees means Design Builder and its parent(s), subsidiaries and affiliates (existing currently or in the future), successors and their respective officers, partners, members, managers, shareholders, directors, employees, and the “Indemnities” identified in the DBA.

DBA Indemnities Exhibit example:

Developer and all affiliated entities
Funding entities and all affiliates
Owner

City
Local economic development agencies

with respect to each of the entities listed herein, each of their parents, subsidiaries and affiliates (existing currently or in the future), successors, and their respective officers, partners, members, managers, shareholders, directors, employees, agents, tenants, property managers, and representatives, such other individuals and/or entities as may be designated by Developer, and Developer’s current Lenders and/or future Lender(s).

Questions?